

DIMENSIONS

DEP WATER QUALITY MANAGEMENT PLANNING RULE PROPOSAL TO ADDRESS EXPIRING SITE-SPECIFIC AMENDMENT LEGISLATION

By: Steven M. Dalton and David J. Miller

Earlier this year, the New Jersey Department of Environmental Protection (“DEP”) published proposed amendments to the state Water Quality Management Planning (“WQMP”) rules promulgated pursuant to the New Jersey Water Quality Management Act. The intent of the proposed rules is to rectify problematic provisions of the current WQMP regulations. Among the various proposed changes, the amendments, if adopted, will re-establish procedures to obtain site-specific amendments and revisions of water quality management and wastewater management plans.

DEP’s 2008 WQMP rule amendments required wastewater management planning agencies to update or submit wastewater management plans (“WMP”) by April 7, 2009 for any WMP that was not current as of July 7, 2008. This deadline was imposed because many WMPs had not been updated for years. The deadline was later extended to April 7, 2011 by Administrative Order. The 2008 regulations provided further that if a county or municipality failed to submit or update a WMP by the applicable deadline, wastewater and sewer service areas would be withdrawn and redesignated as wastewater service areas for planning flows of 2,000 gallons per day or less. The withdrawal of sewer service areas threatened to severely curtail development, as projects in areas where wastewater or sewer service areas were withdrawn would in many cases not be able to obtain certain necessary permits and/or approvals.

Site-specific amendments or revisions to wastewater management plans and WQMPs are an important tool to allow environmentally-sound development projects to be deemed consistent with

the applicable WQMP, thus enabling DEP to issue other necessary permits and approvals. In addition to mandating the withdrawal of non-compliant WMPs, the 2008 amendments also eliminated a developer’s ability to obtain a site-specific amendment or revision to achieve consistency with the WQMP. The regulations provided that DEP would reject all site-specific amendment or revision applications in areas where a WMP was withdrawn.

To prevent the wholesale withdrawal of sewer service area designations established in WMPs and the economic consequences that would flow from such severe action, the State Legislature passed P.L.2011, c. 203 (the “Legislation”), which was signed by Governor Christie on January 17, 2012, and extended by P.L. 2013, c. 188 in 2013. The Legislature determined that “[t]he withdrawal of wastewater service areas, including sewer service areas would have significant negative economic impacts” and, consequently, it was in the public interest for DEP to proceed with review of site-specific amendments or revisions

to WQMPs. The Legislation extended the effective period for sewer service and wastewater area designations and established a site-specific amendment and revision process.

The Legislation, however, expires on January 17, 2016 and no extending legislation has been introduced. Upon expiration, the legislatively-created site-specific amendment process will terminate and DEP will review pending amendment and revision applications in accordance with the existing regulations codified at N.J.A.C. 7:15. Accordingly, the provisions of the 2008 regulations that call for DEP to reject site-specific amendment and revision applications will be revived. This has implications for pending applications and prospective applicants because, while most wastewater planning agencies have adopted future wastewater service area maps, many have not completed the final WMP/WQMP update process.

DEP is attempting to address this problem through its proposed regulatory amendments. The proposed regulations set forth a site-specific amendment process substantially similar to the Legislative site-specific amendment process. An application for a site-specific amendment under the proposed rules must include a description of the proposed amendment including an explanation of the need for the amendment, documentation demonstrating that certain entities listed in the rules received notice and an opportunity to consult with the applicant regarding the amendment, and a compliance statement. DEP has 90 days to review the application and make a decision or request additional information. Public

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to NAHB so that it can be processed and referred to the respective NAHB committees for consideration during the IBS meetings in January. Following committee consideration, the Recommendation will be presented to the NAHB Board of Directors in the form of a Resolution. Provided that NAHB agrees to move forward and provide the necessary funding for the study, HIRL will begin the study in NJ.

MOUNT LAUREL

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in benefits for municipalities, especially since trial courts have considerable flexibility in making fair share determinations as to towns that settle at this juncture. Builders are participating in the DJ cases as intervenors or "interested parties," and such participation maximizes the likelihood of acquiring zoning relief, either by way of settlement or, if negotiations fail, litigation of the issues.

Conclusion

The next few months will be pivotal in bringing about judicial implementation of the "rules" that will guide the process going forward, and the adoption of fair share plans that will greatly reduce the exclusionary zoning that plagues the State. Builders who are not yet involved in the process are well-advised to explore the possibilities provided by the Mount Laurel doctrine.

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notice of the application is required and the applicant must request written statements of consent from identified interested agencies. A public hearing may be required prior to final decision by DEP if there is sufficient public interest. Applicants will also need to adhere to applicable requirements of designated planning agencies, whose application procedures should be made consistent with DEP's regulations. Additional procedures are required if the amendment is sought in the Pinelands National Reserve or the Highlands Region.

Given that the newly proposed rules will not go into effect prior to January 17, 2016, the question exists as to whether site-specific amendment and revision applications submitted under the Legislation but not adopted prior to January 17, 2106 will be processed during the "gap" period between the expiration of the Legislation and DEP's adoption of the proposed rules. In the rule proposal explanatory statement, DEP advises that once the Legislation expires, the 2008 regulations will be applied to pending applications. Thus, if the applicable WMP is not current, the application will be delayed until the proposed rules are adopted, and then at such time it will be processed according to the procedures outlined in the new rules. DEP has advised that, with an applicant's consent, it will continue to process pending applications pursuant to the proposed regulations but will withhold final decision until the new rules are adopted. This may require submission of additional information by the applicant to DEP to address proposed substantive changes in the rules and would require identification of a specific project. Such applications could be advanced to the point where the application would typically go to public notice. However, proceeding to public notice, and final action on such applications, would only occur after adoption of the proposed regulations.

DEP has advised that any applications submitted after the Legislation expires and before the amended regulations are adopted will be treated in the same manner. Ideally, through this process, delays in obtaining approval of site-specific amendments or revisions will be minimized.

In sum, those with pending site-specific applications that are not adopted prior to January 17, 2016 should expect delays during the "gap" period between the expiration of the Legislation and the adoption of the overhauled WQMP rules if the application is for a site in an area where a WMP is not in compliance with the existing regulations, though the continued review of applications by DEP during the gap period should help reduce the extent of delays. If the proposed rules are adopted as drafted, any pending site-specific amendment applications will be processed under the new rules, which would codify site-specific amendment and revision procedures in DEP's regulations and allow for site-specific relief to be obtained while the WMP/WQMP update process is on-going. Amendment applications for parcels within the jurisdiction of a compliant WMP or WQMP, such as Middlesex County, would be eligible for approval under the current, existing WQMP rules. In instances where the determination of compliance of a WMP is based upon application of the Permit Extension Act (PEA), potential exceptions to the PEA and the effective period of the PEA must be considered. DEP has advised it intends to identify compliant WMPs and WMPs that may be compliant. Parties with pending applications or who were planning to submit an application under the Legislation should determine if their parcel is located in municipality within a compliant WQMP, as they may have an opportunity to obtain site-specific amendment relief under the current regulations during the "gap" period.