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Prepare for Even Slower NJDEP Permitting

Notwithstanding the new 'Fast Track' law, permitting decisions may not be so fast in the future

By David P. Steinberger

Do you think the time required to obtain permits from the New Jersey Department of Environmental Protection was already too slow? Hold on. Notwithstanding the newly enacted "Fast Track law," P.L. 2004, Chapter 89, which was generally designed to expedite permitting decisions, the permitting process might get even slower after a recent court ruling. That recent court ruling will likely leave regulators wondering what they must do to ensure that their permitting decisions can withstand judicial scrutiny. And that can only lead to increased regulatory scrutiny before the DEP will issue permits.

On Nov. 16, 2004, the New Jersey Appellate Division issued a decision in

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In Re Authorization for Freshwater Wetlands General Permits, Water Quality Certification and Waiver of Transition Area for Access, 372 N.J. Super. 578, 860 A.2d 450 (App. Div. 2004). This matter came to the Appellate Division as an appeal by a citizen group, Preserved Old Northfield (Pond), of a final DEP permitting decision. Specifically, Pond was challenging a Letter of Interpretation and a freshwater wetlands general permit issued by the DEP. Pond objected to a proposed residential development that would have allowed the developer to construct eleven single-family homes on a new cul de sac.

In its applications before the DEP, the developer indicated that there were several isolated wetlands on the property. DEP ultimately concurred with that conclusion by issuing an LOI identifying those isolated wetlands on the property. Because the DEP had agreed with the developer that only isolated wetlands existed on the property, the DEP concluded that issuing a general permit under the Freshwater Wetlands Protection Act was appropriate. DEP issued General Permit No. 6 (GP6).

The Freshwater Wetlands Protection Act, N.J.S.A. 13:9B, regulates development activities in wetlands. Any regulated activities within wetlands must be permitted by the DEP. Through its regulatory authority, the DEP has issued a number of general permits that allow regulated activities to occur in wetlands under certain

conditions. Applications for general permits require less scrutiny by the DEP than applications for individual wetlands permits. One general permit issued by the DEP is GP6, which allows regulated activities to be undertaken in isolated, or "non-tributary" wetlands. A nontributary wetland is a freshwater wetland that is "not part of a surface water tributary system [connecting or] discharging into an inland lake or pond, or a river or stream." N.J.A.C. 7:7A-5.6(a). "However, the connection [between water bodies] may be through overland flow [i.e. stormwater] only if there is evidence of scouring, erosion or concentrated flows." N.J.A.C. 7:7A-1.4. While there are other limitations to the applicability of GP6, Pond was really only challenging the DEP's determination that the on-site wetlands were isolated wetlands.

Pond had argued before the DEP that the wetlands were not isolated, but were instead part of a tributary system. They presented expert reports and other evidence to the DEP indicating that during moderate to heavy rain events, there was overland flow from the on-site wetlands into off-site water bodies and that those overland flows included scouring, erosion and concentrated flows. Therefore, Pond argued, the on-site wetlands were not isolated, and GP6 was inappropriate for the proposed development.

On appeal, the court remanded the decision to the DEP because the DEP had apparently failed to conduct proper fact-finding before issuing the LOI

and GP6. What is striking about this decision, however, was the remand of the DEP's LOI and GP6 in the face of what would appear to be a significant fact finding effort by the DEP. In fact, the court noted that "[t]he LOI and GP6 permit were issued by DEP after a long and arduous process, entailing submission of voluminous correspondence and evidentiary materials, including a number of expert reports and videotapes, submitted by the objectors, several site investigations by DEP and a meeting between DEP and interested persons." *In Re Authorization* at 580.

The court first set forth the standards by which a court reviews the decisions of a state agency. The Appellate Division noted that its review is limited. The court wrote that "[t]he fundamental consideration 'is that a court may not substitute its judgment for the expertise of an agency so long as that action is statutorily authorized and not otherwise defective because arbitrary or unreasonable [or not supported by the record].'" *Id.* at 593. "In exercising [its] review powers, [the court] traditionally defer[s] to an agency's expertise in cases involving technical matters within the agency's special competence." *Id.* at 593. The court further stated, "we do not reverse an agency's determination because of doubt as to its wisdom or because the record may support more than one result."

The court then set forth the requirements which an agency must follow in executing its permitting authority. The court noted that permitting decisions are "quasi-judicial" and must "set forth basic findings of fact, supported by the evidence and supporting the ultimate conclusions and final determination" made by the agency. *Id.* at 594. These findings of fact are necessary to provide "interested parties and the reviewing tribunal ... the basis on which the decision was reached so that it may be readily determined whether the result is sufficiently and soundly grounded or derives from arbitrary, capricious or extralegal considerations." *Id.* at 594. The court concluded by stating that "no

matter how great a deference the court is obliged to accord the administrative determination it is being called upon to review, it has no capacity to review unless there is some kind of reasonable factual record developed by the administrative agency and the agency has stated its reasons grounded in that record for its actions." *Id.* at 595.

The court's analysis begs the question: what is a reasonable factual record? As the court noted in this case, the DEP had conducted significant fact finding. The DEP even noted that it had "scrutinized the site far more than is customary for the review of a Letter of Interpretation." *Id.* at 590 (quoting a July 25, 2002 DEP letter). In reading the court's opinion, however, it is hard not to get the sense that the court simply did not agree with the DEP's findings.

For instance, the court refers six times to a 1986 DEP Freshwater Wetlands map that covers the subject property. In describing the map for the first time, the court wrote that the map "shows significant wetlands on the property. The depiction of these wetlands on the map suggests interconnections with wetlands coursing through the area." *Id.* at 580. Later in its opinion, the court "point[ed] out [its] discomfort in blindly accepting DEP's determinations based upon the limited scope of review doctrine in light of DEP's 1986 Freshwater Wetlands map which seems to show the wetlands on the subject property as part of an inland tributary system. Perhaps it is out of date. Perhaps there is some expert analysis to support a contrary conclusion. But the DEP has not yet provided that to either the parties or the court." *Id.* at 597.

But there was expert analysis. The DEP inspected the property three times. In fact, "two of the inspections included a supervisory level staff member, while one inspection included the Manager of the Bureau of Inland Regulations." *Id.* at 591. Nonetheless, the court had a "nagging concern" that the DEP had only conducted its inspections during a dry period. However, isn't the determination of when to conduct a wetlands

inspection the exact type of question better suited for an expert agency to decide than a court? It is reasonable to assume that the DEP's Manager of the Bureau of Inland Regulations knows when and how to inspect a wetland. The court, however, went on to essentially advise the DEP that it would have to conduct a site inspection during the "rainy season" if its analysis and conclusions were to hold any weight with the court.

Further, as noted above, the sheet flow of stormwater is insufficient to create wetlands interconnections. However, if the stormwater flow results in scouring, erosion or concentrated flows, then there is an interconnection between the water bodies. In this case, the DEP concluded that any such overland stormwater connections only occurred through sheet flow, and therefore the wetlands were isolated wetlands. However, the court questioned how the DEP was sure that the only interconnections occurred through "sheet flow" of stormwater. But the record contained a letter from the DEP indicated that the DEP had not observed any evidence during its site inspections of scouring, erosion or concentrated flows coming from the on-site wetlands. *Id.* at 590. What greater evidence would the court want than the observations of the expert agency based upon field observations? Presumably, the DEP knows how to identify evidence of scouring, erosion or concentrated flows. And, the record contained the DEP's written statement that it did not find any evidence of such occurrences in its site inspections or review of Pond's reports, videos and photographs.

Finally, the court based its remand on what can fairly be viewed as a disbelief in the DEP's ultimate conclusions. In fact, in its order, the court "[r]emanded for further investigative analysis. ... " *Id.* at 598. The requirement that the DEP conduct additional investigations and analysis, in light of the extraordinary amount of effort the DEP had already expended on this wetlands application, almost seems to require the DEP to revise the outcome of its permitting

process.

At the end of the day, the DEP must be left wondering what is required of them. Certainly, the regula-

tors will feel compelled to spend more time on any potentially controversial permitting decisions. And that can only lead to significantly slower permitting

decisions by the DEP. Notwithstanding the new "Fast Track" law, permitting decisions may not be so fast in the future. ■