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*IN RE CHALLENGE OF CLAYTON
SAND COMPANY TO DECEMBER 4,
2023 AMENDMENTS TO N.J.A.C. 7:50-
1.1 ET SEQ.*

SUPERIOR COURT OF NEW
JERSEY, APPELLATE DIVISION
Docket No. A-001476-23

ON APPEAL FROM:

New Jersey Pinelands Commission
Rulemaking Notice of Adoption
Published on December 4, 2023 at
55 N.J.R. 2507(a)

CIVIL ACTION

PETITIONER/APPELLANT CLAYTON SAND COMPANY'S
INITIAL MEMORANDUM OF LAW

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Petitioner/Appellant, *i.e.*, Clayton Sand Company (“Clayton”), presents this brief appealing administrative rulemaking by Respondent/Appellee, *i.e.*, N.J. Pinelands Commission (the “Pinelands Commission,” “Commission,” or “PC”).

PRELIMINARY STATEMENT

This appeal challenges regulatory overreach by the PC. Without any legislative authorization, the PC recently expanded its regulatory jurisdiction into a domain that the Legislature entrusted to the N.J. Department of Environmental Protection (“NJDEP,” “DEP,” or the “Department”) alone: diversions (*i.e.*, withdrawals) of groundwater. Diversion regulation is beyond the PC’s expertise, and its unauthorized, bungling interference in this area is causing confusion, uncertainty, and hardship—without any measurable benefit for the Pinelands.

This is particularly true for resource extraction operations such as Claytons’, which have been mining sand and gravel in the Pinelands for decades and were already heavily regulated by multiple agencies (including the PC). Although sand and gravel mining entails diversions of groundwater, the diversions are “nonconsumptive,” *i.e.*, virtually all of the water is returned to the source unchanged, as DEP recognizes. Both Clayton and DEP informed the PC of the need for a nonconsumptive use exemption and of numerous other problems with the rule, but the PC made only cosmetic amendments in response. Clayton thus appeals.

The PC's boondoggle began in 2001 when the Legislature directed it to study how water supply needs in the Pinelands can be met while protecting the Kirkwood-Cohansey aquifer (the "Aquifer") system. L. 2001, c. 165. The PC then frittered away twenty years and millions of dollars on studies. (Amazingly, despite all that time and money, the PC was unaware of the distinction between consumptive and nonconsumptive diversions until informed by Clayton and DEP.)

Ultimately, the PC promulgated a rule regulating diversions of water from the Aquifer. But neither L. 2001, c. 165 nor any other statute empowers the PC to regulate diversions. L. 2001, c. 165 authorizes the PC to prepare a report only, and the PC's enabling act does not even mention the word "diversion." Accordingly, the PC's rule is *ultra vires* (i.e., beyond its powers) and thus void.

That the rule is *ultra vires* should come as no surprise; the Legislature granted all power over diversions to DEP in the Water Supply Management Act ("WSM Act"). That act directs DEP to "manage the water supply by adopting a uniform water diversion permit system." N.J.S.A. 58:1A-2 (emphasis added). Therefore:

NJDEP has the exclusive authority to . . . manage the water supply . . . and the diversions of that water supply.

[United Water N.J., Inc. v. Boro. of Hillsdale, 438 N.J. Super. 309, 319 (App. Div. 2014) (emphasis added).]

In fulfillment of this directive, DEP promulgated comprehensive regulations.

Nevertheless, the PC promulgated a rule that conflicts with the WSM Act. For example, the rule regulates proposed diversions of 50,000 gallons per day (“GPD”) or more, whereas the Legislature set a 100,000-GPD threshold. The rule also limits and reduces the water quantity that may be diverted, without adhering to the procedure set by the WSM Act. And most relevant to Clayton: For a sand mine to be exempted from the requirements of the PC’s rule, it must demonstrate its diversion is nonconsumptive by calculating the amount of water returned to the source, which is virtually impossible given that a sand mine’s diversion returns to the source through dripping, not through a pipe. This is a clear contradiction of DEP’s regulations, which exempt sand/gravel mines from the requirement that diversion sources have flow meters, and allow estimates instead. Accordingly, the rule is preempted by the authority granted to (and exercised by) DEP.

And because the subject matter is beyond the PC’s expertise, the rule is unsurprisingly based on faulty data, methodology, and assumptions. Although Clayton, DEP, and others informed the PC of the flaws, the PC forced through the half-baked rule with minimal amendments, presumably in a rush to justify the 20 years and millions of dollars it spent on its studies. Therefore, the rule is void for the additional reason that it is arbitrary, capricious, and unreasonable. Finally, the rule is void because PC failed to adhere to rulemaking procedures, particularly those requiring maximum public participation. Clayton thus requests its invalidation.

PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

The Original Rule Proposal

On September 6, 2022, the PC published a rule proposal in the New Jersey Register at 54 N.J.R. 1668(a) (the "Original Rule Proposal" or "Original Proposed Rule"). The Original Rule Proposal proposed amendments to the Pinelands Comprehensive Management Plan, N.J.A.C. 7:50-1.1 *et seq.* (the "CMP"),² which amendments affected diversions of water from the Aquifer. It included, *inter alia*, a proposed N.J.A.C. 7:50-6.86(d) stating:

A new diversion or an increase in allocation from either a single existing diversion source or from combined existing diversion sources in the same HUC-11 watershed³ and in the Kirkwood-Cohansey aquifer, that results in a total diversion of 50,000 gallons of water per day or more (hereafter referred to as a "proposed diversion") shall meet the criteria and standards set forth at (d)3 through 9 below.

[54 N.J.R. 1676.]

¹ For the sake of brevity, Clayton has combined the intertwined procedural history and statement of facts.

² The CMP describes itself as "regulations and standards . . . designed to promote orderly development of the Pinelands so as to preserve and protect the significant and unique natural, ecological, agricultural, archaeological, historical, scenic, cultural and recreational resources of the Pinelands." N.J.A.C. 7:50-1.3.

³ "HUC-11" or "hydrologic unit code 11" means an "area within which water drains to a particular receiving surface water body, also known as a subwatershed, which is identified by an 11-digit hydrologic unit boundary designation, delineated within New Jersey by the United States Geological Survey." N.J.A.C. 7:50-2.11.

"Divert" or "diversion" was defined in proposed N.J.A.C. 7:50-2.11 as the "taking of water from a river, stream, lake, pond, aquifer, well, or other underground source, or other waterbody, whether or not the water is returned thereto, consumed, made to flow into another stream or basin, or discharged elsewhere." 54 N.J.R. 1675. "Allocation" was defined in proposed N.J.A.C. 7:50-6.86(d) as a "diversion permitted pursuant to a Water Allocation Permit or Water Use Registration Number issued by [DEP] pursuant to N.J.A.C. 7:19." 54 N.J.R. 1676.

The above-referenced (d)3 through (d)9 imposed limitations and restrictions on proposed diversions from the Aquifer of 50,000 GPD or more. For example:

Subsection d(3) stated that any such "proposed diversion shall be permitted only in" certain enumerated Pinelands Management Areas, which do not include the Pinelands Preservation Area District. 54 N.J.R. 1676; see also id. at 1669-70.

Then d(4) stated a "proposed diversion shall only be permitted if the applicant demonstrates that no alternative water supply source is available." Id. at 1676.

Subsection (d)5 stated that a "proposed diversion shall not have an adverse ecological impact on the Kirkwood-Cohansey aquifer." Ibid. "Adverse ecological impact" was then defined as an "adverse regional impact and/or an adverse local impact, as described at (d)6 and 7 below." Ibid.

In turn, subsection (d)6 asserted that a "proposed diversion shall be deemed to have an adverse regional impact if it, combined with all existing permitted

allocations in the same HUC-11 watershed, exceeds 20 percent of the stream low flow margin⁴ for the year of peak use established in the [NJ] Statewide Water Supply Plan.” 54 N.J.R. at 1676. Proposed N.J.A.C. 7:50-6.86(d)6iii thus required the applicant to “calculate the sum of the proposed diversion and all existing permitted allocations in the affected HUC-11 watershed, . . . show whether the sum exceeds 20 percent of the stream low flow margins for the year of peak use established in the New Jersey Water Supply Plan,” and present the calculations in a report. Id. at 1676.

Subsection (d)7 declared that a “proposed diversion shall be deemed to have an adverse local impact . . . if it results in the drawdown of the water table . . . of any portion of the Preservation Area District, Forest Area, or Special Agricultural Production Area in the affected HUC-11 watershed, or of more than four inches of the wetlands nearest to the estimated zone of influence in the affected HUC-11 watershed.” Id. at 1676. Proposed N.J.A.C. 7:50-6.86(d)7i thus required the applicant to submit a complex “analysis of potential drawdown impacts,” submit a “proposed hydrogeologic test procedure,” complete the test, “prepare a final hydrogeologic report,” “calculate an estimated zone of influence created by the proposed diversion,” and “submit a groundwater flow model.” Id. at 1677.

⁴ “Stream Low Flow Margin” or “LFM” is the “difference between a stream's normal dry-season flow (September Median Flow) and drought flow (7Q10) as reported in the New Jersey Statewide Water Supply Plan, [DEP], 2017, New Jersey Water Supply Plan 2017-2022: 484p, <http://www.nj.gov/dep/watersupply/wsp.html>, as amended and supplemented.” N.J.A.C. 7:50-2.11.

Response to the Original Rule Proposal

In response to the Original Rule Proposal, Clayton and other interested parties informally met with PC staff members on September 14, 2022 to discuss their concerns. At this meeting, Clayton representatives explained that although sand and gravel miners withdraw large amounts of water from the ground in the mining process, DEP policy recognizes that approximately 90 percent of the water is returned to the ground, and such nonconsumptive diversions should be exempted from the rule. See, e.g., Clayton’s January 25, 2019 Water Allocation Permit from DEP for diversions from the Aquifer at Clayton’s Woodmansie site in Woodland Township, Pa214 at Pa221 (“[DEP] considers sand and gravel operations typically to be 10 percent consumptive.”). Specifically, miners dig sand out of the ground until they hit groundwater, which creates manmade ponds. The sand miners then dredge the bottom of these ponds and suck water from them, which water contains sand. See id. at Pa216 (“Water Uses: Mining Dredge or Processing”); id. at Pa219 (“Water is diverted in a slurry mixture of sand and water”). The sand is compiled, and the water drains overland to the pond and into the ground. Ibid. (“All water except for a minor amount retained in the product makes its way back to the mining pond via two channels from the sand plant.”). Only about 10 percent of the water is lost, through evaporation and/or being trapped in the sand. This explanation of the mining process was important as the PC staff was under the impression that

mine operators drill wells and pump water from the Aquifer through those wells, which is not the case. PC staff ultimately admitted it “came to recognize that during the long years of developing the rule, water use by sand and gravel mines was not really considered. We hadn’t conducted outreach to that sector, so we kind of overlooked it.” 18T4-10 to -15.⁵

On October 12, 2022, the PC staff (not the PC) held a public hearing on the Original Rule Proposal. One of Clayton’s attorneys, namely, Ryan Benson, spoke at the hearing. 14T14-10. He explained that the Original Rule Proposal was overbroad, arbitrary, capricious, and unreasonable as it restricted nonconsumptive diversions. 14T14-19. He also explained that the Original Rule Proposal was *ultra vires* because the PC does not have power to regulate diversions/allocations of water, which power was instead granted to DEP, and that the Original Rule Proposal actually clashed with the requirements set forth by the Legislature. 14T15-11.

Clayton then submitted written comments by letter dated November 3, 2022 from Clayton's attorney Kevin Coakley. Pa1. The letter expanded upon the arguments made at the October 12, 2022 hearing. In support of its argument that the

⁵ The transcripts are numbered accordingly: (1) 1/14/22; (2) 2/25/22; (3) 3/11/22; (4) 3/25/22; (5) 4/8/22; (6) 4/29/22; (7) 5/13/22; (8) 5/27/22; (9) 6/10/22; (10) 6/24/22; (11) 7/8/22; (12) 8/12/22; (13) 9/9/22; (14) 10/12/22; (15) 10/14/22; (16) 11/2/22; (17) 11/10/22; (18) 11/30/22; (19) 12/9/22; (20) 1/27/23; (21) 2/10/23; (22) 3/10/23; (23) 4/14/23; (24) 5/3/23; (25) 5/12/23; (26) 6/9/23; (27) 7/14/23; (28) 8/11/23; (29) 8/25/23; (30) 9/8/23.

Original Rule Proposal was overbroad, arbitrary, and unreasonable inasmuch as it had no rational nexus to the problems it purported to solve, it also attached an expert report prepared by Brian Blum, Certified Professional Geologist, LSRP, of Langan Engineering and Environmental Services, Inc., dated November 2, 2022. Pa16.

Clayton was not the only party to make comments. Among the many comments submitted was a November 4, 2022 letter from Jeffrey Hoffman, State Geologist, of DEP's Division of Water Supply and Geoscience ("DWSG"). Pa30. DWSG's letter expressed numerous concerns (many of them echoing Clayton's concerns), which are detailed in the below Legal Argument section.

Amended Rule Proposal

Eventually, on April 3, 2023, the PC published in the New Jersey Register a Notice of Substantial Changes Upon Adoption at 55 N.J.R. 577(a) (the "Amended Rule Proposal"). The introductory section thereof stated: "The [PC] is proposing three substantial changes to the [CMP] amendments in response to comments received." 55 N.J.R. at 578. Those changes appeared to be the following:

First, proposed N.J.A.C. 7:50-6.86(d)2 added the following subsection iii. to the list of diversions exempted from the above-referenced subsections (d)3 through (d)9: "Any proposed diversion for a resource extraction operation that constitutes a nonconsumptive use, provided the water returned to the source is not discharged to

a stream or waterbody or otherwise results in offsite flow, and the diversion and return are located on the same parcel.” 55 N.J.R. at 582.

Second, a definition of “nonconsumptive use” was added to proposed N.J.A.C. 7:50-2.11: “the use of water diverted from surface or ground waters in such a manner that at least 90 percent of the diverted water is returned to the source surface or ground water at or near the point from which it was taken.” Id. at 581.

Third, the following was added to the list of required items for an application for resource extraction (*e.g.*, sand and gravel mining) at N.J.A.C. 7:50-4.2(b)6:

xi. If the application includes a proposed diversion from the Kirkwood-Cohansey aquifer, a **hydrogeologic report** that **identifies** the volume of the diversion, the **volume of water to be returned to the source**, a description of the route of return to the source, the **methodology used** to **quantify** the volume of water returned to the source, and a description of any other existing or proposed water diversions or discharges on or from the parcel. The report shall also include a map that depicts the location of the diversion, the **location of the return to source**, the location of all existing or proposed resource extraction operations, and the location of all wetlands on or within 300 feet of the parcel on which the diversion is proposed.

[55 N.J.R. at 581 (emphasis added)⁶.]

In addition to announcing a public hearing on May 3, 2023, the Amended Rule Proposal also launched a new public comment period running until June 2, 2023. 55

⁶ All emphasis in this brief has been added unless otherwise noted.

N.J.R. at 578. Accordingly, Clayton submitted new public comments by letter dated May 25, 2023, Pa75, explaining the following:

Although the Amended Rule Proposal nominally recognized the difference between consumptive uses and nonconsumptive uses, the “Economic Impact” section thereof stated that a resource extraction operation is only exempted from the “hydrogeologic modeling requirement at proposed N.J.A.C. 7:50-6.86(d) if it can **demonstrate** that the diversion constitutes a nonconsumptive use.” Pa75 (quoting 55 N.J.R. at 580). The Economic Impact section added that “[t]o demonstrate that the application meets” this standard:

a resource extraction operation will have to provide a hydrogeologic report that **identifies** the volume of the diversion, the **volume of water to be returned to the source**, a description of the route of return to the source, the **methodology used** to **quantify** the volume of water returned to the source, and a description of any other existing or proposed water diversions or discharges from the parcel.

[Ibid. (quoting 55 N.J.R. at 580.)]

However, Clayton’s letter continued, "because of the nature of sand mining, it is virtually impossible for such a sand mining operation to calculate the exact amount of water it returns to the source." Pa76. A "sand mine operation does not return the water to the ground through a single metered pipe." Ibid. Rather, "water returns to the ground through over land runoff as much as by piping." Ibid. There are also "too many variables to account for, *e.g.*, rainfall on the mined sand, hours

of direct sunlight, evaporation, etc.," ibid., as was explained in greater detail in a May 25, 2023 expert report prepared by the aforementioned Brian Blum and attached to Clayton's comments, Pa85.

Clayton thus proposed in the letter that sand mining should be exempted based on DEP's determination (demonstrated through exhibits to the letter at Pa78 and Pa82, DWSG's comments, and Clayton's Water Allocation Permit) that such operations return more than 90 percent of the water to the source, without any need for further demonstration. Pa76. Proposed revisions, Pa89, were attached to Clayton's letter, *e.g.*, revising proposed N.J.A.C. 7:50-4.2(b)6xi and -6.86(d)2iii to require only an estimation of water gallnage (as opposed to a precise calculation) and to enable a resource extraction operation to demonstrate its use is nonconsumptive by providing "that diversion information that is already required by NJDEP for a Water Allocation Permit." Pa91.

Draft Notice of Adoption

On August 17, 2023, PC staff made available the agenda packet for the August 25, 2023 meeting of the PC's Policy and Implementation Committee. Pa98. The packet included a draft Notice of Adoption for the rulemaking. Pa103, which draft showed the PC staff had not revised the rule language to accommodate the outstanding concerns discussed in Clayton's May 25, 2023 letter. Ibid.

By letter dated August 22, 2023, Clayton’s attorneys wrote to the PC regarding the draft Notice of Adoption. Pa143. The letter reiterated that “it is virtually impossible for a sand and gravel mining operation to calculate the exact amount of water it returns to the source.” Pa144. For that reason, and because sand mining diversions are nonconsumptive, DEP’s Water Supply Allocation regulations, N.J.A.C. 7:19-1.1 et seq., expressly exempt “sand and gravel operations using water for media transport” from the requirement that diversion sources be equipped with flow meters. Pa144 (quoting N.J.A.C. 7:19-2.14(a)4ii). The DEP regulations then add that “[a]ny permittee with a diversion source that meets the requirements of (a)4i, ii or iii above may estimate the diversion quantity using an accurate and reasonable method approved by the Department.” Pa144.

Accordingly, Clayton’s August 22, 2023 letter requested that proposed N.J.A.C. 7:50-4.2(b)6xi be revised to read, in pertinent part:

a hydrogeologic report that estimates the volume of the diversion, the volume of water to be returned to the source, a description of the route of return to the source, the methodology used to estimate the volume of water returned to the source, and a description of any other existing or proposed water diversions or discharges on or from the parcel.

[Pa144.]

The letter also requested that the definition of “nonconsumptive use” at proposed N.J.A.C. 7:50-2.11 should be similarly revised for the same reasons stated

above. Pa145. Specifically, it was suggested that the words “reasonably estimated to be” should be inserted such that the definition read:

use of water diverted from surface or ground waters in such a manner that at least 90 percent of the diverted water is reasonably estimated to be returned to the source surface or ground water at or near the point from which it was taken.

[Pa145.]

As the August 22, 2023 letter made clear, these requested changes were consistent with the PC’s own response to Comments 1, 2, 3, 4, and 5 in the proposed Notice of Adoption. That response stated:

[T]he application for resource extraction will require submission of a hydrogeologic report that estimates . . . the volume of water to be returned to the source, describes the route of return to the source and the methodology used to estimate the volume of water returned to the source, and describes any other proposed water diversions or discharges on or from the parcel. Reports of this type comport with reports routinely submitted to DEP for water allocation permit modifications for nonconsumptive use by sand and gravel operations.

[Pa144 (citing Draft Notice of Adoption at Pa109).]

The meeting of the PC’s Policy and Implementation Committee followed on August 25, 2023. See generally 29T. Despite Clayton’s remonstrances leading up to the meeting, and despite recognizing the difficulties of precisely calculating a

resource extraction operation's return of diverted water back to the source,⁷ and despite recognizing that DEP deems sand mining as nonconsumptive without the need for any demonstration,⁸ the Committee voted to recommend the draft Notice of Adoption to the full PC without the requested changes. 29T10.

Notably, the Committee did not provide any opportunity for oral public comment until after it had voted. 29T10-25. In the general public comment period at the end of the meeting, Clayton's attorney Kevin Coakley echoed the comments he had made in the above-referenced August 22, 2023 letter, but by then the vote had already occurred. 29T13-14 to 29T16-19.

By letter dated August 30, 2023, Pa148, Clayton's attorneys followed up, noting in writing that the Policy and Implementation Committee meeting did not include an opportunity for oral public comment before the vote. Ibid. The letter also highlighted the incongruence of the Committee's voting to recommend the draft Notice of Adoption despite recognizing the difficulties of precisely calculating a resource extraction operation's return of diverted water. Pa148.

⁷ See, e.g., 29T9-12 ("So it would be very difficult to somehow record water usage in that scenario."); see also 29T9-23 ("But it isn't like the returned water goes through a meter of some kind.").

⁸ In the words of Gina Berg of the PC staff: "[NJ]DEP considers most of that water to be returned to the source without changing quality or quantity. They set a bar of 90 percent returned water, but speaking with them they say it's probably much less than that, maybe not even 5 percent water is lost." 18T5-17.

The August 30, 2023 letter also emphasized the draft Notice of Adoption’s response to Comment 57, which response sought to justify the PC’s refusal to further revise the rule language. Pa148-49. That response stated the PC had recently received a report from a resource extraction operation demonstrating that a such an operation can conduct “quantitative analysis of the diverted water that will be returned to the source.” *Ibid.* (quoting Pa135). However, a document request (under the Open Public Records Act) for that report yielded⁹ a document titled “Major Modification: Water Allocation Permit Technical Report,” dated January 16, 2023,¹⁰ and submitted by WHIBCO OF New Jersey. Pa56. This WHIBCO report demonstrated nothing of the sort claimed by the PC. Instead, page 16 of the report stated that an “estimated 99% of the water diverted is returned back to the source relatively undiminished in quality.” Pa74. In other words, there were no precise calculations, just an estimate. Pa149.

By email dated August 31, 2023, PC Executive Director Susan Grogan responded “on behalf of [PC] Chair [Laura] Matos and the [PC] staff.” Pa150. The email stated that “[c]omments received after the close of the comment period, such as your August 22, 2023 and August 30, 2023 letters, are outside the record and will

⁹ The August 23, 2023 OPRA response letter is available at Pa147.

¹⁰ The document is also stamped with the date April 11, 2023, though the reason for the stamp is unclear. Pa56.

therefore not be provided to the Commissioners prior to their consideration of the resolution for adoption of the amendments.” Ibid. The email so stated even though the PC did not make the draft Notice of Adoption available until August 17, 2023. Pa98. The email continued: “Nor will an additional opportunity for public comment be provided at the [PC] meeting prior to the [PC]’s action in order to ensure that the [PC] bases its action on the established public record.” Pa150.

Clayton’s attorneys replied by letter dated September 6, 2023. Pa152. The letter explained that the position stated in Ms. Grogan’s email was not consistent with applicable legal authorities (as is discussed later in this brief). Ibid. The letter thus asked that the public be given an opportunity to provide oral comments directly to the PC before its vote on the draft Notice of Approval, and that the PC be provided with Clayton’s August 22 and August 30, 2023 letters.

Adoption of the Rule

Despite all of the above, at its September 8, 2023 meeting, the PC voted to approve the draft Notice of Adoption without hearing any public comments until after the PC had already voted. 30T5. In the general public comment session at the end of the meeting, one of the attorneys for Clayton, namely, Kevin Coakley, noted that there had been no opportunity for the public to present oral comments directly to the PC members (as opposed to PC staff) before the adoption of the rule. 30T10. He also reiterated that the adopted rule contradicts DEP regulations. 30T8.

The final Notice of Adoption was published in the New Jersey Register on December 4, 2023 at 55 N.J.R. 2407(a). Per that Notice, the new rule adopted therein (the “Rule” or the “Rulemaking”) was effective immediately. This appeal followed.

LEGAL ARGUMENT

POINT I

STANDARD OF REVIEW

“[A]ppeals may be taken to the Appellate Division as of right . . . to review the validity of any rule promulgated by [a State administrative] agency.” R. 2:2-3(a)(2). An appellate court’s review of agency rulemaking entails a “determination whether that rule is arbitrary, capricious, unreasonable, or beyond the agency’s delegated powers.” In re Amend. of N.J.A.C. 8:31b-3.31 & N.J.A.C. 8:31b-3.51, 119 N.J. 531, 543-44 (1990). Such determination involves three inquiries:

- (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law;
- (2) whether the record contains substantial evidence to support the findings on which the agency based its action;
- and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

[Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018).]

The “agency may not, under the guise of interpretation, extend a statute to give it a greater effect than its language permits.” GE Solid State, Inc. v. Dir., Div. of Taxation, 132 N.J. 298, 306 (1993). Moreover, agencies “have no superior ability

to resolve purely legal questions, and that a court is not bound by an agency's determination of a legal issue is well established." Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992). Deference to an agency's technical expertise and knowledge of its subject matter "is only as compelling as is the expertise of the agency, and this generally only in technical matters which lie within its special competence." Application of Boardwalk Regency Corp. for a Casino License, 180 N.J. Super. 324, 333 (App. Div. 1981). The agency's action "must . . . rest on a reasonable factual basis." In re Attorney Gen. Law Enf't Directive Nos. 2020-5 & 2020-6, 246 N.J. 462, 491 (2021). In any case, the U.S. Supreme Court just overturned the concept of deference to administrative agencies. Loper Bright Enters. v. Raimondo, 603 U.S. ____ (2024).

POINT II

THE RULEMAKING IS ULTRA VIRES AND VOID. (See November 3, 2022 Comment Letter from Clayton's Attorneys, Connell Foley, Pa1.)

An administrative agency "is a creature of legislation" and thus "must act only within the bounds of the authority delegated" to it. In re Closing of Jamesburg High School, 83 N.J. 540, 549 (1980).

"When the rule of an administrative agency contravenes the statute which created it, the rule lacks legal efficacy." Kamienski v. Bd. Of Mortuary Science, 80

N.J. Super. 366, 370 (App. Div. 1963). Even “[a]ssuming the [agency’s] good faith, it still may not adopt a rule which contravenes the statute.” Id. at 370.

Further, “[a]dministrative regulations . . . cannot alter the terms of a legislative enactment or frustrate the policy embodied in the statute.” N.J. State Chamber of Commerce v. N.J. Election Law Enforcement Comm’n, 82 N.J. 57, 82 (1980). An agency only “has authority to prescribe reasonable rules and regulations consistent with, but limited by, the provisions of the statute being administered, which are deemed necessary to the due and efficient exercise of the power expressly granted.” Hotel Suburban System, Inc. v. Holderman, 42 N.J. Super. 84, 90 (App. Div. 1956). “[W]hen the provisions of the statute are clear and unambiguous, [the agency] may not make rules and regulations amending, altering, enlarging or limiting the terms of the legislative enactment.” Ibid.

In particular, “[u]nder the guise of rule-making, [the agency] may not exceed the authority given to [it] by the statute, the source of [its] power.” Id. at 90-91; see also In re Centex Homes, LLC, 411 N.J. Super. 244, 252 (App. Div. 2009). An “administrative interpretation [that] attempts to add to a statute something that is not there can furnish no sustenance to the enactment.” In re Centex Homes, LLC, supra, 411 N.J. Super. at 252.

And “[w]here there exists reasonable doubt as to whether . . . power is vested in the administrative body, the power is denied.” In re Closing of Jamesburg High

School, supra, 83 N.J. at 549; see also In re Centex Homes, LLC, supra, 411 N.J. Super. at 252. In the same vein, “where there is a conflict between a specific provision of a statute and a general provision of a statute, the specific provision must control.” In re Centex Homes, LLC, supra, 411 N.J. Super. at 265.

“[W]hen regulations are promulgated without explicit legislative authority and implicate important policy questions, they are better off decided by the Legislature.” Ibid. A “policy question of [great] significance lies in the legislative domain and should be resolved there.” Id. at 268. A “court should not find such authority in an agency unless the statute under consideration confers it expressly or by unavoidable implication.” Ibid. Accordingly, the “judicial function is to ascertain whether the will of the Legislature has been carried out.” Hotel Suburban System, Inc., supra, 42 N.J. Super. at 91.

In Hotel Suburban System, Inc., supra, the Commissioner of Labor promulgated two regulations, purportedly pursuant to the Minimum Fair Wage Standards Act. 42 N.J. Super. at 87. That statute provided a minimum wage for women and minors employed in an “occupation,” but exempted “employment in a hotel.” Id. at 88. Nevertheless, the first of the two regulations stated that the exemption did not include employment “in a restaurant operated in a hotel catering to non-resident guests” (*i.e.*, guests “not being furnished with lodging”), and the other regulation stated that the exemption did not include employment “by or in a

hotel when performing [laundry services] in relation to articles which are not the property of or are not being processed for the exclusive use of the hotel.” Ibid. When hotel owners challenged the validity of the regulations in court, the Commissioner argued that the “regulations are a valid and lawful interpretation of the statute.” Ibid.

The Appellate Division ruled that the regulations were “contrary to statutory authority” and thus “held to be invalid.” Id. at 91. The court found the language of the statute was not “fairly susceptible of more than one interpretation.” See id. at 90. As it explained, the statute so “unequivocally and unqualifiedly exempts ‘employment in a hotel,’ that there is no basis for interpretation or construction of the statute by the Commissioner.” Id. at 91. The Commissioner’s attempt to carve out certain types of hotel employment “was exercising a legislative and not an administrative function, and his action clearly was *ultra vires*.” Ibid.; see also Kamienski, supra, 80 N.J. Super. at 369-70 (invalidating a regulation that limited each mortuary science establishment to only one permit even though the statute in question stated: “Every individual, partnership, or corporation . . . which in the usual and regular course of his or its practice makes use of a mortuary owned, operated, or maintained by another shall annually apply to the board for a certification of registration for each mortuary operated, maintained, or used by the applicant.”).

If the Commissioner’s fair-minded regulation in Hotel Suburban System was *ultra vires*, then the Pinelands Rule definitely is. At least in Hotel Suburban System

the Commissioner was regulating based on a clear power to set regulations for a minimum wage and merely misunderstood the scope of the exemption for employment in a hotel. On the other hand, the Legislature has not granted the PC any power to regulate water diversions/allocations, as is explained below.

A. The Legislature Did Not Empower the Pinelands Commission to Regulate Water Diversions or Allocations.

The Original Rule Proposal seems to invoke L. 2001, c. 165 as the authority for the Rule. See 54 N.J.R. at 1668. However, that statute only authorizes the PC to prepare a report:

The [PC] shall . . . assess and prepare a report on the key hydrologic and ecological information necessary to determine how the current and future water supply needs within the pinelands area may be met while protecting the Kirkwood-Cohansey aquifer system and while avoiding any adverse ecological impact on the pinelands area.

[L. 2001, c. 165.]

This language clearly does not authorize the PC to promulgate regulations relating to water diversions or anything else. Nor does the remainder of the statute.

The Pinelands Protection Act, N.J.S.A. 13:18A-1 *et seq.* (the “Pinelands Act”), does not support the Rule either. The Act does not grant the PC any power to regulate diversions or allocations, even in the Pinelands,¹¹ as is discussed below:

¹¹ DEP’s DWSG additionally observed in its comments that the low flow margin (“LFM”) results for some HUC-11s “may . . . be only partially inside the Pinelands Area.” Pa30 at Pa31 (comment 4). In its response in the Notice of Adoption, the PC “agree[d] there are some HUC-11 watersheds that straddle the Pinelands Area

The section of the Pinelands Act enumerating the powers of the PC does not list any power to regulate water. N.J.S.A. 13:18A-6. The only mention of water in that section states that the PC has the power merely to “prepare and transmit to the Commissioner of [DEP] such recommendations for water quality standards for surface and ground waters in the pinelands area, or in tributaries and watersheds thereof, as the [PC] deems appropriate.” N.J.S.A. 13:18A-6i.

The section of the Pinelands Act granting the power to prepare the Pinelands CMP is also unsupportive. See N.J.S.A. 13:18A-8. Although it mentions water, it does not bestow any power to regulate water diversions/allocations. It is focused on regulation of land, which indirectly impacts water. See, e.g., N.J.S.A. 13:18A-8d (authorizing the PC to prepare a “land use capability map and a statement of policies for planning and managing the development and use of land in the pinelands area”).

Regarding water, it only authorizes PC to: (1) prepare a “resource assessment” that “[d]etermines the amount and type of human development and activity which the ecosystem of the pinelands area can sustain . . . , with special reference to ground and surface water supply and quality,” N.J.S.A. 13:18A-8a; and

boundary where non-Pinelands areas contribute to stream flow.” 55 N.J.R. 2407(a) at 2412 (response to Comment 41). Obviously, the PC does not have legislative authority to regulate areas outside the Pinelands Area, yet it is overstepping. DEP’s DWSG also commented that the Pinelands Rule refers to LFM results even though those results include agricultural, horticultural and aquacultural water use and allocations, which the PC is not authorized to regulate. Pa31 (comment 5).

(2) include in its “land use capability map and comprehensive statement of policies for planning and managing the development and use of land” certain “policies” for protection of land and water, N.J.S.A. 13:18A-8d. The only mention of water is thus in the context of regulating land. Water regulations are not specifically authorized.

In its response to comments in the Notice of Adoption, the PC disagreed with comments contending it did not have the authority to regulate water use. 55 N.J.R. at 2409 (Comment 16).

First, it stated that the Pinelands Act “directs the [PC] to regulate development and establish standards to allow development without a significant adverse impact to the resources of the Pinelands Area.” Ibid. (response to Comment 16). Tellingly, this response does not cite any specific authority. The provision that the PC appears to be citing is the above-referenced N.J.S.A. 13:18A-8a(1), but that section authorizes only a “resource assessment.”

Second, the PC cited the above-referenced N.J.S.A. 13:18A-8d, which, according to the PC, “specifically authorizes the [PC] to regulate land and water management.” 55 N.J.R. at 2409 (response to Comment 16). However, as is noted above, that section is focused on land, authorizing only a “land use capability map and a comprehensive statement of policies for planning and managing the development and use of land in the pinelands area.” N.J.S.A. 13:18A-8d. Only in its subsections does it even mention water, and there is certainly no mention of

diversions, allocations, aquifers, or groundwater. In fact, the list of possible “land and water protection and management techniques” at subsection d(1) clearly contemplates land use regulation, not regulation of water diversions/allocations. That subsection authorizes the CMP to include “policies for planning and managing the development and use of land in the pinelands area, which policies”:

[c]onsider and detail the application of a variety of land and water protection and management techniques, including but not limited to, zoning and regulation derived from State and local police powers, development and use standards, permit systems, acquisition of conservation easements and other interest in land, public access agreements with private landowners, purchase of land for resale or lease-back, fee acquisition of public recreation sites and ecologically sensitive areas, transfer of development rights, dedication of private lands for recreation or conservation purposes and any other appropriate method of land and water protection and management which will help meet the goals and carry out the policies of the management plan

[N.J.S.A. 13:18A-8d(1).]

The PC will undoubtedly cling to the last few lines quoted above. However, even in isolation those lines provide for only “water protection,” *i.e.*, protection of water quality through land use regulation. They do not provide for conservation of water supply through regulation of diversions/allocations, and certainly not regulation of diversions/allocations that do not even reduce the water supply, i.e., nonconsumptive diversions such as those of sand and gravel mines. In the case of nonconsumptive diversions, there is nothing to protect the water from.

Reinforcing this land use focus is N.J.S.A. 13:18A-8j. That section makes clear that to the extent the PC is authorized to deal with water under N.J.S.A. 13:18A-8, it is only authorized to address water quality (through land use regulation), not to regulate water diversions/allocations. While N.J.S.A. 13:18A-8j expressly authorizes the PC to help prepare a “plan to implement the provisions of the ‘Clean Water Act’ (P.L. 95-217) and the ‘Safe Drinking Water Act’ (P.L. 93-523) which pertain to the surface and ground waters of the Pinelands National Reserve” (not at issue here), it includes no such authorization for PC to help implement the Water Supply Management Act, N.J.S.A. 58:1A-1 et seq. (the “WSM Act”), the statute governing diversions/allocations of water. See N.J.S.A. 13:18A-8j. That is because the Legislature made DEP solely responsible for regulating diversions/allocations, as explained below. See also N.J.S.A. 13:18A-6i (listing the following as the only water-related power of the PC: “transmit to [DEP] . . . recommendations for water quality standards . . . in the pinelands”).

The PC will presumably counter that N.J.S.A. 13:18A-9c(5) of the Pinelands Act lists the following among the “goals” of the CMP with respect to the Preservation Area: “Protect and preserve the quantity and quality of existing surface and ground waters.” However, reliance on this provision is misguided for several reasons. First, this provision is nothing but a goal. It does not authorize any regulation. Second, it certainly does not authorize regulation of

diversions/allocations. Third, this goal is applicable to the Preservation Area only, not to the Protection Area, but the Rule purports to apply to both areas. Fourth, another section of the Act states “[n]othing in this act shall be construed to authorize or permit the exportation of any ground or surface waters from the pinelands area,” N.J.S.A. 13:18A-25a, suggesting that the Legislature’s concern with water “quantity” was related to exportation from the Pinelands, not internal diversions. Fifth, this is the sole mention of water “quantity” in the entire statute, which reinforces the understanding that the statute is focused on land use regulation.¹²

¹² In re Centex Homes, LLC, *supra*, reinforces that a general goal is not a specific mandate. In that case, the enabling act of the State Board of Public Utilities (“BPU”) directed it to “require any public utility to . . . construct . . . any reasonable extension of its facilities where, in the judgment of the board, the extension is reasonable and practicable and will furnish sufficient business to justify the construction and maintenance of the same and when the financial condition of the public utility warrants the original expenditure required in making and operating the extension.” *Id.* at 254-55. Based on another provision in the enabling act that authorized BPU to “require any public utility to furnish . . . and perform[] . . . service in a manner that tends to conserve and preserve the quality of the environment,” *id.* at 253-54, BPU promulgated a regulation “prohibit[ing] regulated utilities from paying for or financially contributing to extensions in certain areas not designated for growth according to the New Jersey Planning Commission State Policy Map,” *id.* at 247, which areas were “admittedly environmentally sensitive areas,” *id.* at 260.

Despite finding BPU’s power to regulate utilities to be “broad,” *id.* at 254, the court held the rule was *ultra vires*. *Id.* at 249. The court reasoned that the legislative intent underlying the extension provision “did not have land use or environmental concerns as main purposes.” *Id.* at 263. Again, “where there is a conflict between a specific provision of a statute and a general provision of a statute, the specific provision must control.” *Id.* at 265. Consistent with the precept that “where there exists reasonable doubt as to whether such a power is vested in the administrative body, the power is denied,” *id.* at 251-52, the court explained: “[W]hile the language of the [statute]

The “Legislative findings and declarations” section of the Pinelands Act reinforces the land use/water quality focus of the Legislature. That section notes the need for “maintenance of the existing high quality of surface and ground waters” in the Pinelands. N.J.S.A. 13:18A-2. It expresses concern with “environmental degradation of surface and groundwaters which would be occasioned by the improper development or use thereof.” Ibid. The Legislature intended to address this concern by requiring “more stringent restrictions on the development and use of land,” not by regulating diversions/allocations. Ibid.

In sum, the Rule is *ultra vires* and void because the PC has no authority to regulate water diversions/allocations. Again, “[w]here there exists reasonable doubt

requires that the BPU ensure environmental compliance by regulated utilities, it does not explicitly grant BPU with the broad environmental mandate it claims,” *i.e.*, to factor environmental considerations into its extension decisions, id. at 265.

Like the BPU, the PC is trying to use a general provision to impose a very specific requirement (in this case, to use a vague goal of protecting water quantity in a limited portion of the Pinelands to regulate water diversions throughout the Pinelands). Just as the BPU’s enabling act did not have land use or environmental concerns as main purposes, the Pinelands Act does not have protection of water quantity as a main purpose, as the Pinelands Act is focused on land use regulation. In fact, the PC’s argument is even weaker than BPU’s. Whereas BPU’s enabling act at least authorized it to “require” a public utility to furnish and perform service in a manner that tends to conserve and preserve the quality of the environment, the Pinelands Act does not specifically authorize the PC to do anything with regard to water quantity, let alone diversions of water. It merely sets a general goal. If the rule in In re Centex Homes was *ultra vires*, then the Pinelands Rule certainly is.

as to whether . . . power is vested in the administrative body, the power is denied.”

In re Closing of Jamesburg High School, supra, 83 N.J. at 549.

B. The Commission is Preempted from Regulating Water Diversions Given that DEP Was Granted that Power in the Water Supply Management Act and that DEP Promulgated Comprehensive Regulations.

The Rule is *ultra vires* for the additional reason that the PC is preempted from regulating water diversions/allocations. Comparison of PC’s powers with DEP’s powers shows that all authority to regulate diversions/allocations lies with DEP.

The Appellate Division stated as follows about DEP’s power to regulate in this domain:

Under [WSM Act], the NJDEP has the exclusive authority to “control, conserve, and manage the water supply of the State and the diversions of that water supply.”

[United Water N.J. v. Boro. of Hillsdale, 438 N.J. Super. 309, 319 (App. Div. 2014) (citing N.J.S.A. 58:1A-5).]

In fact, in United Water N.J., Inc., supra, the Appellate Division called DEP’s authority “exclusive” no fewer than three times. 438 N.J. Super. at 319, 321, 323.

Preemption typically occurs in the context of a State law preempting a municipal ordinance, but the reasoning applies equally well to the regulations of an agency with only regional jurisdiction (like the PC). Courts consider the following factors when determining whether preemption applies:

1. Does the ordinance conflict with [the] state law, either because of conflicting policies or operational effect[,] [that is, does the ordinance forbid what the Legislature has permitted . . . ?

2. Was the state law intended[] expressly or impliedly[] to be exclusive in the field?
3. Does the subject matter reflect a need for uniformity?
4. Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?
5. Does the ordinance stand []as an obstacle to the accomplishment and execution of the full purposes and objectives[] of the Legislature?

[438 N.J. Super. at 316.]

In United Water N.J., Inc., supra, a municipality notified a water purveyor that the purveyor’s dam modification project (for a reservoir pursuant to an DEP permit) required site plan approval from the municipality’s planning board. 438 N.J. Super. at 313. After the purveyor objected, the municipality adopted two ordinances. Ibid. One amended the tree removal provisions of the municipality’s land use ordinance such that removal of more than three trees on a lot in a calendar year was prohibited and such that every tree removed from a flood plain needed to be replaced with four trees—even though the purveyor’s DEP permit required “removal of trees as part of the dam improvement project.” Id. at 313, 318. The other new ordinance amended the conditional use standards for public utilities such that the municipality’s “land use boards [had] authority to review, deny, or approve with conditions, plans for any [construction, modification, *etc.*] to any [utility development] before construction may begin.” Id. at 313, 318. It also provided “for local oversight of the impact a dam improvement project might have on the [municipality’s] management of its

stormwaters” even though the WSM Act gives DEP “exclusive authority to ‘control, conserve, and manage the water supply of the State and the diversions of that water supply.’” Id. at 319 (quoting N.J.S.A. 58:1A-5).

The purveyor therefore filed an action in lieu of prerogative writs challenging the ordinances. Id. at 314. It argued that the municipality adopted and sought to enforce requirements that were preempted by State statute, *i.e.*, the WSM Act and the Safe Dam Act (“SDA”), and that DEP had exclusive jurisdiction over the project under those statutes. Ibid.

After the trial court found in the purveyor’s favor, intervenors appealed and argued they were “not challenging the NJDEP’s exclusive authority to enforce the SDA and the [WSM Act].” Id. at 315. Rather (according to them), the issue was that DEP’s issuance of a permit did “not exempt [the purveyor] from complying with certain local zoning laws and other regulations.” The municipality’s ordinances sought only to “require municipal review and evaluation of the ‘construction, operation, maintenance or repairs’ through the municipal site plan review process, so that certain ‘legitimate local concerns’ may be addressed,” and so the parties “may at least attempt to arrive at a mutually acceptable plan which addresses the local concerns and can then be submitted to NJDEP for review and approval, before the permit is issued.” Id. at 315-316; see also id. at 319 (explaining the municipality’s argument that conditions imposed by the ordinance were acceptable because they

supposedly “pertain[ed] solely to matters of local concern” and were “outside the purview of the NJDEP’s exclusive regulation”).

The Appellate Division rejected these arguments and upheld the trial court’s finding of preemption. *Id.* at 316. As the court explained, the tree ordinance “directly conflicts with the regulations adopted by NJDEP pursuant to the SDA” and “stands as an obstacle to the uniform regulation by the NJDEP of dam design, construction, operation and maintenance of dams and reservoirs in this State.” *Id.* at 318. And “requiring [the purveyor] to secure site plan approval pursuant to [the other ordinance], and compliance with the requirements imposed by that ordinance, would substantially undercut the NJDEP’s pervasive regulation in this area under the SDA.” *Id.* at 318-19. Indeed:

The ordinance empowers the Borough’s local planning board to impose conditions in addition to those required by the NJDEP, and to deny approval of the project unless those conditions are met. The exercise of such regulatory authority cannot coexist with the exclusive authority conferred upon the NJDEP in the SDA. Moreover, local review of the modifications could delay construction that the NJDEP directed [the purveyor] to begin promptly.”

[*Id.* at 319.]

Regarding the WSM Act, the court found that the ordinance’s “local oversight of the impact a dam improvement project might have on the [municipality’s] management of its stormwaters” clearly “conflicts with the NJDEP’s authority under the [WSM Act].” *Id.* at 319. Specifically, “NJDEP has the exclusive authority to

‘control, conserve, and manage the water supply of the State and the diversions of that water supply.’ *Ibid.* (quoting N.J.S.A. 58:1A-5). The court continued:

NJDEP has adopted comprehensive regulations governing the water supply, which include a *detailed application for water supply allocation or diversion* in the public interest. *See, e.g., N.J.A.C. 7:19-2.2(a) to (f).* Decisions as to the allocation and diversion of water from the dam are conferred upon the NJDEP by the [WSM Act], and the NJDEP’s *pervasive* authority in this area *precludes local regulation* of the sort contemplated by [the ordinance].

[United Water N.J., Inc., *supra*, 438 N.J. Super. at 320.]

Therefore, it was unacceptable that the “ordinance confer[red] upon the local planning board the power to deny site plan approval if the project does not meet the specified conditions, even though those conditions have not been imposed by the NJDEP through its permitting process.” *Id.* at 321. In particular, it was not acceptable that the “ordinance is concerned with matters over which the NJDEP has *exclusive* authority under the SDA and the WSMA, and it essentially allows the municipality to prohibit by zoning proscription the construction of the project.” *Ibid.* The court thus concluded that the municipality was “preempted by the SDA and the [WSM Act] from applying [the ordinances] to [the purveyor’s] dam improvement project.” *Id.* at 324; *see also Tp. of Montville v. Lotta Lettuce J.T.S. Farms LLC*, Docket No. A-6036-10T3, 2013 N.J. Super. Unpub. LEXIS 1424, 19 (App. Div. 2013), Pa234 at Pa239. (“Statewide legislation and DEP implementing regulations

regarding water supply . . . , well construction . . . , and agricultural activities and water usage . . . together evince a clear intention to preempt local legislation . . .”).

Like the municipality in United Water N.J., Inc., the PC is arguing that despite DEP’s indisputably “exclusive” authority to “control, conserve, and manage the water supply” of the State and the diversions of that water supply,” 438 N.J. Super. at 319, the PC has “statutory authority to regulate water management [that] is independent of the DEP’s authority pursuant to the [WSM Act],” 55 N.J.R. 2407(a), 2409. Application of the preemption factors (enumerated above in a block quote) show the PC is wrong.

1. The Rule Conflicts with a State Statute, i.e., the WSM Act.

As for factor number 1, the Rule does conflict with a State statute because of conflicting policies or operational effect and does forbid what the Legislature has permitted. The Rule particularly clashes with the WSM Act’s gallons per day threshold for water diversions, its procedure for limiting or reducing diversion amounts and requiring use of alternate sources of water, and its policies for interbasin transfers of water.

(i) The Gallons Per Day Threshold.

Most notably, the WSM Act calls for the DEP “commissioner” to institute a:

permit system to allocate or reallocate any or all of the waters of the State, which system shall provide for the issuance of permits to diverters of more than 100,000 gallons per day [“GPD”] of the waters of the State.

[N.J.S.A. 58:1A-5a.]

That 100,000 GPD threshold is repeated multiple times in the WSM Act:

- “[DEP] in developing the permit system . . . shall . . . [r]equire any person diverting more than 100,000 gallons per day of any waters of the State . . . to obtain a diversion permit.” N.J.S.A. 58:1A-6a(3).
- “A person shall not divert more than 100,000 gallons per day of any waters of the State . . . unless the person obtains a diversion permit or water usage certification, as appropriate, pursuant to [N.J.S.A. 58:1A-6].” N.J.S.A. 58:1A-7a.

This statutory authority directly contradicts the Rule. The Rule purports, without authority, to regulate diversions of half that 100,000 GPD figure (*i.e.*, 50,000 GPD), not to mention that it adds new diversion restrictions not contemplated by the statute or by DEP. See N.J.A.C. 7:50-6.86(d).

The Legislature could have set a 50,000 GPD threshold for the Pinelands, but chose not to do so. In fact, the Legislature did set a 50,000 GPD threshold for the Highlands Region, but not for the Pinelands, stating in the WSM Act that DEP:

shall establish a permit system to provide for review of allocation or reallocations . . . of waters of the Highlands . . . to provide for the issuance of permits for diversions . . . of more than 50,000 gallons per day of waters of the Highlands in the Highlands preservation area.

[N.J.S.A. 58:1A-5.1.]

The Legislature was thus quite conscious of the difference between a 50,000 GPD threshold and a 100,000 GPD threshold.

In other words, like the ordinance in United Water N.J., Inc., the Pinelands Rule clashes with the will of the Legislature, in this case by enabling the PC to prohibit a diversion approved by DEP.

- (ii) Procedure for Limiting or Reducing Diversion Amounts and Requiring Use of Alternative Sources of Water.

The Rule also contradicts the section of the WSM Act that states diversion permits “shall” include a provision:

[p]ermitting [DEP] to modify the conditions of a diversion permit issued . . . **in a designated area of critical water supply concern** in order to (1) limit or reduce the quantity of water which lawfully may be diverted to the safe or dependable yield of the resource; (2) transfer the point of diversion; or (3) require a permittee to utilize alternate sources of water, upon a determination that the existing diversion or continued use of the same source in excess of the safe or dependable yield, as the case may be, adversely impacts or threatens to adversely impact the water resources of the State.

[N.J.S.A. 58:1A-8j.]

There is a process for designating a region as an “area of critical water supply concern”; such a designation cannot simply be declared. See N.J.S.A. 58:1A-6b; see also N.J.A.C. 7:19-8. Even in a designated area of critical water supply concern, such requirements for reduction and use of alternative sources are limited by N.J.S.A. 58:1A-7.3.

Despite the above, the Rule purports to limit or reduce the quantity of water that may be diverted and to require a permittee to utilize alternate sources of water

without requiring that the area in question be a designated area of critical water supply concern. For example, N.J.A.C. 7:50-6.86(d)3 limits diversions to specific areas without the need for prior designation of those areas as areas of critical water supply concern. Yet there is no statutory support for imposing restrictions in some areas and not others absent a DEP designation of an area as a critical water supply concern, defined in the DEP regulations as a “region of the State where excessive water usage or diversion presents undue stress, or wherein conditions pose a significant threat to the long-term integrity of a water supply source, including a diminution of surface water due to excess groundwater diversion.” N.J.A.C. 7:19-1.3; see also N.J.S.A. 58:1A-6b; N.J.A.C. 7:19-2.5(d). Similarly, without limiting itself to designated areas of critical water supply concern, N.J.A.C. 7:50-6.86(d)4 prohibits a proposed diversion unless the “applicant demonstrates that no alternative water supply source is available or viable.”

The Rule also contradicts the section of the WSM Act that states:

Every diversion permit issued . . . *shall* be renewed by [DEP] upon the expiration thereof, with any conditions deemed appropriate by [DEP], except that the [DEP] may, *after notice and public hearing*, limit the quantity to the amount currently diverted, subject to contract, or reasonably required for a demonstrated future need.”

[N.J.S.A. 58:1A-7b; see also N.J.A.C. 7:19-2.5(d).]

Ignoring this statutory provision, the Rule purports to prohibit increases in diversion volume in certain regions of the Pinelands, as is mentioned above, without

prior notice and public hearing. See N.J.A.C. 7:50-6.86(d)3; see also 54 N.J.R. at 1670 (“[T]he Commission is proposing to limit new *or increased* diversions from the Kirkwood-Cohansey aquifer to the following Pinelands Management Areas”), 1674. Again, as in United Water N.J., Inc., *supra*, the PC is attempting to prohibit what the Legislature has permitted.

(iii) Interbasin Transfers.

And whereas the Rule tries to regulate “interbasin” transfers of water, see N.J.A.C. 7:50-6.86(b), the WSM Act has already accounted for such transfers of Pinelands water:

[N]o person shall transport, or cause to be transported, more than 10 miles outside . . . the Pinelands National reserve, any ground or surface water therefrom

[N.J.S.A. 58:1A-7.1.]

The most the Pinelands Act has to say on the matter is that “[n]othing in this act shall be construed to authorize or permit the exportation of any ground or surface waters from the pinelands area.” N.J.S.A. 13:18A-25a. It certainly does not state that the PC is authorized to regulate interbasin transfers of water within the Pinelands Area. In short, the Rule’s prohibition on water transfers goes far beyond the regulation contemplated by the Legislature and thus prohibits what the Legislature permitted as in United Water N.J., Inc.

2. The WSM Act and Its Delegation to DEP Was Intended to Be Exclusive in the Field.

The WSM Act is unequivocal as to what entity is charged with regulating the State's water supply:

[T]o ensure an adequate supply and quality of water for citizens of the State . . . and to protect the natural environment of the waterways of the State, it is necessary that the State, through its Department of Environmental Protection, have the power to manage the water supply by adopting a uniform water diversion permit system and fee schedule, a monitoring, inspection and enforcement program, a program to study and manage the State's water sources and plan for emergencies and future water needs, and regulations to manage the waters of the State during water supply and water quality emergencies.

[N.J.S.A. 58:1A-2.]

The WSM Act thus provides:

The commissioner [of DEP]¹³ shall have the power to adopt, enforce, amend or repeal . . . rules and regulations to control, conserve, and manage the water supply of the State and the diversions of that water supply to assure the citizens of the State an adequate supply of water under a variety of conditions and to carry out the intent of this act. These rules and regulations may apply throughout the State or in any region thereof and shall provide for the allocation or the reallocation of the waters of the State . . .

[N.J.S.A. 58:1A-5.]

Moreover:

- The “department [of Environmental Protection¹⁴],” not the PC, is empowered by the WSM Act to “[e]valuate and determine the adequacy

¹³ See N.J.S.A. 58:1A-3 (defining “commissioner” as “Commissioner of [DEP]”).

¹⁴ See N.J.S.A. 58:1A-3 (defining “department” as DEP).

of ground and surface water supplies and develop methods to protect aquifer recharge areas.” N.J.S.A. 58:1A-15m.

- DEP is empowered to set “[s]tandards and procedures to be followed to maintain the minimum water levels and flow necessary to provide adequate water quantity and quality.” N.J.S.A. 58:1A-5e.
- DEP is empowered to institute a “permit system to allocate or reallocate any or all of the waters of the State, which system shall provide for the issuance of permits to diverters of more than 100,000 gallons per day¹⁵ of the waters of the State.” N.J.S.A. 58:1A-5a; see also N.J.S.A. 58:1A-6a(3).
- DEP (through its permits) shall “[~~fix~~] the maximum allowable diversion” and “[~~identify~~] and limit] the use or uses to which the water may be put”). N.J.S.A. 58:1A-8b & -8c.
- DEP is empowered to promulgate “[s]tandards and procedures to be followed by diverters to ensure that . . . [DEP] is provided with adequate and accurate reports regarding the diversion and use of water.” N.J.S.A. 58:1A-5b(4); see also N.J.S.A. 58:1A-5c (stating DEP rules may also set “monitoring” and “reporting procedures”).
- DEP is empowered to set “[s]tandards and procedures to be followed to determine the location, extent and quality of the water resources of the State and plan for their future use to meet the needs of the citizens of the State.” N.J.S.A. 58:1A-5d.
- DEP is tasked with preparing, adopting, and maintaining the New Jersey Statewide Water Supply Plan. N.J.S.A. 58:1A-13a. That Plan “shall” touch on “maintenance and protection of watershed areas” and “[r]ecommendations for administrative actions to ensure the protection of ground and surface water quality and water supply sources.” N.J.S.A. 58:1A-13b(5) and -13b(7). Notably, the Legislature required DEP to “consult with the Highlands Water Protection and Planning Council” before the “adoption of any revision to the New Jersey Statewide Water Supply Plan” concerning possible effects on the Highlands. N.J.S.A. 58:1A-13d. By contrast, the Legislature did not include any such

¹⁵ This figure, which clashes with the threshold set by the Rule, is discussed below.

provision requiring consultation with the PC for revisions impacting the Pinelands Region. See ibid.

- DEP is empowered to “[p]erform any and all acts and issue such orders as are necessary to carry out the purposes and requirements of [the WSM Act],” N.J.S.A. 58:1A-15a, and to “[a]dminister and enforce the provisions of [the WSM Act] and rules, regulations and orders adopted, issued or effective thereunder,” N.J.S.A. 58:1A-15b.

In contrast to these numerous and extensive statutory directives, the PC’s entire case for regulating water diversions/allocations hinges on a few general provisions that do not specifically authorize the PC to regulate diversions/allocations, as is explained above. Therefore, the PC is authorized to address ground water only through land use, and DEP is the sole agency empowered to regulate water diversions/allocation.¹⁶

Finally, it should be noted that even an aquifer “crisis” of the type proclaimed by PC does not detract from DEP’s sole power in this domain. The WSM Act states:

In exercising the water supply management and planning functions . . . , particularly in a region of the State where excessive water usage or diversion present undue stress, or wherein conditions pose a significant threat to long-term integrity of a water supply source, including a diminution of surface water supply due to excess groundwater

¹⁶ The PC has attempted to couch the Rule as a “water management” rule to avoid the obvious truth that it is attempting to regulate water supply, *i.e.*, diversions/allocations, without authority. However, it is equally obvious that “water management” is just a euphemism for water diversion/allocations. In fact, the PC was referring to the Rule as the “water supply” rule until Clayton submitted its initial objections in November 2022. See 1T2-5; 2T2-7; 6T3, 6; 7T2-20. Thereafter, the PC tellingly changed course, shunning the “water supply” label in favor of “water management.” See 20T2, 5, 6, 10.

diversion, [DEP] shall . . . designate that region as an area of critical water supply concern.

[N.J.S.A. 58:1A-6b.]

After such a designation, DEP “in consultation with . . . local governing bodies . . . shall,” among other things, “select and adopt appropriate water supply alternatives.” N.J.S.A. 58:1A-6c(4). Clearly, this language puts DEP in the primary position of power and limits local governing bodies such as the PC to merely being consulted. This is consistent with the Pinelands Act itself. See, e.g., N.J.S.A. 13:18A-3i (authorizing the PC to “transmit to [DEP] . . . recommendations for water quality standards in the pinelands”); N.J.S.A. 13:A-8 (authorizing the PC to prepare resource assessments, land use capability maps, and statements of policies relating to land and water protection and management, but not to regulate water diversions/allocations). Only DEP can “revise the designation [of critical water supply concern] and impose further restrictions” if it determines “that the alternatives selected are not effective.” N.J.S.A. 58:1A-6d.

In short, State law intended DEP’s authority to be exclusive in the domain of water diversions and allocations.

3. The Subject Matter Reflects a Need for Uniformity.

There is also no doubt that regulation of diversions/allocations of water reflects a need for uniformity. Again, the WSM Act itself uses the word “uniform”:

[T]o ensure an adequate supply and quality of water for citizens of the State . . . and to protect the natural

environment of the waterways of the State, it is necessary that the State, through [DEP], have the power to manage the water supply by adopting a uniform water diversion permit system

[N.J.S.A. 58:1A-2.]

See also Tp. of Montville v. Lotta Lettuce J.T.S. Farms LLC, Docket No. A-6036-10T3, 2013 N.J. Super. Unpub. LEXIS 1424, 24 (App. Div. 2013), Pa234 at Pa240. (stating that the “confluence of the State’s stewardship of the water supply, comprehensive oversight of well construction, and protection of farming activities demonstrably bespeak the need for a one-voice approach.”) The one voice is DEP’s voice, and there is no room for the PC’s Rule.

Indeed, the legislative findings and declarations section of the WSM Act makes clear that water supply should be regulated by an entity with Statewide purview, not a regional body such as the PC. It asserts that the “water resources of the State are public assets of the State held in trust for its citizens and are essential to the health, safety, economic welfare, recreational and aesthetic enjoyment, and general welfare, of the people of New Jersey.” N.J.S.A. 58:1A-2. The “ownership of these assets is in the State as trustee of the people.” Ibid. “[B]ecause some areas within the State do not have enough water to meet their current needs and provide an adequate margin of safety, the water resources of the State . . . must be planned for and managed as a common resource from which the requirements of the several

regions and localities in the State shall be met.” *Ibid.* A single regulatory voice is thus required.

4. The DEP Water Supply Management Scheme Is So Pervasive and Comprehensive that It Precludes Coexistence of the Pinelands Rule.

Not only is DEP uniquely authorized to regulate these matters, but it has actually promulgated comprehensive and pervasive regulations at N.J.A.C. 7:19-1.1 *et seq.* As the Appellate Division explained:

NJDEP has adopted comprehensive regulations governing the water supply, which include a detailed application for water supply allocation or diversion in the public interest. See, *e.g.*, N.J.A.C. 7:19-2.2(a) to (f). Decisions as to the allocation and diversion of water . . . are conferred upon the NJDEP by the [WSM Act], and the NJDEP’s pervasive authority in this area precludes local regulation”

[United Water N.J., Inc., *supra*, 438 N.J. Super. at 320.]

See also Tp. of Montville v. Lotta Lettuce J.T.S. Farms LLC, Docket No. A-6036-10T3, 2013 N.J. Super. Unpub. LEXIS 1424, 19 (App. Div. 2013), Pa234 at Pa239. (“Statewide legislation and DEP implementing regulations regarding water supply . . . , well construction . . . , and agricultural activities and water usage . . . together evince a clear intention to preempt local legislation . . .”).

It is not difficult to see why the Appellate Division reached that conclusion. DEP’s water supply management regulations describe themselves as “governing the establishment of privileges to divert water, the management of water quantity and quality, the issuance of permits, and the handling of drought warnings, water

emergencies and water quality emergencies.” N.J.A.C. 7:19-1.1a. The DEP regulations thus “prescribe[] the application, review, notification and hearing procedures for establishing those [diversion] privileges,” N.J.A.C. 7:19-1.1(a), and “establish[] the procedures for . . . areas of critical water supply concern . . . and water emergency allocation,” N.J.A.C. 7:19-1.1(b).

Consistent with the WSM Act, the DEP regulations set the default threshold for regulated diversions at 100,000 GPD. See N.J.A.C. 7:19-1.10 (“No person shall divert water either from a single diversion source or from combined diversion sources at a rate in excess of 100,000 gallons of water per day without obtaining a Water Supply Allocation Permit”); see also N.J.A.C. 7:19-1.7(a).

The DEP regulations also “prescribe[] the procedures which shall be followed by applicants when applying for . . . water supply allocation permits” N.J.A.C. 7:19-2.1 & -2.2; see also United Water N.J., Inc., supra, 438 N.J. Super. at 320 (stating DEP “has adopted comprehensive regulations governing the water supply, which include a detailed application process for water supply allocation or diversion in the public interest”). These procedures include requirements for specific reports that must be provided. See, e.g., N.J.A.C. 7:19-2.2(d) (“The applicant . . . shall provide . . . [a] comprehensive hydrological evaluation of the proposed diversion”).

Moreover, the DEP regulations set standards for who may obtain a permit to divert. See, e.g., N.J.A.C. 7:19-2.2(f) & (g). These standards require the applicant to demonstrate, among other things, “[t]hat the diversion *shall not exceed the natural replenishment or safe yield of the water resources or threat to exhaust such waters,*” and “[t]hat the plans for the proposed diversion are just and equitable to the other water users affected thereby, and that the withdrawal does not adversely affect other existing withdrawals, either ground or surface.” N.J.A.C. 7:19-2.2(f). The applicant must also “substantiate[] the need for the proposed allocation *and support[] the designated choice of water resource for the allocation.*” N.J.A.C. 7:19-2.2(g). The application will be denied if the applicant fails to establish any of the various items at N.J.A.C. 7:19-2.2(f) & (g), or if DEP “determines that a more viable alternative source of water is available, or if the proposed diversion is not in accordance with the New Jersey Statewide Water Supply Plan.” N.J.A.C. 7:19-2.2(h). These regulations apply to increased diversions as well as new diversions. N.J.A.C. 7:19-2.2(c) (“An applicant whose application includes a new well, an increase in diversion capacity, and/or an increase in monthly or yearly allocation shall conduct a hydrogeologic test . . .”).

Similarly, those who already have a permit must continually meet certain DEP standards and requirements. See, e.g., N.J.A.C. 7:19-2.14. These include a maximum allowable diversion and a requirement that the “permittee is responsible

for mitigating adverse impacts on ground or surface waters.” See, e.g., N.J.A.C. 7:19-2.14(a)2 & 11. They also include reporting requirements. See, e.g., N.J.A.C. 7:19-2.14(a)3 (requiring “[t]hat the monthly diversion amount be reported on a quarterly basis on forms provided by the Department”) & -2.14(a)7 (requiring “[t]hat the static water levels for ground water sources be determined and reported on the quarterly diversion”). The DEP regulations additionally address fee calculations for water allocation permits. See N.J.A.C. 7:19-3.1.

Perhaps most importantly, the DEP regulations already institute a system, and criteria, for identifying and protecting aquifers that have reached dangerously low water levels. For example:

[DEP] shall, after notice and public hearing, designate as areas of critical water supply concern those areas in which [DEP] determines that adverse conditions exist, related to the ground or surface water, such that special measures are required to ensure the integrity and viability of the water supply source and to protect the public health, safety or welfare. [DEP] shall demonstrate that the designation is warranted through the use of a water supply availability study.

[N.J.A.C. 7:19-8.2(a).]

In such areas of critical water supply concern, N.J.A.C. 7:19-8.3(a) indicates that DEP shall take certain steps relating to water supply availability, needs, and alternatives. Then, DEP “will not issue new or increased diversions from affected aquifers within an area of critical water supply concern,” with limited exceptions. N.J.A.C. 7:19-8.3(i). In such areas, DEP can also “[m]odify the conditions of an

existing water supply allocation permit . . . to limit or reduce the quantity of water which may be diverted” and “[r]equire the permittee to use alternate sources of water.” N.J.A.C. 7:19-8.3(c). DEP apparently considers the following to be “additional controls and requirements” for use in areas of critical water supply concern in certain, but not all, circumstances: “metering, *additional reporting requirements, restrictions of inter-basin diversions* of water for water supply or wastewater discharge, restriction of consumptive uses and water quality testing of wells.” See N.J.A.C. 7:19-8.2(d). And the “[DEP] . . . may impose such additional restrictions and requirements during a water emergency [as] [it] deems necessary to alleviate the water emergency.” N.J.A.C. 7:19-10.1.

In the section most relevant for Clayton, DEP’s regulations expressly exempt “sand and gravel operations using water for media transport” from the requirement that diversion sources be equipped with flow meters. N.J.A.C. 7:19-2.14(a)4ii. The DEP regulations then add that “[a]ny permittee with a diversion source that meets the requirements of (a)4i, ii or iii above may *estimate* the diversion quantity using an accurate and reasonable method approved by [DEP].” N.J.A.C. 7:19-2.14(a)5; see also N.J.A.C. 7:19-2.2(i) (exempting “[s]and and gravel mining” from the requirement to submit to DEP a Water Conservation & Drought Management Plan).

Finally, it should be noted that DEP actively issues permits for water diversions, and the PC’s Rule clashes with those permits. A perfect example is

Clayton's January 25, 2019 Water Allocation Permit from DEP for diversions from the Aquifer at Clayton's Woodmansie site. Pa214. That permit grants permission for Clayton to divert far more than 50,000 gallons of water per day and does not expire until January 31, 2029. Ibid. It also recognizes sand and gravel mining diversions as nonconsumptive without any need for the burdensome hydrologic reports that the Pinelands Rule imposes, id. at Pa221, states that neither flow meters nor water Conservation Plans are required for this type of operation, id. at Pa220 at nos. 10 & 11, and states that an "aquifer test was not required for this activity," id. at Pa221 at no. 1. It further indicates that the permit may be renewed. See id. at Pa227 at no. 1.

This DEP permit clearly shows the complications that would arise if multiple agencies are allowed to regulate the same subject matter—and that such redundant regulation is unnecessary as well as problematic. Also, as is noted on Pa219, an applicant for a mining water diversion in the Pinelands is already required to obtain a Certificate of Filing from the PC, and the PC already issued a Certificate of Filing for that this particular water diversion on September 27, 2018, which Certificate of Filing is attached as Pa231. A mining diversion is also required to obtain a Mine Registration Certificate from the Department of Labor, as Clayton did in this case. Pa35. In other words, the existing overlap of regulatory jurisdictions is complicated

(and burdensome) enough without the PC's new attempt to regulate the exact same subject matter as DEP.

Simply put, there is no need for the Pinelands Rule given DEP's comprehensive regulatory scheme.

5. The Pinelands Rule Stands as an Obstacle to the Accomplishment and Execution of the Full Purposes and Objectives of the Legislature.

Not only is there no need for the Pinelands Rule, but it actually interferes with and unnecessarily complicates DEP's legislatively directed regulation of water diversions/allocations. The above-listed conflicts (section 1, *supra*) illustrate that interference and complication.¹⁷ Moreover, the "Legislative findings and declarations" section of the WSM Act expressly states that the "water resources of the State" must be "planned for and managed as a common resource." N.J.S.A. 58:1A-2. The PC's attempt to impose unique regulations for just the water supply in the Pinelands area clearly impedes that objective--not to mention the objective that there be a "uniform water diversion permit system" administered by DEP specifically. *Ibid.*

Consider also the comments raised by DEP's own DWSG. Pa30. It noted how the Rule thwarts the WSM Act's intention that the threshold for diversion

¹⁷ For example, whereas DEP has an elaborate process for restricting diversions in areas it designates as being of critical water supply concern (see N.J.S.A. 58:1A-6b; see also N.J.S.A. 58:1A-7.3; N.J.A.C. 7:19-8), the Rule simply ignores that procedure, confounding the whole system. This problem is discussed above.

permits be set at 100,000 GPD: “[U]nder the Commission’s proposal, an existing diversion that exceeds 100,000 gallons per day and is permitted in accordance with [DEP’s] N.J.A.C. 7:19 . . . will be subject to the Commission’s review and may not meet the new proposed standards proposed by Pinelands.” Pa32.

DWSG further noted the impediment that the Pinelands Rule poses to the Legislature’s allowance of diversions throughout the Pinelands. Specifically, DWSG stated that “[p]roposed new or increased diversions are not permitted [by the Rule] in preservation, forest, or special agricultural areas,” even though “there may be . . . existing diversions in these restricted areas that could be impacted by this restriction” and are allowed by DEP, *e.g.*, “sand quarries.” Pa32. A perfect example is Clayton’s sand and gravel mining operation at its Woodmansie site in Woodland Township, which is in the Preservation Area. That site has a water allocation permit from DEP to divert water for mining purposes, see Pa214, but the Pinelands Rule would limit that use going forward, in contradiction of DEP’s approval of that use.

For all of these reasons, the Rule is an obstacle to the accomplishment of the full purposes of the Legislature, the PC is preempted from regulating water diversions/allocations, and the Rule must be overturned.

POINT III

THE RULEMAKING MUST BE STRUCK DOWN BECAUSE IT IS ARBITRARY, CAPRICIOUS, AND

UNREASONABLE. (See November 3, 2022 Comment Letter from Clayton's Attorneys, Connell Foley, Pa1.)

As is explained above, an appellate court's review of administrative rulemaking entails a "determination whether that rule is arbitrary, capricious, unreasonable, or beyond the agency's delegated powers." In re Amend. of N.J.A.C. 8:31b-3.31 & N.J.A.C. 8:31b-3.51, 119 N.J. 531, 543-44 (1990). While the above Point II focused on the Rule's being "beyond the agency's delegated powers," this Point III focuses on the Rule's being arbitrary, capricious, and unreasonable.

The relevant inquiries are thus "whether the record contains substantial evidence to support the findings on which the agency based its action," and whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors." Allstars Auto. Grp., Inc., 234 N.J. at 157. The agency's action "must . . . rest on a reasonable factual basis." In re Attorney Gen. Law Enf't Directive Nos. 2020-5 & 2020-6, supra, 246 N.J. at 491.

Here, the Rule is arbitrary, capricious, and unreasonable inasmuch as, for example, its requirements have no rational nexus to the problems they purport to solve. This flaw is discussed at length in the attached expert report prepared by Brian Blum, CPG, LSRP of Langan and dated November 2, 2022 (the "Expert Report"). Pa16.

A. The Rule Fails to Sufficiently Distinguish Between Consumptive and Nonconsumptive Diversions.

One of the Rule’s most egregious flaws is its insufficient distinction between “consumptive” and “nonconsumptive” diversions. As is discussed above, the Original Rule Proposal made no distinction whatsoever, reflecting the PC’s glaring ignorance of the matters it was regulating. Although the PC ultimately revised the Rule to make some distinction, the change was cosmetic and insufficient for the two reasons listed below. The PC’s refusal to correct these problems, despite being informed of them, was arbitrary, capricious, and unreasonable.

1. The Rule's Cosmetic Distinction Between Consumptive and Nonconsumptive Uses Is Effectively Negated by Its Requirement that the Applicant Demonstrate the Nonconsumptive Nature of Its Use.

In the WSM Act, the Legislature defined “nonconsumptive use” as:

The use of water diverted from surface or ground waters in such a manner that it is returned to the surface or ground water at or near the point from which it was taken without substantial diminution in quantity or substantial impairment of quality.

[N.J.S.A. 58:1A-3e.]

By contrast, “consumptive use” is defined as “any use of water diverted from surface or ground waters other than a nonconsumptive use.” Ibid.

Even though the professed, overarching purpose of the Rule is “to better protect the aquifer,” 54 N.J.R. at 1668,¹⁸ “there was no distinction or recognition in the [Original Rule Proposal] between the diversion of water that is consumed or depleted versus water that is returned in an un-depleted manner.” Pa16 (Expert Report) at Pa17. As a result, sand mining operations (recognized by DEP as returning 90 to 95 percent or more¹⁹ of their diversions back to the water source, see id. at Pa17, and not addressed at all in the Kirkwood-Cohansey Project studies)²⁰

¹⁸ Another aspect of the Pinelands Rule fails to advance that purpose. The Rule relies on DWSG-published low flow margin (“LFM”) data to determine whether a proposed diversion has an unacceptable adverse regional impact on the Kirkwood-Cohansey Aquifer. N.J.A.C. 7:50-6.86(d)6. However, as DWSG observed in its comments: “DWSG’s LFM results for some HUC-11s include diversions from unconfined aquifers that are not the Kirkland-Cohansey aquifer.” Pa30 at Pa31 (comment 4). In fact, “[s]ome of these same HUC-11s may . . . be only partially inside the Pinelands Area.” Ibid. In its response in the Notice of Adoption, the PC admitted there are HUC-11 watersheds that include unconfined aquifers other than the Kirkwood-Cohansey formation contributing to surface water flow,” and that it “would . . . be difficult to distinguish between the portions of the LFM from the Kirkwood-Cohansey aquifer from those outside the aquifer.” See 55 N.J.R. 2407(a) at 2412 (response to Comment 41). Clearly then, the LFM data does not provide an accurate picture of the Aquifer, and regulating the amount of water in other aquifers does not serve the Rule’s professed purpose of protecting the Kirkwood-Cohansey Aquifer.

¹⁹ In the words of Gina Berg of Pinelands: “[NJ]DEP considers most of that water to be returned to the source without changing quality or quantity. They set a bar of 90 percent returned water, but speaking with them they say it’s probably much less than that, maybe not even 5 percent water is lost.” 18T5-17.

²⁰ “There are no documented ecological impacts associated with water diversions for hydraulic dredging from manmade ponds as the water is returned to the water table in an undiminished manner.” Expert Report at Pa18-19.

were regulated as much as uses returning 0 percent back to the source. This was undeniably arbitrary, capricious, and unreasonable.

Clayton so notified the PC. See, e.g., Pa1 at Pa12; Pa16 at Pa16, Pa18. Similarly, DEP’s DWSG informed the PC the “proposed rules do not appear to make this distinction [between consumptive and nonconsumptive use]” and seem “to refer to the diversion and assume that all of it is lost, which is incorrect.” Pa30 at Pa32 (comment 8); see also id. at comment 9 (“[T]his would seem to impact diversions from sand quarries where water is returned to the source, minimally impacting the aquifer.”).

Although the subsequent Notice of Substantial Changes Upon Adoption (“Amended Rule Proposal”) nominally recognized the difference between consumptive and nonconsumptive, the “Economic Impact” section thereof stated that a resource extraction operation is only exempted from the extremely burdensome “hydrogeologic modeling requirement at proposed N.J.A.C. 7:50-6.86(d) if it can demonstrate that the diversion constitutes a nonconsumptive use.” 55 N.J.R. at 580. Ignoring Clayton’s ensuing comments on the impossibility of precisely calculating the amount of water a sand mining operation returns to the source, see, e.g., Pa75, the adopted Rule required applicants for development review of resource extraction operations to provide a “hydrogeologic report that identifies . . . the volume of water to be returned to the source” and the “methodology used to

quantify” it. N.J.A.C. 7:50-4.26(b)6xi; see also 20T4 (stating that the hydrogeologic report obligation requires applicants to demonstrate “how they’re calculating that 90 percent of the water will be returned”). Although the Notice of Adoption tried to assuage Clayton’s concerns by suggesting PC’s requirements for determining return of water to the source will mirror DEP’s, see 55 N.J.R. at 2408 (response to Comments 1-5), the above-quoted Rule language belies that claim, and PC even contradicted itself in the same Notice of Adoption. See 55 N.J.R. at 2408, 2410, (using “demonstrate” instead of “estimate” in reply to Comments 1-5, 18, & 27).²¹

The PC’s decision to finalize the Rule with the above terms “identifies” and “quantify” is thus absurd for two reasons.

First, the PC recognized the virtual impossibility of a mine precisely calculating the amount of water returned to the source. See, e.g., 29T9-12 (“So it

²¹ The PC also contradicted itself on this issue in response to DWSG’s comments. DWSG remarked that in DEP’s “anticipated proposal amending N.J.A.C. 7:19 [*i.e.*, DEP’s water allocation rules], a link between volumes of water (*e.g.*, 100,000 gallons per day) and pumping rates (*e.g.*, 70 gallons per minute) will be addressed.” Pa30 at Pa33 (comment 19). DWSG thus recommended “that the [PC] include a similar link to identify new wells more readily being installed by their pump capacity and relation to the volumetric regulatory thresholds.” Ibid. The PC cavalierly dismissed this recommendation without providing any meaningful reasoning: “The [PC] thanks the commenter for the suggestion but does not agree that including the suggested link will benefit applicants for development in the Pinelands Area.” 55 N.J.R. at 2410 (response to Comment 20).

would be very difficult to somehow record water usage in that scenario.”); see also 29T9-23 (“[I]t isn’t like the returned water goes through a meter of some kind.”).

Second, the PC was informed that DEP (the agency with the expertise on water supply issues) does not require precise calculations from sand and gravel mines because of the difficulties of preparing such calculations. Pa75. DEP’s regulations expressly exempt “sand and gravel operations using water for media transport” from the requirement that diversion sources be equipped with flow meters, N.J.A.C. 7:19-2.14(a)4ii, and allow them to “estimate the diversion quantity,” N.J.A.C. 7:19-2.14(a)5; see also N.J.A.C. 7:19-2.2(i).

The PC’s conscious decision to ignore this information and require quantification anyway is arbitrary, capricious, and unreasonable.

2. The Low Flow Margin Methodology Employed by the Rule Was Designed by DEP (not the Pinelands Commission) to Evaluate Net Loss of Water, but the Rule Bases Its Evaluation of Regional Adverse Impact on the Potential for Full Use of the Proposed Diversion.

The Rule’s distinction between consumptive and nonconsumptive uses is insufficient in one other way, an erroneous use of low flow margin (“LFM”) data.

The Rule states a “proposed diversion shall not have an adverse ecological impact” on the Aquifer, adverse ecological impact meaning an “adverse regional impact and/or an adverse local impact.” N.J.A.C. 7:50-6.86(d)5. A “proposed diversion shall be deemed to have an adverse regional impact if it, combined with all current depletive-consumptive net use in the HUC-11 watershed, exceeds 20

percent of the stream low flow margin for the year of peak use.” N.J.A.C. 7:50-6.86(d)6.

In its comments on the Rule, Pa30, DEP’s DWSG pointed out that the LFM methodology employed by the Rule was:

designed [by DEP] to evaluate the net loss of water to a HUC-11 and as such considers consumptive and non-consumptive uses plus imports and exports (*e.g.*, 90% of a golf course irrigation is assumed to be consumptive and 10% is assumed to return to the local aquifer). The proposed rules do not appear to make this distinction. The proposal seems to refer to the diversion and assume that all of it is lost, which is incorrect. The proposed rule should be clarified so that the LFM refers to the net loss of the diversion to the HUC-11.

[Pa32 (comment 8).]

The PC’s dismissive response in the Notice of Adoption does not coherently address DWSG’s comment: “Although the [PC] intends to base its determination of remaining stream volume on current depletive-consumptive net use as proposed in the Water Supply Plan, it will base its evaluation of regional adverse impact on the potential for full use (100 percent) of the new diversion.” 55 N.J.R. at 2412 (response to Comment 43). The PC claimed “it is reasonable and acceptable to rely upon the LFM, a published value, as a benchmark” because the “[PC]’s evaluation is not for the purpose of issuing a water use permit, but rather to assess the potential impact of a proposed diversion.” Ibid. However, the PC did not explain why that purpose makes a difference. See ibid.

In other words, the PC, without any justification, is treating a use as 100 percent consumptive when it determines whether that use will have a regional adverse impact—even if the use is known to be less than 100 percent consumptive. This will yield inaccurate results and is arbitrary, capricious, and unreasonable. It also suggests the PC does not truly intend to exempt nonconsumptive uses.

B. The Rule's Methodology Is Flawed in Other Ways as Well.

The Rule is also arbitrary, capricious, and unreasonable because of other methodology flaws. Again, none other than DEP identified these flaws, and DEP is the agency identified by the Legislature as having the necessary expertise in regulating water supply. Indeed, DEP is tasked not only with regulating water supply, but also with preparing the Statewide Water Supply Plan, and its DWSG authored the technical guidance that the PC invoked in the Rule, *i.e.*, “Technical Memorandum 12-2, Hydrogeologic Testing and Reporting Procedures in Support of New Jersey Water Allocation Permit” (“TM 12-2”).

1. The Rule Requires Analysis of Potential Drawdown Impacts Pursuant to DEP's TM 12-2 Methodology, but DEP States that TM 12-2 Is Not Appropriate for Such Analysis and Could Yield Inaccurate Results.

In its comments, DEP’s DWSG noted a significant problem with the methodology in N.J.A.C. 7:50-6.86(d)7. That provision states that an applicant’s new diversion or increase in allocation from existing diversion(s) in the same HUC-11 watershed that results in a total diversion of 50,000 GPD or more is deemed to

have an adverse local impact if it results in the drawdown of the water table of any portion of the Preservation District, Forest Area, or Special Agricultural Production Area in the affected HUC-11 watershed, or of more than four inches of the wetlands nearest to the estimated zone of influence in the affected HUC-11 watershed.

Specifically, DWSG noted that N.J.A.C. 7:50-6.86(d)7 requires analysis of potential drawdown impacts pursuant to DWSG's own TM 12-2, but that TM 12-2 is not appropriate for such analysis. Pa30. TM 12-2 is for "provid[ing] guidance on conducting aquifer tests and submitting hydrogeological reports in support of requests for new and revised [DEP] water allocation permits under [DEP's] Water Allocation Permits rules at N.J.A.C. 7:19." Pa30. It is not for determining adverse local impacts under the PC's N.J.A.C. 7:50-6.86(d)7: "TM 12-2 was developed in consideration of the withdrawal limits under N.J.A.C. 7:19 (100,000 gallons per day or greater) and DWSG's standard evaluation criteria for impact analysis (one (1) foot of drawdown)," **NOT** the 50,000 gallons per day threshold and four-inch drawdown proposed by the PC. Pa30.

As DWSG explained, this discrepancy could result in inaccuracy:

The recommendations for number and location of observation wells, and pumping volume and duration, are based on the need to generate and observe sufficient groundwater drawdowns that can be analyzed for aquifer properties and then used to predict a one-foot drawdown zone of influence. Aquifer tests conducted using the document's guidance but with lower withdrawal rates may not produce data that can be accurately analyzed for

aquifer parameters that in turn can be used to reliably predict a four-inch drawdown zone of influence. This may be especially true for the prolific Kirk[wood]-Cohansey aquifer, where significant withdrawals are required to see measurable drawdowns.

[Pa30-31.]

Accordingly, DWSG “recommend[ed] that the Commission consider a ‘Pinelands-specific’ guidance based on TM 12-2 so that aquifer tests are more likely to produce appropriate results that can provide insight to groundwater impacts at the proposed lower withdrawal rates and smaller allowed impacts.” Pa31.

The PC’s only response was that it disagreed with DWSG because the U.S. Geological Survey (“USGS”) “advised that the data required pursuant to the new rulemaking is acceptable for the evaluation of the impacts of a proposed diversion from the [Aquifer].” 55 N.J.R. at 2412 (Comment 48).²² However, USGS did not author TM 12-2. DWSG did. Therefore, it was arbitrary, capricious, and unreasonable for PC to ignore the DWSG comments and not remedy the problem.

²² Ironically, despite the PC’s insistence that it “consulted with [USGS],” 55 N.J.R. 2407(a) at 2412 (response to Comment 48), DWSG also pointed out: The PC’s proposed rule uses the Hydrologic Unit Code 11 (“HUC-11”) watershed unit, but “HUC-11s are no longer supported by [USGS’s] and [DEP’s] Watershed mapping groups.” Pa31 (comment 3).

2. The Rule Evaluates the Potential Impact of a Diversion without Considering All Other Existing Diversions and Potential Four-Inch Drawdown Impact, which Is Inconsistent with DWSG's Evaluation Methodology.

The above was not the only problem that DWSG observed related to use of TM 12-2 for N.J.A.C. 7:50-6.86(d). DWSG was also concerned that the “potential impact of a new or increased diversion may be evaluated without consideration of all other existing diversions and the potential four-inch drawdown impact on wetlands and surface water bodies.” Pa31. In particular, “[e]xisting ground water conditions reflect current diversions and the need to base evaluations without considering all pre-existing diversions is not consistent with DWSG’s evaluation methodology, including using the model impacts based upon one foot of drawdown.” Ibid.

In the Notice of Adoption, the PC responded that the rules “do require an evaluation of all existing permitted allocations for the purpose of determining whether the new or increased diversion will have an adverse regional impact,” ignoring that the rules do not do so for adverse local impact. 55 N.J.R. at 2412 (response to Comment 49). The PC additionally admitted that although “[a]ll diversions pursuant to the same water allocation permit are also collectively considered for the purposes of determining whether the new or increased diversion meets the 50,000 gpd threshold in the amended rule,” all such diversions are not considered “in determining whether the new or increased diversion will result in

adverse impacts to the resources of the Pinelands.” 55 N.J.R. 2407(a) at 2412-13 (response to Comment 49). Therefore, the PC’s refusal to fix these problems was arbitrary, capricious, and unreasonable.

3. The Rule Arbitrarily Set 20 Percent of Stream Low Flow Margin as the Standard for Determining Adverse Regional Impact, in Conflict with the State Water Supply Plan.

Finally, the PC arbitrarily chose 20 percent of stream low flow margin as the standard for determining adverse regional impact. The PC Rule states that a “proposed diversion shall be deemed to have an adverse regional impact if it, combined with all current depletive-consumptive net use in the same HUC-11 watershed, exceeds 20 percent of the stream low flow margin for the year of peak use.” N.J.A.C. 7:50-6.86(d)6.). As is noted above, DEP’s DWSG commented that the Rule refers to low flow margin (“LFM”) results even though those results include agricultural, horticultural and aquacultural water use and allocations, which the PC is not authorized to regulate. Pa31 (comment 5). The PC responded in the Notice of Adoption that “[t]o allow for the additional agricultural/horticultural diversions, the [PC] has set an impact standard of 20 percent of the LFM rather than 25 percent of the LFM,” 55 N.J.R. 2407(a) at 2412 (response to Comment 42), even though the PC recognized that the State Water Supply Plan “recommends 25 percent,” 4T18-23. There is no indication in the record that the 25 percent threshold was determined

with any degree of mathematical certainty. It is thus arbitrary, capricious, and unreasonable.

C. Disparate Treatment of Different Pinelands Management Areas and Uses Without Justification.

The Rule is also arbitrary, capricious, and unreasonable because it prohibits new and increased diversions in some Pinelands Management Areas and not others, without any regard to relative impact on the Aquifer. “Nothing in the Pinelands Studies supports the absolute prohibition of new or increased diversions in the Forest and Preservation Areas while imposing no such prohibition in other areas.” Pa16 (Expert Report) at Pa18. This discrepancy leads to the incongruous result that new or increased sand mine diversions are absolutely prohibited in the Preservation Area (where virtually no development is allowed anyway, and only limited diversions are occurring) even if completely nonconsumptive, while agricultural diversions, which tend to be highly consumptive, are encouraged in the Agricultural Production Areas. See Pa16 at Pa18. In other words, without any supporting evidence, the Rule actually results, in some cases, in consumptive uses being regulated less than nonconsumptive uses simply because of geography.²³ Such a result does not further

²³ This possibility is not hypothetical. Clayton actually has nonconsumptive sand mine operations in the Preservation Area that the Rule prohibits from implementing new or increased diversions. Pa16 at Pa18, Figure 1; see also Clayton’s permit, Pa214.

the professed regulatory goal of protecting the Aquifer and is thus arbitrary, capricious, and unreasonable.

DEP (which is the agency that actually has expertise on water supply) agrees. DEP's DWSG noted the absurdity that "[p]roposed new or increased diversions are not permitted in preservation, forest, or special agricultural areas," as "there may be specific existing diversions in these restricted areas that could be impacted by this restriction." Pa32. DWSG continued:

Notably, this would seem to impact diversions from sand quarries [e.g., Clayton's mining operations] where water is returned to the source, minimally impacting the aquifer. Modifications are necessary for those facilities as they often relocate sources due to the nature of mining as well as changing of pumps and associated capacities, which often requires modification of the permit. DWSG recommends that the [PC] create exceptions to the proposed limitations.

[Pa32.]

The Notice of Adoption seems not to have responded to this suggestion for exceptions—even though the PC recognized “there are over 70 existing resource extraction operations in the Pinelands Area, approximately half of which are located in the Preservation Area District and Forest Area.” 55 N.J.R. 2407(a) at 2408 (response to Comments 1-5). The PC's failure to remedy this incongruity is arbitrary, capricious, and unreasonable.

D. Lack of Evidence that Aquifer Levels Will Decrease to the Modeled Levels.

Even the premise on which the Rule is based is hollow. To demonstrate the need for additional protection of the Aquifer, the PC relied on studies (the Kirkwood-Cohansey Project) that “simulated or modeled reductions in stream flow of up to 30 percent, lowering of groundwater levels by up to 6-inches (15 cm), or pumping withdrawal rates at upwards of 30 percent of the ground water recharge.” Expert Report at Pa18. However:

These studies present no evidence that existing groundwater levels in the Pinelands will be reduced to the extent simulated by models. The Kirkwood-Cohansey Project studies have not established a nexus to actual hydrological impacts from the presumed diversions.

[Expert Report at 3.]

In other words, the basis for increased regulation has not been justified, and certainly does not justify the dramatic regulatory steps that the PC is proposing. Those steps are therefore arbitrary and unreasonable.

E. Lack of Economic Considerations.

Similarly, the Rule is based entirely on studies of ecological impacts without any meaningful consideration of economic impacts. The statute that the PC invokes as its authority for the Rule directed the PC to:

assess and prepare a report on the key hydrologic and ecological information necessary to determine how the current and future water supply needs within the pinelands area may be met while protecting the

Kirkwood-Cohansey aquifer system and while avoiding any adverse ecological impact on the pinelands area.

[P.L. 2001, c. 165 § 1.

This accounting for “water supply needs” is consistent with the Pinelands Act itself, which requires the CMP to “[r]ecognize existing economic activities within the area and provide for the protection and enhancement of . . . those indigenous industries and commercial and residential developments which are consistent with such purposes and provisions.” N.J.S.A. 13:18A-8(d)(3); see also N.J.S.A. 13:18A-56 (expressing concern about the “[CMP] and its accompanying land use regulations plac[ing] a number of restrictions on opportunities for economic development”); N.J.S.A. 13:18A-5b (“The membership of the entire commission shall include residents of the pinelands area who represent economic activities, such as agriculture, in the area . . .”). It is also consistent with the WSM Act, which declares that the “water resources of the State are . . . essential to the . . . economic welfare . . . of the people of New Jersey,” among other things. N.J.S.A. 58:1A-2. Nevertheless, the PC chose to focus on the ecological aspect of its directives and completely ignored “water supply needs” and economic concerns.

The Original Rule Proposal itself (in its “Summary” section) describes the “series of studies that resulted from this law” accordingly:

The [Kirkwood-Cohansey] Project addressed two major questions: (1) hydrologic effects of groundwater diversions from the Kirkwood-Cohansey aquifer on stream flows and wetland water levels; and (2) the

ecological effects of stream flow and groundwater-level changes on aquatic and wetland communities.

[54 N.J.R. at 1668.]

Notably absent from those two major questions is the question of “how the current and future water supply needs within the pinelands area may be met.” See ibid. Even the “Economic Impact” section of the Rule Proposal fails to address how the “water supply needs within the pinelands area” can/will be met. See id. at 1673

Apparently cognizant of the above shortcoming, the PC tries to make up for it in a way that is not meaningful. It claimed in the Rule Proposal that the Rule “ensur[es] a sufficient water supply for development in the more growth-oriented areas of the Pinelands Area.” 54 N.J.R. at 1668. Specifically, while new and increased diversions are prohibited in certain Pinelands Management Areas, new and increased diversions are still permissible in other Pinelands Management Areas, subject to the Rule’s new restrictions on diversions. See N.J.A.C. 7:50-6.86(d)3.

However, the Rule Proposal does not mention any study supporting its conclusory statement that it has ensured a sufficient water supply for development in the more growth-oriented areas of the Pinelands Area. See 54 N.J.R. at 1668. And it simply ignores whether there is a sufficient water supply for uses in the non-growth-oriented areas of the Pinelands. Further, the Proposed Rule totally ignores the economic impact from the loss of sand resources necessary for public and private construction projects which will occur if future sand mining is prohibited.

The Rule Proposal also fails to appreciate the distinction between securing water supply and meeting water supply needs. For purposes of “water supply needs,” it does not matter if high water levels are maintained in the Aquifer if no one can use the water—whether because of increased regulatory costs or outright prohibition. Unsurprisingly, the PC’s failure to study how water supply needs could be met resulted in water supply needs being omitted from the Rule.

In short, the Rule is overbroad, arbitrary, and unreasonable.

POINT IV

IN PROMULGATING THE RULEMAKING, THE COMMISSION DID NOT ADHERE TO VARIOUS PROCEDURAL REQUIREMENTS, INCLUDING THE REQUIREMENTS OF THE PINELANDS PROTECTION ACT, THE PINELANDS COMPREHENSIVE MANAGEMENT PLAN, AND THE NATIONAL PARKS AND RECREATION ACT OF 1978. (See September 6, 2023 Letter from Clayton’s Attorneys, Connell Foley LLP, Pa152.)

The PC, in addition to promulgating an unnecessary and preempted Rule with questionable substance, also violated various procedural requirements.

A. The Commission Failed to Obtain the Secretary of Interior’s Approval.

First, the PC violated the federal National Parks and Recreation Act of 1978, P.L. 95-625 (the statute that called for the Pinelands National Reserve and directed New Jersey to create a CMP), specifically the provision codified at 16 U.S.C. 471i (titled “Pinelands National Reserve”). After listing requirements for the adoption of the CMP, the statute makes clear that the Secretary of Interior “shall consider a plan

revision in accordance with the [same] procedure set forth” for adoption of the original CMP. 16 U.S.C. 471i(g)(4). “Such revisions must be consistent with the purposes of this section.” Ibid. Accordingly, the “State shall obtain the approval of the Secretary prior to any modification of the approved plan,” and the Secretary “shall consider plan revisions in accordance with the procedures set forth” for CMP adoption. 16 U.S.C. 471i(g)(6).

Clayton’s attorneys therefore filed a document request with the PC on May 24, 2024 pursuant to the Open Public Records Act, requesting the Secretary of Interior’s approval of the Rule. Pa155. By letter dated May 31, 2024, ibid., the PC responded and attached documents related to the Secretary of Interior. Pa156 through Pa213. Although those documents included a notice to the Secretary, they did not include any approval from the Secretary.

B. The Commission Failed to Provide the Public with All Required Opportunities to Be Heard Before Adopting the Rule.

Moreover, per the federal National Parks and Recreation Act of 1978, the CMP was required to include a “program to provide for the maximum feasible . . . public participation in the management of the Pinelands National Reserve.” 16 U.S.C. 471i(f)(7). In fact, when the Secretary of Interior determines whether to approve the CMP and revisions thereto (see more on this below), she must consider whether the planning entity, *i.e.*, the PC “has afforded adequate opportunity, including public hearings, for public and governmental involvement in the

preparation and review of the plan, and whether such review and comment thereon were considered in the plan or revision as presented to [her]." 16 U.S.C. 471i(g)(2)(A).

The CMP thus includes a subchapter (7) on "Amendments to the [CMP]," which subchapter states: "The procedures established by this subchapter are designed to maximize public participation in the amendment process." N.J.A.C. 7:50-7.1. Given that N.J.A.C. 7:50-7.1 is titled "Purpose," it is clear that the CMP must be interpreted to effectuate the purpose of maximizing public participation in the amendment process. Nevertheless, the PC failed to maximize public participation in the following ways:

1. The Commission Failed to Provide the Public with an Opportunity to Present Oral Comments Directly to Commission Members (as Opposed to Staff).

As is explained above, the public did not receive an opportunity to present oral comments directly to the PC's members (as opposed to staff) before the Rule was adopted. This omission was a violation of the Pinelands Act and the CMP.

The Pinelands Act states that the CMP "shall be periodically revised and updated after public hearings." N.J.S.A. 13:18A-8; see also N.J.A.C. 7:50-7.2 (stating the PC may not amend the text of the CMP except "after a public hearing"). The CMP then makes clear that the public hearing shall be conducted by the PC itself, not staff:

A minimum period of 30 days from the date of publication of the proposed amendment in the New Jersey Register shall be provided for receipt of public comment. During the 30-day period, a public hearing shall be held for purposes of considering the proposed amendment. **The Commission shall conduct the hearing** pursuant to the provisions of N.J.A.C. 7:50-4 and the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

[N.J.A.C. 7:50-7.4(b).]

Here, there was never any public hearing before the PC itself, despite Clayton's efforts to speak. Pa148, 30T9, 10, 11. As the Notice of Adoption recognizes, "[formal public hearings were held . . . before the Commission **staff** on October 12, 2022 and November 2, 2022 on the original proposal and on May 3, 2023, on the notice of proposed substantial changes." 55 N.J.R. at 2407. In other words, the PC itself never provided an opportunity for the public to be heard and thus failed to comply with the above requirements. And common sense dictates that the public should have had one last opportunity to be heard after the PC's response to public comments (and its reasoning for accepting or rejecting those comments and otherwise amending the Rule Proposal) was published. The need for full consideration by the PC is especially strong when the rule at issue is one of wide applicability that has been under consideration by the PC for over 20 years.

2. The Commission Ignored Certain Letters Even Though It Was Required to Consider Any Information Necessary or Appropriate for Full and Proper Consideration of the CMP Amendment.

The PC staff also erred by refusing in its above-referenced August 31, 2023 email (Pa150) to forward to the PC the Clayton letters dated August 22, 2023 (Pa143) and August 30, 2023 (Pa148). The reason given was that those letters were supposedly received after the close of the comment period (Pa150)—even though the PC did not vote to adopt the Rule until September 6, 2023, 30T.

The CMP does not include any absolute prohibition of written comments after the close of the public comment period for the notice of substantial changes to the proposed rulemaking upon adoption. To the contrary, it states that “[p]rior to any formal [PC] action on [] a proposed amendment [to the CMP],” the following, *inter alia*, “shall be made available to the [PC] for its review and consideration”:

Any other information necessary or appropriate for full and proper consideration of the proposed amendment.

[N.J.A.C. 7:50-7.3(a)6.]

The letters dated August 22 and August 30 contain such information necessary or appropriate for full and proper consideration of the proposed amendment. As is explained in those letters, the Rule requires resource extraction operations to submit data that is virtually impossible for a sand mining operation to calculate. The requirement for such data will have a negative impact on the sand mining industry without any benefit to the Aquifer—unless the data can be reasonably estimated, as

is proposed in the letters. Therefore, the August 22 and August 30 letters were appropriate for full and proper consideration of the Rule and should have been provided to the PC before it voted on adoption.

CONCLUSION

For all of the reasons discussed above, the Rule is void and should be declared invalid.

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Sand Company*

BY: /s/Ryan A. Benson

DATE: July 25, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-001476-23T4

IN RE CHALLENGE OF	:	
CLAYTON SAND	:	<u>CIVIL ACTION</u>
COMPANY TO DECEMBER	:	
4, 2023 AMENDMENT TO	:	ON APPEAL FROM
N.J.A.C. 7:50-1.1 ET SEQ.	:	New Jersey Pinelands Commission
	:	Rulemaking Notice of Adoption
	:	Published on December 4, 2023 at 55
	:	N.J.R. 2507(a)
	:	
	:	
	:	

BRIEF ON BEHALF OF RESPONDENT NEW JERSEY PINELANDS
COMMISSION

Date Submitted: November 26, 2024

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PRELIMINARY STATEMENT

The Pinelands Commission is statutorily charged with the protection and planning of the environmentally significant Pinelands Area, under which the Kirkwood-Cohansey aquifer (the “Aquifer”) lies. Because the Aquifer is critical to the Pinelands eco-system, the Pinelands Protection Act, N.J.S.A. 13:18A-1 to -29 (“the Act”) authorized the Commission through the Pinelands Comprehensive Management Plan, N.J.A.C. 7:50-1.1 to -10.35 (the “CMP”) to regulate development in the Pinelands Area, in a manner sufficient to protect Pinelands resources, including ground and surface waters.

Appellant, Clayton Sand Company (“Clayton”) challenges the Commission’s rulemaking, which further strengthened its existing rules. The Rules primarily reduce the threshold for review of diversions of water from the Aquifer from 100,000 gallons per day (“gpd”) to 50,000 gpd and place additional requirements and restrictions on such diversions to ensure they will not result in adverse ecological impacts.

Clayton’s claims that the Rules are ultra vires is belied by abundant statutory authority and years of regulation in this area. The Rules are reasonable and are based on the Commission’s experience in regulating the Pinelands Area along with a series of studies authorized by the Legislature in 2001 which considered the hydrologic effects of groundwater diversions from the Aquifer

on stream flows and wetland water levels and the ecological effects of streamflow and groundwater-level changes on aquatic and wetland communities. Thus, Clayton's arguments that the Rules are arbitrary and capricious fail.

Further, contrary to Clayton's assertions, the Water Supply Management Act ("WSMA"), which the Department of Environmental Protection ("DEP") implements does not preempt the Rules, rather these sister state agencies have and will continue to concurrently regulate water supply and associated development. Clayton's claims of conflict between the WSMA and the Rules are unfounded. There is no conflict.

Finally, Clayton's contention that the Rules are void because the Commission did not provide for adequate public participation in adopting the Rules is demonstrably incorrect from even a cursory review of the record, which is replete with public meetings and public hearings, as well as public comments, particularly those from Clayton itself, and resulted in substantial changes to the Rules prior to adoption.

The court should reject Clayton's claims and affirm the Commission's adoption of the Rules.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS¹

The Aquifer is a fresh water reservoir located in the Pinelands and contains an estimated seventeen trillion gallons of water. (Pa157).² The Aquifer is a source of potable and non-potable water for hundreds of thousands of people living and working in South Jersey and is vital to sustaining the ecology of the Pinelands by supporting wetlands and the Pinelands' unique vegetative and animal communities. Ibid. The Aquifer supplies water to more development than any other aquifer located along the shore and barrier beaches of Atlantic, Cape May, and Ocean Counties and is recharged from precipitation, vertical leakage, and release of water stored in the clay layers above, beneath, and within the formation.³ Diversions⁴ of water from the Aquifer can adversely impact the Pinelands

¹ Because they are closely related, these sections are combined for efficiency and the court's convenience.

² "Pa" refers to the Appendix filed by Clayton. "Pb" refers to the brief filed by Clayton. "Rb" refers to the brief filed by Commission. "T" refers to the transcripts of the public hearings held by the Commission and the CMP Policy and Implementation ("P&I") Committee. The transcripts are numbered as listed at Pb8, n.5.

³ https://nj.gov/pinelands/cmp/1980_CMP.pdf, at 13 (last visited November 25, 2024)...

⁴ A diversion is "the taking of water from a river, stream, lake, pond, aquifer, well, other underground source, or other waterbody, whether or not the water is returned thereto, consumed, made to flow into another stream or basin, or discharged elsewhere." N.J.A.C. 7:50-2.11.

environment by changing critical habitats for rare plants and animals, drawing down wetlands, reducing the water supply, and facilitating a pattern and intensity of development inconsistent with the goals of the Act and the CMP. (Pa157).

Clayton operates a sand mining business in the Pinelands Area. (Pa143). Clayton mines sand by digging sand out of the ground until it strikes groundwater, creating a manmade pond. (Pa17). Clayton then dredges water from the pond to remove water which contains sand. Ibid. The sand is then compiled and the water drains overland back to the pond and into the ground. Ibid. The CMP defines these types of resource extraction operations as “development.” See N.J.A.C. 7:50-2.11 (defining “development” to include “commencement of resource extraction or drilling or excavation on a parcel of land”).

At issue in this appeal is the Commission’s adoption of the Rules to strengthen protections for the Aquifer and its symbiotic relationship to Pinelands ecology.

A. Statutory and Regulatory Background

Some of Appellant’s claims involve the relative authorities of the DEP and the Commission. As explained further below, both DEP and the

Commission have a role in regulating groundwater diversions in the Pinelands Area.⁵

DEP and the Water Supply Management Act

In enacting the WSMA, the Legislature provided DEP authority to regulate the water supply and diversions of that water supply. N.J.S.A. 58:1A-2. In so doing, the Legislature granted DEP authority to adopt regulations “to control, conserve, and manage the water supply of the State and the diversions of that water supply to assure the citizens of the State an adequate supply of water under a variety of conditions and to carry out the intent of [the WSMA].” N.J.S.A. 58:1A-5. The WSMA requires a user seeking to divert 100,000 gpd or more to obtain a permit from DEP. N.J.S.A. 58:1A-7.

N.J.A.C. 7:19-1.1(a) constitutes “the Department’s rules governing the establishment of privileges to divert water, the management of water quantity and quality, the issuance of permits, and the handling of drought warnings, water emergencies and water quality emergencies considered severe enough to constitute water emergencies” The WSMA rules apply to those “diverting, having the capability to divert, or claiming the right to divert more than 100,000 gallons of water per day either from a single source or a combination of sources, and to all persons

⁵ The Pinelands Area consists of all the areas within the boundaries described in the Act. N.J.S.A. 13:18A-11.

intending to divert more than 100,000 gallons of water per day” with certain exceptions. N.J.A.C. 7:19-1.4(a). In addition, of particular relevance here, N.J.A.C. 7:19-8 governs the establishment of and regulation of areas of critical water supply which are areas where “adverse conditions exist, related to the ground or surface water, such that special measures are required to ensure the integrity and viability of the water supply source and to protect the public health, safety or welfare.” N.J.A.C. 7:19-8.2(a). In critical water supply areas, the Department may institute certain controls like restrictions on inter-basin transfers of water and consumptive uses. N.J.A.C. 7:19-8.2(d)

Of note, the WSMA acknowledged the authority of the Commission in the Pinelands region and instructed that that DEP’s actions taken under the WSMA not be inconsistent with either the Pinelands Protection Act, N.J.S.A. 13:18A-1 to –29, or the provisions of the CMP, N.J.A.C. 7:50-1.1 to -10.35. N.J.S.A. 58:1A-15.1.

The Commission, the Pinelands Protection Act & the Comprehensive
Management Plan

Congress established the 1,000,000-acre Pinelands National Reserve in the National Parks and Recreation Act of 1978, Pub. L. No. 95-625, 92 Stat. 3492 (codified at 16 U.S.C. § 471i). A “wilderness of pine-oak forests and wild and scenic rivers, the Pinelands harbors a ‘wide variety of rare, threatened and endangered plant and animal species.’” S. Energy and Env’t Comm. Statement to S. 3091 (L. 1979, c. 111) (June 28, 1979) (internal citation omitted). It also “overlies

the vast, seventeen-trillion gallon [Aquifer], ‘one of the largest virtually untapped sources of pure water in the world.’” Ibid.

Declaring the protection and preservation of the Pinelands to be in the national interest, in 1978, Congress dedicated federal funding to assist New Jersey in the development of a comprehensive plan for management within the Pinelands National Reserve because of its “critical ecological values which are in immediate danger of being adversely affected or destroyed.” 16 U.S.C. §§ 471i(b)(1) to (b)(3), (h)(1)(A). In response, the Legislature enacted the Act in 1979, creating the Commission to implement the Act and assume primary responsibility for planning in the Pinelands. N.J.S.A. 13:18A-4.

The Act established the Commission, a fifteen-member body, N.J.S.A. 13:18A-5, as the regional planning entity in the Pinelands Area and empowered it to effectuate the Federal Act. N.J.S.A. 13:18A-4. The Act also vested the Commission with the power to “prepare, promulgate, adopt, amend or repeal . . . such rules and regulations as are necessary in order to implement” its provisions. N.J.S.A. 13:18A-6(j). The Act authorized the Commission to implement a CMP to protect, preserve and enhance the Pinelands Area. N.J.S.A. 13:18-9(a). In 1981, pursuant to this power and in accordance with the Administrative Procedure Act, the Commission adopted the CMP, which embodies the regulations of the Commission. N.J.A.C. 7:50-1.1 to 10.35. The objective of the CMP is “to promote orderly development of

the Pinelands so as to preserve and protect the significant and unique natural, ecological, agricultural, archaeological, historical, scenic, cultural and recreational resources of the area.” N.J.A.C. 7:50-1.3.

The CMP establishes various Pinelands Management Areas and further establishes minimum standards for land use distribution and intensities for each management area. See N.J.A.C. 7:50-5.21 to 5.29 (minimum standards for land use distribution and intensities). As directed by the Act, the CMP Management Area designations are a result of a resource assessment and land capability mapping. N.J.S.A. 13:18A-8. The CMP designated certain areas as more ecologically sensitive. N.J.A.C. 7:50-5.13.

The Preservation Area District is “the heart of the Pinelands environment and represents the most critical ecological region in the Pinelands.” N.J.A.C. 7:50-5.13(a). This area has “significant environmental and economic values that are especially vulnerable to degradation” and consists of a “large, contiguous, wilderness-like area of forest, transected by a network of pristine wetlands, streams and rivers [which] supports diverse plant and animal communities and is home to many of the Pinelands’ threatened and endangered species.” Ibid.

“Forest Areas are similar to the Preservation Area in terms of their ecological value and, along with the Preservation Area, serve to provide a suitable ecological reserve for the maintenance of the Pinelands environment.

N.J.A.C. 7:50-5.13(b). These areas “support characteristic Pinelands plant and animal species and provide suitable habitat for many threatened and endangered species” and are “an essential element of the Pinelands environment, contain high quality water resources and wetlands, and are very sensitive to random and uncontrolled development.” Ibid.

Special Agricultural Production Areas are areas within the Preservation Area District which are “primarily used for berry agriculture or horticulture of native Pinelands plants.” N.J.A.C. 7:50-5.13(d). These areas “represent a unique and essential element of the Pinelands economy and, because they are generally compatible with the ecological values of the Preservation area, are a part of the essential character of the Pinelands.” Ibid. The CMP strictly limits non-agricultural uses in these areas “to maintain these agricultural uses in a manner which recognizes their integral relationship to the Preservation Area.” Ibid.

Likewise, Agricultural Production Areas are areas of active agricultural use, together with adjacent areas containing suitable soils, where the expansion of agricultural operations is appropriate and encouraged. N.J.A.C. 7:50-5.13(c). Other areas were designated as more growth-oriented areas, including Regional Growth Areas, Rural Development Areas, Pinelands Towns and Pinelands Villages. See generally, N.J.A.C. 7:50-5.13. Finally, Military and Federal

Installation Areas recognize existing federal enclaves within the Pinelands Area.

Ibid.

In addition, the CMP includes minimum standards for various management programs, including wetlands, vegetation, fish and wildlife, forestry, agriculture, resource extraction, waste management, water quality, air quality, scenic resources, fire management, recreation, historic, archaeological, and cultural preservation. N.J.A.C. 7:50-6. One area of regulation within water quality, of relevance here, is water management. N.J.A.C. 7:50-6.86.

The origins of N.J.A.C. 7:50-6.86 date back to 1981 and the adoption of the first CMP. 12 N.J.R. 575(c). The original CMP contained various provisions relating to water conservation in the Pinelands. 13 N.J.R. 91(e). The original CMP explained:

The most important abiotic element of the Pinelands ecosystem is water, considering its availability and characteristic chemistry. Water is stored in the extensive sand aquifers below the surface. This ground water supports 89 percent of the flow in the Pinelands streams, discharging primarily through the swamps and marshes. It is replenished solely by precipitation, of which about 44 percent of the annual total percolates through the sandy soil surface.⁶

Withdrawals from the aquifers underlying the Pinelands can affect the unique ecosystem by lowering the water table; the original CMP noted that monitoring

⁶ https://nj.gov/pinelands/cmp/1980_CMP.pdf, at 11. (last visited November 25, 2024).

withdrawals from the Aquifer is critical because the surface aquatic systems would be directly and immediately affected.⁷ Moreover, regarding groundwater withdrawals and exportation of waters from the Pinelands, the original CMP found:

The exportation of large quantities of water from the region would have a significant impact upon the ecological stability of the National Reserve and would result in complete alteration of the area required to be protected by both federal and state legislation. In recognition of the overriding role of abundant and clean water supplies in the Pinelands, the Commission has adopted a policy to preserve, protect, and enhance the water resources of the region. New facilities which export ground or surface waters from the Pinelands shall not be permitted. All new development serviced by existing sewer treatment facilities that discharge effluent to a surface water body in or out of the Pinelands shall utilize water-saving technology such as low-flush water closets, flow restrictors, and low-flow shower nozzles. It is further recommended that the Division of Water Resources of the Department of Environmental Protection undertake a detailed study to determine current groundwater withdrawals from the Pinelands' major aquifers. This information is necessary to determine environmentally safe yields.⁸

The original CMP also found:

The characteristic ecosystem of the Pinelands depends on a relatively shallow water table. The maximum amount of water that can be withdrawn from the surface aquifer

⁷ https://nj.gov/pinelands/cmp/1980_CMP.pdf, at 15. (last visited November 25, 2024).

⁸ https://nj.gov/pinelands/cmp/1980_CMP.pdf, at 228. (last visited November 25, 2024).

without adversely affecting the ecosystem needs to be determined so that appropriate water supply strategies can be implemented.⁹

The precursor to N.J.A.C. 7:50-6.86 was Section 6-806.¹⁰ That section provided as follows:

Water Management

A. Interbasin transfer of water between watersheds in the Pinelands should be avoided to the maximum extent practical. In areas served by central sewers, water-saving devices such as water-saving toilets, showers and sink faucets shall be installed in all new development.

B. Water shall not be exported from Pinelands counties except by natural surface and ground water flows.

[Ibid.]

This section was later recodified to N.J.A.C. 7:50-6.86. After minor revisions in November 1987 to include a reference to N.J.S.A. 58:1A-7.1, see 19 N.J.R. 2047, on January 3, 1994, the Commission proposed to amend N.J.A.C. 7:50-6.86 to “promote greater consideration of water conservation by requiring both purveyors and users of water supply systems to address

⁹ https://nj.gov/pinelands/cmp/1980_CMP.pdf, at 265. (last visited November 25, 2024).

¹⁰ https://nj.gov/pinelands/cmp/1980_CMP.pdf, at 421. (last visited November 25, 2024).

conservation.” 26 N.J.R. at 167. On December 5, 1994, the Commission adopted those amendments to add sections (c)-(e), which provided:

(c) All wells and all increases in diversion from existing wells which require water allocation permits from the New Jersey Department of Environmental Protection and Energy shall be designed and located so as to minimize impacts on wetlands and surface waters

(d) All applications for the development of water supply wells or the expansion of existing water distribution systems shall address measures in place or to be taken to increase water conservation in all areas to be served by the proposed well or system. This shall include efforts by water purveyors and local governments to reduce water demands by users and to reduce losses in the supply and distribution system.

(e) Except for agricultural uses, all new potable and non-potable water supply diversions of more than 100,000 gallons per day that utilize the Kirkwood-Cohansey aquifer as a source of water supply and new increases in existing potable and non-potable water supply diversions of over 100,000 gallons per day that utilize the Kirkwood-Cohansey aquifer may be permitted only if it is demonstrated that: 1. No viable alternative water supply sources are available; or 2. The proposed use of the Kirkwood-Cohansey aquifer will not result in any adverse ecological impact on the Pinelands Area.

[46 N.J.R. at 4825.]

B. The Kirkwood-Cohansey Project

In 2001, the New Jersey Legislature enacted a law directing the Commission, in cooperation with DEP, Rutgers University, the U.S. Fish and Wildlife Service and the U.S. Geological Survey to study the ecological impacts

of human activities, such as water diversions, on the Pinelands. 2001 N.J. ALS 165 (L. 2001, c. 165). This legislation directed these entities to “assess and prepare a report on the key hydrologic and ecological information necessary to determine how the current and future water supply needs within the pinelands area may be met while protecting the [Aquifer] system and while avoiding any adverse ecological impact on the pinelands area.” Ibid.

The twelve studies that followed¹¹ became collectively known as the Kirkwood-Cohansey Project (the “Project”). (Pa157). The Project’s conclusions demonstrated a direct correlation between simulated groundwater diversions and simulated streamflow reductions on the distribution and composition of forested wetlands and individual wetlands species. Ibid. The Project predicted reductions in Pinelands plant and animal species caused by groundwater diversions, including a decline in the water table by more than four inches in wetlands, which would reduce the survival rates of wetlands amphibian species, including the State threatened Pine Barrens tree frog. (Pa158).

C. Rule Amendments

Based on the Project’s conclusions, the Commission determined it was necessary and appropriate to propose more quantifiable standards for assessing

¹¹ These studies are described in more detail at <https://www.nj.gov.pinelands/science/complete/kc>. (last visited November 25, 2024).

the ecological impacts of non-agricultural diversions from the Aquifer and conserve the water supply in the watershed where diversions are located. Ibid. To accomplish this goal, the Commission expanded the scope of diversions that would be subject to Pinelands water management standards by reducing the threshold from 100,000 gpd to 50,000 gpd. Ibid. The Rules only regulate new diversions or increases in allocation from either a single existing diversion source or from combined existing and new diversion sources in the same HUC-11 watershed¹² and in the Aquifer resulting in a total diversion of 50,000 gpd or more. N.J.A.C. 7:50-6.86(d). Diversions meeting these criteria are referred to as “proposed diversions.” Ibid. The Rules further define “allocation” as “a diversion permitted pursuant to a Water Allocation Permit or Water Use Registration Number issued by [DEP] pursuant to N.J.A.C. 7:19.” Ibid.

The CMP regulates development in the Pinelands Area, including the construction of new wells and increases in water diversions from existing wells. N.J.A.C. 7:50-2.11. “Development” is defined as “the change of or enlargement of any use or disturbance of any land and includes, but is not limited to “alteration, either physically or chemically, of a “river, stream, lake pond, [or]

¹² A HUC-11 is “an area within which water drains to a particular receiving surface water body, also known as a subwatershed, which is identified by an 11-digit hydrologic unit boundary designation, delineated within New Jersey by the United States Geological Survey.” N.J.A.C. 7:50-2.11.

wetlands[,]” Ibid. “Land” is defined as “the surface and subsurface of the earth as well as improvements and fixtures on, above, or below the surface and any water found thereon.” Ibid.

N.J.A.C. 7:50-6.86(d)(3) restricts proposed diversions to the following Pinelands Management Areas: the Regional Growth Area; Pinelands Towns; the Rural Development Area; the Agricultural Production Area; the Military and Federal Installation Area; and certain defined Pinelands Villages. In addition, like the prior rule, N.J.A.C. 7:50-6.86(d)(4) requires applicants to show that no alternative water supply source is available or viable. The Rules define “alternative water supply sources” to include groundwater and surface water sources that are not part of the Aquifer and public water purveyors and suppliers. N.J.A.C. 7:50-6.86(d)(4).

The prior rule more generally required that a diversion have no adverse ecological impact on the Pinelands Area, while the Rules now require that a proposed diversion have no adverse ecological impact on the Aquifer, N.J.A.C. 7:50-6.86(d)(5), which includes either an “adverse regional impact” or an “adverse local impact.” N.J.A.C. 7:50-6.86(d)(6)-(7).

Adverse Regional Impact

The Rules provide that a proposed diversion “shall be deemed to have an adverse regional impact if it, combined with all current depletive-consumptive net

use in the same HUC-11 watershed, it exceeds 20 percent of the stream low flow margin for the year of peak use.” N.J.A.C. 7:50-6.86(d)(6).

Under DEP’s WSMA rules, N.J.A.C. 7:19-1.3, consumptive use “means any use of water diverted from surface or ground waters other than a nonconsumptive use” A nonconsumptive use means “the use of water diverted from surface or ground waters in such a manner that it is returned to the surface or ground water at or near the point from which it was taken without substantial diminution in quantity or substantial impairment of quality.” Ibid. The CMP does not define consumptive use, but it defines “Nonconsumptive use” as “the use of water diverted from surface or ground waters in such a manner that at least 90 percent of the diverted water is returned to the source surface or ground water at or near the point from which it was taken.” N.J.A.C. 7:50-2.11. Essentially, a consumptive use does not return the water to the surface or groundwater at or near the point from which it was taken. So, the Rules look to all pre-existing consumptive uses that do not return the water in the same HUC-11, when evaluating a proposed diversion.

Stream Low Flow Margin is “the difference between a stream’s normal dry-season flow (September Median Flow) and drought flow (7Q10) as reported in the New Jersey Statewide Water Supply Plan, New Jersey Department of Environmental Protection, 2017, New Jersey Water Supply Plan 2017-2022” N.J.A.C. 7:50-

2.11. To analyze whether twenty percent of the stream low flow margin for the year of peak use is exceeded, the Rules require applicants to use Appendix A of the New Jersey Statewide Water Supply Plan, as amended and supplemented, and refer to the HUC-11 watershed where the proposed diversion will be located. N.J.A.C. 7:50-6.86(d)(6).

If the twenty-percent threshold of the stream low flow margin for the year of peak use is exceeded and it is determined that a proposed diversion has an adverse regional impact, the applicant must permanently offset the diversion on a gallon-for-gallon basis within the affected HUC-11 watershed. N.J.A.C. 7:50-6.86(d)(6)(i).

Such offsets shall include:

(A) The recharge of previously non-infiltrated stormwater runoff in the Pinelands Area; (B) The recharge of treated wastewater that is currently discharged by a regional sewage treatment plant that discharges treated wastewater into the Delaware River or Atlantic Ocean; (C) Development of a desalinization facility; and (D) Sewerage system inflow and infiltration abatement and/or water distribution infrastructure leak auditing and correction.

[N.J.A.C. 7:50-6.86(d)(6)(i)(1).]¹³

If water withdrawals already exceed twenty percent of the stream low flow margin, the Rules provide proposed diversions shall have an adverse regional impact unless

¹³ “Recharge” means “the amount of water from precipitation that infiltrates into the ground and is not evapotranspired.” N.J.A.C. 7:8-1.2.

the applicant can permanently offset the entire diversion. N.J.A.C. 7:50-6.86(d)(6)(ii).

Adverse Local Impact

The Rules further provide that a proposed diversion will be considered to have an “adverse local impact” if it “results in the drawdown of the water table . . . of any portion of the Preservation Area District, Forest Area, or Special Agricultural Production Area in the affected HUC-11 watershed, or of more than four inches of the wetlands nearest to the estimated zone of influence in the affected HUC-11 watershed.” N.J.A.C. 7:50-6.86(d)(7). Drawdown is the difference between the original groundwater level and the reduced groundwater level caused by pumping. Cech, Thomas V., Principles of Water Resources History, Development, Management, and Policy 108 (2nd ed. 2005).

To determine whether there is an adverse local impact, an applicant must analyze potential drawdown impacts in accordance with “the New Jersey Geological & Water Survey Technical Memorandum 12-2, Hydrogeologic Testing and Reporting Procedures in Support of New Jersey Water Allocation Permit in effect at the time of application” (“TM 12-2”). N.J.A.C. 7:50-6.86(d)(7)(i)(1). After completing that analysis, an applicant must submit a proposed hydrogeologic test procedure, developed in accordance with TM 12-2, which shall include the:

(A) Installation of a single pumping well; (B) Observation wells to sufficiently monitor water levels while the test

well is pumped at a constant rate; (C) Observation wells to collect time-drawdown data for aquifer characterization; and (D) At least one piezometer to measure surface water and water table decline at: the nearest boundaries of the Preservation Area District, Forest Area, or Special Agricultural Production Area in the affected HUC-11 watershed found in any direction from the proposed well location; and the wetlands nearest to the estimated zone of influence in the affected HUC-11 watershed.

[N.J.A.C. 7:50-6.86(d)(7)(i)(2).]

The Rules also require the Commission review the hydrogeologic test procedure and the applicant to complete the test and submit a final hydrogeologic report. N.J.A.C. 7:50-6.86(d)(7)(i)(3). An applicant must then estimate a zone of influence created by the proposed diversion and submit a groundwater flow model for the water table at the nearest boundaries of the Preservation Area District, Forest Area, or Special Agricultural Production Area in the affected HUC-11 watershed and the boundary of the wetland nearest to the proposed diversion in the same HUC-11 watershed. N.J.A.C. 7:50-6.86(d)(7)(i)(4). Lastly, the applicant must provide written documentation of water conservation measures that have been implemented, or that are planned for implementation, for all areas to be served by the proposed diversion as well as notice of the proposed diversion. N.J.A.C. 7:50-6.86(d)(8)-(9). Non-consumptive diversions for resource extraction operations, such as Clayton's, are not required to meet the new standards set forth at N.J.A.C. 7:50-6.86(d)(3)-(9), "provided the water returned to the source is not discharged to a

stream or waterbody or otherwise results in offsite flow, and the diversion and return are located on the same parcel.” N.J.A.C. 7:50-6.86(d)(2)(iii).

D. Rulemaking Process

On September 6, 2022, the Commission published the initial rule proposal. 54 N.J.R. 1668(a). The proposal was subject to public review and comment through a series of stakeholder meetings and focus groups from 2015 to 2022, as well as at public meetings of the Commission and the CMP Policy and Implementation Committee. (Pa158).

On September 14, 2022, during the public comment period, Clayton’s representatives met with Commission staff to express Clayton’s concerns with the initial rule proposal. (Pb7). Clayton explained the process by which sand and gravel are mined by withdrawing large amounts of water from the ground, from which the materials are extracted and approximately ninety percent of the water is returned to the ground, while the remainder is lost to either evaporation or extraction. (Pa17). Based on that explanation, Clayton advocated for an exemption for such non-consumptive diversions in the rule proposal. (Pa75). Clayton’s representatives submitted additional public comments at an October 12, 2022 public hearing and by letter dated November 3, 2022. (14T:14-24; Pa1). Clayton’s November 3, 2022 written comments highlighted its objections to the original rule proposal’s failure to distinguish between consumptive and

non-consumptive uses (of which sand mining is the latter) because non-consumptive uses return water to the surface or groundwater at the point it was taken without a substantial diminution in quantity or quality. (Pa12).

Accordingly, on April 3, 2023, in response to these industry concerns and other public comments, the Commission published a Notice of Substantial Changes Upon Adoption. 55 N.J.R. 577(a). The amended rule proposal provided for another public hearing on May 3, 2023, and an additional public comment period through June 2, 2023. 55 N.J.R. at 578. Among the changes to the rule proposal, the Commission added a definition for “non-consumptive use” at proposed N.J.A.C. 7:50-2.11, defining that term as “the use of water diverted from surface or ground waters in such a manner that at least 90 percent of the diverted water is returned to the source surface or ground water at or near the point from which it was taken.” 55 N.J.R. at 581.

N.J.A.C. 7:50-4.2(b)(6), governing application requirements, was also proposed to be amended to include a new section xi, providing as follows:

If the application includes a proposed diversion from the [Aquifer], a hydrogeologic report that identifies the volume of the diversion, the volume of water to be returned to the source, a description of the route of return to the source, the methodology used to quantify the volume of water returned to the source, and a description of any other existing or proposed water diversions or discharges on or from the parcel. The report shall also include a map that depicts the location of the diversion, the location of the return to the source,

the location of all existing or proposed resource extraction operations, and the location of all wetlands on or within 300 feet of the parcel on which the diversion is proposed.

[55 N.J.R. at 581.]

Finally, relevant to Clayton's appeal, proposed N.J.A.C. 7:50-6.86(d)(2)(iii) exempted resource extraction operations from the requirements of proposed N.J.A.C. 7:50-6.86(d)(3) through (d)(9) "provided the water returned to the source is not discharged into a stream or waterbody . . . and the diversion and return are located on the same parcel." 55 N.J.R. at 582.

Clayton's representatives submitted oral comments at the May 3, 2023 public meeting. (24T:6 to 7). By letter dated May 25, 2023, Clayton submitted additional public comments contending that, because of the nature of sand mining, an operator cannot calculate the volume of water returned to the source, as required by N.J.A.C. 7:50-6.86(d). (Pa75). Despite this contention, Clayton again acknowledged that sand mining operations return ninety percent of water to the source, and alleged it should not be required to calculate the volume of water to be returned to the source as required by proposed N.J.A.C. 7:50-4.2(b)(6)(xi). Ibid. Rather, Clayton again asserted it should be exempt from the rule proposal's requirements or that the rule be amended to require only an estimate of the volume of water to be returned to the source. Ibid.

The public comment period closed on June 2, 2023. 55 N.J.R. at 578. On August 17, 2023, the Commission published the agenda packet for the August 25, 2023 CMP Policy and Implementation Committee meeting. (Pa98). That packet included a draft Notice of Adoption for the rulemaking. (Pa103). Clayton submitted additional public comment by letter dated August 22, 2023, reiterating its objections to the proposed Rules and again contending that resource extraction operations should either be exempt from the proposed rules' requirements or be permitted to estimate water volume returned to the source. (Pa143). Clayton's representatives also provided oral public comment at the August 25, 2023 committee meeting, regurgitating the comments made in the August 22 correspondence. (29T:13-19). On August 30, 2023, Clayton submitted another letter alleging it did not have an adequate opportunity to submit public comments, despite the many written comments it submitted which resulted in a change to the rule proposal and the more than twenty public meetings wherein the proposed Rules were discussed and commented upon. (Pa148); see also, generally (1T-30T).

On August 31, 2023, the Commission's Executive Director replied to Clayton's belated submissions, explaining comments received after the close of the public comment period would not be considered by the Commission. (Pa150). On September 6, 2023, Clayton submitted additional comment

objecting to the Commission's decision to not consider additional comment after the close of the public comment period and contending that the Commission must hold an additional public hearing before adopting the Rules. (Pa152).

At its September 8, 2023 meeting, the Commission voted to adopt the Rules. (30T:5-6 to -8). Following the formal vote, Clayton's representative submitted additional public comment alleging entitlement to a public hearing before the Commission and that the proposed Rules contradict DEP's Rules. (30T:6-18 to 11-9).

On December 4, 2023, the Commission published the final notice of adoption in the New Jersey Register. 55 N.J.R. 2407(a). This appeal followed.

ARGUMENT

POINT I

THE PINELANDS COMMISSION REASONABLY ADOPTED THE RULES AND THE ADOPTION OF THE RULES IS WITHIN ITS AUTHORITY (Addressing Appellant's Points I, II.A. and III.A-D).

Consistent with its mandate to protect the fragile Pinelands ecosystem, the Commission adopted the Rules to conserve water, thereby preserving wetlands and wetlands habitats in the Pinelands. In doing so, the Commission's adoption of the Rules complied with applicable law. When reviewing an agency's adoption of Rules, a reviewing court must give "great deference" to an agency's "interpretation of statutes within its scope of authority and its adoption of rules

implementing' the laws for which it is responsible." N.J. Ass'n of Sch. Adm'rs v. Schundler, 211 N.J. 535, 549 (2012) (quoting N.J. Soc'y for Prevention of Cruelty to Animals v. N.J. Dep't of Agric., 196 N.J. 366, 385 (2008)). Such deference is appropriate because it recognizes that "agencies have the specialized expertise necessary to enact regulations dealing with technical matters and are 'particularly well equipped to read . . . and to evaluate the factual and technical issues that . . . rulemaking would invite.'" New Jersey State League of Muns. v. Dep't of Cmty. Affairs, 158 N.J. 211, 222 (1999) (quoting Bergen Pines Cnty. Hosp. v. New Jersey Dep't of Hum. Servs., 96 N.J. 456, 474 (1984) (second alteration in original)). Consequently, agency rules are accorded a presumption of validity and reasonableness. In re Petition of N.J. Am. Water Co., 169 N.J. 181, 188 (2001). Further, the challenging party has the burden of proving the rule is at odds with the statute. In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 488-89 (2004) (citing Bergen Pines Cnty. Hosp., 96 N.J. at 477). Mere disagreement with an agency's conclusions does not rise to a finding that the decision on which it is based is arbitrary and capricious. United Hunters Ass'n of N.J., Inc. v. Adams, 36 N.J. 288, 292 (1962).

Moreover, when reviewing an administrative agency's promulgation of a rule, it is not the court's role "to assess the wisdom of the agency's decision, but only its legality." N.J. Ass'n of Nurse Anesthetists, Inc. v. N.J. State Bd. of Med.

Exam'rs, 183 N.J. 605, 610 (2005). Rather, the court's function is to "rule on whether the subject matter falls within the substantive authority delegated to the agency and whether the rule was enacted in accordance with applicable legal principles." Ibid.

In this regard, the promulgation of administrative rules and regulations lies at the very heart of the administrative process, permitting "expert and flexible control in areas where the diversity of circumstances and situations to be encountered forbids the enactment of legislation anticipating every possible problem which may arise and providing for its solution." Cammarata v. Essex Co. Park Comm., 26 N.J. 404, 410 (1958). Accordingly, "[t]he basic purpose of establishing agencies to consider and promulgate rules is to delegate the primary authority of implementing policy in a specialized area to governmental bodies with the staff, resources and expertise to understand and solve those specialized problems." Bergen Pines Cnty. Hosp., 96 N.J. at 474.

Consequently, "[i]n reviewing agency action, the fundamental consideration is that a court may not substitute its judgment for the expertise of an agency 'so long as that action is statutorily authorized and not otherwise defective because arbitrary or unreasonable.'" In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. 100, 116 (App. Div. 2013) (citing Williams v. Dep't of Hum. Servs., 116 N.J. 102, 107 (1989) (internal quotation omitted)). In fact, a court may not invalidate a regulation

provided it is “within the fair contemplation of the delegation of the enabling statute.” N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 561-62 (1978) (quoting S. Jersey Airways, Inc. v. Nat’l Bank of Secaucus, 108 N.J. Super. 369, 383 (App. Div. 1970)). And in deciding whether a particular agency action is authorized, a court “may look beyond the specific terms of the enabling act to the statutory policy sought to be achieved by examining the entire statute in light of its surroundings and objectives.” Id. at 562. A reviewing court is also required to extend substantial deference to an agency’s interpretation and application of its own regulations, particularly on technical matters within the agency’s special expertise. In re Freshwater Wetlands Prot. Act Rules, 180 N.J. at 488-89.

However, “[a] reviewing court is ‘in no way bound by [an] agency’s interpretation of a statute or its determination of a strictly legal issue.’” In re Young, 471 N.J. Super. 169, 177 (App. Div. 2022) (quoting Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm’n, 234 N.J. 150, 158 (2018) (second alteration in original)). But a court will only “overturn an agency’s interpretation of a statute it implements only when it is ‘plainly unreasonable.’” Ibid. (quoting In re Comm’r’s Failure to Adopt 861 CPT Codes, 358 N.J. Super. 135, 149 (App. Div. 2003) (additional citations omitted)).

Here, as explained further below, the Commission's rules are well within its statutory authority and are reasonable and based on substantial credible evidence in the record.

A. The Pinelands Commission's adoption of the Rules was Consistent with Statutory Authority.

The Commission possessed ample authority under the Act to adopt the Rules to protect the Aquifer. When interpreting a statute, "[t]he goal . . . 'is to give effect to the intent of the Legislature.'" State v. Morrison, 227 N.J. 295, 308 (2016) (quoting Maeker v. Ross, 219 N.J. 565, 575 (2014) (additional citations omitted)). Thus, a court will "construe the statute sensibly and consistent with the objectives that the Legislature sought to achieve." Ibid. (quoting Nicholas v. Mynster, 213 N.J. 463, 480 (2013)). Accordingly, a court will not "adopt an interpretation of the statutory language that leads to an absurd result or one that is distinctly at odds with the public-policy objectives of a statutory scheme." Ibid. (citing Murray v. Plainfield Rescue Squad, 210 N.J. 581, 592 (2012)).

In interpreting a statute, a court will "first look to the statutory language, which is generally the 'best indicator' of the Legislature's intent." Maeker, 219 N.J. at 575 (quoting DiProspero v. Penn, 183 N.J. 477, 492 (2005)). Further, an agency's authority to modify its rules inheres in its obligation "to adapt to changing circumstances and conditions," Glukowsky v. Equity One, Inc., 180 N.J. 49, 67

(2004), “and to be flexible ‘to deal justly with unanticipated as well as anticipated situations in accordance with general legislative guides.’” In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. 100, 125 (App. Div. 2013) (quoting Ward v. Scott, 11 N.J. 117, 127 (1952)).

If an agency’s action exceeds the authority granted by “its enabling act or regulations, that act is ultra vires” In re Cert. of Need Application for the Mem’l Hosp., 464 N.J. Super. 236, 249-50 (App. Div. 2020). “While findings of ultra vires actions are disfavored, ‘[the court’s] role is to enforce the will of the Legislature’ because ‘[s]tatutes cannot be amended by administrative fiat.’” Id. at 250 (quoting In re Agric., Aquacultural, & Horticultural Water Usage Certification Rules, 410 N.J. Super. 209, 223 (App. Div. 2009) (second alteration in original)). To show a regulation is ultra vires, a challenger must “demonstrat[e] an inconsistency between the regulation and the statute it implements, a violation of policy expressed or implied by the Legislature, an extension of the statute beyond what the Legislature intended, or a conflict between the enabling act and other statutory law that cannot be harmonized.” N.J. Ass’n of Sch. Adm’rs v. Cerf, 428 N.J. Super. 588, 596 (App. Div. 2012). Clayton fails to make that showing here.

Here, the Act itself is replete with references to the Commission’s authority to regulate water resources. The legislative findings include a statement reading as follows:

The Legislature further finds and declares that a certain portion of the pinelands area is especially vulnerable to the environmental degradation of surface and ground waters which would be occasioned by the improper development or use thereof; that the degradation of such waters would result in a severe adverse impact upon the entire pinelands area

The Legislature further finds and declares that the current pace of random and uncoordinated development and construction in the pinelands area poses an immediate threat to the resources thereof, especially to the survival of rare, threatened and endangered plant and animal species and the habitat thereof, and to the maintenance of the existing high quality of surface and ground waters

[N.J.S.A. 13:18A-2 (emphasis added).]

In addition to its general findings, the Legislature also gave ample and explicit authority to the Commission to regulate water resources pursuant to the Act. N.J.S.A. 13:18A-9(a) provides “the goal of the [CMP] with respect to the entire pinelands area shall be to protect, preserve and enhance the significant values of the resources thereof in a manner which is consistent with the purposes and provisions of this act and the Federal Act.” Section (b)(2) of that same statute provides: “the goals of [the CMP] with respect to the protection area shall be to ... [p]rotect and maintain the quality of surface and ground waters.” Section (c)(5) further provides: “the goals of [the CMP] with respect to the preservation area shall be to: . . . [p]rotect and preserve the quantity and quality of existing surface and ground waters.”

In addressing the adoption of the CMP, the Legislature further instructed the Commission to prepare a “resource assessment” to determine “the amount and type of human development and activity which the ecosystem of the pinelands area can sustain while still maintaining the overall ecological values thereof, with special reference to ground and surface water supply and quality” N.J.S.A. 13:18A-8(a)(1). In addition, the Legislature directed the Commission to prepare a plan, in conjunction with existing State programs and planning processes, “to implement the provisions of the ‘Clean Water Act’ . . . and the ‘Safe Drinking Water Act’ . . . which pertain to the surface and ground water of the Pinelands National Reserve” N.J.S.A. 13:18A-8(j).

The Legislature further authorized the Commission to “[t]o prepare and transmit to the Commissioner of Environmental Protection such recommendations for water quality standards for surface and ground waters in the pinelands area, or in tributaries and watersheds thereof, as the commission deems appropriate;” and “[t]o prepare, promulgate, adopt, amend or repeal, pursuant to the provisions of the ‘Administrative Procedure Act,’ . . . , such rules and regulations as are necessary in order to implement the provisions of this act.” N.J.S.A. 13:18A-6(i)-(j). Finally, the Legislature enacted N.J.S.A. 13:18A-29, which provides “[t]he object, design and purpose of this act being the protection of the pinelands area and the resources thereof, this act shall be liberally construed.” Thus, the Legislature, in enacting the

Act and mandating a liberal construction thereof, plainly contemplated the Commission regulating water resources as well as protecting land.

New Jersey's courts have repeatedly recognized this mandate. A major purpose of the Act is to protect the "especially vulnerable" surface and ground waters in the Pinelands. MCG Assocs. v. Dep't of Env't Prot., 278 N.J. Super. 108, 124 (App. Div. 1994) (citing N.J.S.A. 13:18A-2). Here, the Act expressly gives the Commission the broad power to invoke "a variety of land and water protection and management techniques, including but not limited to . . . acquisition of conservation easements and other interest [sic] in land, . . . transfer of development rights, dedication of private lands for recreation or conservation purposes." In re Protest of Coastal Permit Program Rules, 354 N.J. Super. 293, 367 (App. Div. 2002) (quoting N.J.S.A. 13:18A-2) (alterations in original).

Indeed, the "[p]revention of degradation of surface and ground waters and of other threats to the Pinelands environment were set forth among the goals" of the CMP. Orleans Builders & Devs. v. Byrne, 186 N.J. Super. 432, 435 (App. Div. 1982) (citing N.J.S.A. 13:18A-9). And, the Commission has regulated the water resources in the Pinelands as authorized by the Act since the CMP's inception in 1981, as detailed above.

Based on the foregoing, the Act explicitly authorizes the Commission to regulate water resources in the Pinelands and the Commission has, in fact, been

regulating aspects of water supply since its inception. As such, Clayton's argument that the Rules are ultra vires fails.

B. The Rules Are Not Arbitrary and Capricious

The Rules were reasonably adopted after thoughtful consideration of the Project, years of experience regulating Pinelands water resources, and after making specific changes in response to concerns raised by Appellant. Yet, Clayton argues the Rules are arbitrary and capricious. (Pb52). Clayton's primary concerns rest on its unsupported claim that the rules do not sufficiently distinguish between consumptive and non-consumptive uses. (Pb54). More specifically, and as explained further below, Clayton's claims fail because the Rules do not proscribe estimation as a method to determine whether a use is non-consumptive as Clayton claims. (Pb57-58). Rather, the Rules correctly use low flow margin data to quantify impacts on the Aquifer; the Rules properly differentiate between the Pinelands management areas in protecting water resources; and the Rules properly apply drawdown to regulate local impacts. N.J.A.C. 7:50-6.86. Finally, Clayton's reliance on a net opinion to argue the Project does not support the rulemaking is improper. (Pb67).

1. The Rules Allow Estimation As A Methodology To Determine A Use Is Non-consumptive.

The Rules at N.J.A.C. 7:50-6.86 exempt non-consumptive uses from the hydrologic modeling requirements of that section if a resource extraction

operation, such as Clayton's, can demonstrate the diversion constitutes a non-consumptive use. 55 N.J.R. at 580. The CMP defines non-consumptive use as "the use of water diverted from surface or ground waters in such a manner that at least 90 percent of the diverted water is returned to the source surface or ground water at or near the point from which it is taken." N.J.A.C. 7:50-2.11.

Clayton frets about the Commission's use of the term "demonstrate" in the Rules, arguing that it cannot precisely calculate that ninety percent of the diverted water is returned. (Pb57). In so doing, Clayton acknowledges that the Rules' requirements to show ninety-percent return will mirror DEP's regulatory requirements for water allocation permits, with which Clayton is already complying. (Pb57-58); see also N.J.A.C. 7:19-2.14 (listing water supply allocation permit conditions). However, the Pinelands Commission explicitly addressed Clayton's concerns, revising the rule proposal in response to Clayton's comments and acknowledging that "applications for resource extraction will require submission of a hydrogeologic report that estimates both the volume of the diversion and the volume of water to be returned to the source . . . [and] describes the methodology used to estimate the volume of water returned to the source" 55 N.J.R. at 2408 (emphasis added). Clayton quibbles about the Rules' text using the term "demonstrate" rather than "estimate" but this argument is a distinction without a difference. The Rules

certainly contemplate that Clayton and other resource extraction operators may submit a methodology that estimates the percentage of water returned to the source, and Commission staff confirmed that fact at a public meeting. (29T:9-10).

2. The Rules' Use Of Low Flow Margin Data To Determine Impacts On The Aquifer Is Proper.

Clayton next contends the Rules are arbitrary because the Rules use low flow margin data to determine impacts on the Aquifer. (Pb58). The Rules define “stream low flow margin” as “the difference between a stream's normal dry-season flow (September Median Flow) and drought flow (7Q10) as reported in the New Jersey Statewide Water Supply Plan, New Jersey Department of Environmental Protection, 2017, New Jersey Water Supply Plan 2017-2022” N.J.A.C. 7:50-2.11. In layman’s terms, low flow margin estimates how much water might be left in a stream during a drought.¹⁴

The Rules use low flow margin to assist in quantifying adverse ecological regional impacts on the Aquifer, wetlands and wetlands habitats by limiting water diversions to twenty percent of the low flow margin in any HUC-11 watershed. (4T:18). This percentage is not in conflict, as Clayton contends (Pb64), but is lower than the State water supply plan, which recommends

¹⁴ <https://www.nj.gov/dep/njgs/pricelst/tmemo/tm13-3.pdf>, at 2 (last visited November 25, 2024).

twenty-five percent, to afford greater protection to the Aquifer and in recognition that the CMP does not regulate all water uses in the Pinelands, including replacement wells, agricultural uses, and non-consumptive uses. N.J.A.C. 7:50-6.86(d)(2)(i)-(iii); see also (4T:18-19).

The Rules require an applicant to calculate low flow margin to measure whether a proposed diversion will have an adverse regional impact. N.J.A.C. 7:50-6.86(d)(6). Clayton claims that it was inappropriate to utilize the low flow margin from DEP's methodology, which calculates the net loss of water in stream based on both consumptive and non-consumptive uses. (Pb64-65). However, the Commission explained that it based its evaluation of regional adverse impact on

the potential for full use (100 percent) of the new diversion. As the Commission's evaluation is not for the purpose of issuing a water use permit, but rather to assess the potential impact of a proposed diversion, it is reasonable and acceptable to rely upon the low flow margin, a published value, as a benchmark.

[55 N.J.R. 2407(a).]

Accordingly, the Commission's reasoning for use of low flow margin data is based on sufficient credible evidence and should be affirmed.

3. Different Standards for Different Management Areas Within the Pinelands Is Wholly Reasonable and Consistent with the Act.

The Rules only allow proposed diversions in certain management areas, namely, Regional Growth Area, Pinelands Towns, Rural Development Area, Agricultural Production Area, Military and Federal Installation Area, and certain enumerated Pinelands Villages. N.J.A.C. 7:50-6.86(d)(3). Thus, proposed diversions are not permitted in the Preservation Area District, Forest Area, Special Agricultural Production Areas and certain Pinelands Villages. In addition, a proposed diversion shall be deemed to have an adverse local impact in the Pinelands Area if it results in the drawdown of the water table of any portion of the Preservation Area District, Forest Area, or Special Agricultural Production Area in the affected HUC-11 watershed. N.J.A.C. 7:50-6.86(d)(7).

Clayton contends the Rules are arbitrary because the Rules treat Pinelands Management Areas differently. (Pb65). In support of its argument, Clayton cites to its engineer's report for the proposition that the Project does not support treating water withdrawals from the Agricultural Production Area differently than water withdrawals from the Preservation Area District and Forest Areas. (Pa18).

However, the different management areas reflect the resource assessment and land capability mapping as required by the Act. N.J.S.A. 13:18A-8. And

the Commission's rulemaking record provides a well-reasoned rationale for the distinctions the Rule makes relative to the management areas:

To protect the more ecologically sensitive portions of the Pinelands Area, the Commission is proposing to limit new or increased diversions from the [Aquifer] to the following Pinelands Management Areas: Regional Growth Area, Pinelands Towns, Rural Development Area, Military and Federal Installation Area, and the 24 Pinelands Villages that are not located in the Pinelands Preservation Area. Not only is most existing development in the Pinelands Area located in these management areas, but the CMP also directs and encourages new development here as well. Requiring new and increased diversions to be located in the same management areas as the existing and new development to be served is fully in keeping with long-standing CMP requirements for other types of infrastructure. New and increased diversions from the [Aquifer] will also continue to be permitted in the Agricultural Production Area, where the Commission is charged with maintaining agriculture as an essential element of the Pinelands region. Such diversions will not be permitted in the Preservation Area District, Forest Area, or Special Agricultural Production Area, which comprise the most ecologically sensitive portions of the Pinelands Area.

[54 N.J.R. 1668(a).]

The Commission therefore proposed strengthening protections for wetlands and the animal and plant species that rely on wetlands habitats for survival, by requiring an assessment of the ecological impacts of proposed diversions. Ibid. In response to comments, the Commission further explained that the Act authorizes greater protection for the Preservation Area, and a fundamental premise of the CMP is the

importance of providing enhanced protection to both the Preservation Area District and the Forest Area based on the ecology of these management areas. N.J.S.A. 13:18A-9(c); N.J.A.C. 7:50-5.13; 55 N.J.R. 2407(a).

Moreover, the Act explicitly authorizes providing enhanced protections for the broader Preservation Area, which boundaries are defined at N.J.S.A. 13:18A-11(b), including protection of quantity and quality of surface and groundwater. N.J.S.A. 13:18A-9(c)(1)-(5).

Clayton's arguments here miss the mark because they ignore the Rules' purposes, which are to preserve the Aquifer, Pinelands wetlands complexes, and Pinelands species habitats associated with wetlands. (Pa157). The Aquifer sustains the Pinelands' ecology by supporting wetlands and the unique Pinelands vegetative and animal communities. Ibid. Diversions of water from the Aquifer can adversely impact the Pinelands environment if such diversions cause changes to habitats, reduce the quantity of water in the Pinelands Preservation Area District, or result in inappropriate development. Ibid. The Commission adopted the Rules to strengthen protections for the Aquifer and its symbiotic relationship to Pinelands ecology. Ibid.

4. The Commission Properly Used Draw-Down Methodology

Clayton also criticizes the Commission's use of drawdown methodology to regulate adverse local impacts. (Pb60-61). Drawdown is the difference

between the original groundwater level and the reduced groundwater level caused by pumping. Cech, Thomas V., Principles of Water Resources History, Development, Management, and Policy 108 (2nd ed. 2005). The Rules use drawdown to measure the impacts of water diversions on Pinelands wetland-dependent species, such as frogs. (4T:20). The Project showed that adverse impacts on these species sharply increased when drawdown reached the four-inch mark.¹⁵ To address this impact to wetlands species, the Commission adopted the standard set forth in the Rules prohibiting more than four inches of drawdown in wetlands in management areas other than the Forest Area, Preservation Area District and Special Agricultural Production Area. N.J.A.C. 7:50-6.86(d)(7). In these special areas, the Commission set a standard of zero inches. Ibid.; see also (4T:20-21).

Although Clayton correctly contends (Pb60-61) DEP cautioned aquifer tests using its technical manuals may not produce accurate data predicting a four-inch drawdown, DEP not only qualified its concern, but also recommended the Commission consider “Pinelands-specific” guidance based on the technical manual for withdrawals from the Aquifer. (Pa30). The Commission disagreed with DEP’s comment because it consulted with the United States Geological Survey

¹⁵ <https://www.nj.gov/pinelands/science/pub/KC%20Anuran%20Final%20Report.pdf> (last visited November 25, 2024).

(“USGS”),¹⁶ which advised that the data required pursuant to the new rulemaking is acceptable for the evaluation of the impacts of a proposed diversion from the Aquifer. 55 N.J.R. at 2412.

Further, Commission staff noted that it was authoring an agreement with USGS to validate the design and results of the required modeling. (4T:21). Thus, despite Clayton’s contentions (Pb62), the Commission reasonably relied on USGS advice that using drawdown data is scientifically acceptable to measure adverse local impacts of water diversions from the Aquifer.

5. Clayton’s Critique Of The Project’s Conclusion Regarding Decreases In Aquifer Levels Is A Net Opinion.

Clayton also insists that the court accept its engineer’s opinion that the Project’s data does not support the Rules’ goals of reducing impacts to groundwater levels. (Pb67). Clayton’s engineer summarily disagreed with the Project’s conclusion that, unless impacts to the Aquifer are reduced, models predict reductions in stream flow of up to thirty percent, lowering groundwater levels by six inches. (Pa18).

¹⁶ USGS is a federal governmental entity that “works with partners to monitor, assess, conduct targeted research, and deliver information on a wide range of water resources and conditions including streamflow, groundwater, water quality, and water use and availability.” <https://www.usgs.gov/mission-areas/water-resources/message-associate-director-water> (last visited November 25, 2024).

Clayton's critique amounts to a net opinion because it merely concludes that the Project's methodology is flawed without giving the wherefore or why of his opinion. Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002). See also Creanga v. Jardal, 185 N.J. 345, 360 (2005) (an expert's conclusion is deemed to be inadmissible net opinion "when it is a bare conclusion unsupported by factual evidence"); Buckelew v. Grossbard, 87 N.J. 512, 524 (1981) (the expert must "explain a causal connection between the act or incident complained of and the injury or damage allegedly resulting therefrom.")

Further, even if this court accepts Clayton's unsupported opinion disagreeing with the Project's conclusions regarding decreases in water levels (Pb67), the fact that Clayton's engineer disagrees with the Project's conclusions is of no moment. This court should not reverse an agency decision "because of doubts as to its wisdom or because the record may support more than one result." In re N.J. Pinelands Comm'n Resol., 356 N.J. Super. 363, 372 (App. Div. 2003). Thus, even if the court gives credence to Clayton's engineer's opinion, it is not dispositive of this issue.

POINT II

THE RULES ARE NOT PREEMPTED BY AND DO NOT CONFLICT WITH THE WSMA (Addressing Appellant's Point II.B).

Clayton next contends that the Rules are preempted by DEP's authority to regulate water allocation under the WSMA. (Pb30). Clayton's arguments are

meritless because preemption does not apply here to the authority of two sister state agencies. Preemption is a judicially created principle based on the proposition that a municipality, which is an agent of the State, cannot act contrary to the State. Overlook Terrace Mgmt. Corp. v. Rent Control Bd., 71 N.J. 451, 461-462 (1976) (citing Summer v. Teaneck, 53 N.J. 548, 554 (1969)). Preemption analysis calls for the court to initially answer whether the field or subject matter in which the ordinance operates is the same as that in which the State has acted. Ibid. If not, then preemption is clearly inapplicable. Ibid. An affirmative answer calls for further analysis for “[i]t is not enough that the Legislature has legislated upon the subject” Summer v. Teaneck, 53 N.J. at 554.

“Pre-emption may be either express or implied.” In re Reglan Litig., 226 N.J. 315, 328 (2016) (quoting Gade v. Nat’l Solid Wastes Mgmt. Ass’n, 505 U.S. 88, 98 (1992)). “There are two forms of implied preemption - field preemption and conflict preemption.” Ibid. Field preemption applies “where the scheme of federal regulation is ‘so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.’” Ibid. (internal quotation omitted). Conflict preemption applies “where ‘compliance with both federal and state regulations is a physical impossibility,’” ibid. (internal quotation omitted), “or where state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” Ibid. (internal quotations omitted).

Here, Clayton contends one State agency's (DEP) authority under the WSMA preempts another State agency's (the Commission) concurrent authority to regulate water conservation in the Pinelands Area. (Pb30). Clayton's arguments principally rely on United Water N.J., Inc. v. Borough of Hillsdale, 438 N.J. Super. 309, 319 (App. Div. 2014), which held that a municipality's ordinance regulating water supply and diversions of the water supply was preempted by DEP's exclusive authority under the WSMA to regulate same. However, this case is readily distinguishable as it involves a municipality rather than another State agency with the explicit authority to regulate water, as set forth in Point I above.

Instead, the case here is analogous to the facts and holdings in other cases where the Commission and DEP may each regulate the same subject matter. First, in In re New Jersey Pinelands Commission Resolution, 356 N.J. Super. 363, 377 (App. Div. 2003)., the court found no conflict between the DEP's and Commission's concurrent regulation of threatened and endangered species because the laws were complementary and not inconsistent. In so finding the court noted under the Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 to -13 ("ENSCA"), the DEP Commissioner implements and enforces ENSCA. Ibid. The Commission, on the other hand, implements the CMP, which contains its own endangered species protection Rules. N.J.A.C. 7:50-6.33.

In assessing both ENSCA and the CMP, the court found no conflict between DEP and the Commission when regulating for the protection of threatened species. In re New Jersey Pinelands Comm’n Resol., 356 N.J. Super. at 377 (citing Barron v. State Health Benefits Comm’n., 343 N.J. Super. 583, 587 (App. Div. 2001) (“individual statutory provisions should not be read in isolation but rather as parts of a harmonious legislative plan”)). The court further noted, “[w]hen interpreting different statutory provisions, [courts] are obligated to make every effort to harmonize them, even if they are in apparent conflict.” Ibid. (quoting In re Gray-Sadler, 164 N.J. 468, 485 (2000) (first alteration in original)). The court thus found DEP’s authority in that case was concurrent with the Commission’s, and the two agencies could exercise their powers in a “harmonious fashion.” Ibid.

Similarly, in In re Freshwater Wetlands Protection Act Rules, 180 N.J. 415, 429 (2004), the Court interpreted N.J.S.A. 13:9B-6b to find that DEP and the Commission may concurrently regulate the discharge of dredge or fill in wetlands in the Pinelands Areas. That case involved a challenge to DEP’s authority to regulate cranberry bogs in the Pinelands. Id. at 422. The Court agreed with DEP in holding the mitigation requirements of the Freshwater Wetlands Protection Act are not applicable to the general permit regulating cranberry bogs because N.J.S.A. 13:9B-6b “limits the scope of regulated activities in the Pinelands Area to discharges of dredged or fill material into freshwater wetlands, and does not allow DEP to require

freshwater wetland transition areas.” Id. at 428 (quoting N.J.S.A. 13:9B-6b). Thus, both agencies may regulate wetlands in the Pinelands Area.

A similar situation exists here. The Act directs the Commission to regulate water resources in the Pinelands. N.J.S.A. 13:18A-9. The WSMA provides DEP with authority to regulate the State’s water supply. N.J.S.A. 58:1A-5. Despite Clayton’s contentions (Pb35), both the DEP and the Commission can concurrently regulate water in the Pinelands region without the WSMA preempting the CMP.

Clayton’s other arguments regarding alleged conflicts between the CMP and the WSMA are equally unavailing. (Pb35-39). N.J.S.A. 58:1A-2 requires a user seeking to divert 100,000 gpd or more obtain a DEP permit and satisfy certain requirements. N.J.S.A. 58:1A-7. The CMP on the other hand regulates new diversions of over 50,000 gpd and imposes certain restrictions and requirements. N.J.A.C. 7:50-6.86(d). A diverter of water can comply with the requirements in both the WSMA and CMP. Just because the threshold and the requirements differ does not mean they conflict. Clayton has failed to identify an actual conflict between the two.

Clayton further contends the Rules conflict with the WSMA because they limit the quantity of water that may be diverted without following the procedures detailed in the WSMA and its rules to designate the protected area as an area of critical water supply concern. (Pb38). Again, the Act provides authority to regulate

the water resources of the Pinelands and the WSMA recognizes the Commission's authority to regulate water in the Pinelands, providing DEP's actions taken under the WSMA shall not be inconsistent with either the Act or the provisions of the CMP. N.J.S.A. 58:1A-15.1. Thus, the Commission may regulate water supply in the Aquifer separate and apart from the WSMA's procedures to limit diversions by designating an area of critical water supply concern.

Finally, Clayton argues the Rules conflict with the WSMA by regulating interbasin water transfers. (Pb39). The pre-existing rules discouraged interbasin transfers in the Pinelands. (4T:6). The Rules now prohibit interbasin water transfers in the Pinelands. N.J.A.C. 7:50-6.86(b)-(c); (4T:7). Clayton claims this is in conflict with the WSMA because of N.J.S.A. 58:1A-7.1 (Pb39), which provides that no person shall transport any ground or surface water outside the Pinelands National Reserve. Clayton correctly notes that the Act does not authorize the export of water from the Pinelands. N.J.S.A. 13:18A-25. However, Clayton's arguments regarding the WSMA's alleged conflict with the CMP's ability to regulate water resources in the Pinelands, including interbasin transfers (Pb39), fails based on the plain language of N.J.S.A. 13:18A-9(c)(5) and N.J.S.A. 58:1A-15.1.

Moreover, even if there were a conflict, the Act and the CMP supersede other statutes when they conflict:

It is the intent of the Legislature that, except as otherwise specifically provided in this act, in the event

of any conflict or inconsistency in the provisions of this act and any other acts pertaining to matters herein established or provided for or in any rules and regulations adopted under this act or said other acts, to the extent of such conflict or inconsistency, the provisions of this act and the rules and regulations adopted hereunder shall be enforced and the provisions of such other acts and rules and regulations adopted thereunder shall be of no force and effect.

[N.J.S.A. 13:18A-27.]

See also Uncle v. New Jersey Pinelands Comm’n, 275 N.J. Super. 82, 90 (App. Div. 1994) (holding Municipal Land Use Law superseded by the Act). Further, the WSMA, N.J.S.A. 58:1A-15.1, specifically acknowledges the Commission’s authority to regulate water in the Pinelands. That section provides DEP’s actions taken under the WSMA shall not be inconsistent with either the Act or the provisions of the CMP. Ibid. See also N.J.S.A. 13:18A-10(c) (“no State approval . . . for the construction of any structure or the disturbance of any land within such area shall be granted, unless such approval or grant conforms to the provisions of [the CMP]”). As such, the Commission’s regulation of diversions of water here cannot be legislatively preempted by the WSMA. For all of these reasons, this court should find that the Rules are not preempted by and do not conflict with the WSMA.

POINT III

THE ADOPTION OF THE RULES COMPLIED WITH THE PROCEDURAL REQUIREMENTS FOR RULEMAKING (Addressing Appellant's Points III.E. and IV).

Finally, Clayton contends the Commission's adoption of the Rules violated the procedural requirements for rulemaking of the Act, the CMP and the 1978 National Parks and Recreation Act by not maximizing public participation and not complying with CMP provisions related to obtaining approval of the U.S. Secretary of the Interior and providing an economic impact analysis. (Pb70). However, Clayton's arguments ignore the plain language of the CMP, which addresses the procedures to amend the CMP and the APA both of which the Commission followed in adopting the Rules.

1. The Commission Provided Adequate Public Process

Amendments to the CMP are governed by N.J.A.C. 7:50-7.1 to -7.11. The Rules are textual amendments to the CMP. N.J.A.C. 7:50-7.1 and -7.2. The CMP sets forth the required notice of proposed rulemaking procedures at N.J.A.C. 7:50-7.4. However, Clayton does not contend these procedures weren't followed. Rather, Clayton argues that it was not afforded "maximum feasible public participation" during the proposal and adoption of the Rules.

Clayton's contentions are without merit given the facts of this case. (Pb71). It is clear on this record that Clayton participated at every step of the

Commission's proposal and adoption of the Rules, including the submittal of both verbal and written public comment at multiple public hearings where the Rules were discussed. Specifically, Clayton's representatives submitted oral comments at the October 12, 2022, and May 3, 2023 public hearings (14T:14 to 24 and 24T:6 to 7), as well as the January 27, 2023, and August 25, 2023 Policy and Implementation Committee meetings. (20T:13 and 29T:13 to 16). Six Commissioners regularly attend the Policy and Implementation Committee meetings.¹⁷ Thus, Clayton had the opportunity to comment directly to the Commissioners serving on this committee. Clayton also submitted extensive written public comments during the Rules' proposal and adoption process, both during and after the close of the public comment period. (Pa1; Pa75; Pa143; Pa148; Pa152). Moreover, Clayton opted not to appear at any of the regularly scheduled monthly Commission meetings to comment on the proposed Rules until the Rules were adopted on September 8, 2023, despite the Rules being proposed on September 26, 2022. 54 N.J.R. 1668(a); see also, generally, (1T, 3T, 5T, 7T, 9T, 11T, 12T, 13T, 15T, 17T, 19T, 21T, 22T, 23T, 25T, 26T, 27T, 28T). Finally, Clayton admits that it met with Commission staff as part of the Commission's stakeholder outreach on the Rules on September 14, 2022. (Pb7).

¹⁷ <https://www.nj.gov/pinelands/about/commit/> (last visited November 25, 2024).

Thus, Clayton's claims that it was not afforded sufficient public participation fail on this record.

Clayton further admits that its comments resulted in substantial changes to the Rules. (Pb7-8). These changes resulted in an exemption for non-consumptive uses, such as Clayton's sand mining operation, from the hydrologic modeling requirements if the operation can demonstrate the diversion constitutes a non-consumptive use. N.J.A.C. 7:50-6.86(d)(2)(i)-(iii); 55 N.J.R. at 580. Based on the foregoing facts, Clayton's claims that the public were not afforded ample ability to participate are meritless and should be rejected.

2. The Commission Complied with the CMP's Provisions Requiring Notice to the Secretary of Interior

The CMP further requires that amendments to the CMP be submitted to the Secretary of the United States Department of the Interior within five days of adoption. N.J.A.C. 7:50-7.9(a). The Commission followed that process. (Pa156). Moreover, on January 16, 1981, the Secretary approved that process when approving the CMP.¹⁸ Accordingly, the Commission's adoption of the Rules complied with the procedural requirements for rulemaking of the Act, the CMP and the 1978 National Parks and Recreation Act. Clayton's contentions to the contrary (Pb70), are without merit.

¹⁸ <https://www.nj.gov/pinelands/cmp/summary/> (last visited November 26, 2024).

3. The Commission Provided an Economic Impact Statement

Clayton also contends the Commission did not consider economic impacts in its adoption of the Rules. (Pb67). However, in its Economic Impact Statement, the Commission recognized when it initially proposed the Rules, it was not aware of the potential impacts on the resource extraction industry in the Pinelands Area. 55 N.J.R. 577(a). The Commission acknowledged the initial proposal would result in a negative economic impact on the resource extraction industry and changed the Rules to avoid adverse impacts to both resource extraction operations and the construction industry in general. Ibid.

An economic impact statement is required to “describe[] the expected costs, revenues, and other economic impact upon governmental bodies of the State, and particularly any segments of the public proposed to be regulated.” N.J.A.C. 1:30-5.1(c)(3). “All that is required is for the agency to describe the expected economic impact.” In re Rules Regarding Prop. Disposition of Casino Licensee (N.J.A.C. 19:41-7.2(A)), 224 N.J. Super. 316, 324 (App. Div. 1988); accord In re Protest of Coastal Permit Program Rules, 354 N.J. Super. 293, 365 (App. Div. 2002). The purpose of an economic impact statement is to provide interested parties with notice of the impacts anticipated by the agency proposing the rule. In re Adoption of N.J.A.C. 5:96 and 5:97, 416 N.J. Super. 462, 506-507 (App. Div. 2010) (citing In re Protest of Coastal Permit Program Rules, 354 N.J. Super. at 364-65; In re Prop.

Disposition of a Casino License, 224 N.J. Super. at 324). Such notice affords interested parties the opportunity to participate meaningfully in the rule-making process and to “inform[] regulators of possibly unanticipated dimensions of a contemplated rule.” In re Coastal Permit Program Rules, 354 N.J. Super. at 365 (quoting Fed. Pac. Elec. Co. v. New Jersey Dep’t of Env’t Prot., 334 N.J. Supcr. 323, 340-41 (App. Div. 2000)).

In its Economic Impact Statement, the Commission acknowledged there will be some monetary costs for a resource extraction operation proposing a new or expanded diversion from the Aquifer that meets the 50,000 gpd volume threshold. 55 N.J.R. 577(a). As revised under the Rules, such operations will still have to apply for a diversion, but will not have to conduct the hydrogeologic modeling required by N.J.A.C. 7:50-6.86(d) if they can show that the diversion constitutes a non-consumptive use, the water returned to the source is not discharged to a stream or waterbody or otherwise results in offsite flow, and the diversion and return are located on the same parcel that is the subject of the application to the Commission. Ibid. Although there may be engineering and other professional costs associated with the preparation of the application and hydrogeologic report, the Commission noted that DEP requires similar information from a resource extraction operation that is applying for a modification to a water allocation permit. Ibid.

As such, Clayton's contention that the Rules failed to adequately address economic impacts (Pb67), is meritless and should be rejected.

CONCLUSION

For these reasons, the Pinelands Commission's adoption of the Rules should be affirmed.

Respectfully submitted,

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IN RE CHALLENGE OF CLAYTON
SAND COMPANY TO DECEMBER
4, 2023 AMENDMENTS TO N.J.A.C.
7:50-1.1 ET SEQ.

SUPERIOR COURT OF NEW
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CIVIL ACTION

**PROPOSED AMICUS BRIEF OF PINELANDS PRESERVATION
ALLIANCE**

Date submitted: December 23, 2024

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INTERESTS OF AMICUS CURIAE

The Pinelands Preservation Alliance (PPA) was founded in 1989, and is the “leading voice for protecting the natural and historic resources of the New Jersey Pinelands.”¹ PPA advocates to enforce and improve the Pinelands Protection Act (the Act or Pinelands Act) and Comprehensive Management Plan (CMP) as the best way to protect the Pinelands against sprawl, poorly-designed development, and other abuses of land and water. PPA advocates for the sustainable use of the aquifers and participated in this rulemaking process to amend the CMP to accord with the best available science regarding diversions from the Kirkwood-Cohansey aquifer. PPA will help educate the Court from the unique perspective of an advocacy group with thirty-five years of experience working on Pinelands issues and advocating for the protection of the natural and historic resources of the Pinelands. Accordingly, PPA has moved to be included as amicus curiae and submits this proposed brief to urge the Court to uphold the amendments to the CMP as necessary, science-based updates to protect the Pinelands.

PRELIMINARY STATEMENT

The Pinelands area represents over one million acres of forests, rivers, rare and endangered plant and animal species. It sits atop the Kirkwood-Cohansey

¹ Cert. in support of Mot. ¶ 3.

aquifer, a source of potable and nonpotable water for hundreds of thousands of people in South Jersey. Aa157. The federal government and New Jersey have mandated for over fifty years that the Pinelands be subject to heightened environmental protections on top of generally applicable statewide regulations. In 2001, the Legislature directed the Commission to investigate the sustainable use of the Kirkwood-Cohansey aquifer. L. 2001, c. 165. More than twenty years of study followed, which demonstrated “a direct correlation between simulated groundwater withdrawals” and reductions in wetland communities and species, illuminating “the need to update the CMP to better protect the aquifer.” Aa157.

In this appeal, a sand and gravel mining company seeks to avoid the burden of more protective environmental regulations by claiming that the agency does not have the authority to regulate in this area at all. The result of this challenge, if accepted, would be to vitiate the Pinelands Protection Act, and imperil decades of harmonious co-regulation of the Pinelands between state agencies. Concurrent jurisdiction is the heart of the Pinelands Protection Act, which has always added protections tailored to Pinelands conditions above the baseline and uniform protections that apply across the state, and the Court must be mindful of this unique context.

There is an exceptional amount of scientific evidence in the record to support the Pinelands Commission’s rulemaking under any standard of review, and

it should be upheld on this basis. The rulemaking by the Commission was based on an extensive, twenty-year scientific process culminating in notice-and-comment rulemaking. The United States Supreme Court decision in Loper Bright does not change the standard that applies in New Jersey, and courts in this state still afford deference to state agencies, particularly rulemaking within the agency's expertise based on scientific factual findings. The Court should reject Appellant's attempt to invalidate the much-needed updates to the CMP, which already balances the needs of water users against the long-term health of the aquifer and the environment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

For efficiency, PPA incorporates by reference the Procedural History and Counter Statement of Facts set forth in the Pinelands Commission's brief. Rb3-24.

ARGUMENT

I. THE PINELANDS COMMISSION ACTED WELL WITHIN ITS AUTHORITY TO AMEND THE WATER DIVERSION RULES

The Pinelands Act grants the Commission unambiguous authority to regulate water, including to preserve groundwater quantity and quality. This is clear from the plain text of the Act, and the overarching intent of the Legislature to prevent harm to land and water resources, which are inextricably linked. Any argument that DEP regulations addressing the same subject matter preempt Pinelands

regulations must fail for two reasons: 1) The nature of the Pinelands Act is concurrent jurisdiction—it layers tailored protections on top of generally applicable state laws; and 2) While there is no direct conflict between the rules, if there were, the Pinelands Act supersedes the Water Supply Management Act.

A. The Pinelands Act grants the Pinelands Commission broad authority to regulate water, including to preserve the quantity of existing groundwater

Appellant is correct when it asserts that agencies must act within the bounds of their legislative authority, and they cannot expand their grant of authority through regulation. Appellant is wrong when it claims that the “Legislature has not granted the PC any power to regulate water diversions/allocations,” Ab23 (emphasis in original), and therefore the Commission’s actions are ultra vires. The Pinelands Protection Act grants the Commission clear authority to regulate land and water to protect the Pinelands. The challenged rules also align with and further the legislative purpose of the Pinelands Protection Act. Further, Pinelands Commission regulation regarding the diversion of water is not new. The latest rules are an amendment of the existing rules that have regulated diversions of water unchallenged since at least 1994.

The New Jersey Supreme Court has repeatedly instructed that “the grant of authority to an administrative agency is to be liberally construed in order to enable the agency to accomplish its statutory responsibilities and . . . courts should readily

imply such incidental powers as are necessary to effectuate fully the legislative intent.” N.J. State League of Municipalities v. Dep’t of Cmty. Affairs, 158 N.J. 211, 223 (1999) (citation omitted). A regulation is not ultra vires provided it is “within the fair contemplation of the delegation of the enabling statute.” N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 561 (1978) (citation omitted). A court may find that an agency acted without authority “only in those rare circumstances when it is clear that the agency action is inconsistent with its legislative mandate.” Caporusso v. N.J. Dep’t of Health & Senior Servs., 434 N.J. Super. 88, 111 (App. Div. 2014) (citation omitted).

The goal of the Pinelands Protection Act is “to protect especially sensitive land in its natural state and to promote compatible agricultural, horticultural, and recreational uses.” Gardner v. New Jersey Pinelands Comm’n, 125 N.J. 193, 201 (1991). The very purpose of the Act, as laid out in the “legislative findings and declarations,” includes the “maintenance of the existing high quality of surface and ground waters,” because uncontrolled development would lead to the “degradation of such waters [that] would result in a severe adverse impact upon the entire pinelands area.” N.J.S.A. § 13:18A-2. In particular, the “Legislature has enumerated the objects sought to be attained by regulating the use of land within the Preservation Area of the Pinelands” including to “[p]rotect and preserve the quantity and quality of existing surface and ground waters.” Uncle v. N.J.

Pinelands Comm’n, 275 N.J. Super. 82, 87–88 (App. Div. 1994) (emphasis added) (quoting N.J.S.A. 13:18A-9(c)).

The plain text of the Act specifically authorizes the Commission to regulate land and water management. For example, N.J.S.A. 13:18A-8 provides the Commission the authority to prepare and enforce the CMP, which shall include, *inter alia*,

- “A resource assessment which: (1) Determines the amount and type of human development and activity which the ecosystem of the pinelands area can sustain while still maintaining the overall ecological values thereof, with special reference to ground and surface water supply and quality[.]”
- “A land use capability map and a comprehensive statement of policies for planning and managing the development and use of land in the pinelands area, which policies shall: (1) Consider and detail the application of a variety of land and water protection and management techniques . . .”
- “Consider and detail the application of . . . any other appropriate method of land and water protection and management which will help meet the goals and carry out the policies of the management plan”
- “Include a policy for the use of State and local police power responsibilities to the greatest extent practicable to regulate the use of land and water resources in a manner consistent with the purposes and provisions of this act and the Federal Act[.]”

N.J.S.A. 13:18A-8(a), (d).

Given this clear authority, the Commission was not only permitted, but required, to update the CMP to reflect the new scientific evidence. The Pinelands Commission must “[p]rohibit any construction or development which is incompatible with the preservation of this unique area.” N.J.S.A. 13:18A-9(c). The

Act directs the Commission to regulate development to encourage compatible uses “while protecting the pinelands environment from the individual and cumulative adverse impacts thereof.” N.J.S.A. 13:18A-9(b). The Commission is empowered to “prepare, promulgate, adopt, amend or repeal, pursuant to the provisions of the Administrative Procedure Act, . . . such rules and regulations as are necessary in order to implement the provisions of this act.” N.J.S.A. 13:18A-6(j). The Commission must periodically revise and update the CMP to ensure development conforms with the Act to the “maximum extent practical and feasible.” N.J.S.A. 13:18A-13; see also N.J.S.A. 13:18A-8. And the Act grants the Commission broad discretion to issue rules that further the purpose of the statute. E.g. N.J.S.A. 13:18A-13 (Commission shall issue amendments to the rules it “deems necessary and appropriate); N.J.S.A. 13:18A-2 (“[I]t is now necessary to . . . insure the realization of pinelands protection through the establishment of a regional planning and management commission empowered to prepare and oversee the implementation of a comprehensive management plan for the pinelands area”). The authority, and duty, to regulate is clear.

The Appellants selectively quote language from the statute to argue that the Pinelands Act only provides authority over land use. Ab24–25. However, to give effect to the intent of the Act, “individual statutory provisions should not be read in isolation but rather as parts of a harmonious legislative plan.” Barron v. State

Health Benefits Comm’n., 343 N.J. Super. 583, 587 (App. Div. 2001). The legislative findings in the Act are clear that the degradation of ground and surface water was a paramount concern, N.J.S.A. 13:18A-2, and the goals of the CMP include to “preserve the quantity and quality of existing surface and ground waters,” N.J.S.A. 13:18A-9(c). The regulation of the “development and use of land,” N.J.S.A. 13:18A-8d(,) necessarily includes regulation of water impacts, as all land uses in the Pinelands can impact the surficial Kirkwood-Cohansey reservoir. Likewise, the “degradation of such waters would result in a severe adverse impact upon the entire pinelands area.” N.J.S.A. 13:18A-2. Regulation of water diversions is therefore well “within the fair contemplation of the delegation of the enabling statute.” N.J. Guild of Hearing Aid Dispensers, 75 N.J. at 561 (citation omitted). The Pinelands Commission reasonably regulates and protects water resources by requiring that applications for development of any land comply with the standards established in the CMP, adopted to implement the Act. See Aa115.

Appellants rely on language from United Water to argue that: “NJDEP has the exclusive authority . . . to manage the water supply . . . and the diversions of that water supply.” Ab30–35 (quoting United Water N.J. v. Boro. Of Hillsdale, 438 N.J. Super. 309, 319 (App. Div. 2014)). This may be true in areas outside the Pinelands. But this case is readily distinguishable from the instant case because

Hillsdale is not in the Pinelands, and the local government that passed the ordinance in that case had not been granted the concurrent and explicit authority to regulate water. In contrast, the Pinelands Commission has clear, concurrent authority to regulate water, and the language from United Water cannot be isolated and uncritically imported here.

Nor is this a new or transformative exercise of power by the Pinelands Commission that might subject it to additional scrutiny. E.g., West Virginia v. EPA, 597 U.S. 697, 728 (2022) (new and unprecedented assertion of authority to fundamentally change the regulatory scheme requires clear congressional authority). Rather, the Pinelands Commission has a longstanding, unchallenged practice of regulating water diversions through the CMP, which “is to be accorded great weight as evidence of its conformity with the legislative intent.” Pennsauken Solid Waste Mgmt. Auth., Matter of, 238 N.J. Super. 233, 251 (App. Div. 1990).

The original 1981 CMP addressed the need to limit groundwater withdrawals to avoid adverse impacts. Rb10–13. Since 1994, the CMP has required applications proposing water diversions of more than 100,000 gallons per day from the Kirkwood-Cohansey aquifer to demonstrate that “1. No viable alternative water supply sources are available; or 2. The proposed use of the Kirkwood-Cohansey aquifer will not result in any adverse ecological impact on the Pinelands Area.” N.J.A.C. 7:50-6.86(e) (1994). The recent amendments to the

CMP are based on studies that provided significant new information on how to measure and avoid these adverse ecological impacts of water diversions from the Kirkwood-Cohansey reservoir. Based on the studies, the Pinelands Commission amended the existing rules to lower the regulatory threshold from 100,000 gallons to 50,000 gallons, and added application requirements, including modeling, and distinguishing between adverse local and regional impacts. But they were not cut out of whole cloth. The argument that the Pinelands Commission has no authority to regulate in this area is therefore belied not only by the text of the Pinelands Protection Act, but by the Commission's longstanding and unchallenged practice.

B. Concurrent jurisdiction is at the core of the Pinelands Act and must be upheld

The federal National Parks and Recreation Act, 16 U.S.C. § 471i, and the New Jersey Pinelands Protection Act provide additional protections for the Pinelands that are an overlay on generally applicable, uniform state regulations. The Pinelands Act does not act to displace other state laws, unless they directly conflict, but rather adds a layer of regulation tailored to Pinelands conditions on top of the statewide laws and rules. See, e.g., N.J.S.A. 13:18A-8 (requiring the CMP to have a “coordination and consistency component . . . which details how land, water, and structures managed by governmental or non-governmental entities in the public interest within the pinelands area may be integrated into the

management plan.”). The purpose of the Pinelands Act is to add protections for the environment that are both stronger and are designed to address the specific conditions in this unique and sensitive area. N.J.S.A. § 13:18A-2; Gardner, 125 N.J. at 201. If the Court were to hold that a DEP regulation preempts a Pinelands regulation, it would have wide-ranging implications for decades of harmonious co-regulation, and it would violate the letter and spirit of the Pinelands Act.

“[T]he Legislature is free to adopt statutes that overlap in subject matter or regulatory authority.” In re Adoption of N.J.A.C. 7:15-5.24(b), 420 N.J. Super. 552, 577 (App. Div. 2011). The law of preemption, particularly the sort of implied preemption that Appellant asks the Court to impose, Ab33–52, is suited to application between higher and lower bodies of government, and is inapposite when applied to two state agencies. Cf. United Water N.J., 438 N.J. Super. 309 (local municipal ordinance preempted by state law). Concurrent jurisdiction with other state agencies is at the core of the Pinelands Protection Act and the CMP, and rejecting that core principle would undermine the Act and CMP, which has been held constitutional since Gardner. 125 N.J. 193.

Appellant’s argument, if accepted by this Court, would call into question myriad subject matter areas where the Commission and other state agencies have overlapping and concurrent jurisdiction. These include wetlands protections and protections for threatened and endangered species, as evidenced by the published

opinions of this Court discussed in the Commission’s Brief, Rb45–47. See In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 429 (2004) (DEP and Pinelands Commission have concurrent jurisdiction over discharge of dredge or fill in wetlands); In re N.J. Pinelands Comm’n Resolution, 356 N.J. Super. 363, 377 (App. Div. 2003) (DEP and Pinelands Commission have concurrent jurisdiction over threatened and endangered species).

In addition to the above, the Pinelands Commission regularly exercises concurrent or superseding jurisdiction with other state agencies in nearly every aspect of environmental regulation,² including ensuring safe drinking water,³

² E.g., N.J.A.C. 7:50-4.81 (“No department, board, bureau, official or other agency of the State of New Jersey shall issue any approval, certificate, license, consent, permit, or financial assistance for the construction of any structure or the disturbance of any land in the Pinelands Area unless such approval or grant is consistent with the minimum standards of this Plan.”).

³ N.J.S.A. 13:18A-8(j) (Pinelands Act requires the CMP to contain, “[i]n conjunction with existing State programs and planning processes, a plan to implement the provisions of the” Clean Water Act and Safe Drinking Water Act).

discharges to surface waters,⁴ forestry,⁵ energy project siting,⁶ hazardous waste,⁷ and more. Concurrent jurisdiction is the regulatory norm in the Pinelands, which is

⁴ E.g., N.J.A.C. 7:50-6.84 (CMP prohibitions on discharge to surface waters); N.J.A.C. 7:14A (DEP New Jersey Pollutant Discharge Elimination System rules, establishing regulatory framework within which DEP regulates discharge of pollutants to surface and ground waters of the State).

⁵ E.g., N.J.A.C. 7:50-6.1-48 (CMP standards for commercial forestry that seek to maximize forest land values and provide for long-term economic and environmental integrity of the Pinelands); N.J.A.C. 7:3 (DEP forestry rules governing State’s forestation program and forest stewardship program). See also New Jersey Pinelands Commission & New Jersey Department of Environmental Protection, Memorandum of Agreement Regarding Forestry Activities (May 1997) https://www.nj.gov/dep/parksandforests/forest/docs/May_1997-NJ_DEP.pdf (establishing “framework for coordinating the policies and activities of each agency relating to forestry activities . . . in the Pinelands Area”).

⁶ Selected Pinelands rules: N.J.A.C. 7:50-1.6(c)4. (definition of linear development includes gas and electric lines—note that the CMP also uses the term “linear improvement” interchangeably); N.J.A.C. 7:50-6.13 (standards for linear improvements in wetlands), N.J.A.C. 7:50-5.36 (standards for siting and approving solar developments). In addition, the following sections regulate “public service infrastructure” development in various Pinelands Management Areas, with varying conditions placed on their permissibility in each Management Area: N.J.A.C. 7:50-5.13(i), N.J.A.C. 7:50-5.22(b)4, N.J.A.C. 7:50-5.23(b)12, N.J.A.C. 7:50-5.24(b)9, N.J.A.C. 7:50-5.25(b)3, N.J.A.C. 7:50-5.26(b)10, N.J.A.C. 7:50-5.27(a)1, N.J.A.C. 7:50-5.29(a)2, N.J.A.C. 7:50-5.35(a)3.

Selected DEP and BPU rules: N.J.A.C. 7:7-15.4 (DEP rule setting standards for siting energy facilities in coastal zone management area); N.J.A.C. 14:8-12 (BPU rules for siting grid supply and large net-metered solar facilities); N.J.A.C. 14:7-1.4 (BPU rule proscribing installation of gas pipelines in certain areas); N.J.A.C. 14:3-2.1 (BPU rules governing construction and installation of all utility facilities); N.J.A.C. 14:5-2.1 (BPU rules governing construction and installation of EDC facilities); N.J.A.C. 14:6-2.1 (BPU rules governing construction and installation of gas utility facilities); N.J.A.C. 14:8-9.5 (BPU rule establishing project siting requirements for community solar projects).

⁷ Selected Pinelands rules: N.J.A.C. 7:50-4.62(d)1.iii (CMP regulation on waivers for projects essential for the remediation of a site contaminated with wastes or hazardous or toxic substances.), N.J.A.C. 7:50-5.36(b)1.ii. (CMP regulation regarding solar energy facilities on contaminated land), and N.J.A.C. 7:50-6.73(d) (CMP regulation regarding waste management facilities essential for the remediation of a site contaminated with wastes or hazardous or toxic substances).

Selected DEP rules: N.J.A.C. 7:26D (establishing remediation standards for groundwater, surface water, soil, soil leachate, and indoor air for contaminated sites); N.J.A.C. 7:26G

subject to various, generally applicable state environmental regulations, *and* to the often stricter and more specific regulations meant to protect and promote sustainable development within the Pinelands. The state environmental regulations are a floor for protection, and the Pinelands regulations offer additional protections. As explained plainly by the Commission in its response to comments on the challenged rules, “While the Commission often adopts rules that are consistent with DEP rules, there are instances where it opts for different or more stringent standards to provide greater protection of the Pinelands resources.” Aa122.

Where the Commission and DEP have concurrent authority, and “the laws are complementary and not inconsistent,” there is no reason to invalidate either regulation. In re N.J. Pinelands Comm’n Resolution, 356 N.J. Super. at 377. This court has held that agencies should endeavor to “exercise their powers in a harmonious fashion.” Ibid. The Pinelands Commission has done so here, and specifically sought to harmonize with and avoid conflict with DEP regulations, including making changes to terminology in the rules to align with DEP⁸ and using

(hazardous waste rules governing registration, operation, closure and post-closure maintenance of hazardous waste facilities, and registration, operation, and maintenance of hazardous waste transporting operations and facilities).

⁸ Aa123 (recognizing that DEP changed the terminology from “sealing” abandoned wells to “decommissioning” wells and revising the CMP amendments accordingly); see also Aa181 (response to comments in Draft Notice of Rule Adoption rejecting suggested revision of “divert”

a “modeling process similar to the DEP’s to avoid the need for duplicative modeling by applicants in those situations where there is regulatory overlap.”⁹

C. There is no conflict, but the Pinelands Act and its regulations take precedence over any conflicting laws

There is no actual conflict between the Pinelands Commission’s amendments to the CMP and the DEP’s regulations on water diversions. When interpreting different statutory provisions, this Court is “obligated to make every effort to harmonize them, even if they are in apparent conflict.” State v. Gomes, 253 N.J. 6, 15–16 (2023) (citation omitted); In re N.J. Pinelands Comm’n Resolution, 356 N.J. Super. at 377. The Appellant’s brief does not point to any single area where following the application criteria in the amended CMP actually conflicts with the DEP’s permitting scheme, instead pointing out differences or supposed “clashes” between the two regimes. Ab35–39. For example, the fact that the CMP amendments regulate new or increasing diversions of 50,000 gallons per day or more, while the Water Supply Management Act (WSMA) regulates diversions of 100,000 gallons per day or more, is not a conflict as Appellant claims, Ab3, but simply a different regulatory threshold. Complying with the CMP

or “diversion” that would conflict with the definitions in the DEP’s water supply allocation rules).

⁹ Aa186-87a. See also Aa181a (explaining that “the application for resource extraction will require submission of a hydrogeologic report that . . . comport with reports routinely submitted to the DEP for water allocation permit modifications”).

here does not preclude complying with the WSMA rules. Nor does the Appellant identify any specific provision of the DEP rules that it cannot comply with because it must comply with the requirements of the CMP.

Appellants instead object to the greater burden of regulation inherent in complying with both: “In other words, the existing overlap of regulatory jurisdictions is complicated (and burdensome) enough without the PC’s new attempt to regulate the exact same subject matter as DEP.” Ab50–51. But additional regulation, often more stringent, is precisely the point of the Act, and industries in the Pinelands have been subject to this since the passage of the Act in 1979. The balance of burdens was struck when the Legislature decided that the Pinelands Area requires additional protections, in order to protect the natural environment, promote sustainable development, and protect existing uses of the land and water. See N.J.S.A. 13:18A-9(b).

If the DEP water allocation rules and the amendments to the CMP contained conflicting requirements, which they do not, then the CMP must prevail under the terms of the Pinelands Act and the WSMA. The New Jersey Legislature made clear that the Pinelands Protection Act and the regulations adopted therein supersede other state statutes when they conflict. In a section of the Pinelands Protection Act titled “Enforcement of provisions of this act over inconsistent or conflicting acts,” the Legislature provided:

It is the intent of the Legislature that, except as otherwise specifically provided in this act, in the event of any conflict or inconsistency in the provisions of this act and any other acts pertaining to matters herein established or provided for or in any rules and regulations adopted under this act or said other acts, to the extent of such conflict or inconsistency, the provisions of this act and the rules and regulations adopted hereunder shall be enforced and the provisions of such other acts and rules and regulations adopted thereunder shall be of no force and effect.

N.J.S.A. 13:18A-27 (emphasis added).

The WSMA, passed by the Legislature two years after the Pinelands Protection Act, also acknowledges the Act's supremacy: "No action taken by the department pursuant to the provisions of [the WSMA] shall be inconsistent with the provisions of the 'Pinelands Protection Act,' . . . [or] the comprehensive management plan for the pinelands area" N.J.S.A. 58:1A-15.1.

This Court has already held that the application of a statewide law of general applicability must yield to the Pinelands Protection Act and CMP should there be any conflict. Uncle v. N.J. Pinelands Comm'n, 275 N.J. Super. at 90. In Uncle v. N.J. Pinelands Commission, another case regarding sand and gravel mining in the Pinelands, this Court rejected the Appellant's argument that the recent revisions to the CMP exceeded the Commission's statutory authority because it was in conflict with the Municipal Land Use Law (MLUL). Ibid. The Court noted that the "Legislature has made it clear, however, that the Pinelands Protection Act and the regulations adopted under it supersede the MLUL when they conflict," and cited to

N.J.S.A. 13:18A-27. Ibid. The MLUL even contains language similar to the “uniform water diversion permit system” language of the WSMA relied on by Appellants to claim that the WSMA preempts the field. the MLUL declares that the intent and purpose of the act is “[t]o encourage municipal action to guide the appropriate use or development of all lands in this State . . .” N.J.S.A. 40:55D-2(2)(a) (emphasis added). Yet, it must harmonize with or yield to the Pinelands Protection Act. Uncle, 275 N.J. Super. at 90. So, too, must any conflicting regulations under the WSMA.

II. LOPER BRIGHT IS INAPPOSITE, AND THE RULEMAKING SATISFIES THE STANDARD OF REVIEW THAT APPLIES IN NEW JERSEY

Appellant, in its bid to overturn the Commission’s duly promulgated rules, claims that “the U.S. Supreme Court just overturned the concept of deference to administrative agencies.” Ab19; see also Amicus br. of Winslow Township at 10–12. But this is not the holding of the United States Supreme Court’s decision in Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024), which directs federal courts to interpret ambiguous statutory language to determine the best reading, and not defer to agencies in that instance. Nor does this federal precedent change the standard of review that New Jersey courts apply to state agency decisions. Here, the Commission’s rulemaking was based on an extensive, twenty-

year scientific process culminating in notice-and-comment rulemaking that surpasses the relatively deferential standard applicable in New Jersey.

A. Loper Bright is a narrow, federal precedent that does not bind New Jersey Courts

In Loper Bright, the Supreme Court formally overruled Chevron deference, which required federal courts to defer to an agency's interpretation of ambiguous statutory language, so long as it was reasonable. The Supreme Court reasoned that courts have the duty and "special competence" to determine the best reading of ambiguous laws, and courts therefore should not defer to an agency's interpretation. Loper Bright, 144 S. Ct. at 2251. The Court found that the intent and language of the federal Administrative Procedure Act, 5 U.S.C. § 706, which directs that courts "shall decide all relevant questions of law," requires courts to "exercise independent judgment in determining the meaning of statutory provisions," including ambiguous language subject to multiple interpretations. Loper Bright, 144 S. Ct. at 2262. The Court cited the Skidmore doctrine as a possible replacement to Chevron deference, in which agencies still have a "power to persuade" the Court that their interpretation of the law is correct, which "depends upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Id. at 2259 (citation omitted).

First, the holding of Loper Bright does not apply to the review of agency action in New Jersey in any case. Board of Educ. v. M.N., 318 A.3d 670, 676 n. 4 (2024) (acknowledging Loper Bright standard of review is not binding on New Jersey Supreme Court and declining to apply same). Loper Bright rested on a provision of the federal APA that specifies that courts “shall decide all relevant questions of law,” 5 U.S.C. § 706, and which has no corollary in the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. Compare Loper Bright, 144 S. Ct. at 2261–2264 (interpreting section 706 of the APA to delineate judicial review of agency action), with N.J.S.A. 52:14B-1 et seq. (containing no such provision delineating judicial review of agency action).

Even if New Jersey courts did import the reasoning of Loper Bright to the review of agency action, it is inapposite here. Loper Bright instructs federal courts to determine the best reading of ambiguous statutory language. The language granting the Pinelands Commission explicit authority to regulate land and water is unambiguous. See supra Section I.A (citing relevant statutory grants of authority). Loper Bright also recognized that statutes may authorize an agency to “exercise a degree of discretion” in rulemaking, such as to “fill up the details of a statutory scheme,” and that in such instances a court’s role is to review the rulemaking for reasonableness. Loper Bright, 144 S. Ct. at 2263. The Pinelands Act grants the

Commission precisely this broad discretion to promulgate rules to carry out the Act. E.g., N.J.S.A. 13:18A-2; N.J.S.A. 13:18A-6(j); E.g. N.J.S.A. 13:18A-13.

The Appellant’s characterization of the holding in Loper Bright is also far too broad. Loper Bright does not change the deference federal courts give to agencies’ scientific and factual findings, which are upheld as long as they are not arbitrary and capricious. Loper Bright, 144 S. Ct. at 2261 (the APA “does mandate that judicial review of agency policymaking and factfinding be deferential.”) (emphasis in original); Alaris Health at Blvd. E. v. NLRB, 2024 U.S. App. LEXIS 31156, *21–24 (3d. Cir. Dec. 9, 2024) (discussing Loper Bright and applying deferential “substantial evidence” standard of review to agency’s factual findings). The Commission issued the rules here based on twenty years of scientific study, and agency rulemaking based on factual and scientific findings is also afforded substantial deference in New Jersey. See, e.g., N.J. State League of Municipalities, 158 N.J. at 222.

B. The Pinelands Commission exercised its scientific expertise to issue rulemaking based on substantial evidence, and deference is therefore appropriate

Courts in New Jersey give “deference to an agency’s interpretation and implementation of its rules enforcing the statutes for which it is responsible . . . because it recognizes that ‘agencies have the specialized expertise necessary to enact regulations dealing with technical matters’” In re Freshwater Wetlands

Prot. Act Rules, 180 N.J. at 488–89. But Courts “may not simply rubber stamp an agency’s decision.” In re Adoption of Amendments to Ne., Upper Raritan, 435 N.J. Super. at 584. Courts must ensure that the record “contains substantial evidence to support the agencies’ findings” and “will reverse an agency decision if it is arbitrary, capricious, or unreasonable or if it is not supported by credible evidence in the record.” In re N.J. Pinelands Comm’n Resolution, 356 N.J. Super. at 372. The Pinelands Commission’s rulemaking, grounded in twenty years of scientific study, meets and exceeds this standard of review.

In 2001, the New Jersey State legislature directed the Pinelands Commission to “assess and prepare a report on the key hydrologic and ecological information necessary to determine how the current and future water supply needs within the pinelands area may be met while protecting the Kirkwood-Cohansey aquifer system and while avoiding any adverse ecological impact on the pinelands area.” L. 2001, c. 165, § 3(a). Scientists from several state and federal agencies worked together to create a work plan for the Kirkwood-Cohansey Project that underwent peer review and was subject to a public hearing before approval by the Commissioner. Aa157. Scientists from the Pinelands Commission, Department of Environmental Protection, United States Geological Study, and Rutgers University completed twelve studies as part of the Kirkwood-Cohansey Project. Ibid. These included a hydrological framework, assessment, and modeling studies, an

evapotranspiration study, and multiple studies on specific habitats and creatures within the Pinelands. Aa100. The Kirkwood-Cohansey studies quantified in particular how withdrawals from the Kirkwood-Cohansey aquifer impact streams and wetlands, and the plants and wildlife that depend on them, through extremely sophisticated field tests and modeling on a sub-watershed scale.¹⁰ Aa157. The Project's models demonstrated that increased groundwater diversions are correlated with streamflow reductions, which negatively impact forested wetlands and specific species, including the Pine Barrens tree frog. Aa157–58.

The twenty years of study here represent a robust and exceptional level of evidence to support an agency rulemaking, which exceeds the substantial evidence standard. C.f., Mercer Cty. Deer All. v. State Dep't of Env'tl. Prot., 349 N.J. Super. 440, 449 (App. Div. 2002) (rejecting claim that DEP plan was adopted without sufficient scientific research and investigation because the record reflected “a wealth of respectable professional and scientific literature supporting the determinations represented by the Plan”); Chemical Specialties Mrfs. Ass'n v. Jorling, 85 N.Y.2d 382, 395–96 (App. Ct. N.Y. 1995) (upholding a New York

¹⁰ The twelve studies that form the Kirkwood-Cohansey Project, and were the scientific basis of the rulemaking here, are available at State of New Jersey, Pinelands Commission, Kirkwood-Cohansey Project, <https://www.nj.gov/pinelands/science/complete/kc>. E.g., United States Geological Survey, R.L. Walker et al., Hydrologic Assessment of Three Drainage Basins in the Pinelands of Southern New Jersey, 2004-06 (2011), available at <http://pubs.usgs.gov/sir/2011/5056>.

environmental agency rulemaking based on voluminous scientific and factual evidence). This is not a case in which the agency's rulemaking rests on a mere scintilla of evidence, but rather a profound level of rigor and scientific evidence, with contributors from state and federal governments, as well as academia. The Legislature directly mandated the undertaking of this research to understand how to sustainably use and preserve the aquifer, L. 2001, c. 165, which speaks to the unusual importance of this work.

Ultimately, based on this massive body of scientific work, the Pinelands Commission determined it was necessary to amend the portion of the CMP that already regulated diversions of water to incorporate this new information, and ensure that diversions do not have an adverse ecological impact on the Kirkwood-Cohansey aquifer. The Commission approved "clearer, quantifiable standards for assessing the ecological impacts of non-agricultural diversions from the Kirkwood-Cohansey aquifer" and "new, quantifiable standards to protect the available water supply in the watershed in which a diversion will be located," referred to as local and regional impacts. Aa158. The rulemaking and the Kirkwood-Cohansey Project on which it is based lie in the heartland of deference to agency rulemaking based on scientific findings and technical expertise. The Court should therefore decline to disturb the agency's rulemaking.

The Pinelands Commission’s brief ably addresses the science behind Appellant’s specific objections to the rule. Rb34–42. The Commission marshaled substantial and credible evidence to support the amendments to the CMP. The Pinelands Commission has far surpassed the arbitrary and capricious baseline standard of review that is applied by courts in New Jersey. It promulgated rules that are not only permitted but required by the evidence in the record and the Commission’s mandate to issue and amend “such rules and regulations as are necessary in order to implement the provisions of this act.” N.J.S.A. 13:18A-6(j); see also N.J.S.A. 13:18A-2. The Court need not “rubber stamp” the agency’s decision, because a searching review of the record reveals that the Commission acted not only legally, but soundly.

CONCLUSION

The Commission's amendments to the CMP are well within their authority and do not conflict with the DEP regulations regarding water diversions. Concurrent jurisdiction is the nature of a statute like the Pinelands Act that is meant to heighten protections for a particular area, beyond the baseline and uniform protections that apply statewide, and preemption is inappropriate. The rules accord with the intent and purpose of the Pinelands Protection Act, and were promulgated on the basis of substantial, credible evidence in the record before the agency. The Regulations must be upheld in order to preserve the concurrent regulatory structure on which the Act is based, and to ensure the Pinelands remains protected, as the Legislature intended.

Respectfully submitted,



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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

IN RE CHALLENGE OF CLAYTON
SAND COMPANY TO DECEMBER
4, 2023 AMENDMENT TO N.J.A.C.
7:50-1.1 *ET SEQ.*

: SUPERIOR COURT OF NEW
: JERSEY, APPELLATE DIVISION
: Docket No. A-001476-23
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: New Jersey Pinelands Commission
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:

BRIEF OF AMICUS WINSLOW TOWNSHIP, COUNTY OF CAMDEN

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PRELIMINARY STATEMENT

Amicus, Township of Winslow, Camden County (“Winslow”), a municipal corporation of the State of New Jersey, with offices at 125 South Route 73, Braddock, New Jersey 08037, submits this Amicus Brief in support of the appeal of Appellant Clayton Sand Company (“Appellant”) challenging the New Jersey Pinelands Commission’s (“Pinelands Commission”) 2023 regulatory amendments to the Comprehensive Management Plan (CMP) that confer the State Agency with new regulatory authority over diversions, or water usage, for Pinelands Areas within its jurisdiction (“2023 Amendments”).

PROCEDURAL HISTORY

Winslow filed a Motion for Leave to Intervene, and in the alternative, to file an Amicus Brief on September 16, 2024.

By Appellate Order of October 3, 2024, the motion for leave to file an Amicus Brief was granted.

STATEMENT OF FACTS

The Pinelands Commission jurisdiction encompasses lands within 52 municipalities in seven (7) counties. 35A *New Jersey Practice, Local Government Law*, Section 26:6 Regional environmental agencies – Pinelands (4th ed.).

In its proposed regulation, the Pinelands Commission emphasizes the importance of the Kirkwood Cohansey aquifer to the New Jersey Pinelands:

The Kirkwood-Cohansey aquifer is a freshwater reservoir underlying the New Jersey Pinelands and containing an estimated 17 trillion gallons of water. It is a source of potable and non-potable water to hundreds of thousands of people in South Jersey and sustains the ecology of the Pinelands by supporting wetlands and unique Pinelands vegetation and animal communities. As a result, withdrawals from the aquifer can impact the essential character of the Pinelands environment if they cause changes to habitats, reduce the quality of water in the Preservation Area, or encourage inappropriate patterns of development.

(157a).

Based on this concern, “The New Jersey Legislature enacted a law in 2001 calling for a study of the ecological impacts of human activities, such as diversions, on the ecology of the Pinelands Area.” (the “2001 Law”). (157a). Twelve (12) studies were thereafter prepared, in consultation with the Pinelands Commission, New Jersey Department of Environmental Protection (DEP), Rutgers University, the United States Fish and Wildlife Service and the United States Geologic Service, to “assess and prepare a report on the key hydrologic and ecological information necessary to determine how the current and future water supply needs within the pinelands areas may be met while protecting the Kirkwood-Cohansey aquifer system.” (P.L. 2001, c. 165). The twelve (12) studies later came to be known as the Kirkwood-Cohansey Project (157a).

Of particular importance, the 2001 Law merely appropriated funding for preparation of the Kirkwood-Cohansey Project studies and, in terms of state agency administrative authorization, only directed the DEP to “issue approvals or allocations for increased ground water withdrawals in Cape May only upon a funding that such new withdrawals will not accelerate salt water intrusion, lower existing stream base flow or harm existing ecological functions or wildlife”. Thus, the Legislature did not confer any agency authority to the Pinelands Commission to adopt implementing regulations, including the 2023 Amendments. For a period of twenty plus years, the New Jersey Legislature failed to amend the *New Jersey Pinelands Protection Act*, N.J.S.A. 13:18A-1 *et seq.* (“*Pinelands Protection Act*”), to allow for implementation the Kirkwood-Cohansey Project recommendations. The Pinelands Commission, likewise, undertook no agency rulemaking to implement the recommendations of the Kirkwood-Cohansey Project over two (2) decades. Despite this lengthy period of legislative and agency inaction, the Pinelands Commission avers that, “The findings of the Kirkwood-Cohansey Project form the basis for most of the proposed amendments, which significantly strengthen the ecological protections of the Kirkwood-Cohansey aquifer.” (158a, 169a).

In support of the 2023 Amendments, the Pinelands Commission avers that “The proposed amendments strengthen protections to the Kirkwood-Cohansey aquifer and the Pinelands ecology while ensuring sufficient water supply for

development in the more growth-oriented areas of the Pinelands Areas (157a). Despite this pronouncement of purpose, the Pinelands Commission issues utterly inconsistent findings that the potential impacts on Pinelands Growth Areas will be insubstantial:

It should be noted that the Commission is proposing a more stringent standard for maintaining water availability than that advised by the DEP in the Water Supply Plan. [160a, 186a, 193a].

To protect the more ecologically sensitive portions of the Pinelands Area, the Commission is proposing to limit new or increased diversions from the Kirkwood-Cohansey aquifer to the following Pinelands Management Areas: Regional Growth Area, Pinelands Towns, Rural Development Area, Military and Federal Installation Area and the 24 Pinelands Villages that are not located in the Pinelands Preservation Area. [159a].

The current water management standards for withdrawals from the Kirkwood-Cohansey aquifer only apply to diversions over 100,000 gallons of water per day. Existing N.J.A.C. 7:50-6.86(e). The Commission is proposing, at recodified N.J.A.C. 7:50-6.86(d), to expand the scope of wells that will be subject to the proposed new requirements by lowering that threshold to 50,000 gallons of water or more a day. [159a].

The proposed amendments also specify that the 50,000 gallon per day threshold includes all of an applicant's existing diversions in the same HUC-11 watershed, in addition to new or increased diversion. [159a].

The Pinelands Commission further acknowledges that well pumping tests required by the DEP for approval of a new water supply well to divert 100,000 gallons per day, would be redundantly duplicated under the 2023 Amendments. (161a):

After completing the pump test, the applicant is required to submit to the Commission a hydrogeologic report prepared in accordance with TM12-2 that includes the testing procedures, data collected and analyzed, and evaluation of the effect on the proposed diversion on the Kirkwood-Cohansey aquifer. N.J.A.C. 7:50-6.28(d)7i(3). ...Applicants will be encouraged to concurrently consult the DEP, as a pump test is also required by that agency.

Having a substantial portion of its lands located within Pinelands Growth Areas and affected by the Kirkwood-Cohansey aquifer, Winslow is particularly affected by the 2023 Amendments. Indeed, the Pinelands Commission in its agency rulemaking acknowledged: 1) Winslow's water situation currently requires it to purchase 1.5 million gallons per day of its public water supply from New Jersey American Water Company through annual contracts. (111a, 162a, 182a); and 2) "The HUC-11 watersheds in Monroe and Winslow Townships that have some volume attributable from areas outside of the Pinelands Area are stressed watersheds and 20 percent of the LFM is entirely used by existing diversions." (127a, 198a). Thus, Winslow's existing municipal water supply wells already exceed the standards of the 2023 Amendments from the date of its adoption.

Based on these adverse impacts, Winslow participated in the administrative rulemaking adoption process and provided several comments in opposition to the 2023 Amendments through its Township Administrator, Joseph Gallagher. (105a, 106a, 111a, 112a, 115a, 127a, 129a, 168a, 170a, 176a, 182a, 183a, 186a, 197a, 198a,

200a, 201a). Because Winslow was particularly affected by the 2023 Amendments, it was granted Amicus status to participate in this appeal.

LEGAL ARGUMENT

I. THE PINELANDS COMMISSION REGULATION OF WATER DIVERSIONS WITHIN THE ENTIRETY OF ITS JURISDICTION IS ULTRA VIRES.

A. Standard of Review.

The standard of review for adjudicating an *ultra vires* claim of improper agency action in the regulation of water use is set forth in *In re Agricultural, Aquacultural, and Horticultural Water*, 410 N.J. Super. 209, 223-224 (App. Div. 2009):

Reviewing courts generally accord substantial deference to the interpretation an agency gives a statute that it is charged with enforcing. [citations omitted]. In addition, “[i]n reviewing agency action, the fundamental consideration is that a court may not substitute its judgment for the expertise of the agency ‘so long as that action is statutorily authorized and not otherwise defective because arbitrary and unreasonable. [citations omitted] This applies to policymaking, fact-finding and statutory interpretation. [citation omitted].

“Thus a regulation can only be set aside if it is proved to be arbitrary or capricious, plainly transgresses the statute it purports to effectuate, or alters the terms of the statute and frustrates the policy embodied in it.” [citations omitted] It is well settled that agency regulations are presumed valid and are accorded a presumption of reasonableness. [citations omitted].

Nevertheless, administrative agencies derive their authority from legislation, the terms of which they cannot alter, nor are they

permitted to frustrate the legislative purpose. [citations omitted]. The party contesting the regulation has the burden of proving its invalidity. [citations omitted].

While findings of ultra vires are disfavored, [citations omitted], “[o]ur rule is to enforce the will of the Legislature” because “[s]tatutes cannot be amended by administrative fiat.” [citations omitted]. Consequently, a “regulation that is plainly at odds with its enabling statutory authority must be set aside.” [citations omitted].

B. The Pinelands Commission Has Transgressed its Statutory Authority.

The purposes of the Pinelands CMP, set forth in N.J.S.A. 13:18A-9, confers authority to the Pinelands Commission to regulate matters of “water quality”, and to a limited extent “water quantity” only within its Preservation Areas. Yet, as acknowledged by the Pinelands Commission in its rulemaking, the 2023 Amendments would allow for Pinelands Commission to regulate water quantity usage within Preservation Areas and Growth Areas. (159a). Such regulation amounts to a transgression of the limitations imposed by the *Pinelands Protection Act* and usurpation of the DEP’s exclusive authority to regulate water allocation in New Jersey.

It is undisputed that the DEP is statutorily conferred exclusive power and authority under the *WSM Act*, N.J.S.A. 58:1A-1 to -17, to regulate water usage, including both water quantity and quality, throughout the State. See, *Matter of Water Supply Critical Area No. 2*, 233 N.J. Super. 280, 285-86 (1989):

Our Legislature adopted the Water Supply Management Act to create a regulatory system for the State's water resources effectively and productively ensuring the present and future adequate supply and quality of water and to protect the natural environment of the State's waterways. N.J.S.A. 58:1A-2. This regulatory power was placed with DEP."). *Id.* This power was described in this way:

[I]t is necessary that the State, through its Department of Environmental Protection, have the power to manage the water supply by adopting a uniform water diversion permit system and fee schedule, a monitoring, inspection and enforcement program, a program to study and manage the State's water resources and plan for emergencies and future water needs, and regulations to manage the waters of the State during water supply and water quality emergencies. [N.J.S.A. 58:1A-2].

See also, *In re Agricultural, Aquacultural, and Horticultural Water*, *supra*. 410 N.J. Super. at 218:

The Water Act gives DEP broad responsibility to manage the State's water resources "to ensure an adequate supply and quality of water for citizens of the State, both present and future, and to protect the natural environment of the waterways of the State." N.J.S.A. 58:1A-2.

See also, *United Water N.J. v. Boro. of Hillsdale*, 438 N.J. Super. 309, 319, 321, 323 (App. Div. 2014)(Under [WSM Act], the DEP has the exclusive authority to "control, conserve, and manage the water supply of the State and the diversions of that water supply.").

If the Legislature had intended to confer duplicative regulatory authority to the Pinelands Commission to regulate "water usage" in addition to "water quality" throughout the entirety of its jurisdiction, it would be expressly so provided in the statutory purposes of the CMP. However, the *Pinelands Protection Act* provides

otherwise. With respect to Pinelands Protection Areas (including Growth Areas), the Pinelands only has jurisdiction to regulate “water quality” concerns. See, *N.J.S.A. 13:18A-9b(2)*, “The goals of the comprehensive management plan with respect to the protection area shall be to: Protect and maintaining the quality of surface and groundwaters;”. With respect to Pinelands Preservation Areas, the Pinelands has regulatory authority over “water quantity” and “water quality”. See, *N.J.S.A. 13:18A-9c(5)*, “The goals of the comprehensive management plan with respect to the preservation area shall be to: Protect and preserve the quantity and quality of existing surface and ground waters.”

N.J.S.A. 13:19A-6(i) further circumscribes the Pinelands Commission’s role as purely advisory and consultative to the DEP in the regulation of water use in New Jersey: “The Pinelands Commission shall have the following powers: To prepare and transmit to the Commissioner of Environmental Protection such recommendations for water quality standards for surface and ground waters in the pinelands are, or in tributaries and watersheds thereof, as the commission deems appropriate;”.

The 2023 Amendments are distinguished from the water allocation regulations upheld in *In re Highlands Water Protection and Planning Act Rules*, 401 N.J. Super. 587 (App. Div. 2008), where Judge Skillman concluded that the *Highlands Act* regulations of water allocation permit revocation in “preservation

areas” were valid, notwithstanding apparent conflicts with applicable DEP regulations, because they were supported by explicit statutory authority in the *Highlands Act*. That is not the case with the *Pinelands Protection Act*.

Application of the 2023 Amendments will have a net effect of substantially reducing Winslow and other Pinelands municipalities actual water allocation from that authorized by the DEP in municipal Water Allocation Permits. It effectively stunts permitted development potential in Winslow and other Pinelands municipalities as contemplated by the CMP growth area regulations and their respective DEP Water Allocation Permits. New municipal water supply wells in the Pinelands Areas now require special permitting for any net diversion exceeding 50,000 gallons per day (GPD), significantly less than the DEP’s current standard of 100,000 GDP.

C. The Failure of the Legislature To Amend The *Pinelands Protection Act* To Implement The Recommendations Of The Kirkwood-Cohansey Project After Twenty (20) Years Is Further Evidence That the 2023 Amendments Are *Ultra Vires*.

In construing a statute, a court’s initial concern is to seek legislative intent. *Application of Meadowlands Communication Systems, Inc.*, 175 N.J. Super. 53 (App. Div. 1980). “The history of the legislation is also an important aid. By history, the courts mean the prior statutes on the same subject.” *State v. Kress*, 105 N.J.

Super. 514, 520 (Law Div. 1969), quoting *Murphy v. Zink*, 136 N.J.L. 235 (Sup. Ct. 1947).

Here, the appeal concerns the proper interpretation of the *Pinelands Protection Act* and implicates its legislative history concerning a potential statutory amendment to address ecological concerns affecting the Kirkwood-Cohansey aquifer. By adoption of the 2021 Law, the Legislature appropriated funding for the Pinelands Commission, DEP, Rutgers University, the United States Fish and Wildlife Service and the United States Geologic Service to prepare the Kirkwood-Cohansey Project studies and to make recommendations for further legislative amendment to the *Pinelands Protection Act* to protect the Kirkwood-Cohansey aquifer. Having possessed the findings and conclusions of the Kirkwood-Cohansey Project studies for twenty plus (20+) years, the Legislature has not shown a collective will over an extended period of time to statutorily amend the *Pinelands Protection Act*. Due to such legislative inaction, the Pinelands Commission has improperly attempted to legislate the outcome it sought in the preparation of the Kirkwood-Cohansey Project through agency rulemaking. The Pinelands Commission's efforts to implement a regulatory shortcut to required statutory amendment must be rejected.

II. THE PINELANDS COMMISSION REGULATION OF WATER ALLOCATION WITHIN THE ENTIRETY OF ITS JURISDICTION IS THE TYPE OF OVERREGULATION THAT JUSTIFIED THE U.S. SUPREME COURT’S OPINION IN *LOPER BRIGHT* TO ELIMINATE *CHEVRON* DEFERENCE.

The Pinelands Commission has exceeded the ambit of its statutory authority through its attempt at duplicative statutory regulation of water usage within the Pinelands municipalities. The Pinelands Commission attempts to justify its water usage regulation upon “Pinelands Growth Areas” based on the potential net adverse impacts of water usage on Pinelands Preservation Areas. In effect, the Pinelands Commission is attempting to fill the void on what it believes is a legislative gap through its broad agency interpretation of its powers the *Pinelands Protection Act*.

This is the type of over-regulatory activity that caused our United Supreme Court to reverse *Chevron*¹ deference in *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244 (2024). Accordingly, the Appellate Panel must confer no agency deference to any Pinelands Commission justifications for its 2023 Amendments expanding its reach to regulate “water quantity” beyond its Preservation Areas.

In *Loper Bright, supra*, 144 S.Ct. 2273-2275, Justice Clarence Thomas issued a concurring opinion explaining that, “*Chevron* deference compromises [the]

¹ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S. Ct. 837 (1984)

separation of powers [doctrine] in two ways. It curbs the judicial power afforded to courts, and simultaneously expands [governmental] agencies' executive power beyond constitutional limits.....[Under *Chevron*, a judge must accept an agency's interpretation of an ambiguous law, even if he thinks another interpretation is correct. *Ante*, at 19. *Chevron* deference thus prevents judges from exercising their independent judgment to resolve ambiguities. [citations omitted]. By tying a judge's hands, *Chevron* prevents the Judiciary from serving as a constitutional check on the Executive. It allows 'the Executive...to dictate the outcome of cases through erroneous interpretations.' [citations omitted]. Because the judicial power requires judges to exercise their independent judgment, the deference that *Chevron* requires contravenes Article III's mandate.

Judge Thomas concluded his concurring opinion, "*Chevron* 'permit[s] a body other than Congress to perform a function that requires an exercise of legislative power.' [citations omitted]. No matter the gloss put on it, *Chevron* expands agencies' power beyond the bounds of Article II by permitting them to exercise powers reserved to another branch of Government.

It is Winslow's contention that, regardless of its intent in adopting the 2023 Water Diversion regulations, the Pinelands Commission has exceeded the ambit of its statutory authority, which omits the subject matter of regulating of "water quantity" diversions outside of its Preservation Areas. The Pinelands Commission

may even have relied upon *Chevron* deference in 2023 as justification to backstop its expansive regulation of “water diversions”, which subject matter is already regulated exclusively by the DEP. *Loper Bright* requires the reigning in of Pinelands Commission’s efforts to it’s expand powers, which are reserved to the New Jersey Legislature.

CONCLUSION

For the foregoing reasons, Amicus Winslow Township, respectfully requests the Court invalidate the 2023 Amendments regulating Water Diversions within the entirety of Pinelands Areas.

THE PLATT LAW GROUP, P.C.

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STUART A. PLATT, ESQUIRE

BY: /s/Christopher J. Norman
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Dated: January 3, 2025



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January 13, 2025

Via Electronic Filing

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Re: In Re Challenge of Clayton Sand Company to December 4, 2023
Amendments to N.J.A.C. 7:50-1 et seq.
Docket No. A-001476-23T4

Letter Brief on behalf of Respondent, New Jersey Pinelands
Commission, in Response to Brief of Amicus Curiae Winslow
Township

Dear Mr. Orlando:

Please accept this letter brief on behalf of Respondent, the New Jersey
Pinelands Commission (the "Commission"), in response to the brief filed by Amicus
Curiae Winslow Township ("Winslow").



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PROCEDURAL HISTORY AND STATEMENT OF RELEVANT FACTS¹

This appeal challenges rulemaking by the Commission regulating water use from the Kirkwood-Cohansey Aquifer (the “Rules”). On September 6, 2022, the

¹ The procedural history and statement of facts have been combined for the sake of brevity and for the convenience of the court.

Commission proposed amendments to the Pinelands Comprehensive Management Plan (“CMP”), N.J.A.C. 7:50-1.1 to -10.35, to add fees for applications for certain wells; add definitions to clarify the substantive changes to the Rules; restrict the transfer of water between different basins in the Pinelands Area except for intrabasin transfers within either the Atlantic or the Delaware basins; expand the scope of diversions that are subject to the Rules from wells diverting 100,000 gallons of water per day or more to those diverting 50,000 gallons or more from the Kirkwood-Cohansey Aquifer; and require those applicants to conduct tests to evaluate ecological impacts as defined in the Rules. 54 N.J.R. 1668(a).

As a result of comments expressed during public comment period, the Commission published a Notice of Substantial Changes Upon Adoption on April 3, 2023. 55 N.J.R. 577(a). The amended rule proposal provided for a public comment period through June 2, 2023. 55 N.J.R. at 578. In total, Winslow made six comments on the proposed Rules through its Township Administrator, Joseph Gallagher. 54 N.J.R. 1668(a). The Commission voted to adopt the Rules at its September 8, 2023 meeting, and published the final notice of adoption in the New Jersey Register on December 4, 2023. 55 N.J.R. 2407(a).

On January 18, 2024, Appellant Clayton Sand Company (“Clayton”) filed a Notice of Appeal, challenging the Commission’s rulemaking as ultra vires, arbitrary,

capricious and unreasonable, and procedurally deficient. Clayton filed its merits brief and appendix on July 25, 2024, and filed amended briefs and appendices on July 29, 2024, and July 30, 2024. In its merits brief, Clayton argues that the Commission exceeded its statutory authority by regulating water diversions or allocations (Pb23),² that the Commission is preempted from regulating water diversions given that DEP was granted exclusive regulatory authority in the Water Supply Management Act (Pb30), that the rule fails to sufficiently distinguish between consumptive and nonconsumptive diversions (Pb54), that the rule's methodology is flawed (Pb60), that the requisite approvals were not obtained (Pb70), and that the required public opportunities to be heard before adoption were not provided. (Pb71).

On September 16, 2024, Winslow moved to intervene pursuant to Rule 4:33-1 or 4:33-2, or to appear as amicus curiae pursuant to Rule 1:13-9. The court denied Winslow's request to intervene and granted the request to participate as an amicus by order dated October 3, 2024.

The Commission filed its merits brief on November 26, 2024. Initially, Winslow filed its Amicus Brief and Appendix on November 12, 2024. The

² "Pb" refers to the brief filed by Clayton. "Rb" refers to the brief filed by the Commission. "WTb" refers to the revised amicus brief filed by Winslow on January 3, 2025.

arguments therein relied upon documents that were not part of the record, but nonetheless had been included in Winslow's Appendix. On November 29, 2024, the Commission filed a motion to strike Winslow's brief and appendix. Winslow subsequently filed a cross-motion to supplement the record on December 2, 2024, which the Commission opposed. On December 23, 2024, the Court granted the Commission's motion to strike, denied Winslow's cross-motion to supplement the record, and ordered Winslow to file a revised brief and appendix by January 3, 2025.

Winslow filed its revised Amicus Brief on January 3, 2025, arguing that the Commission's 2023 Amendments are ultra vires because the Commission exceeded the scope of its statutory authority (WTb7-10), and that same constitutes overregulation pursuant to the U.S. Supreme Court's opinion in Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024). (WTb12-14). For the reasons stated herein, the court should reject Winslow's arguments and affirm the Commission's adoption of the Rules.

ARGUMENTS

POINT I

THE RULEMAKING IS WITHIN THE COMMISSION'S AUTHORITY

Winslow first argues that the Rules are ultra vires because the Commission

has authority under the Act to regulate only “water quality” concerns in the Pinelands Protection Area and not “water quantity.” (WTb9). The Commission possesses authority under the Pinelands Protection Act (“the Act”) to adopt the Rules to protect the Kirkwood-Cohansey Aquifer. N.J.S.A. 13:18A-2; N.J.S.A. 13:18A-9; N.J.S.A. 13:18A-6(i)-(j); N.J.S.A. 13:18A-29. The Commission’s authority for the challenged regulations was explained in full in its merits brief and the Commission relies upon same herein. (Rb29-34). Additionally, Winslow’s argument that the Commission lacks authority under the Act to regulate water quantity in the Protection Area disregards the fact that the construction of new wells and an increase in water diversions from existing wells constitutes development. N.J.A.C. 7:50-2.11. The Rules address the potential negative impacts from such development on the resources of the Pinelands including surface and ground water, wetlands, and threatened and endangered species. The Commission’s authority to regulate development in the Pinelands is not in dispute and the Act clearly enables the Commission to do same. See N.J.A.C. 7:50-1.3 (“The regulations and standards [this chapter] contains are designed to promote orderly development of the Pinelands so as to preserve and protect the significant and unique natural, ecological, agricultural, archaeological, historical, scenic, cultural and recreational resources of the Pinelands.”)

The Act at N.J.S.A. 13:18A-9(a) provides “the goal of the [CMP] with respect to the entire pinelands area shall be to protect, preserve and enhance the significant values of the resources thereof in a manner which is consistent with the purposes and provisions of this act and the Federal Act.” (emphasis added). The Commission’s regulation of water outside of the Preservation Area supports water quantity goals within the Preservation Area as the Kirkwood-Cohansey Aquifer is interconnected between the Protection Area and Preservation Area within the Pinelands and serves a vital purpose in sustaining the ecology of the Pinelands. 54 N.J.R. 1668.

The Rules at issue are intended to address development involving the installation of new wells or an increase in the allocation of existing wells withdrawing 50,000 gallons per day (“gpd”) of water from the Kirkwood-Cohansey Aquifer. N.J.A.C. 7:50-6.86(d). By addressing new and increased withdrawals, the Commission can evaluate the impacts of the withdrawals on the vital resources of the Pinelands. N.J.A.C. 7:50-6.81.

In addition, that the Act fails to mention the regulation of water quantity within the Protection Area similarly to the Preservation Area is of no significance because the Legislature mandated a liberal construction of the Act by enacting N.J.S.A. 13:18A-29, which provides “[t]he object, design and purpose of this act

being the protection of the pinelands area and the resources thereof, this act shall be liberally construed.”

Further, the Act grants the Commission various means of regulation to achieve its purpose. N.J.S.A. 13:18A-8(d)(1) states that the CMP must:

[c]onsider and detail the application of a variety of land and water protection and management techniques, including but not limited to, zoning and regulation derived from State and local police powers, development and use standards, permit systems, acquisition of conservation easements and other interest in land, public access agreements with private landowners, purchase of land for resale or lease-back, fee acquisition of public recreation sites and ecologically sensitive areas, transfer of development rights, dedication of private lands for recreation or conservation purposes and any other appropriate method of land and water protection and management which will help meet the goals and carry out the policies of the management plan

Based on the foregoing, and as explained in detail in its merits brief (Rb29-34), the Commission was explicitly authorized by the Legislature to regulate water resources in the Pinelands and has been regulating aspects of water supply since its inception. N.J.S.A. 13:18A-8. Therefore, Winslow’s argument that the Rules are ultra vires fails.

Next, in its discussion of authority, Winslow also argues that the “[a]pplication of the 2023 amendments will have a net effect of substantially reducing Winslow and other Pinelands municipalities actual water allocations from

that authorized by the DEP in municipal Water Allocation Permits.” (WTb10). This argument does not relate to the Commission’s authority in promulgating the Rules and is not supported by the record. The argument also misconstrues the Rules, which only regulate new diversions or increases in allocation from either a single existing diversion source or from combined existing and new diversion sources in the same HUC-11 watershed and in the Kirkwood-Cohansey Aquifer, resulting in a total diversion of 50,000 gpd or more. N.J.A.C. 7:50-6.86(d). Any future impact on development is speculative and outside of the record, and therefore Winslow’s argument is irrelevant here.

POINT II

THE RULES ARE NOT PREEMPTED BY THE WATER SUPPLY MANAGEMENT ACT

Winslow next argues that the Rules are preempted by DEP’s “exclusive” authority to regulate water allocation under the Water Supply Management Act (“WSMA”). (WTb7-9). Preemption is discussed at length in the Commission’s merits brief and does not apply where the Commission and DEP can concurrently regulate water in the Pinelands Region under both the WSMA and CMP. (Rb43-49). Additionally, Winslow’s argument that the net diversion threshold of 50,000 gpd set forth in the Rules conflicts with the 100,000 gpd in the WSMA is addressed in the Commission’s merits brief. (Rb47). For these reasons, and the reasons stated

in the Commission’s brief, Winslow’s argument that the Commission is preempted from regulating water allocation fails.

POINT III

THE LEGISLATURE WAS NOT REQUIRED TO AMEND THE ACT AS A RESULT OF THE KIRKWOOD-COHANSEY PROJECT

Winslow next argues that the Legislature “possessed the findings and conclusions of the Kirkwood-Cohansey Protect studies for twenty plus (20+) years,” and that “the Legislature has not shown a collective will over an extended period of time to statutorily amend the Pinelands Protection Act.” (WTb11). This argument is being raised for the first time on appeal by amicus and is outside the scope of Clayton’s appeal of the Rules.

It is well documented that an amicus curiae must take the case on appeal as they find it, meaning that they must accept the case as presented by the parties “and cannot raise issues not raised by the parties.” State v. Lazo, 209 N.J. 9, 25 (2012) (quoting Bethlehem Twp. Bd. of Educ. v. Bethlehem Twp. Educ. Ass’n, 91 N.J. 38, 48-49, (1982) (additional citations omitted)); see also State v. Gandhi, 201 N.J. 161, 191 (2010) (“[A]n amicus must take the case on appeal as they find it.”). Therefore, this new argument raised by amicus should not be considered by the court.

Assuming, arguendo, that the court is inclined to consider this argument, it is

without merit. L. 2001, c. 165 and the Kirwood Cohansey Project are discussed at length in the Commission's merits brief. (Rb13-14; Rb34; Rb42-43). The Project's conclusions spurred the Commission to undertake the Rulemaking at issue. There is nothing in the legislation establishing the Kirkwood-Cohansey project that required the Commission to conduct studies or take any actions based thereon within a specific time frame. L. 2001, c. 165. Second, the studies were published between 2008 and 2014, with one study remaining incomplete.³ DEP's release of the Statewide Water Supply Plan in 2017 provided the Commission with crucial data for water supply, demand, allocation, and low flow margin throughout the Pinelands Area rendered completion of this study moot.⁴ Rulemaking began shortly thereafter in 2017, after all necessary data was obtained.

Winslow argues that the failure of the Legislature to enact new legislation to specifically authorize the Commission to implement the findings of the Project is somehow dispositive and representative of the legislature's lack of "will" to implement the Project findings. (WTb11). However, the Legislature need not act

³ These studies are described in more detail at <https://www.nj.gov.pinelands/science/complete/kc>. (last visited November 25, 2024).

⁴ The 2017-2022 New Jersey Water Supply Plan can be found at <https://www.nj.gov/dep/watersupply/pdf/wsp.pdf>. (last visited January 10, 2025).

where the Commission already possesses sufficient statutory authority to implement such measures as explained above and in the Commission’s merits brief. (Rb29-34).

Here, the Commission did not wait “twenty-plus” years to implement the findings of the Project as claimed by Winslow and instead used its legislatively authorized rulemaking authority upon the completion of the studies and consultation with DEP to better protect the Pinelands Area.

POINT IV

LOPER BRIGHT DOES NOT APPLY

In its Amicus Brief, Winslow argues that the Commission’s Rulemaking is “overregulation” as contemplated in the recent Supreme Court decision Loper Bright Enterprises, 603 U.S. at 412-415, and therefore the Commission should not be given deference. (WTb12). Specifically, Winslow relies on the concurring opinion issued by Justice Clarence Thomas overturning “Chevron” deference typically afforded to federal agencies as a result of Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). (WTb13). However, Loper Bright relates to federal agency deference and does not relate to state agency deference. Loper Bright Enters., 603 U.S. at 379. Moreover, the New Jersey Supreme Court has already concluded that Loper Bright is not binding on it. See Bd. of Educ. v. M.N., 258 N.J. 333, 343 n.4 (2024) (“Loper Bright is not binding on this Court and we do not rely

on it here”).

In New Jersey, when reviewing an agency’s adoption of Rules, a reviewing court must give “great deference” to an agency’s “‘interpretation of statutes within its scope of authority and its adoption of rules implementing’ the laws for which it is responsible.” N.J. Ass’n of Sch. Adm’rs v. Schundler, 211 N.J. 535, 549 (2012) (quoting N.J. Soc’y for Prevention of Cruelty to Animals v. N.J. Dep’t of Agric., 196 N.J. 366, 385 (2008) (additional citations omitted)). Such deference is appropriate because it recognizes that “agencies have the specialized expertise necessary to enact regulations dealing with technical matters and are ‘particularly well equipped to read . . . and to evaluate the factual and technical issues that . . . rulemaking would invite.’” New Jersey State League of Muns. v. Dep’t of Cmty. Affs., 158 N.J. 211, 222 (1999) (quoting Bergen Pines Cnty. Hosp. v. New Jersey Dep’t of Hum. Servs., 96 N.J. 456, 474 (1984) (second alteration in original)). Consequently, agency rules are accorded a presumption of validity and reasonableness. In re Petition of N.J. Am. Water Co., 169 N.J. 181, 188 (2001).

Further, the challenging party has the burden of proving the rule is at odds with the statute. In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 488-89 (2004) (citing Bergen Pines Cnty. Hosp., 96 N.J. at 477). Mere disagreement with an agency’s conclusions does not rise to a finding that the decision on which it is

based is arbitrary and capricious. United Hunters Ass'n of N.J., Inc. v. Adams, 36 N.J. 288, 292 (1962).

Winslow's argument that Loper-Bright strips the Commission of deference in its rulemaking is a misreading and misunderstanding of the cases and is contradicted by the deference given to agencies in New Jersey.

CONCLUSION

For the reasons stated herein, as well as those reasons expressed in the Commission's merits brief, the Pinelands Commission's adoption of the Rules should be affirmed.

Respectfully submitted,

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*IN RE CHALLENGE OF CLAYTON
SAND COMPANY TO DECEMBER 4,
2023 AMENDMENTS TO N.J.A.C. 7:50-
1.1 ET SEQ.*

SUPERIOR COURT OF NEW
JERSEY, APPELLATE DIVISION
Docket No. A-001476-23

ON APPEAL FROM:

New Jersey Pinelands Commission
Rulemaking Notice of Adoption
Published on December 4, 2023 at
55 N.J.R. 2507(a)

CIVIL ACTION

REPLY BRIEF OF PETITIONER/APPELLANT,
CLAYTON SAND COMPANY,
IN RESPONSE TO NEW JERSEY PINELANDS COMMISSION

On the Brief:

Ryan A. Benson

Of Counsel:

Kevin J. Coakley

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PRELIMINARY STATEMENT

The PC's opposition brief illustrates "mission creep." Over the years, PC gradually lengthened its reach without any legislative expansion of its jurisdiction. The Pinelands Act does not mention diversions—not once. The Legislative Findings section of that Act, as well as the Chapter Law, shows it concerns "development and use of land," which indirectly impacts water. And the Act's definitions show the Legislature did not consider "development" to include diversions.

Consistent with the Act, the original CMP included only *de minimis* water-related regulation and nothing related to diversions. The CMP's introductory text even indicated that "ground water withdrawals" was an issue for DEP. Nevertheless, while the Act remained static, PC later added water regulations little by little.

Now, the Rule is clearly *ultra vires*. In an attempt to justify its overreach, PC embellishes the Pinelands Act. PC proffers marginal references to water in the Act, but nowhere does it authorize blanket "regulation of water resources" as PC claims.

The Rule also conflicts with and is preempted by the statute that actually regulates diversions, the WSM Act. PC argues preemption does not apply here. However, the authorities it cites do not limit preemption to municipalities or to situations involving impossibility of dual compliance. Nor do they show PC and DEP may regulate the same subject matter in all cases. Consequently, PC cannot overcome its various contradictions of the WSM Act, such as the setting of a

diversion threshold half that fixed by the WSM Act (forbidding what the Legislature has permitted). And provisions calling for the CMP to be respected do not give PC *carte blanche* to issue regulations in domains expressly reserved for DEP.

The Rule is also arbitrary. *Inter alia*, PC knowingly drafted the Rule text such that it does not authorize estimation for determining a diversion is nonconsumptive—even though it admits precise calculation is impossible. Despite being asked to authorize estimation in the Rule itself, it refused and mentioned it in the commentary only. PC also fails to meaningfully address DEP’s various concerns and does not deny it violated the procedural requirements for CMP amendments.

Finally, given the public safety importance of integrated, careful groundwater regulation (see, e.g., recent mistakes in California), the court should again recognize the absolute need for a uniform system of diversion regulation, not the haphazard PC proposal. Groundwater requires uniform administration balancing environmental, economic, and safety concerns. For these reasons, the Rule must be deemed invalid.

COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY¹

See Statement of Facts and Procedural History in Clayton’s initial brief.

LEGAL ARGUMENT

POINT I

THE PC EMBELLISHES THE PINELANDS ACT, WHICH DOES NOT MENTION DIVERSIONS.

PC notes that statutory language is the “best indicator of the Legislature’s

¹ For brevity, Clayton combined the counterstatement of facts/procedural history.

intent.” Rb29. If so, surely it is significant that the Pinelands Act never mentions diversions/withdrawals and refers to itself (in the first line of the chapter law) as an “Act concerning the development and use of land in the pinelands.” L. 1979, c. 111. PC baselessly suggests that the Act’s general references to water and water *quality* somehow authorize diversion regulation. Rb30. But these suggestions are meritless.

First, PC quotes language stating that a “portion of the pinelands area is especially vulnerable to the environmental degradation of surface and ground waters which would be occasioned by the improper development or use thereof.” N.J.S.A. 13:18A-2 (emphasis added).² “Degradation” is not defined, but it clearly refers to a reduction in grade, *i.e.*, quality, not quantity, through development. Indeed, the same provision states that the “pace of . . . development and construction in the pinelands area poses an immediate threat to the . . . high quality of surface and ground waters.” N.J.S.A. 13:18A-2. Even if this provision did express a concern for water quantity, it does not address that concern through diversion regulation.

Second, PC emphasizes N.J.S.A. 13:18A-9 (“Goals of [CMP]”). This section, distinct from the “Powers” section, *i.e.*, N.J.S.A. 13:18A-6, lists water quality among the goals multiple times. The only reference to water quantity (in the entire statute) is the “goal” to “[p]rotect and preserve the quantity and quality of existing surface and ground waters” in the “preservation area” only. N.J.S.A. 13:18A-9. But

² All emphasis herein is added, unless noted otherwise.

the preservation area is to be regulated through “more stringent restrictions on the development and use of land.” N.J.S.A. 13:18A-2. Diversions are not mentioned.

Third, PC cites the provision calling for the CMP to include a “resource assessment” and a plan to implement the Clean Water Act/Safe Drinking Water Act. Rb32 (citing N.J.S.A. 13:18A-8). But the requirement to prepare a resource assessment obviously authorizes PC to do nothing more than prepare a resource assessment, not to regulate diversions. And the CWA/SDWA concern water quality, not quantity. In short, the Pinelands Act does not authorize diversion regulation.³

POINT II
THE RULE DOES CONFLICT WITH AND IS
PREEMPTED BY THE WSM ACT.

As a reminder, the Legislature stated as follows in the WSM Act:

[I]t is necessary that the State, through its [DEP], have the power to manage the water supply by adopting a uniform water diversion permit system and fee schedule, a monitoring, inspection and enforcement program, a program to study and manage the state’s water resources and plan for emergencies and future water needs, and regulations to manage the waters of the State during water supply and water quality emergencies.

[N.J.S.A. 58:1A-2.]

Accordingly, DEP is the agency representing the State in its capacity as “trustee of the people” for “uniform” regulation of “water resources.” See *ibid.*⁴ The

³ The three cases cited by PC at Rb33 have nothing to do with diversions.

⁴ The Legislature chose DEP for good reason. DEP is the agency with the expertise and means to properly regulate water supply. The State budget for 2025 (L. 2024, c. 22) shows an appropriation to DEP in the amount of \$243,200,000 for “Water Supply” and \$4,699,000 for “Water Monitoring and Resource Management.” Id. at 319. By contrast, a mere \$3,749,000 is set aside for PC “Administration, Planning and Development

WSMA powerfully conveys the gravity of this role. It states that “water resources” are “essential to the health, safety, economic welfare, . . . and general welfare” of the people. Also, “because some areas . . . do not have enough water to meet their current needs and provide an adequate margin of safety, the water resources of the State . . . must be planned for and managed as a common resource from which the requirements of the several regions and localities . . . shall be met.” Ibid.

The statute thus gives DEP broad, express powers to regulate diversions pursuant to specific standards. N.J.S.A. 58:1A-5; see also N.J.S.A. 58:1A-13 (directing DEP, not PC, to develop Statewide Water Supply Plan and requiring consultation with Highlands Council, but not PC, concerning same); N.J.S.A. 58:1A-6b &-8j (authorizing DEP to designate/regulate areas of critical water supply concern through a specific (due) process disregarded by PC’s Rule); N.J.S.A. 58:1A-4 (directing DEP, not PC, to prepare/administer Emergency Water Supply Allocation Plan and related regulations for state of water emergency, which Plan is the basis for imposing water restrictions and which is to subject to obligations ignored by PC) for “fair compensation, reasonable rate relief and just and equitable terms, to be determined after notice and hearing”). The grant of these powers to DEP was intended to replace and strengthen a preexisting regulatory system for water

Activities.” Id. at 106. No appropriation to PC for water regulations provided for. Those concerned with proper administration of water resources should look to DEP, not PC.

resources that was “ineffective and counterproductive,” *i.e.*, that administered by the Water Policy and Supply Council before the WSMA. N.J.S.A. 58:1A-2. In this context, it is ridiculous for PC to claim its attempt to regulate diversions (based on comparatively paltry water provisions in the Pinelands Act) is not preempted. PC’s involvement complicates and interferes with the above-described regulatory scheme. In short, PC has no basis to supplant the WSM Act.

PC claims preemption applies to municipalities and “does not apply here to the authority of two sister agencies.” Rb44.⁵ However, the cases PC cites do not assert that preemption cannot apply to State agencies. In fact, Overlook Terrace Mgmt. Corp. v. Rent Control Bd., 71 N.J. 451, 461 (1976), indicates that preemption is “based on the proposition that . . . an *agent of the State*[] cannot act contrary to the State.” PC is a State *agency* and thus an agent of the State no less than a municipality is. Accordingly, PC cannot act contrary to the State’s WSM Act. In any case, the reasoning of United Water N.J., Inc. v. Boro. Of Hillsdale, 438 N.J. Super. 309, 319 (App. Div. 2014) applies as explained in Clayton’s initial brief. See also In re Water Sup. Critical Area No. 2, 233 N.J. Super. 280, 285-86 (App. Div. 1989).⁶

⁵ Notably, PC’s “sister” agency, *i.e.*, DEP, criticized the Rule as discussed herein and has not intervened or filed an amicus brief to support its “sister” in this litigation.

⁶ PC additionally cites federal law regarding federal preemption doctrine, Rb44, which obviously does not apply to a case not involving the federal government. See also Overlook, supra, 71 N.J. at 466 (“Resolution of preemption between the federal government and the state . . . calls into play different policy reasons and principles than when the preemption issue involves the state and its . . . agent.”)

PC also cites two cases supposedly showing PC and DEP “may each regulate the same subject matter.” Rb45. Neither supports PC’s arguments.⁷

Regarding the Rule’s 50,000 GPD diversion threshold (that conflicts with the WSM Act’s 100,000 GPD threshold), PC argues a diverter “can comply with the requirements in both the [WSM Act] and CMP.” Rb47. The possibility of compliance with both is not the issue. PC itself stated there are different types of preemption, not all of which entail “impossibility” of dual compliance. Rb44. The real issue

⁷ First, PC claims that In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 415 (2004), “interpreted N.J.S.A. 13:9B-6b to find that DEP and [PC] may concurrently regulate discharge of dredge or fill in wetlands in the Pinelands.” Rb46. However, that was not the question posed to the court. The court held DEP’s wetlands General Permit 23 (expansion of cranberry bogs in Pinelands) was permissible because N.J.S.A. 13:9B-6b included an exception. Id. at 428. Here, there is no exception that allows PC to regulate diversions. Also, N.J.S.A. 13:9B-6b stated PC “may provide for more stringent regulation of activities in and around freshwater wetland.” Id. at 428 (quoting N.J.S.A. 13:9B-6b). Here, there is no statute allowing PC to “provide for more stringent regulation” of diversions.

Next, PC cites In re Pinelands Comm’n Res., 356 N.J. Super. 363 (App. Div. 2003). There, environmentalists sued under the Environmental Rights Act (“ERA”), challenging a settlement involving developers, PC, and DEP, on grounds that the Endangered & Nongame Species Conservation Act (“ENSCA”) was not adequately enforced. Id. at 366-67. Per the trial court, PC “had concurrent jurisdiction to enforce ENSCA, and once it assumed jurisdiction over issues concerning endangered species, its jurisdiction became exclusive.” Id. at 371. “Thus, the [trial] court held that [the environmentalists] had no standing . . . to prosecute the alleged violation of ENSCA.” Id. at 371. On appeal, the court found “no conflict between the authority of DEP and the [PC] when regulating for the protection of threatened species,” id. at 377. However, this case is distinguishable. First, it does not concern diversions. Second, the Pinelands Act discusses T&E species in numerous places, see, e.g., N.J.S.A. 13:18A-2, -8, -9b, whereas it never mentions diversions. Third, in In re Pinelands, PC was not prohibiting what the Legislature permitted, whereas PC’s Rule contradicts the WSM Act. Fourth, ENSCA does not require “uniform” regulation by DEP as the WSM Act does. See N.J.S.A. 58:1A-2. Also, no one in In re Pinelands contended that PC’s regulation of species was preempted or *ultra vires*, and PC’s statutory authority for such was not examined. See id. at 376-77.

(among others at Pb30-31) is whether the Rule “forbid[s] what the Legislature has permitted,” United Water, *supra*, 438 N.J. Super. at 316,⁸ and the WSM Act clearly sets a threshold of 100,000 GPD, no lower. N.J.S.A. 58:1A-7a. It further requires a “uniform water diversion permit system” managed by DEP. N.J.S.A. 58:1A-2.

It is also misleading for PC to state (on Rb47) that it need not follow the procedures of the WSM Act regulatory scheme for limiting the amount of water that can be diverted (discussed at Pb37-39). Citing N.J.S.A. 58:1A-15.1, PC claims the Pinelands Act “provides authority to regulate the water resources of the Pinelands and the [WSM Act] recognizes the [PC’s] authority . . . , providing DEP’s actions . . . under the [WSM Act] shall not be inconsistent with” the Pinelands Act or CMP.

As explained above, the Pinelands Act does not grant blanket authority to “regulate water resources” in the Pinelands. PC’s repeating of that phrase merely shows PC wishes that language was in the statute. Moreover, N.J.S.A. 58:1A-15.1 states only that “[n]o action taken by [DEP] pursuant to [the WSM Act] shall be inconsistent with the provisions of” the Pinelands Act or CMP. This statement does not confer any authority on PC. It simply requires DEP to respect PC regulations promulgated in conformance with statutory authority. It obviously does not give PC

⁸ See also Overlook, *supra*, which concerned rent control and stated: “It is not sound to reason that, so long as the municipally fixed rent is lower than that prescribed by the [N.J. Housing Finance] Agency, no conflict exists.” 71 N.J. at 463. Nor is it sound to reason that so long as PC sets a GPD lower than DEP’s, no conflict exists.

carte blanche to regulate anything it wants (*e.g.*, diversions), and it obviously does not require DEP to adhere to PC regulations that are *ultra vires*.

As for the Rule’s ban on interbasin water transfers, PC states: “Clayton claims this is in conflict with the [WSM Act] because of N.J.S.A. 58:1A-7.1,” Rb48, which states “no person shall transport . . . more than 10 miles outside . . . the Pinelands . . . any ground or surface water therefrom.” PC omits a key detail. The Pinelands Act states only this about water transfers: “Nothing in this Act shall be construed to authorize or permit the exportation of any ground or surface water from the Pinelands.” N.J.S.A. 13:18A-25a. Thus, not only is PC powerless to regulate interbasin transfers, but PC is trying to prohibit what the Legislature permitted.⁹

⁹ As such, PC’s citations (at Rb48-49) to N.J.S.A. 13:18A-27 and N.J.S.A. 13:18A-10(c) are irrelevant. N.J.S.A. 13:18A-27 concerns conflicts or inconsistencies between the Pinelands Act/CMP and other statutes/rules, and N.J.S.A. 13:18A-10(c) asserts that no State approval for the “disturbance of any land within [the Pinelands] shall be granted, unless [it] conforms to [the CMP].” Here, there is no “conflict or inconsistency.” The Pinelands Act does not authorize PC to regulate, let alone ban, interbasin transfers. And N.J.S.A. 13:18A-27 and -10(c) do not give PC *carte blanche* to do whatever it wants. PC regulations that are *ultra vires* cannot not trump legitimate DEP regulations.

It is also inapposite for PC to cite Uncle v. N.J. Pinelands Comm’n, 275 N.J. Super. 82, 90 (App. Div. 1994), which according to PC held the “Municipal Land Use Law [(“MLUL”)] [was] superseded by the [Pinelands] Act.” Rb49. In that case, there was no question that the regulation in question was authorized by the Pinelands Act. In fact, unlike the Rule in Clayton’s case, the regulation in Uncle existed in the original 1980 CMP in substantially the same form. Id. at 86 n.2. Uncle is thus quite distinguishable from Clayton’s case. In Uncle, an owner of property previously used for sand mining claimed it was illegal for the CMP to require registration of a sand mine use by a certain deadline to continue such use. Id. at 84. The court disagreed primarily on substantive due process grounds, id. at 87-90, but secondarily (and very briefly) considered whether the owner’s use was protected as a preexisting nonconforming use under the MLUL’s N.J.S.A. 40:55D-68. Id. at 90. Although

POINT III
**THE CMP'S HISTORY UNDERMINES RATHER
THAN STRENGTHENS THE PC'S ARGUMENTS.**

Knowing the Pinelands Act does not mention diversions, PC paradoxically turns to its own CMP as if the CMP is self-authorizing. PC claims the “original [1980] CMP contained various provisions relating to water conservation.” Rb10. As a threshold matter, the original CMP is not determinative of whether the Rule is *ultra vires*; only the statute is. Regardless, conservation provisions are not the same as provisions regulating diversions, and the lack of diversion regulation in the original CMP demonstrates PC has engaged in (unauthorized) mission creep over the years.

The original CMP text is quoted on Rb12. Clearly, this “Water Management” provision does not regulate diversions. It merely limits interbasin water transfers, requires water-saving devices in new development, and prohibits exportation of water from the Pinelands. In other words, rather than demonstrating long-standing diversion regulation, the original CMP demonstrates an absence of diversion regulation. It also shows that in 1980, PC understood its “Water Management” power to mean something less than diversion regulation. Accordingly, subsequent

the court referenced N.J.S.A. 13:18A-27, there was no actual conflict between the MLUL and the Pinelands Act, and that reference was thus *dictum*. N.J.S.A. 40:55D-68 is specific to “ordinance[s]” that turn a previously conforming use into a nonconforming use. It does not mention statutes/regulations. Ibid. Ultimately, the court held merely that the “MLUL does not prevent [PC] from requiring that the registration include proof that plaintiff had obtained State and local permits for the extraction operation.” Id. at 90. It should also be noted that the regulation in Uncle required mere registration, whereas the PC Rule challenged by Clayton imposes heavy regulatory burdens.

expansion into diversion regulation amounts to unauthorized mission creep.

And mission creep ensued. Over a decade later, in 1994, PC adopted a CMP amendment that greatly (and without legislative authorization) expanded its “Water Management” power. Rb13. The new “Water Management” section suddenly declared that Aquifer “diversions of more than 100,000 [GPD] . . . may be permitted only” under certain conditions. Rb13 (quoting 46 N.J.R. at 4825). This expansion did not result from any new legislation, though the 100,000 GPD threshold was at least consistent with the WSM Act threshold administered by DEP.

But the mission creep extended further with the new Rule. By decreasing PC’s diversion threshold from 100,000 to 50,000 GPD, the Rule clashes with the express terms of the WSM Act and DEP’s rules in addition to exceeding PC’s authority.

PC also cites the introductory text of the original CMP as if it illustrates PC’s power to regulate diversions. PC first claims the “original CMP noted that monitoring withdrawals from the Aquifer is critical.” Rb10-11. But monitoring is not regulating. Moreover, the page cited by PC (15) does not mention monitoring. Perhaps PC is referring to page 14, which mentions “monitor[ing] [of] chloride concentrations.” That clearly concerns water quality, not quantity.

Next, PC quotes introductory text stating that “exportation of large quantities of water from the region would have a significant impact,” that “[n]ew facilities which export . . . waters from the Pinelands shall not be permitted,” and that “[a]ll

new development serviced by existing sewer treatment facilities . . . shall utilize water-saving technology such as low-flush water closets.” Rb11 (citing page 228 of said original CMP). Prohibiting exportation of water from the Pinelands and requiring use of water-saving technology is not the same as regulating diversions.

Adding further support to Clayton’s argument is the following:

It is ... recommended that the Division of Water Resources of [DEP] undertake a detailed study to determine current ground water withdrawals from the Pinelands’ major aquifers.

[Rb11 (quoting original CMP introductory text at 228).]

Thus, under the original CMP, PC did not believe it had authority to even *study* diversions, let alone *regulate* diversions. It saw diversions as DEP’s domain.¹⁰

POINT IV
NOTWITHSTANDING THE PC’S CONTRARY CLAIMS, THE RULE IS ARBITRARY.

PC first claims the Rule allows estimation as a methodology to determine a use is nonconsumptive. Rb34. But the Rule text clearly does not state that estimation is permissible. (PC used the word “estimate” in response to comments, not in the Rule.) Clayton alerted PC of that issue, and PC could have added a sentence to the

¹⁰ PC emphasizes that the CMP’s “Management Programs” Subchapter includes a “Water Management” section. Rb10. This reference might be more convincing if that section were not in a Part titled “Water Quality” (not quantity). Similarly, knowing the Pinelands Act authorizes regulation of development, not diversions, PC notes that the CMP’s “development” definition includes “commencement of resource extraction.” Rb4 (citing N.J.A.C. 7:50-2.11). Of course, it is the statute’s definitions that matter. While the Act does not define “development,” its definitions of “major development” and “application for development” show the CMP’s definition of “development” goes farther than the statute intended. N.J.S.A. 13:18A-3g. In any case, resource extraction is not the same as diversion.

Rule making clear that estimation suffices. Instead, without justification, PC refused. If this issue were as minor as PC claims, it would have made the change.

PC also fails to meaningfully address DEP's concern with improper use of LFM data. PC argues its Rule does not conflict with the State Water Supply Plan by limiting diversions to 20% of LFM even though the Plan recommends 25%. Rb36. PC assumes 20% is reasonable simply because it "is lower than [the percentage in] the State [] plan," to "afford greater protection to the Aquifer and in recognition that the CMP does not regulate all water uses in the Pinelands." Rb36-37.

PC ignores that the author of the Plan, *i.e.*, DEP's DWSG, disagrees. DWSG finds it improper that the Rule refers to LFM results even though those results include water uses/allocations that PC is not authorized to regulate. Pa31 (cmt. 5). In other words, DWSG recognizes and objects to what should be obvious: PC is overstepping its authority by accounting for water uses/allocations it knows it is not allowed to regulate. It is also no excuse that PC's lower LFM threshold is intended to protect the Aquifer. Rb36-37. Obviously, the State Water Supply Plan is trying to protect the Aquifer too. PC exceeded the Plan threshold to be more protective, without any evidence that that degree of protection is even helpful.

PC also fails to counter that it is arbitrary to base its evaluation of Regional Adverse Impact on the potential for 100% consumption of new diversions while using LFM methodology. The author of said methodology (DWSG) informed PC

said methodology was designed to evaluate net loss of water and as such considers the amount of water returned to the source. However, PC's Rule mistakenly assumes 100% of a diversion is lost. Pb59 (citing Pa32). Accordingly, DWSG stated the Rule "should be clarified so that the LFM refers to the net loss of the diversion." Ibid.

Instead of explaining why DWSG is wrong, PC effectively responds that it will employ LFM methodology however it wants. Rb37. The only justification it gives is that PC can do so because its "evaluation is not for the purpose of issuing a water use permit, but rather to assess the potential impact of a proposed diversion." Ibid. Clearly, ignoring diverters' return of water to the source cannot accurately "assess the potential impact of a proposed diversion." PC also fails to explain what difference it makes that PC's evaluation is not for purposes of issuing water permits.

Regarding Pinelands Management Areas ("PMAs"), it is irrelevant that some PMAs are more sensitive than others. See Rb39-40. Assuming the diversion amount is equal, a diversion that returns 89% of the water to the Aquifer is indisputably less impactful than a diversion that returns 0%. Nevertheless, PC's Rule would prohibit the former in a "sensitive" PMA and allow the latter in a non-sensitive PMA—even though both come from the same Aquifer. See Pb66 (citing DWSG at Pa32).

Next, PC's argument to justify its draw-down restrictions is that its models showed that adverse impacts on some species "increased when drawdown reached the four-inch mark." Rb41. Yet the Rule set a standard of 0" drawdown in certain

areas. Ibid. Therefore, by PC's own admission, 0" greatly exceeds what is necessary.

Inexplicably, PC also emphasizes (Rb41) DEP's recommendation that PC create a Pinelands-specific guidance "so that aquifer tests are more likely to produce appropriate results." Pa31. This cuts against PC; PC chose not to create such Pinelands-specific guidance. It used the TM12-2 that DEP warned could result in inaccuracies. PC did so based on a USGS consultation (Rb41-42) not in the record.

Finally, a perfunctory Economic Impact Statement does not make up for the lack of economic considerations in the Rule. The Rule is based entirely on studies of ecological impacts even though L. 2001, c. 165 and the Pinelands Act required consideration of economic conditions. Pb67-70. There is nothing in the record showing anything more than superficial economic considerations, and there would be even less if Clayton had not raised the issue of impacts on mines.

POINT V
THE PC DOES NOT DENY IT VIOLATED
PROCEDURAL REQUIREMENTS.

Concerning the requirement that "[PC] shall conduct the hearing" at which the public can provide oral comments, N.J.A.C. 7:50-7.4, PC does not deny that the Commission itself (not staff) must conduct the hearing, or that the Commission itself failed to do so. See Rb50-52. As for DOI approval, PC does not that deny federal law requires it to "obtain the approval of the Secretary prior to[] modification of the [CMP]," 16 U.S.C. 471i(g)(6), or that it failed to do so. Last, PC does not deny its staff withheld some of Clayton's letters from the PC members. Pb74-75.

CONCLUSION

For all of the reasons discussed above, the Rule must be declared invalid.

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BY:

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