

IN THE SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION

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FRIENDS OF LIBERTY STATE PARK, INC.,	:	<b>DOCKET NO: A-003444-06T1</b>
	:	
	:	<b>CIVIL ACTION</b>
Appellant	:	
	:	<b>ON APPEAL FROM:</b>
v.	:	NEW JERSEY DEPARTMENT OF
	:	ENVIRONMENTAL PROTECTION
LISA JACKSON, Commissioner, New Jersey	:	AUTHORIZATION UNDER COASTAL
Department of Environmental Protection; and	:	GENERAL PERMIT NO. 17 (LURP FILE
JON S. CORZINE, Governor, State of New	:	No.: 0906-04-0003.2) AND SUBSEQUENT
Jersey,	:	REVIEW BY STATE OFFICIALS
	:	
Respondents.	:	

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BRIEF OF APPELLANT FRIENDS OF LIBERTY STATE PARK, INC.  
IN SUPPORT OF APPEAL OF THE STATE OF NEW JERSEY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION'S DECISION TO AUTHORIZE CONSTRUCTION OF  
THE NEW JERSEY STATE SEPTEMBER 11<sup>TH</sup> MEMORIAL AND  
SUBSEQUENT REVIEW BY STATE OFFICIALS

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## PRELIMINARY STATEMENT

In 2002, when Governor McGreevey selected a site for the State of New Jersey's September 11<sup>th</sup> Memorial, he chose a site on the Hudson River entirely within the heavily regulated Coastal Zone. Even for the Coastal Zone this site is unique: it is bordered by two historic landmarks, the Morris Canal Basin and the Central Railroad of New Jersey Terminal. Most importantly, the site enjoyed dramatic and uninterrupted views of the lower Manhattan skyline, Ellis Island, the Statue of Liberty and New York Harbor.

Precisely because this appeal involves such an emotionally-charged subject, one may be tempted to ask why anyone would want to oppose the September 11<sup>th</sup> Memorial. Such a question shifts the focus away from the proper subject of the appeal: how the Department of Environmental Protection ("DEP") authorized a large-scale waterfront development project under a coastal general permit designed for the construction of small-scale recreational facilities in public parks. The project was indisputably ineligible for the coastal general permit because the project did not meet the permit criteria.

Appellant's challenge to the coastal general permit authorization is mainly procedural. The challenged agency action was essentially quasi-legislative, which is the both the reason this appeal is timely and the reason that the permit authorization was arbitrary and capricious. The timeliness and the merits of the appeal are reverse sides of the same coin.

Respondent DEP eliminated the possibility of a public hearing and public newspaper notice through a clever, but illegal, choice of permit. There are no hearings on coastal general permits. After excluding the public, the DEP steadfastly ignored mounting public opposition and repeated requests for hearings from appellant, the public and many elected officials.

Respondent DEP's refusal to listen to the public had one important, and perhaps

unintended, consequence. Because the DEP did not conduct public hearings, it did not seriously consider the negative impacts of the project during design, planning and permitting phases of the project. By failing to consider the public, the DEP failed to consider the negative impacts.

The real question is how a massive project could ever have been approved under a coastal general permit without public hearings and without the requisite State Historic Preservation Office approval. The fact that the proposed development was the September 11<sup>th</sup> Memorial supplies the answer to this question.

### **PROCEDURAL HISTORY**

The State of New Jersey approved construction of the September 11<sup>th</sup> Memorial through a combination of actions that included a DEP Land Use Regulation Program Coastal General Permit Authorization on May 6, 2005; a State Historic Preservation Office informal approval given at the time of the permit authorization in May 2005 and confirmed in August 2006; a decision by DEP Commissioner Lisa Jackson rejecting appellant's request for a public meeting and refusing to reconsider the memorial design or location in July 2006; and, finally, a review by Governor Corzine, after which he decided to allow construction of the Memorial to go forward. The Governor's decision was communicated to appellant by letter dated October 1, 2006. This combination of State actions is discussed more fully below.

In December of 2003, the State of New Jersey released a request for proposal ("RFP") for the New Jersey September 11, 2001 Memorial Design Competition. (Appellant's Appendix ("AA") 1a, 11a.) In its RFP, the State noted that it had designated 1.6 acres of the northeast end of Liberty State Park for the Memorial. (AA4a.) The RFP stated "this small piece of land offers spectacular views of Manhattan and provides open space for interpretation, recreation and relaxation." (AA5a.) The RFP also stated that the proposed Memorial site is "situated directly

along the Hudson River on its North and East boundaries with some of the most dramatic views of New York City and the former World Trade Center site anywhere along the Hudson.” (AA8a.) Photos and a graphic showing the location, views and orientation of the site were included in the RFP. (AA1a, 12a, 13a.)

In response to the request for proposal, 320 proposals were received. (AA33a, 73a.) On May 4 and May 5, an eight-member jury, also referred to as the Professional Advisory Committee, reviewed the 320 qualifying proposals and selected six finalists. (AA30a-36a.) Representatives of the Family and Survivor Memorial Committee interviewed the six finalists over two days, June 21 and June 22, 2004. (AA33a, 36a.) Soon after the Family and Survivor Memorial Committee picked their favorite design, on June 30, 2004 Governor McGreevey publicly announced that a winning design had been selected. (AA25a-26a, 73a.) On September 10, 2004, there was a site dedication ceremony at which Governor McGreevey, joined by victims’ families and survivors, broke ground at the Memorial site. (AA36a.) The announcement of the winning design and the site dedication ceremony preceded any environmental assessment and the issuance of any waterfront development permits.

The application for a Coastal General Permit for the “Construction of Recreational Facilities at a Public Park” (N.J.A.C. 7:7-7.17) dated February 4, 2005 was submitted to the DEP Land Use Regulation Program (“LURP”) by Langan Engineering and Environmental Services, Inc. (“Langan”) as agent for the State of New Jersey, Division of Parks and Forestry. (AA54A-137a.) A notice of this application was posted in the March 23, 2005 DEP Bulletin. (AA140a-144a.) However, the application was mistakenly denominated a CAFRA permit application and included in the wrong section of the bulletin. (AA140a-144a.)

Two months later, Langan submitted a revised plan for the Memorial project to LURP.

(AA48a.) On May 6, 2005, LURP determined that the construction of the September 11<sup>th</sup> Memorial is authorized by the Coastal General Permit for the Construction of Recreational Facilities at a Public Park (“Coastal General Permit No. 17”). (AA42a-46a.) Aside from the defective CAFRA listing in the DEP Bulletin, there was no other public notice.

According to the notice published DEP Bulletin, the EA was filed on December 20, 2004 and had been conditionally approved. (AA317a-319a.) A note in the State Historic Preservation Office (SHPO) file attached to the December 21 Koschek letter states “Note – HPO received no EA – DS 12/22/04” indicating that the EA was never reviewed by SHPO prior to its approval. (AA167a.) It appears that at least two different EAs were prepared for the project, one prior to a pre-application permit coordination meeting held at the DEP Office of Permit Coordination and Environmental Review and another after the meeting.<sup>1</sup> A comparison of the two EAs shows that after the pre-application permit coordination meeting, the licenses and permits deemed necessary had changed. (AA145a-153a; AA322a-325a.) The earlier EA specifically notes that Historic Preservation Office Approval would be required “as the work is within 1/4 mile of a historic structure” and that an individual Waterfront Development Permit would also be required. (AA148a.) After the pre-application meeting, the DEP decided to dispense with the State Historic Preservation Office Approval and the individual Waterfront Development Permit. (AA157a.) The revised post-meeting EA states:

Historic Preservation Office Review – A review and approval by DEP’s Historic Preservation Office (HPO) is required for work is [sic] within ¼ mile of a historic

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<sup>1</sup> Two undated EAs contained in appellant’s appendices were initially obtained through the office of Assemblyman Louis M. Manzo as shown on the fax cover sheets forwarding each EA to counsel for appellants. (AA145a-153a at AA152a, AA154a-158a at 158a.) Assemblyman Manzo obtained these EAs from the New Jersey State Legislature’s Office of Legislative Services, as indicated by the fax transmittal attached to one of the EAs. (AA153a.) Despite appellant’s June 29, 2007 motion to settle the record to the DEP and subsequent correspondence requesting the EA and related documents, the DEP furnished the post-permit coordination meeting EA only recently. (AA320a-328a.) It appears from the cover letter forwarding the EA that the DEP has not furnished staff comments on EA. (AA320a) In addition, related documents may have been withheld, such as minutes of the pre-application permit coordination meeting, internal memoranda and communications.

structure. Based on a pre-application meeting with the NJDEP, the HPO review will be done as part of the Waterfront Development Permit review. A formal HPO approval will not be required.

(AA325a.) (emphasis added.) With respect to the Waterfront Development Permit, the EA specifically states:

A Waterfront Development Permit required if any work proposed below Mean High Water or for construction activities in the upland waterfront development zone which extend a maximum of 500 feet from the Mean High Water line. The WFD Permit is issued by the NJDEP's Land Use Regulation Program. Based on a pre-application meeting with the NJDEP and follow-up discussions, the project will qualify for a coastal general permit (NJAC 7:7-7-17), which allows construction of recreational facilities at public parks.

(AA325a.) (emphasis added.)

The decision to dispense with the individual Waterfront Development Permit, made at the permit coordination meeting, is confirmed in a December 21, 2004 letter from Kenneth C. Koschek, Supervising Environmental Specialist, Office of Permit Coordination and Environmental Review. Koschek writes that based upon discussion at the pre-application meeting, the Office of Permit Coordination and Environmental Review "determined that a Coastal General Permit will be required for the project from the NJDEP's Land Use Regulation Program instead of an individual Waterfront Development Permit." (AA92a-93a.) (emphasis added.)

The pre-application permit coordination meeting was well-attended. The sign-in sheet shows that representatives from various DEP offices, the Treasury Department's Division of Property Management and Construction, Frederic Schwartz Architects, and Langan Engineering and Environmental Services (the outside consulting firm preparing the permit application) were in attendance. (AA37a.)

The Land Use Regulation Program's permit application file contains a scanty record of the State's consultation with the State Historic Preservation Office ("SHPO") pursuant to

Executive Order 215. On May 5, 2005, the day prior to the coastal general permit authorization, it appears there was a problem getting SHPO approval as documented in e-mail correspondence between the Office of Permit Coordination and Review and SHPO. (AA51a.) Ruth Foster of the Office of Permit Coordination and Review wrote the following to Dan Saunders of SHPO:

I received a call from Chris Hager of Langan Engineering indicating that there is a problem getting final SHPO approval to go ahead with construction on the 9/11 memorial proposed for Liberty State Park.

Dan – based on our 12/1/04 pre-app with Chris Hager from Langen [sic] Engineering ... it looked like there wasn't going to be much to do regarding meeting SHPO requirements prior to construction commencement for this project. They have all their permits except SHPO go ahead and are ready to start bringing in fill material for the mound on which the memorial walls will be built. They are already 2 months behind but still expect to be finished in time for a memorial service on 9/11/05.

This project is highest priority and if there is a problem with processing the general approval we should sit down with gary [sic] Sondermeyer right away and sort it out. Let know me what the status of the approval is and if there is anything I can do. Please also give Chris Hager [of Langan] a call and email. They need to be out there next week.

(AA51a.)

Saunders replied as follows:

Go ahead and issue the permit. We will send a memo stating our reservations.... [t]here is going to be a real conflict between users of the park, including those approaching the CRRNJ Terminal to take the ferry to Ellis/Liberty Islands, all of whom tend to be boisterous, and visitors hoping for an appropriately reverent memorial experience.

(AA51a.)

An undated, handwritten note to the permit file confirms the problem obtaining SHPO authorization, stating “SHPO – May have an impact on historic resources.” (AA53a.) Immediately below that appears another handwritten note dated May 5, 2006, presumably written after the first, reading “email from Dan Saunders from SHPO says o.k. to issue permit.” (AA53a.)

The LURP permit and the SHPO files do not contain the memorandum stating SHPO's reservations as promised by Saunders.

In addition, there is little record of SHPO's review of the project under its own regulations, the New Jersey Register of Historic Places Rules, N.J.A.C. 7:4-7.1, et seq. The materials Langan submitted to SHPO do not contain any list of local historical societies and historic preservation commissions. Nor was there any list of affected governmental units concerned with historic preservation or statewide or local historic preservation organizations. The SHPO file contains nothing notifying the applicant in writing that its application was deemed complete. (AA159a-188a.) There is nothing in writing notifying the applicant of SHPO's May 5, 2005 decision to "o.k." the coastal general permit authorization. In fact, the SHPO file contained no notices of any kind.

On July 13, 2006, more than a year after the Coastal General Permit authorization, Langan wrote to SHPO requesting a "written concurrence that you have reviewed the proposed September 11<sup>th</sup> Memorial project and that no further approval is required from your office with respect to Cultural Resource Matters." (AA163a-164a.) On August 17, 2006, the head of SHPO, Dorothy Guzzo, responded by dryly stating that the EA and the issuance of the Coastal General Permit, "evidences that the project is consistent with the applicable laws and regulations concerning Historic Properties and Cultural Resources." (AA189a.)

In April of 2006, when the public began to react negatively to the surcharge mound amassed in preparation for construction of the Memorial, appellant began to communicate with the DEP about the overwhelming negative public reaction to the Memorial design. (AA190a-191a.) Appellant first addressed the issue at a meeting of the Liberty State Park Public Advisory Committee on April 10, 2006, noting that there had been no public meeting (AA190a-191a.)

Throughout the following months, appellant made repeated requests for a public meeting by contacting DEP Commissioner Lisa Jackson, DEP Director of the Division of Parks and Forestry, Jose Fernandez and other DEP officials. (AA192a-194a.)

In response to appellant's repeated requests, DEP Commissioner Jackson wrote to Sam Pesin, President of Friends of Liberty State Park, "[a]gain, I must make clear to you ... that I cannot and will not agree to schedule public meetings at this time." (AA192a.) Commissioner Jackson suggested instead a meeting with representatives of the Families and Survivors Memorial Committee. (AA192a.) That meeting was held June 13, 2006. (AA195a.)

Over the next month, Pesin contacted Commissioner Jackson at least twice to reiterate appellant's request for a public meeting, emphasizing "the public's right to give public input on a public memorial in a public park" and the fact that "the negative impact of this design makes a public meeting necessary." (AA196a-199a.) Pesin also noted that a public hearing on the "adverse impact on the historic landmark CRRNJ Terminal was required." (AA196a-197a.) On July 27, 2006, Commissioner Jackson informed Pesin of her decision to "support the completion of the Memorial as presently designed." (AA201a-203a.)

The public and elected officials also began expressing concern about the Memorial's design, siting and the lack of a public hearing. The Mayor of Jersey City, Jerramiah T. Healy, wrote to inform Governor Corzine that the people of Jersey City had "barraged" his office with calls opposing the Memorial's location and design. (AA204a-205a.) The Mayor also requested a public hearing to give the people of Jersey City "an opportunity to weigh in on this issue." (AA204a-205a.) This concern over the lack of input was expressed to the State by the Jersey City Planning Board, the Mayor of Bayonne and State Senator, Joseph V. Doria, and Assemblyman Louis M. Manzo. (AA206a, AA207a, AA208a.) The Hudson County Board of Freeholders

adopted a resolution in support of a public meeting on the Memorial design, which was sent directly to Governor Corzine by letter dated August 10, 2006. (AA209a-210a.) Assemblyman Louis Manzo sponsored a bill in the State Assembly to require the DEP to hold a public hearing on any major development in a State park or forest. (AA216a-220a.) State Senator Joseph Doria sponsored the same bill in the State Senate. (AA211a-215a.) In response to an OPRA request made by Pesin, the State produced no evidence that any public meeting was ever held after the winning design was selected. (AA27a-36a.)

Having been deprived of a public hearing by DEP, the general public, shocked and outraged by the blocked views, wrote directly to the Governor throughout July, August and September of 2006 to protest the Memorial's negative impact on Liberty State Park and to express their extreme dissatisfaction with the State's failure to hold a public meeting. A small sample of these communications has been included in the appendices. (AA225a-247a.) These communications are consistent in voicing strong objections to the blocked views. (AA228a; AA231a.) The letters, e-mails and postcards describe the blocked view as a "sacred and powerful view of the downtown NYC skyline and of the river" and mention the obscured views of the former World Trade Center site and the historic landmark CRRNJ Terminal (AA230a; AA233a-234a.) Other park users noted that the Terminal Public Plaza was the "perfect spot" to appreciate the view and that the plaza is the "wrong place" for the Memorial. (AA230a; AA233a-234a.) Some writers noted the loss of open space (AA238a; AA239a.) Many park users also signed petitions objecting to the Memorial. (AA248a.) Appellant estimates that Governor Corzine and DEP Commissioner Lisa Jackson have received a total of 2,500 letters, e-mails, postcards and petition signatures complaining about the Memorial's negative impact and the lack of a public meeting.

After the State rejected repeated requests for a public meeting from appellant and many others, appellant organized its own meeting in Liberty State Park on August 16, 2006. (AA249a.) The meeting was attended by hundreds of people including governmental officials and park users from Hudson County and other areas. Speakers at the meeting expressed their strong opposition to the Memorial design and the lack of a public process. (AA250a-251a.) This meeting was widely covered in the press and news media. (AA250a-251a.) State legislators have continued to write Governor Corzine to express their opposition to the Memorial up until the present time. (AA310a, AA337a-338a.)

Appellant's requests, the public reaction and communications from elected officials urging a public meeting fell on deaf ears. In fall of 2006, the DEP position on the matter remained unchanged. Governor Corzine wrote to appellant, noting his decision to allow construction of the Memorial to proceed. (AA253a.) Governor Corzine cited his desire to "grant closure" to the survivors and families of victims as his main reason for supporting the Memorial. (AA253a.)

On March 5, 2007, Appellant's Notice of Appeal and Civil Case Information Statement ("CIS") with attachments were filed with the Appellate Divisions and served upon respondent DEP and upon the Attorney General for respondent DEP. A separate copy of the Notice of Appeal and CIS were also served upon the Attorney General for respondent Governor Jon C. Corzine. A CIS was filed on behalf of respondent DEP on March 27, 2007. Respondent Governor Jon C. Corzine has not, to date, filed any CIS. On May 18, 2007, respondent DEP filed a Statement of Items Comprising the Record with a list of eight items, which appeared to be from the LURP permit file only. On June 29, 2007, appellant filed a motion to settle the record to the DEP, specifically seeking records from SHPO and the Office Of Permit Coordination and

Review, records concerning the Executive Order 215 Review and any Environmental Assessment, and public notices and public comments. The DEP did not decide the motion and instead referred appellant to the DAG assigned to the case. On March 20, 2008, respondent DEP filed an Amended Statement of Items Comprising the Record with a total of one hundred and seventy-four items from various offices in the DEP, the Department of Treasury, the Governor's office and the Arts Council. Appellant was scheduled to file its brief and appendices on May 5, 2008, which schedule was tolled by the service of respondents' motion to dismiss on April 17, 2008. By order dated May 14, 2008 and filed May 19, 2008, respondents' motion to dismiss was denied without prejudice.

#### **STATEMENT OF FACTS**

Appellant Friends of Liberty State Park, Inc. is a New Jersey nonprofit corporation incorporated in 1988 for the purpose of preserving, protecting, conserving and promoting Liberty State Park in Jersey City, New Jersey. (AA254a, AA255a-256a.) The Friends is also an Officially Recognized Friends Organization of the DEP Division of Parks and Forestry. (AA257a-267a, 311a-316a.) Appellant is also a member of the Liberty State Park Public Advisory Committee, established in 2003 by DEP policy directive. The Committee was "constituted to ensure adequate representation by Jersey City residents as well as other constituencies." (AA268a-269a.)

Liberty State Park, an urban state park, is located along the Hudson River and the Upper New York Bay in Jersey City, New Jersey, in the heart of one of the most densely populated areas of the nation. (AA270a, AA255a-256a.) The park provides visitors with uninterrupted and dramatic views of the Manhattan skyline, the Statue of Liberty, Ellis Island, the Hudson River and New York Harbor. (AA270a-271a, AA255a-256a.) Its mission "is to provide the public with access to the harbor's resources, a sense of its history and the charge of responsibility for its

continued improvement.” (AA5a.) The historic landmark Central Railroad of New Jersey (CRRNJ) Terminal sits prominently at the northeastern end of the park and is the “cornerstone” or “signature building” of the park. (AA5a, AA281a) Listed to the State and National Registers of Historic Places, the CRRNJ Terminal stands together with the Statue of Liberty and Ellis Island as an historic trilogy illustrating a chapter in our nation’s immigration history. (AA274a, AA5a.) The CRRNJ Terminal now serves as the gateway for park visitors who purchase tickets there and board ferries to Ellis Island and the Statue of Liberty. (AA270a.)

The Memorial site at the northeast end of Liberty State is adjacent to the CRRNJ Terminal and was formerly known as the “Terminal Public Plaza.” (AA4a, 74a-75a, AA84a-85a.) The Terminal Public Plaza had spectacular views of the lower Manhattan skyline because it is the closest place in Liberty State Park to lower Manhattan. (AA8a, 85a.) The site is bordered by the Hudson River to the east and the CRRNJ Terminal to the south, a parking lot and the “North Field” lawn to the west and the Morris Canal Basin to the north. (AA74a.)

The Liberty State Park Master Plan envisioned Terminal plazas to the north and south of the landmark CRRNJ Terminal as “beautifully landscaped plazas, harborboat landings, and scenic overlooks.” (AA289a.) The Master Plan also envisioned the plazas as “stage settings for festivals of many kinds: ethnic celebrations, national commemorations, local and regional fetes.” (AA289a.) As noted in the Master Plan, from the CRRNJ Terminal and the Terminal Plaza, “lower Manhattan pinned by the twin towers of the World Trade Center punctuate the skyline with an astonishing sense of proximity.” (AA297a.) Until the beginning of 2006, the Terminal Public Plaza still offered a view of the Manhattan skyline with the same astonishing sense of proximity. (AA339a-341a.)

According to the permit application, the winning design, entitled “Empty Sky,” consists of

two enormous stainless steel walls cutting a channel through a sloping mound of earth that rises to a height of 10 feet. (AA73a-74a.) The walls, made from marine-grade brushed stainless steel, will be 30-feet high and 200-feet long. (AA74a.) The walls will be supported by two continuous retaining walls anchored by underground concrete piles. (AA74a.) The walls create what has been referred to as a “visual corridor” directing the sight line to Ground Zero. (AA74a.) As stated in the Coastal General Permit Application “[t]he memorial will invite visitors to literally and metaphorically look to the empty sky ....” (AA74a.) The walls will block views of Manhattan to the north and south of Ground Zero, causing visitors inside the walls to focus only upon the “Empty Sky” above Ground Zero. (AA74a.) Outside the walls, the sloping mound of earth alters the formerly flat topography of the site, which was on grade with the CRRNJ Terminal and surrounding areas. (AA74a, AA87a.) The “Empty Sky” site will be surrounded by groves of dogwood trees that will grow to a height of 25 to 30 feet. (AA75a.) Metal halide lights atop the walls will send vertical light beams into the sky. (AA75a.)

Construction of the Memorial as currently designed may prove be an engineering challenge. According to the recommendations of an April 5, 2005 geotechnical engineering study submitted to the DEP, the monument walls and walkway should be supported by “concrete-filled steel pipe piles ... driven to bedrock.” (AA305a.) At the site, bedrock is approximately sixty feet below the surface. (AA307a.)

In early 2006, the formerly flat Terminal Public Plaza was replaced with a mound of earth. (AA339a-340a.) The purpose of the surcharge mound is to compact the earth below and to prevent settlement after construction of the “Empty Sky” project. (AA304a.) The 10-foot hill now obstructs the treasured views of the signature skyline and the Hudson River. Views of the landmark CRRNJ Terminal, the “cornerstone” of the park, are now blocked by the mound from

points north along the Hudson River Walkway, from the northernmost section of the park across the Morris Canal Basin called “Peninsula Park” and from Jersey City’s Paulus Hook National Historic District, which also lies to the north.

After the surcharging was completed, construction was halted because the bids for the project far exceeded the estimated cost for the project (AA308a-309a; AA335a). It appears that the State may be planning to change the design by eliminating the stainless steel panels and replacing them with ivy-covered concrete, the structural tolerances of which have been relaxed. (AA336a.) It appears that no new permit has been sought or approved for the altered project.

## LEGAL ARGUMENT

### **I. The Coastal General Permit Authorization Was A Quasi-Legislative Action, Not Subject To The 45-Day Bar.**

“However an agency may denominate its action, if it is an action required to be taken by rule promulgation pursuant to the Administrative Procedure Act, that action will be deemed quasi-legislative in nature not subject to the 45-day limitation set forth in New Jersey Court Rule 2:4-1(b).” See Pressler, Current NJ Court Rules, Comment R. 2:4-1(b) (Gann 2008). See also, Northwest Cov. Med. Ctr. v. Fishman, 167 N.J. 123, 135-136 (2001); McKenna v. N.J. Highway Authority, 19 N.J. 270, 276 (1955); Toll Bros. v. Dept. of Envir. Pro., 242 N.J. Super. 519 (App. Div. 1990).

There are two frames of reference helpful in evaluating whether rule-making procedures were necessary to approve the Memorial under a coastal general permit, the Coastal Permit Program Rules, N.J.A.C. 7:7 et. seq., and Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313 (1984), which provides a test of when rule-making procedures are necessary to validate agency actions and procedures. Under both the Coastal Permit Program Rules and Metromedia, the challenged DEP action was tantamount to a rule-making and therefore quasi-legislative.

Because the DEP's authorization under Coastal General Permit No. 17 was essentially a quasi-legislative action, this request for appellate review is timely.

**A. Under The Plain Language Of The Coastal Permit Program Rules, Respondent DEP Did Not Have The Authority To Approve The Project Under A Coastal General Permit For Construction Of Recreational Facilities.**

Under the Coastal Permit Program Rules, the Memorial project was clearly and indisputably ineligible for Coastal General Permit No. 17, which is a "coastal general permit for the construction of recreational facilities at public parks." N.J.A.C. 7:7-7.17. Each coastal general permit authorizes only the types of development specifically described in the coastal general permit. N.J.A.C. 7:7-7.1(d). The narrowly-drawn language of each coastal general permit ensures that the regulated development will cause only minimal adverse environmental impacts, individually and cumulatively. N.J.A.C. 7:7-7.1(d). Here, the Memorial project did not fit within the description of recreational facilities listed under Coastal General Permit No. 17.

Under the Coastal Permit Program Rules, there are twenty-five varieties of coastal general permits, each containing a specific description of the type of development authorized by the general permit including the size and type of development that may be undertaken and a precise description of the geographic area to which the coastal general permit applies. N.J.A.C. 7:7-7.5-7.29; N.J.A.C. 7:7-7.1(d) and (e). Coastal General Permit No. 17 authorizes the construction of only certain types of recreational facilities, limited to the following:

1. Construction of the following facilities provided they are not located on a dune or in a wetland, except as noted at (a)3 below:

- i. Playground equipment including, but not limited to, swings, slides, and jungle gyms;
- ii. Picnic tables, benches and grills which are not seasonal;
- iii. Gazebos, rain shelters and sheds provided they do not exceed a

footprint of 200 square feet;

iv. Pathways, bicycle paths and jogging and nature trails and associated fitness equipment provided they are not located on a beach; and

v. Fences which do not require permanent footings.

2. Construction of restroom facilities not located on a beach, dune or in a wetland [....]

3. Trail or boardwalk construction in wetlands [....]

N.J.A.C. 7:7-7.17. This specific description of regulated facilities is not subject to a flexible interpretation as discussed in Point IV., infra.

The application submitted by Langan merely states that the Empty Sky Memorial “most closely matches” the description of “pathways, bicycle paths and jogging and nature trails and associated fitness equipment provided they are not located on a beach.” (AA78a.) This careful phrasing belies the simple fact that the Empty Sky Memorial design does not come close to matching any of the recreational facilities authorized by Coastal General Permit No. 17. The Empty Sky design cannot by any stretch of the imagination be regarded as a pathway, a bicycle path, a jogging or a nature trail.

Under the Coastal Permit Program Rules, when all aspects of a project do not qualify for a coastal general permit, a coastal general permit cannot be issued. N.J.A.C. 7:7-7.3. The 200-foot-long steel walls supported by two continuous retaining walls anchored by underground concrete piles are one aspect of the project which cannot qualify under Coastal General Permit No. 17. (AA76a.) In fact, according to the recommendations of an April 5, 2005 geotechnical engineering study submitted to the DEP, the monument walls and walkway should be supported by “concrete-filled steel pipe piles ... driven to bedrock.” (AA305a.) At the site, bedrock is approximately sixty feet below the surface, beneath twenty to thirty feet of fill material, thirty-one to thirty-nine

feet of silty clay and four to five feet of decomposed rock. (AA307a.) A coastal general permit that does not allow fences with permanent footings should not have been used to approve construction of a project requiring pilings driven to a depth of sixty feet. Because the walls with its footings do not qualify for Coastal General Permit No. 17, the entire project cannot qualify. N.J.A.C. 7:7-7.3.

The sheer size of the Empty Sky Memorial design also makes it ineligible for Coastal General Permit No. 17. The only structures that can be authorized under the permit are “[g]azebos, rain shelters and sheds provided they do not exceed a footprint of 200 square feet.” Here, the entire Memorial site is 1.6 acres, which makes the footprint 69,696 square feet. This exceeds the permissible square footage by a factor of three hundred and fifty. After the initial submission, an additional scope was added, which is shown as 16,000 square feet in a drawing signed by the architect himself. (AA165a.) The walls and pathway alone will occupy 3,200 square feet,<sup>2</sup> which exceeds the limit by a factor of sixteen. By either measure, it is inconceivable that any project of this size and magnitude could be approved under Coastal General Permit No. 17.

In addition, the permit does not explicitly authorize a 10-foot hill that changes the topography of the coastal zone, groves of trees or metal halide lights. Each of those aspects of the Empty Sky project are sufficient to make the project ineligible for Coastal General Permit No. 17. A plain reading of the Coastal Permit Program Rules shows that the DEP did not have the authority to approve this project under Coastal General Permit No. 17.

**B. The Coastal Permit Program Rules Require New Coastal General Permits Be Issued Through A Rule-Making.**

As the Memorial project was not properly authorized under Coastal General Permit No.

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<sup>2</sup> This is roughly calculated as the length of the walls, 200 feet, multiplied by the width of the pathway, 16 feet, which equals 3200 square feet.

17, a coastal general permit authorization for this project could only have been legitimately issued by adopting a new type of coastal general permit. This requires proposing a draft coastal general permit for public comment in the form of a rule proposal. N.J.A.C. 7:7-7.1 (referencing the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.) Had the DEP followed its own procedures for adopting a new type of coastal general permit, the DEP would have proposed a draft coastal general permit for public comment, made a determination that such development will cause only minimal separate and cumulative adverse impacts on the environment, and made a determination that such development “is in keeping with the legislative intent to protect and preserve the coastal area from inappropriate development.” N.J.A.C. 7:7-7.1(c). Further, the DEP would have had to provide “public notice and an opportunity for hearing with respect to the proposed coastal general permit.” N.J.A.C. 7:7-7.1(c)3. In attempting to push this project forward, the DEP forced the project into a coastal general permit category never intended for a large-scale waterfront development project like Empty Sky.

The procedure set forth in the Coastal Permit Program Rules shows that the action taken by the DEP required a rule-making. Therefore, the challenged agency action was quasi-legislative, making appellant’s request for appellate review is timely.

**C. Under The Metro-Media Factors, Coastal General Permit No. 17 Authorization Was A Quasi-Legislative Action, Which Means This Appeal Is Timely.**

An application of the standard set forth in Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313 (1984), also demonstrates that the DEP action was quasi-legislative, such that R.2:4-1(b) forty-five day limitation should not apply. In Metromedia, the New Jersey Supreme Court synthesized the “relevant features of administrative rules” useful in determining when “an agency determination must be considered an administrative rule.” Id. at 329. The Metromedia factors are

relevant whenever questioning the authority of an agency to act without conforming to the formal rulemaking requirements. Doe v. Poritz, 142 N.J. 1 (1995) (citing Woodland Private Study Group, 109 N.J. at 67, 533 A.2d 387). An action requires a rule-making:

if it appears that the agency determination, in many or most of the following circumstances, (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

Metromedia, 97 N.J. at 331-332.

First, the DEP permit authorization will affect the general public, as it approved the construction of a large-scale coastal development project in a public park visited by approximately 5 million members of the public each year and resulted in the elimination of the Terminal Public Plaza. The second factor is inapplicable, because this is “a highly particularized decision, constituting, in effect, an individualized rule-making.” Metromedia, 97 N.J. at 332 (citing Bergen County Pines Hosp. 96 N.J. 456, 476 and Boller Beverages, Inc., 38 N.J. 138, 151-152). Third, the DEP authorization will have a prospective effect upon all future park users. At the time the decision was made, the DEP actions, as applied to this project, were prospective. See George Harms Const. v. Turnpike Auth., 137 N.J. 8 (1994) (finding, even though the challenged action applies only to one project, the actions were prospective at the time they were taken and had a prospective potential.) Fourth, the DEP’s authorization is not supported by a plain reading of the DEP regulations as argued supra in Point I.A. Fifth, the coastal general permit authorization

reflects a radical departure from the DEP's own rules. Sixth, the decision to authorize the project under Coastal General Permit No. 17 reflects unofficial policies or interpretations, such as the use of coastal general permits to circumvent the requirements of public comment and a hearing, or the flexible use of coastal general permits to approve large-scale projects with more than a minimal impact.

State Dept. of Envir. Protection v. Stavola, 103 N.J. 425 (1986), is also instructive in the present case. In Stavola, the DEP wanted to apply the CAFRA coastal permitting rules for the first time to the construction of beachfront cabanas, claiming that the cabanas fit within the definition of "dwellings." Id. at 430, 435. After concluding that neither the statute nor the regulations explicitly included cabanas as a "dwelling unit" and that to do so, the DEP "would go against its own regulatory scheme," the Court held that "in order to subject beach club cabanas to its authority, DEP must proceed through the rulemaking process rather than through ad hoc adjudication." Id. at 435. In comparing Stavola to the present case, the DEP's goals were different, but the impermissible DEP modus operandi was the same. In Stavola, the DEP was attempting to subject previously unregulated beachfront cabanas to more regulation. In the present case, the DEP is attempting to subject the large-scale Memorial to less regulation than customarily required for large-scale waterfront development projects. In both cases, the DEP tried to expansively interpret its own definition of regulated activities to achieve a desired outcome. In Stavola, the New Jersey Supreme Court ruled such expansive interpretations of plain language impermissible without a rule-making.

Following Stavola, respondent DEP does not have the authority to alter, or re-interpret, the descriptions of regulated facilities contained in its own rules without a rule-making. The DEP's deliberate misinterpretation of the plain language of Coastal General Permit No. 17 resulted in

approving construction of the Memorial without a rule-making.

**II. Even If The Coastal General Permit Authorization Is Regarded As Quasi-Judicial, The 45-Day Bar Should Not Be Imposed Because The Project And Its Impacts Are An Important Issue In The Public Interest**

Courts have also declined to impose the 45-day bar when there is an important issue in the public interest. See Jacobs v. N.J. State Highway Authority, 54 N.J. 393 (1969); Township of South Orange Village v. Hunt, 210 N.J. Super. 407 (App. Div. 1986); Piscataway Tp. v. Concerned Citizens for C.P.A., 200 N.J. Super. 615 (App. Div. 1985).

In Jacobs, the Appellate Division had denied a motion to dismiss even though suit was filed “long after the expiration of the time limit.” 54 N.J. at 396. The Appellate Division “felt there should be a decision on the merits” because the suit involved an important public question. Id. In Jacobs, the public question was whether the Turnpike Authority could impose a mandatory retirement age of sixty-five when the State pension system’s mandatory retirement age was seventy. In Township of South Orange, the Appellate Division chose to decide the case on the merits because the Spill Compensation Fund’s denial of claims was of public importance. 210 N.J. Super. at 417. In Piscataway, the Appellate Division noted “we believe the matter should be decided on the merits... [t]he interest of justice and expedition dictate that the exhaustion doctrine be found inapplicable.” 200 N.J. Super. at 619. The public issue in Piscataway was a question of statutory interpretation, whether a group home for the mentally ill required a State license.

The State’s approval of the September 11<sup>th</sup> Memorial is, inarguably, an issue of public importance. The coastal permitting involves a public Memorial in a public park visited by more than five million people each year. (AA225a.) By building the Memorial, the State is eliminating the Terminal Public Plaza, where the public was able to appreciate dramatic and

uninterrupted views from the closest place in Liberty State Park to lower Manhattan (AA85a.) The overwhelming public opposition to the Memorial is a testament to the importance of the issue to the public. Appellant estimates that more than 2,500 people made their opposition known by communicating directly with State officials or by signing petitions. (AA225a-247a.) People barraged Jersey City Mayor Jerramiah Healy's office with calls. (AA204a-205a.) Hundreds attended a meeting hosted by appellant to express their opinion on the Memorial's siting and design and the lack of a public process. (AA249a-251a.) This meeting was covered in the local and regional press. (AA250a-251a.) The fact that so many local officials wrote to respondents about the Memorial is further proof that this is an issue of public importance. (AA204a-AA228a.) As recently as April 28, 2008, the entire Hudson County Legislative Delegation, consisting of three state senators and six assembly people from Districts 31, 32 and 33, signed a letter to Governor Corzine objecting to the blocked views, citing the opposition of park users and requesting the restoration of the public plaza (AA337a-338a.) Back in November 2007, state legislators from District 37 also wrote to the Governor objecting to the Memorial because it will destroy the view. (AA310a.)

This issue has also been consistently covered in the local and regional press and news media, further demonstrating that this is an issue of public importance. (AA339a-351a.) Editorials and letters to the editor appearing in the Jersey Journal and the Bergen Record have roundly come out against the Memorial, all decrying the lack of a public process. (AA341a, 342a, 344a, 350a.)

Given the overwhelming public opposition, the public sentiment that it was excluded, and the evidence that the public was indeed excluded, this case should be decided on the merits.

**III. Respondent DEP Should Be Estopped From Claiming The Challenge To The Coastal General Permit Is Untimely Due To Respondent DEP's Defective And Insufficient Notice Of The Permit.**

The only public notice of the DEP Coastal General Permit No. 17 authorization appeared under the "CAFRA Permit Application" section of the DEP Bulletin. (AA140a, 142a.) Anyone monitoring the DEP Bulletin for permits affecting the coastal area in Liberty State Park would not have looked in the CAFRA section of the bulletin because the Coastal Area Facilities Review Act (CAFRA), N.J.S.A. 13:19, applies to projects near coastal waters in the southern part of the State. Liberty State Park is north of the CAFRA Zone and not regulated under CAFRA. Therefore, the sole public notice for the project was defective.

Even had the notice been correctly listed in the DEP Bulletin, such a notice would not have been sufficient. A coastal general permit notice communicates that a small-scale project with minimal environmental impacts has been approved. No one reading such a notice would have reason to suspect the permit authorization was for a large-scale project like the Memorial. Even an informed reader of the DEP Bulletin seeing a permit authorization under Coastal General Permit No 17, would rightly assume that the authorization was for a jungle gym, a gazebo, a picnic table, a fence without a permanent footing or another of the recreational facilities set forth in N.J.A.C. 7:7-7.17.

Given Respondent DEP's defective and insufficient notice, it should be estopped from now arguing this permit appeal is untimely.

**IV. By Approving The Memorial Project Under A Coastal General Permit For Recreational Facilities, The DEP Violated Its Own Regulations In An Arbitrary And Capricious Manner.**

A decision of an administrative agency may be overturned on appeal if it is arbitrary, capricious, or unreasonable, or if it is not supported by substantial credible evidence in the

record. In re Taylor, 158 N.J. 644, 656 (1999). An agency must adhere to its duly promulgated rules and regulations and may not ignore them. In re Crown Vista Energy Project, 279 N.J. Super. 74, 79 (App. Div.), certif. denied, 140 N.J. 277 (1995). An agency action violating its regulations is per se arbitrary and capricious. County of Monmouth v. Dept. of Corrections, 236 N.J. Super. 523, 525 (App. Div. 1989).

The Terminal Public Plaza is within the Coastal Zone and located entirely within 500 feet of the mean high water line. (AA139, AA84a-88a.) The DEP derives its authority to regulate this portion of New Jersey's waterfront from the Waterfront Development Law, N.J.S.A. 12:5-3. The procedures by which the DEP reviews permit applications for waterfront development are set forth in the Coastal Permit Program Rules, N.J.A.C. 7:7 et seq., and the Coastal Zone Management Rules, N.J.A.C. 7:7E et seq.

The coastal general permit for the construction of recreational facilities expressly limits the development activities by stating that it "authorizes construction of the following recreational facilities ..." and by specifically enumerating each of the authorized activities. N.J.A.C. 7:7-7.17. (emphasis added.) The general standards for issuing coastal general permits at N.J.A.C. 7:7-7.1 make the limited nature of coastal general permits clear. As explained in the general standards, by authorizing only specific types of development, the DEP can ensure that there will be minimal adverse environmental impacts and that the permit is in keeping with the legislative intent to protect the coastal area from inappropriate development. N.J.A.C. 7:7-7.1(c).

As argued in point I.A supra, the Memorial does not match, or come close to matching, any of the descriptions enumerated in Coastal General Permit 17. Even a cursory reading of the regulated recreational facilities, such as playground equipment, picnic tables, gazebos and fences without permanent footings, indicates that the permit is intended for small-scale projects. The

notion that the Memorial could be regulated under this permit as a “pathway,” “bicycle path” or “jogging and nature trail” is nonsensical. It is also arbitrary and capricious.

Any lingering doubt about the limited nature of the coastal general permit is put to rest by the application procedure, which states “[w]hen all aspects of a project do not qualify for a coastal general permit, then the entire project shall require an individual coastal permit application....” N.J.A.C. 7:7-7.3(e). As argued in point I.A supra, the 200-foot long and 30-foot high walls, the concrete pilings to anchor the walls, the footprint, the 10-foot hill and the metal halide lights are all aspects of the project that do not qualify as recreational facilities under the permit. Therefore, an individual coastal permit application should have been required.

The DEP was clearly aware that an individual Waterfront Development Permit was recommended in the early version of the Environmental Assessment. Kenneth Koschek of the DEP Office of Permit Coordination and Environmental Review wrote on December 21, 2004, prior to the submission of the permit application “[o]ur review has determined that a Coastal General Permit will be required for the project from the NJDEP’s Land Use Regulation Program Instead of an individual Waterfront Development Permit.” (AA92a.) The decision not to require any individual coastal permit application was deliberate.

The legislative history of coastal general permits under the Waterfront Development Law, N.J.S.A. 12:5-1 et seq., hints at why the DEP may have chosen a permit so ill-suited for this project. As explained in the DEP rule proposal, the non-CAFRA coastal general permits were initially proposed in 1995 to “simplify the permit process in two principal ways: first, a Compliance Statement may be submitted as part of the permit application in lieu of an Environmental Impact Statement; second, no public hearing under N.J.A.C. 7:7-4.5 will be required.” 27 N.J.R. 1007 (March 20, 1995) (emphasis added.) Because the State had already

allowed the Families and Survivors' Committee to select the winning design, announced a winner and held a ground-breaking ceremony, the DEP may have felt it imperative to forego a public hearing.

When it was clear the project did not meet the criteria set forth in Coastal General Permit No. 17, respondent DEP could have required an individual Waterfront Development Permit or proceeded to create a new coastal general permit through a rule-making. Each of those agency actions has more extensive procedural requirements with respect to public notice and public hearing as compared with a coastal general permit.

Having written its regulations, the DEP is in the best position to follow them. Here, the DEP decided not to follow its own regulations and to grant itself a coastal general permit, being both applicant and permitting agency. As fitting as the words "arbitrary and capricious" may be in this context, they only begin to describe the DEP's actions.

**V. The DEP's Failure To Follow The Administrative Procedure Set Forth In The Coastal Permit Program Rules For The Issuance Of A New Coastal General Permit Was Arbitrary And Capricious.**

As stated in Point IV. supra, an agency action violating its regulations is per se arbitrary and capricious. County of Monmouth v. Dept. of Corrections, 236 N.J. Super. 523, 525 (App. Div. 1989). When a new coastal general permit is adopted by the DEP, it must be done in the form of a rule proposal pursuant to the New Jersey Administrative Procedure Act. N.J.A.C. 7:7-7.1(b). Under the general standards for issuing a coastal general permit, the DEP may issue a coastal general permit only after the DEP has provided public notice and an opportunity for a public hearing with respect to the proposed coastal general permit. N.J.A.C. 7:7-7.1(c).

The strong negative public reaction to the Memorial was based, in part, upon its belief that the public had a right to participate in the approval process. A review of the DEP approval

process confirms that the public perception was utterly correct: the DEP circumvented its own procedures set forth in the Coastal Permit Program Rules, N.J.A.C. 7:7-7.1. The DEP violated its own regulations by issuing a new type of coastal general permit without a rule-making, which is per se arbitrary and capricious.

**VI. The DEP Could Have Proceeded Under An Individual Waterfront Development Permit, But It Chose, Arbitrarily And Capriciously, Not To.**

Given that the September 11<sup>th</sup> Memorial project is ineligible for Coastal General Permit No. 17, the DEP decision not to require the individual Waterfront Development Permit originally recommended in the Environment Assessment was arbitrary and capricious.

The Coastal Permit Program Rules further provide that “a permit shall be required for the construction, reconstruction, alteration, expansion or enlargement of any structure, or for the excavation or filling of any area, any portion of which is in the waterfront area.” N.J.A.C. 7:7-2.3(d). Clearly, construction of the Memorial requires a coastal permit. Because this project is not eligible for any currently existing coastal general permit, an individual Waterfront Development Permit under N.J.A.C. 7:7-4.2 should have been required by the DEP as recommended in the pre-permit coordination meeting EA. The decision not to require an individual Waterfront Development Permit, particularly when the Memorial project was clearly ineligible for a coastal general permit was arbitrary, capricious and unreasonable.

The basic difference between an individual Waterfront Development Permit and a coastal general permit is the opportunity for a hearing. For an individual Waterfront Development Permit, the DEP may “hold a fact-finding public hearing on a coastal permit application when the Department determines that based on public comment or a review of the project, its scope and environmental impact, additional information is necessary to assist in its review or evaluate potential impacts.” N.J.A.C. 7:7-4.5(a). Any hearing on an individual Waterfront Development

Permit is preferably “held in the municipality in which the development is proposed. N.J.A.C. 7:7-4.5(b)2.”

In contrast, the DEP does not hold hearings on individual applications for a coastal general permit, because it is presumed that any activities eligible for a coastal general permit “cause only minimal individual and cumulative environmental impacts.” N.J.A.C. 7:7-7.1(c)3; N.J.A.C. 7:7-1.5(e). This basic difference hints at the underlying reason that the respondent DEP did not require an individual Waterfront Development Permit.

There are other significant differences between an individual Waterfront Development Permit and a coastal general permit. As described above, an individual Waterfront Development Permit requires public notice of the public hearing or comment period in accordance with the Municipal Land Use Law. N.J.A.C. 7:7-4.5(f) and (g) (citing N.J.S.A. 40:55D-12). The public newspaper notice must be a “display advertisement a minimum of four inches in width” and be published in the official newspaper of the municipality. N.J.A.C. 7:7-4.5(f) and (g); N.J.S.A. 40:55D-12(a). In contrast, the DEP regulations do not require newspaper notice to the public for authorizations under coastal general permits. N.J.A.C. 7:7-7.3 (a).

Another significant difference between an individual Waterfront Development Permit and a coastal general permit is the type of Environmental Impact Statement (EIS) or Compliance Statement required as part of the permit application. The EIS or Compliance Statement provides “the information needed to evaluate the effects of the proposed development on the environment of the coastal area.” N.J.A.C. 7:7E-6.1. The “purpose of the EIS or Compliance Statement is to assist the applicant and the Department in assessing the probable effects of a proposal on the natural resources and human activities at the project site and surrounding region and in determining the proposed development’s compliance with the Rules on Coastal Zone

Management, N.J.A.C. 7:7E.” N.J.A.C. 7:7-6.2. (emphasis added.) Normally, when applying for an individual Waterfront Development Permit, the EIS or Compliance Statement “must discuss the applicability of the Department’s Rules on Coastal Zone Management, N.J.A.C. 7:7E, to the proposal.” N.J.A.C. 7:7-6.3(f). Under Coastal General Permit No. 17, the applicant need only show that the project has no adverse impact on any Special Areas defined at N.J.A.C. 7:7E-3. “Coastal General and Individual Permits differ not only in terms of application procedure under the Coastal Permit Program Rules but also in terms of the applicable substantive criteria under the Coastal Zone Management Rules.” Hankin, Stephen “Securing a Coastal Development Permit: How to Comply with the State Statutes Regulating the Development of New Jersey’s Coastal Lands and Waters.” 183 N.J.L.J. 394, p.1 (February 6, 2006).

Finally, the application checklist for the individual waterfront development permit application shows that proof of notice to the Army Corps of Engineers is required for the application. State of New Jersey Dept. of Environmental Protection, Waterfront Development/Coastal Wetlands Permit Application, Checklist for Administrative Completeness, 4/26/06, <http://www.state.nj.us/dep/landuse/forms/waterdev.pdf>. Had an individual waterfront development permit been required, the Army Corps. of Engineers would have been notified and had the opportunity to evaluate the project. Here, the DEP, as applicant and reviewer of the application, determined that it would not submit the application to the Army Corps, which likely would have reviewed the project for federal permitting issues.

**VII. To The Extent Any Permit Authorization Was Predicated Upon A Finding Of Minimal Impact, Such Finding Was Unreasonable And Unsupported By The Evidence.**

Coastal General Permit No. 17 authorizes the construction of certain recreational facilities at public parks provided the construction has no adverse impact on any Special Areas as

defined in N.J.A.C. 7:7E-3. By directing the applicant to apply for a Coastal General Permit for which the project is clearly ineligible, the DEP pre-determined that the Memorial will have no adverse impact on any Special Areas. Even the abbreviated Compliance Statement submitted with the permit application, shows that a finding of adverse impact, or minimal impact, is not supported by the evidence. (AA78a-81a.)

The Compliance Statement submitted in support of the application identifies several Special Areas potentially impacted by the Memorial project and in each instance concludes that the Memorial has no impact on any of the following Special Areas: Public Open Space, N.J.A.C. 7:7E-3.40; Filled Water's Edge, N.J.A.C. 7:7E-3.23; Flood Hazard Zone, N.J.A.C. 7:7E-3.25; Historic and Archaeological Resources, N.J.A.C. 7:7E-3.36; Endangered or Threatened Wildlife or Plant Species, N.J.A.C. 7:7E-3.38; and or Hudson River Waterfront Area, N.J.A.C. 7:7E-3.48.

The Compliance Statement omits important information or incorrectly analyzes information about the Memorial project in order to support the conclusion that there is no impact upon any of the Special Areas. As noted in the Compliance Statement, the entire site of the proposed Memorial is the "Filled Water's Edge" Special Area within the definition set forth in N.J.A.C. 7:7E-3.23. In this Special Area, the 100-foot waterfront portion of a "Filled Water's Edge Site" shall be developed with a water-dependent use. The proposed Memorial displaces the pre-existing water-dependent use of the Terminal Public Plaza and significantly reduces the area previously devoted to a water-dependent use. Notwithstanding this obvious adverse impact, the Compliance Statement failed to identify any adverse impact upon the Filled Water's Edge.

Under the rules applying to Flood Hazard Areas, N.J.A.C. 7:7E-3.25, development is prohibited within 100 feet of a navigable water body unless the development is for a water

dependent use. The proposed Memorial does not preserve the required 100-foot setback and eliminates the previously existing water dependent use, thereby adversely impacting the Flood Hazard Area.

The Compliance Statement also notes that the project site is located in between two historic landmarks listed on the State and National Registers of Historic Places, the CRRNJ Terminal and the Morris Canal Basin. In this Special Area, Historic and Archaeological Resources, development that detracts from, encroaches upon, damages or destroys the value of historic and archaeological resources is discouraged under N.J.A.C. 7:7E-3.36. The proposed Memorial with its 30-foot high 200-foot-long walls will encroach upon both the CRRNJ Terminal and the Morris Canal Basin by blocking the views from many perspectives. Despite this encroachment, the Compliance Statement failed to identify any adverse impact, asserting instead that these adjacent historic sites and other sites in the general area, Ellis Island and the Statue of Liberty, will not be impacted by this project.

Moreover, N.J.A.C. 7:7E-3.36 requires the design of new development near historic and archaeological resources to be compatible with the appearance of the historic and archaeological resource. The Compliance Statement fails to address the issue of compatibility with the new development.

Another Special Area in the Compliance Statement is “Public Open Space.” The proposed Memorial site used to be Public Open Space within the meaning of N.J.A.C. 7:7E-3.40, providing space for “public recreation” and “visual access.” N.J.A.C. 7:7E-3.40 states that development that adversely affects open space is discouraged and that any development should be consistent with the character and purpose of the space as described in the park master plan. The Compliance Statement ignores the fact that the Memorial will severely restrict visual access. The Compliance

Statement also neglects to mention that siting the Memorial on the Terminal Public Plaza is inconsistent with the Liberty State Park Master Plan. In fact, the Compliance Statement omits any mention of the Master Plan, which calls for an open plaza. (AA289a.)

One Special Area, Canals, N.J.A.C. 7:7E-3.8, was entirely omitted from the Compliance Statement. The planned Memorial may interfere with boat traffic entering and leaving the Morris Canal en route to the park's marina by making navigation difficult.

A project cannot be approved under Coastal General Permit No. 17 when there is any adverse impact on a Special Area. N.J.A.C. 7:7-7.17. Based upon the above-described adverse impacts intentionally omitted from the Compliance Statement and overlooked by the DEP, and additional impacts that may be discovered, the State's authorization of the Memorial project under Coastal General Permit No. 17 is not supported by the evidence. By glossing over obvious adverse impacts and proceeding under a coastal general permit, the DEP also failed to adhere to its own regulations.

**VIII. The DEP Historic Preservation Office Approval Was Arbitrary And Capricious, Due To The Agency's Failure To Follow The Historic Places Rules.**

A state agency's decision is usually given deference, except the decision is "clearly inconsistent with its statutory mission or other state policy, or if it does not adhere to its duly promulgated rules and regulations." Beattystown Community Council v. Dept. of Env. Protections, et als., 313 N.J.Super. 236, 248 (App.Div. 1998) (quoting Matter of Musick, 143 N.J. 206, 216 (1996) and Matter of Crown/Vista Energy Project, 279 N.J.Super. 74 (App. Div.), certif. denied, 140 N.J. 277 (1995)).

To carry out the legislative mandate contained in the New Jersey Register of Historic Places Act, N.J.S.A. 13:1B-15.128 et seq., it is incumbent upon the State Historic Preservation

Office to evaluate the impact of public undertakings on historic properties listed in the New Jersey Register. N.J.A.C. 7:4-1.1. The procedures and criteria for evaluating such impact are clearly set forth in the Historic Places Rules. N.J.A.C. 7:4-7.1 - 7.4. According to the Environmental Assessment for the Memorial project “[a] review and approval by DEP’s Historic Preservation Office (HPO) is required for work within ¼ mile of a historic structure.” (AA 325a.) The Memorial site is adjacent to two historic landmarks, the Morris Canal Basin and the CRRNJ Terminal. The CRRNJ Terminal was listed to the New Jersey Register of Historic Places on August 27, 1975 and to the National Register of Historic Places on September 12, 1975. NJDEP-Historic Preservation Office, New Jersey and National Registers of Historic Places, Hudson County, last updated 8/6/2007, <http://www.nj.gov/dep/hpo/1identify/lists/hudson.pdf>. The Morris Canal was listed to the New Jersey Register of Historic Places on November 26, 1973 and to the National Register on October 1, 1974. Id. The entire Morris Canal, extending from the Delaware River to the Hudson River in Jersey City is designated as a landmark. Id.

The Historic Places Rules contain review procedures for projects encroaching on New Jersey Register Properties. N.J.A.C. 7:4-7.1. As stated in the rules, if there is a property on the New Jersey Register in the area of the undertaking’s potential impact, the State shall submit an application to the DEP for project authorization. N.J.A.C. 7:4-7.1(d). The application “shall include a complete list of local historic societies and historic preservation commissions in the area of the undertaking’s potential impact.” N.J.A.C. 7:4-7.1(d). The application shall also include a list of all affected local governmental units, any agencies or instrumentalities thereof concerned with historic preservation, and any Statewide organization and local organization specifically concerned with historic preservation in the area of the undertaking’s potential

impact.” N.J.A.C. 7:4-7.1(d). Within thirty days of receipt, the DEP is to notify the application in writing as to whether the application is complete. N.J.A.C. 7:4-7.2 (a). Upon having deemed the application complete, the DEP is to conduct a review to determine if the undertaking constitutes an encroachment or will damage or destroy the historic property under the criteria set forth in N.J.A.C. 7:4-7.4, the Secretary of the Interior’s Standards for the Treatment of Historic Properties (36 C.F.R. 68) and Guidelines for Preserving, Rehabilitating, Restoring, and Reconstructing Historic Buildings. N.J.A.C. 7:4-7.2 (c)(1). The DEP is then required to notify the application whether or not the undertaking constitutes an encroachment or will damage or destroy the historic property, with “an explanation of the reasons for the [DEP’s] determination.” N.J.A.C. 7:4-7.2 (c)(1).

If the DEP believes the undertaking does not constitute an encroachment, then it is required to send copies of its written determination and explanation of reasons to the local historic societies and historic preservation commissions listed in the application. N.J.A.C. 7:4-7.2 (c)(1). If the DEP determines that the undertaking constitutes an encroachment, then the Historic Places Rules require written notices to owners of directly affected registered properties, local historic societies and historic preservation commissions, all affected local governmental units, any agencies or instrumentalities thereof concerned with historic preservation, and any Statewide organization and local organization specifically concerned with historic preservation in the area of the undertaking’s potential impact. N.J.A.C. 7:4-7.2 (e)(1). Any entity or person receiving notice, may request that a special public meeting be conducted by the Historic Sites Council on the encroachment application. N.J.A.C. 7:4-7.2 (e)(1). The procedures favor holding the meeting in the municipality where the New Jersey-registered site is located. N.J.A.C. 7:4-7.2 (e)(1). Ultimately, the DEP Commissioner determines whether to authorize or deny the

encroachment application, taking into consideration the written recommendations of the Historic Sites Council. N.J.A.C. 7:4-7.2 (e)(7), transmitting a written decision with specific reasons to the applicant.

**A. The Time To Challenge The State Historic Preservation Office Approval Has Not Yet Begun To Accrue, Due To A Failure To Provide Notices In Compliance With The Historic Places Rules.**

Despite the clear legislative mandate and the formal procedures contained in the New Jersey Register of Historic Places Rules, the DEP felt free to disregard its own regulations deciding instead that “the HPO review will be done as part of the Waterfront Development Permit Review. A formal HPO approval will not be required.” (AA325a.) The Historic Preservation Office file shows that it received a copy of the coastal general permit application from Langan on March 16, 2005, (AA170a), but no list of local historical societies, historic preservation commissions, and Statewide and local organizations specifically concerned with historic preservation in the area of potential impact, as required by N.J.A.C. 7:4-7.1(d), was included in that application. (AA117a-133a.) The Historic Preservation Office file contains no written determination on encroachment dating from the time the coastal general permit authorization was granted in May 2005. A review of both the Historic Preservation Office and the Land Use Regulation files does not reveal that any notices whatsoever were sent regarding a determination on encroachment.

“For a state administrative agency to gain repose from an appeal by virtue of the lapse of time from a decision or action it must give the party sought to be bound unmistakable written notice of the finality of the decision or action .” De Nike v. Board of Trustees of Public (State) Emp. Retirement System, 34 N.J. 430, 434 (1961). Here, there was no unmistakable written notice of finality because it was determined that SHPO would act informally, in violation of its

own procedures and regulations.

**B. The Absence of Reasons and Findings on Whether the Project Constitutes An Encroachment Makes the Historic Preservation Office Approval Arbitrary and Capricious**

There is little factual record of the determination on encroachment to serve as the basis for appellate review. N.J.A.C. 7:4-7.2 (c)(1). The head of the Historic Preservation Office wrote to Langan on August 17, 2006 more than a year after the project had been approved. She stated that the project “is consistent with the applicable laws and regulations concerning Historic Properties and Historic Resources,” possibly intending to make up for deficiencies in the approval process. (189a.) However, this letter amounts to little more than an after-the-fact statement of position. While the letter notes that the project is “consistent” with applicable laws, it does not state that the procedure mandated by the Historic Places Rules was followed. Moreover, Ms. Guzzo’s position contradicts earlier notes to the LURP permit file stating “SHPO may have an impact on Historic Resources” and the exchange of e-mail between Ms. Guzzo’s staff and the Office of Permit Coordination and Review. (AA51a.) The e-mails demonstrate that even the under informal approval process that the DEP had settled upon, the Historic Preservation Office approval was difficult to obtain.

N.J.A.C. 7:4-7.4 defines encroachments as “isolation of the registered property from or alteration of the character of the property’s setting when that character contributes to the property’s qualification for the New Jersey Register” and “introduction of visual, audible, or atmospheric elements that are out of character with the registered property or alter its setting....” Ms. Guzzo stated that “because no part of the project falls within the boundaries of the New Jersey Registered properties, there are no direct effects on New Jersey Register listed historic sites.” Given the above-referenced criteria, this after-the-fact statement of position makes little

sense.

The Historic Preservation Office did not make any written findings and did not notify anyone of any findings. Given that there was no real Historic Preservation Office approval, the construction should not proceed.

**IX. The State Did Not Comply With The Process For Approving The Memorial Prescribed By Executive Order, Making Permit Approvals Insufficient To Allow Construction Of The Memorial.**

On October 3, 2001, Acting Governor Donald T. DiFrancesco issued Executive Order No. 134 creating the New Jersey World Trade Center Victim's Memorial Commission, which was charged with developing a concept for and recommending to the Governor and the Legislature a permanent memorial to honor New Jersey's victims of the attacks. In Executive Order No. 134, Acting Governor DiFrancesco also decreed that the Memorial "shall be sited at a suitable location within the grounds of Liberty State Park."

The Memorial Commission, established under Executive Order No. 134, was to consist of the following members or their designees: The State Treasurer; the Adjutant General; the Attorney General; the Secretary of State; the Commissioner of the Department of Environmental Protections; the Recovery Coordinator from the Office of Recovery and Victim Assistance; the Chair of the Port Authority of New York and New Jersey. In addition, the Governor was also to appoint six public members and four members of the State Legislature, upon the recommendation of the Senate President and the Speaker of the Assembly. Under the Executive Order the Memorial Commission was charged with delivering a preliminary report to the Governor and the Legislature within 75 days and a final report to the Governor within 180 days.

Nearly a year later, on August 28, 2002, Governor James I. McGreevey issued Executive Order No. 29, establishing a Family and Survivor Memorial Committee. Pursuant to the

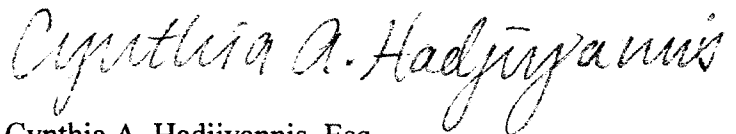
Executive Order, the Family and Survivor Memorial Committee was to review and develop suggestions, plans and designs for a suitable Memorial. Executive Order No. 29 directed the Family and Survivor Memorial Committee to submit its findings and recommendations to the Memorial Commission established by Executive Order No. 134, which was to incorporate these findings into a report, to the Office of Recovery and Victim Assistance, and the Governor's Office. The Family and Survivor Memorial Committee never submitted its findings and recommendations to the Memorial Commission. Nor did the Memorial Commission submit any preliminary or final report to the Governor. It appears the Family and Survivor Memorial Committee selected the Memorial without any review by the Memorial Commission.

Based upon the fact that the Executive Orders establishing the process for selection of the Memorial were not followed, the Memorial design selection is not valid due to the failure to follow the Executive Orders.

### **CONCLUSION**

For the foregoing reasons, appellant respectfully requests that the coastal general permit granted by the DEP be invalidated and revoked, that a review in compliance with the Historic Places Rules be conducted, that the surcharge mound amassed in preparation for construction of the Memorial be removed and that Terminal Public Plaza be restored forthwith.

Respectfully submitted,



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