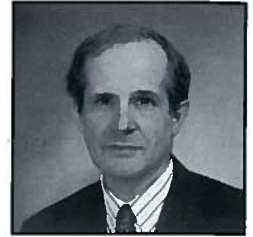




LEGAL & LEGISLATIVE

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DEP CAFRA SETTLEMENTS

Dragon v. NJDEP and Kelly

NJDEP lacks authority under CAFRA to settle disputes through the issuance of a "Letter of Authorization" (LOA) or a "settlement agreement" in lieu of a permit.

The Appellate Division reversed a decision of the DEP Commissioner that had resulted in the issuance of an LOA through settlement of a disputed case. A neighbor challenged the LOA, and the Appellate Division held "nothing in CAFRA authorizes DEP to allow development in the coastal region by way of a [LOA] or in a settlement agreement in lieu of a permit. Nor can that power be reasonably implied by the statutory scheme, even if other conditions safeguarding the environment are attached to the agency's authorization." Under CAFRA, an applicant may only proceed pursuant to a CAFRA individual or general permit.

The Court also confirmed prior caselaw finding that an agency may not waive its rules without express statutory or regulatory authority. While the CAFRA regulations allow DEP to relax procedural requirements, there is no specific authority to waive substantive provisions in the context of settlements.

The Court rejected the State's argument that it had inherent authority to deviate from the substantive provisions of its regulations to avoid "litigation risks". While the Court agreed that DEP "has the power to settle contested matters concerning CAFRA permit applications", it found that no "litigation risks" existed in this case.

LOAs are not uncommon. Not all LOAs involve the waiver of substantive provisions of CAFRA. However, this decision calls the validity of such instruments into question regardless of the circumstances and even though in many cases the only difference between an LOA and a "CAFRA permit" is the title of the document.

The regulated community has consistently called for DEP to adopt regulations to establish specific authority to waive its regulations on the case-specific basis and DEP should take action to do so. Additionally, the Legislature should establish statutory authority to allow DEP to issue Letters of Authorization or settlement agreements in lieu of a permit, as DEP's practice has been effective in reducing costs associated with the hearing request process and reducing the burden on applicant's, DEP and the judicial system while maintaining the integrity of the CAFRA program.

LSRP PROGRAM

On March 16, 2009, the Legislature passed the Site Remediation Reform Act. The legislation, which awaits signature by the Governor, will establish the Licensed Site Remediation Professional program ("LSRP") which is expected to drastically change how contaminated sites are remediated throughout the State. The legislation establishes an LSRP licensing program and permits LSRPs to undertake remediation activities without DEP oversight or prior approval in an effort to expedite cleanups of contaminated sites. The legislation will also establish certain "presumptive remedies" for certain projects, including schools, daycare centers and residential products which define acceptable engineering controls. Additionally, the legislation will also establish a permit program for sites with engineering controls and institutional controls as a replacement for the current biennial inspection process.

AGENCY DELAY

In Re Pinelands Commission

The Appellate Division reversed a decision of the Pinelands Commission denying an application for a waiver for structures in wetlands or wetlands buffers. There were

extensive delays in the Pinelands review process. The structures were built in 1986. The Pinelands did not inspect the property until 1991 and then filed an action in 2001 alleging violations of the Pinelands requirements. Pursuant to a court order, the Plaintiff filed the waiver application in November 2003, but the Commission did not respond until May 2006.

Acknowledging the deference typically granted to agency decisions and noting that caution should be used in granting automatic approvals based on delay in agency action, the court nonetheless found that the "Commission has abused its discretion" and "the unexcused delay is a due process violation." While the Pinelands regulations do not contain an automatic approval provision, the court found that "we are convinced inordinate, unexcused delay in considering and ruling on applications results in a gross injustice and a deprivation of due process to the applicant." Moreover, the Court stated that "we cannot overlook the almost three year delay between the waiver application and Pinelands decision denying the application." Moreover, the Court was "struck by the Commission's lack of timeliness in view of its claim that the wetlands are so significantly affected by the development on Petitioner's property." The Court went on to question the significance of the impacts given the fact that the property consisted of 21 acres and the objectionable improvements were insignificant in comparison to the size of the property.

Applicable deadlines in the development approval process are often one-sided. Hopefully, this decision will help level the playing field in other contexts.