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New Challenges for Developers

300-foot buffer is latest state rule to impact development

Over the last several years, the New Jersey has dramatically increased the difficulty faced by developers who wish to develop properties adjacent to water bodies. The slew of state rules creating such buffers makes it imperative that developers undertake appropriate due diligence before purchasing property to develop or re-develop.

First, in February 2004, the New Jersey Department of Environmental Protection issued new stormwater management rules which created "Special Water Resource Protection Areas," (SWRPAs), which are 300-foot buffers adjacent to Category One (C-1) water bodies. Second, in August 2004, the governor signed into law the Highlands Water Protection and Planning Act, which establishes a 300-foot buffer around almost all water bodies within the 400,000-acre Highlands Preservation Area. Third, in October 2006, the NJDEP issued a draft revision to the Stream Encroachment Rules, which will create 300-foot, 150-foot or 50-foot riparian zone buffers along certain water bodies. Finally, on May 21, 2007, the NJDEP published a draft amendment to the State's Surface Water Quality

Standards, which will upgrade the water quality classification of over 900 miles of streams to C-1. With a potential 600-foot wide buffer along those 900 miles of streams, that is potentially 64,000 acres which will be taken out of the pool of developable property in New Jersey.

The Stormwater Management Rules, N.J.A.C. 7:8-1.1, et seq., became effective in February 2004. The Stormwater Rules only apply to "major development," which is defined as development that provides for the ultimate disturbance of one or more acres of land or that increases impervious cover by one-quarter acre or more. "Development," as used in the definition of "major development," means those activities at a property for which approvals are required under the New Jersey Municipal Land Use Law, N.J.S.A. 40:55-1 et seq. (MLUL).

Among the many stormwater management requirements that apply to major development projects is the creation of SWRPAs, which are 300-foot buffers along both banks of water bodies classified as C-1. Water bodies are classified as C-1 pursuant to the state's Surface Water Quality Standards, N.J.A.C. 7:9B-1.1 et seq.

The Stormwater Rules include a very limited grandfathering provision. To qualify, a major development project that does not require a permit from

the NJDEP Land Use Regulation Program must have received local approval under the MLUL prior to the Stormwater Rules' effective date. If NJDEP land-use permits are required, then in addition to the MLUL approval, the project must have also received at least one NJDEP land-use permit prior to February 2, 2004. There is no grandfathering protection from the SWRPA requirements for streams reclassified as C-1 after February 2, 2004. Thus, for the 900 miles of streams currently slated to be reclassified as C-1, a project will still only be grandfathered if the required permits/approvals were received before February 2, 2004.

Generally, no development is allowed within the SWRPA. However, the NJDEP will allow encroachment into the outer 150 feet of the SWRPA where (a) previous development or disturbance has occurred and (b) the "applicant demonstrates that the functional value and overall condition of the [SWRPA] will be maintained to the maximum extent practicable," N.J.A.C. 7:8-5.5(h)(ii). "In no case shall the remaining [SWRPA] be reduced to less than 150 feet" from the edge of a C-1 water body.

The NJDEP is required to approve all encroachment within the outer 150 feet of the SWRPA. Approval of such encroachment will be governed by a January 2007 NJDEP guidance document, the "Special Water Resource Protection Area Functional Value Analysis." See <http://www.nj.gov/dep/watershed-mgt/DOCS/FunctionalValueAnalysis1>

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-2-07.pdf. This guidance document creates a test for whether the functional value and overall condition of the SWRPA will be maintained post-development. The test considers four factors: habitat, nonpoint source pollution load, temperature moderation and receiving stream channel integrity. The test compares the functional value of these four factors under current conditions and the proposed post-development conditions. Where the test demonstrates a decrease in the functional value of any one of these four factors, then the encroachment into the outer 150 feet will not be allowed "unless it is demonstrated that the loss is unavoidable through project redesign including a reduction in the scope of the development."

The Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1, et seq. (Highlands Act), signed into law in August 2004, created a 400,000-acre Preservation Area. Development within the Preservation Area is severely limited. The Highlands Act generally applies to "major highlands development" projects, which include, for instance: (a) any nonresidential development in the Preservation Area and (b) any residential development in the Preservation Area that requires a land-use or water permit or that results in the ultimate disturbance of one acre or more of land or a cumulative increase of impervious surface by one-quarter acre or more.

Unless a proposed project is exempt from the Highlands Act or receives a waiver, the Highlands Act prohibits any major highlands development within 300 feet of any "highlands open water," which includes all springs, streams, intermittent streams, wetlands and surface water, whether natural or artificial. Excluded from the Highlands Act buffer requirement is linear development for infrastructure, utilities and rights-of-way, but only if there is no feasible alternative. Additionally, structures or land uses existing in the buffer on the date the Highlands Act became effective may remain, provided that the area of disturbance shall not be increased. Other than by exemption or waiver, there is no mechanism for encroachment with-

in the 300-foot buffer under the Highlands Act.

On Oct. 2, 2006, the NJDEP proposed a new Flood Hazard Area Control Act regulation. The Flood Rules will repeal the existing Stream Encroachment Rules and replace them with a new regulatory scheme. The public comment period has ended, and the NJDEP expects the rule to be adopted by late summer. Under state administrative rules, the proposed rule must be adopted by Oct. 2, 2007.

Among the many significant changes in the proposed Flood Rules are changes to the buffer requirements adjacent to water bodies. Under the existing rules, there is generally either a 50-foot or 25-foot buffer from the top of the bank of the stream channel, depending on the type of stream and the resources present. The Proposed Flood Rules create 300-foot, 150-foot and 50-foot buffers, which are now called "riparian zones." The 300-foot riparian zone will be required along C-1 waters and all upstream tributaries of those C-1 waters within the same "HUC-14" watershed. The HUC-14 watershed is simply a measurement of the size of a sub-watershed, as delineated by the United States Geological Survey. The 150-foot riparian zone will be required along (a) all upstream tributaries to trout production waters, trout maintenance waters, and tributaries of those waters within one mile upstream, (b) waters flowing through areas that support certain threatened or endangered species, and tributaries of those streams within one mile upstream, and (c) streams which contain acid-producing soils. The 50-foot riparian zone will apply to all other regulated water bodies.

One significant difference between the 300-foot riparian zone created under the Flood Rules and the 300-foot SWRPA created under the Stormwater Rules is that there is no "major development" trigger in the Flood Rules. Thus, while a major development is required to trigger the 300-foot buffer established in the Stormwater Rules, no such trigger exists under the Flood Rules. Instead, the 300-foot (or 150-foot or 50-foot) riparian zone established under the Flood Rules will apply

to any regulated activities subject to the new rules. Regulated activities include, for example, clearing or removing vegetation, excavation or grading, and adding impervious surfaces. It is likely that more activities will be subject to the Flood Rules' expanded riparian zones than will be subject to the Stormwater Rules' SWRPA.

Under the proposed Flood Rules, the NJDEP will allow some limited regulated activity to be conducted within the riparian zone. To allow such encroachment, the NJDEP must first determine that the basic purpose of the proposed project cannot be accomplished without disturbing the riparian zone vegetation. If a regulated activity can be conducted outside of the riparian zone and still serve the intended purpose of the project, then the activity must be conducted outside the riparian zone. Next, the NJDEP must determine that the disturbance within the riparian zone is eliminated where possible and, where it is not possible, that the disturbance will be minimized. Finally, the proposed Flood Rules contain a table which sets forth the maximum area of vegetation that the NJDEP will allow to be disturbed within riparian zones for various listed activities. Those listed activities include, for example, railroads or public roadways, private roadways, stream bank stabilization projects, stormwater discharge projects, and private residence construction. The allowable limits for disturbance are very small, reflecting the states' goal of keeping development out of the riparian zone.

Finally, the proposed rule does include a limited grandfathering provision. To qualify, an applicant must have its stream encroachment permit submitted to the NJDEP and deemed administratively complete before the new Flood Rules go into effect. Although it is unclear when the new rule will go into effect (subject to the Oct. 2, 2007, administrative deadline), developers may still be able to avoid the new rules.

Because there are many different water body buffers which might impact a development project, it is critical that a developer's team conduct a thorough analysis prior to purchasing property or

preparing costly site plans where water bodies exist on or near the property. The first inquiry should be whether the project falls within the Highlands Preservation Area, and if it does, is it a "major highlands development." If the answer to both questions is yes, do any Highlands Act exemptions apply? If none apply, the developer's team should review the likelihood of receiv-

ing a waiver from the Highlands Act buffer requirements.

If the project is not in the Highlands Preservation Area, the next step should be to determine which riparian zone under the Flood Rules might apply — 300-foot, 150-foot or 50-foot. Is the water body a C-1 water body? Is the water body essential habitat for

threatened or endangered species? Finally, the developer's team will need to determine whether the project is a "major development," and if so, will there be a SWRPA that will impact the proposed development. As can be seen, it will require a detailed analysis to determine what development might be allowed on any given property. ■