

New Jersey Law Journal

VOL. CXC- NO.7 -- INDEX 606

NOVEMBER 12, 2007

ESTABLISHED 1878

Environmental Law

Flood of Proposed DEP Regulations

Agency's proposals will usurp local and statewide planning efforts

By Andrew B. Robins and
Steven M. Dalton

An onslaught of new regulatory proposals by the New Jersey Department of Environmental Protection over the last few months threatens to dramatically alter future development throughout the state. If adopted, the proposals will impact practically all new development. Under the proposals' highly limited "grandfather" provisions, many projects already far down the approval pipeline will require extensive redesign, assuming that they remain viable at all.

The sheer scope of these proposed regulations raises the question of whether existing planning, be it local, regional or statewide, will be relevant as to where new growth in the state should be focused. DEP has clearly not disclosed any significant analysis as to how these new regulations will impact critical state growth goals. Rather, the impact statements accompanying each proposal provide the typical boilerplate language that all impacts will be positive. Left unanswered is if planned growth can occur.

Since October 2006, DEP has published several major regulatory proposals covering the gamut of land use contexts.

Robins and Dalton are shareholders of Giordano, Halleran & Ciesla of Middletown.

On Oct. 2, 2006, DEP proposed to completely overhaul the Stream Encroachment permit regulations. The rule adoption for this proposal was not published in the *New Jersey Register* by October 2, but it has reportedly been signed and will be published in November 2007. The proposed rules greatly expand the scope of regulated waters. DEP has created a completely new regulated area known as a "riparian zone," extending 300-, 150- or 50-foot buffers from regulated waters, depending on ecological features or associated habitat. The rules impose strict flood storage limitations, including statewide application of the "zero net fill" restriction. Up to 20 percent of flood storage area may be displaced on site, provided an equal amount of flood storage area is created off site. Strict limitations on off-site compensation will make it difficult to achieve for most sites. Despite significantly enhanced regulatory provisions, the rules contain an extremely narrow "grandfather" provision.

DEP proposed amendments to its Surface Water Quality Standards rules in May 2007. DEP proposed more than 900 miles of additional Category One (C-1) waters, together with standards and procedures for making future C-1 designations. The C-1 antidegradation designation applies to high quality waters. This designation, among other things, establishes a 300-foot buffer on either side of

the water body through the state's Stormwater Management regulations. Additionally, a use that will measurably change water quality of a C-1 water is precluded. The proposal does not account for grandfathering or potential impacts on planned redevelopment projects.

DEP's May 2007 Water Quality Management Planning (WQMP) proposal would withdraw all sewer service area designations in the event that Wastewater Management Plans (WMPs) are not updated to meet regulatory requirements within nine months of the rule adoption. Counties would assume WMP responsibility for developing WMPs, which would need to be updated every six years. Amendments and revisions to a WMP will not be processed by DEP when a WMP is out of date except in limited circumstances. If a WMP is revoked, DEP will not permit re-establishment of wastewater service areas with planning flows of less than 20,000 gpd discharge to groundwater. A NJPDES permit will be required for any discharge to groundwater that exceeds 2,000 gpd. Developments on septic systems that discharge less than 2,000 gpd to groundwater are allowed under the rules if the development can satisfy the applicable individual septic system rules. The proposal contains a limited grandfather for projects that obtain municipal approval and DEP wastewater approval prior to revocation of a sewer service area, as well as projects that obtained a site-specific WQMP amendment or revision prior to the rules

adoption. There is no incentive in the new rules for coordinated planning efforts, and the rules specifically allow WMPs to be inconsistent with zoning ordinances for "compelling reasons." The proposed rules would also preclude certain environmentally sensitive areas from being designated as sewer service areas, notwithstanding regulation of these areas through other DEP programs.

Earlier this past summer, DEP proposed detailed changes to the Groundwater Quality Standards (GWQS). The GWQS are used to determine effluent limitations for discharges to groundwater (such as those allowed under NJPDES permits) and as standards for remediation cases. The GWQS, therefore, significantly impact all development projects that will have wastewater or stormwater discharges to the ground as well as Brownfield sites with contaminated groundwater.

A major change in the proposed GWQS are strict "anti-degradation" standards intended to establish limits beyond those needed to protect the uses of the applicable groundwater. For example, in areas designated as having Class IIA groundwater (the overwhelming majority of the state), the most sensitive use is designated as drinking water. Hence, the Class IIA numerical standards have been set as the values needed for safe drinking water. The proposed antidegradation rules will require that discharges to Class IIA groundwater areas have some components that are far below drinking water standards. Moreover, since the GWQS will be used in WQMP process, it is expected that many areas will be prohibited from receiving any new discharges to groundwater. Unless there is a current sewer service area in place, no new development will be permitted in those areas regardless of the State Plan designation or local zoning.

New rule proposals are pending regarding the Site Remediation Program (SRP), which oversees all remediation cases. In May, DEP proposed soil cleanup standards and some amendments to the Technical Oversight rules governing whether the standards would apply to approved cleanups. In August, DEP proposed notification and public participation

requirements for SRP cases. Both proposals will impact whether development will occur at Brownfield sites. The proposed soil standards will have the broadest impact. Up to now, all remediation cases have been assessed by SRP under "soil cleanup criteria" guidance.

The proposed standards are based on a series of calculations, depending on the potential pathway to the most sensitive receptor. Thus, there are sets of standards to address "chronic" (long-term) impacts to groundwater, inhalation or ingestion by humans, and dermal contact. Brownfield redevelopment advocates have pointed out that the proposed rules do not take into consideration whether the potential pathway is realistic. For example, the inhalation or dermal contact standards apply equally to soil at the surface (where the pathway would be of obvious concern) and to soil located deep below the surface (where the pathway is absent). Similarly, potential impacts to groundwater are considered identical regardless of the distance between the soil sample and the groundwater or even if the groundwater is not and will not be used for drinking water purposes.

Overall, the proposed SRP regulations do not provide any specific incentives for redevelopment sites in designated "growth areas." For many sites, the conservative methodologies used to develop the proposed standards will discourage remediation and redevelopment by increasing costs. With many of DEP's policies promoting Brownfield redevelopment, the proposed SRP rules fail to provide any clear support for such projects.

DEP's September 2007 Freshwater Wetlands rule proposal contains several significant changes to the existing regulatory program that will complicate and increase costs. The amendments allow municipalities and counties to require an applicant to obtain a Letter of Interpretation from DEP as an approval or application completeness condition. The proposal limits the scope of activities presently allowed under the more streamlined General Permit (GP)

process, and imposes new mitigation requirements on numerous GPs. As a result, more individual permits will be required and development costs will increase. A permit modification must be obtained for each conveyance of the covered by the permit. Additionally, significantly enhanced requirements are proposed with respect to cultural resources.

Based on pronouncements by DEP, these regulations may be just the beginning of what will be viewed en masse as controlling new development anywhere in the state. On the horizon are the long-pending Endangered and Threatened Species rules, which may be formally proposed by the end of the calendar year, and the long-delayed Highlands Regional Master Plan adoption. These programs will result in the additional enhancement of environmental restrictions and overall clamp-down on development opportunities.

With these proposed rules, DEP's regulatory programs will clearly be the paramount driver of where development will occur. The amount of developable land continues to be constrained as each new prescriptive program is adopted. To date, there has been no input or reaction from the State Planning Commission as the cross-acceptance program becomes increasingly irrelevant. Similarly, the Council on Affordable Housing has remained silent as the prospect of the construction of new affordable housing fades with each new restriction. Further complicating the process is the real prospect that DEP will be unable to process applications in a timely manner due to understaffing.

In sum, with a myriad of new regulations, many which impose severe restrictions on development, and with the lack of leadership from any governmental quarter as to where growth can occur, DEP is effectively establishing an administratively imposed ban on any substantial new growth in many areas of the state. What remains unclear is whether the Legislature or the governor's office will take action to truly assess the impact on our state's economy. ■