

New Jersey Law Journal

VOL. CLXXXIX—NO.9—INDEX 717

AUGUST 27, 2007

ESTABLISHED 1878

Environmental Law

NJDEP Jurisdiction Expanding

Proposed revisions to stream encroachment permit rules

By Steve Barnett and Michele T. Tantalla

On October 2, 2006, the New Jersey Department of Environmental Protection proposed sweeping new requirements to obtain a stream encroachment permit. It is very likely that the new rule will be adopted in substantially the same form as proposed in the autumn of 2007. Most important immediately, to be grandparented and not subject to the new rule, certain actions must be taken by property owners before the effective date of the rule. In the longer term, to the extent the rule overhaul is intended to prevent flooding and urban sprawl, it is not clear that it will further either goal. The rule proposal contains no estimates of how much property will be affected statewide and no meaningful discussion of the rule's economic impact. Property owners should assume that the rule will be adopted shortly and plan accordingly. A meaningful discussion of possible legal challenges is better left until after the final rule is published and adopted.

The main impetus for the rule proposal was recent flooding along the Delaware

River. Over several days in September 2004, the remnants of Hurricane Ivan produced heavy rain across northwestern New Jersey and the Catskill Mountains in New York. A river gauge at Riegelsville, Pennsylvania, recorded a peak of 30.94 feet on Sept. 23, 2004 (flood stage is 22 feet).

In April 2005, five inches of rain fell over two days along the Delaware River, which was preceded by two inches of rain over the previous week, together with snow cover in the Pocono and Catskill Mountains. The Riegelsville gauge recorded a peak of 34.07 feet on April 4, 2005. Soon after, Acting Governor Codey established the Delaware River Flood Mitigation Task Force to study and make recommendations regarding flooding of the Delaware River.

Jon Corzine was sworn in as Governor on January 16, 2006. On June 28, 2006, the Riegelsville gauge recorded a peak of 33.62 feet. On Aug. 22, 2006, the Delaware River Flood Mitigation Task Force issued its "Report on Delaware River Flood Mitigation"; on the same day, Governor Corzine announced that the Department would propose new flood control rules.

Although the Department had been working on proposed new flood hazard rules on and off for years, the decision to publish this rule seems to have been a reactive measure made in haste, not correlated with science, and not made by the Department but instead by the governor's office in response to the 2006 flooding of

the Delaware River. There is little evidence that the proposed rule will prevent repeats of past flooding events. The Task Force reported that causes of the 2005 flood were increased rain resulting in soil saturation, snow melt, and overflowing reservoirs in New York and Pennsylvania. The report noted that no reservoirs in New Jersey overflowed during the 2005 floods. Further, the Task Force found "[n]o set of measures, alone or in combination, will stop or eliminate flooding in the Delaware River Floodplain." The most severe flooding recorded in New Jersey, the Great Flood of 1955, occurred years before many current developments were even built (the river gauge at Riegelsville, Pennsylvania, recorded a peak crest of 38.85 feet on Aug. 19, 1955).

The Department devoted a mere two pages of the proposal's 414-page summary to justify that the rule is consistent with smart growth and the State Development and Redevelopment Plan. However, the justification contains little more than conclusory statements. While claiming that the proposal will reduce negative effects of disinvestment in older communities and will help revitalize urban centers, the Department failed to acknowledge that almost every older community and urban center is located on or near a waterbody or waterway. The proposed rule provides no specific mechanism to promote or allow development of brownfields, older communities or urban centers that may be impacted by the rule. Remarkably, the proposal provides no estimates of how much property will lie within the regulat-

Barnett and Tantalla are attorneys in the environmental law practice group of Connell Foley of Roseland.

ed areas and will thus be affected by the new rule. About 35 percent of New Jersey lies in a flood hazard area, and, in many cases, the newly created riparian zone will extend far beyond the flood hazard area.

Stream encroachment permits are currently issued pursuant to the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., and its implementing rules at N.J.A.C. 7:13. The Department will amend N.J.A.C. 7:13 (including changing the name of the permit to a flood hazard area permit) and is also proposing related amendments to the Coastal Permit Program rules (N.J.A.C. 7:7), and to the Coastal Zone Management rules (N.J.A.C. 7:7E), and the Ninety-Day Construction Permit rules (N.J.A.C. 7:1C).

A project will be subject to the Department's jurisdiction under the new rule if: (1) the project is located along a regulated water; (2) the project is located within a regulated area along this water; and (3) the proposed activity is a regulated activity.

Regulated waters under the new rule are all waters in New Jersey except:

- manmade channels;
- coastal wetlands; or
- any water that drains less than 50 acres if:
 - the water has no definable channel, such as a freshwater wetlands swale; or
 - the water is confined within a lawfully existing manmade conveyance structure or drainage feature, such as a pipe, culvert, ditch, channel or basin, not including natural channels that were previously modified; or
 - the water is not connected to a regulated water by a channel or pipe, such as an isolated pond or depression that has no outlet.

The new rule provides for two types of regulated areas: the flood hazard area and the riparian zone. As a result of the new riparian zone, regulated areas will increase from 25 or 50 feet to 50, 150 or 300 feet on both sides of a regulated water measured landward from the top of the bank. The 300-foot riparian zone will apply to any Category 1 water and all upstream tributaries located within the same HUC-14 watershed. (In a separate rule proposal that is currently pending, the Department proposes to change the definition of Category

1 waters to include an additional 900 miles of waterways). The 150-foot wide riparian zone will apply to any upstream tributary to a trout production water, any trout maintenance water and any upstream tributaries within one mile, as well as any segment of water flowing through an area that contains documented habitat for threatened or endangered plant or animal species, which is critically dependent on the regulated water for survival, including all upstream tributaries of this water within one mile. The 150-foot riparian zone also will apply to any waters flowing through an area that contains acid-producing soils. The 50-foot riparian zone will apply to all waters in the State that do not have a 150-foot or 300-foot riparian zone. A riparian zone will exist along every regulated body of water, except there is no riparian zone along the Atlantic Ocean, manmade lagoons or oceanfront barrier island, spit or peninsula.

Regulated activities include the alteration of topography through excavation, grading or placement of fill, the clearing, cutting or removal of vegetation in a riparian zone, the creation of impervious surface, the construction, reconstruction and/or enlargement of a structure, the conversion of a building into a private residence or a public building and the storage of unsecured material. Road crossings will no longer be exempt from net fill requirements. Before starting a regulated activity in a regulated area, a person must obtain one of the following: a permit-by-rule (N.J.A.C. 7:13-7) (46 permits-by-rule are proposed), a general permit (N.J.A.C. 7:13-8) (16 proposed in the new rule), an individual permit (N.J.A.C. 7:13-9, 10,11), an emergency permit (N.J.A.C. 7:13-12) or a coastal permit (N.J.A.C. 7:7 and 7:7E).

There are numerous new requirements to obtain a permit, three of which are:

Riparian zone disturbance. To grant a permit, the Department must find that all work within the riparian zone meets three criteria. First, the basic purpose of the project cannot be accomplished without disturbing vegetation in the riparian zone. Second, disturbance to the riparian zone must be eliminated or minimized by relocating the project and/or reducing the size or scope of the project. Third, vegetation

within the riparian zone must be replanted upon completion of the project.

Flood storage displacement. The zero percent net fill rule currently in effect only in the Central Passaic Basin and Highlands Preservation Area will be expanded to all nontidal flood hazard areas statewide. Displacement of 20 percent of flood storage will still be allowed, but only if the permittee compensates by the creation of an equal volume of flood storage either onsite or in close proximity to the development in the same flood hazard area and HUC-14 watershed and not separated by a road or a dam. Also, compensatory flood storage cannot be in a floodway, in a riparian zone, within the 300-foot buffer special water resource protection area under the stormwater management rules, or in a Highlands Preservation Area buffer, and it cannot cause significant adverse environmental consequences. Further, the purchase of "fill credits" will not be allowed after all existing credits have been used.

Elevation of structures. Under the new rule, the lowest habitable floor of a building must be constructed at least one foot above the flood hazard area design flood elevation. When FEMA maps are used, the lowest floor must be two feet above the FEMA 100-year flood elevation. Any fill to achieve these new requirements must comply with the net fill rules.

The new rule must be adopted within one year from the date the notice of proposal was published in the *New Jersey Register* (Oct. 2, 2006). N.J.A.C. 1:30-6.2. Substantial changes to the proposed language may draw challenges from parties who would have commented differently in response to a different proposal. Department representatives have indicated that a form of the proposed rule will be adopted and that it will likely become effective sometime between August 2007 and October 2007.

A project will be grandparented from the rules if, prior to the adoption of the new rule, a property owner submits an administratively complete application for a stream encroachment, waterfront development or CAFRA permit application and subsequently obtains the permit. In addition, if a project does not require a stream encroach-

ment or coastal permit under the current rules, the project must be granted a final municipal building or construction permit prior to adoption of the rule in order to be grandparented, or alternatively if no municipal building or construction permit is needed, project construction must begin prior to the adoption of the new rule. It is not clear whether a building or construction permit for the first phase of a multiple-phased project would make the grandparenting provision applicable to the remaining phases of the project.

Existing rules require development in fluvial flood hazard areas in the coastal zone to conform to the Flood Hazard Area Control Act rules, whereas development in tidal flood hazard areas must conform to the Federal flood hazard reduction standards and Uniform Construction Code. N.J.A.C. 7:7E-3.25(f) is proposed to be amended to require a development subject to the coastal rules in any flood hazard area (whether fluvial or tidal) to meet all three sets of standards. Since the requirements of N.J.A.C. 7:13 will be incorporated into the

review of the coastal permit, a separate flood hazard area permit will not be required. An exception is made for coastal wetlands, because N.J.S.A. 58:16A-60 provides that the Flood Hazard Area Control Act does not apply to lands subject to the Wetlands Act of 1970. Therefore, in coastal wetlands, only the Federal flood hazard reduction standards and Uniform Construction Code will apply. It is unclear whether an entire site with coastal wetlands would be exempt from N.J.A.C. 7:13 or only the portion of the site constituting coastal wetlands.

Other potential conflicts exist with the Freshwater Wetlands Protection Act (FWPA) (which provides that it is the exclusive statute for regulation of freshwater wetlands) (N.J.S.A. 13:9B-1, et seq.), the Endangered and Nongame Species Conservation Act (N.J.S.A. 23:2A-1 et seq.), Water Quality Management Planning Act (N.J.S.A. 58:11A-1, et seq.) and Water Quality Management Planning (N.J.A.C. 7:15), and the Stormwater Management rules

(N.J.A.C. 7:8-1.1, et seq.) Possible legal challenges after promulgation of the rule include pre-emption by, or conflict with other statutes or rules, an abuse of discretion by the Department in promulgating the rules and/or applying the rules in a specific instance, and/or unconstitutional taking without compensation by inverse condemnation. A meaningful discussion of such conflicts and possible legal challenges to the rule or its implementation is better left until after finalization of the rule.

There is little scientific evidence that the proposed rule will prevent floods or that it is consistent with the State Plan. However, it is likely that it will be adopted soon. Therefore, prior to purchasing a property for development, careful investigation should be conducted to identify all on-site and nearby waters to determine the potential impact of the new rule. Owners of property, which will be subject to the new rule, should consider taking immediate action to qualify for grandparenting provisions. ■