

Back to the Drawing Board on Flood Hazards?

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Over the past year, a battle between the New Jersey Department of Environmental Protection (NJDEP) and the New Jersey legislature has delayed the adoption of changes to the regulations governing flood hazard areas in New Jersey. Despite efforts by the NJDEP to appease legislative critics and environmental advocates, the legislature is on the brink of invalidating these regulations and sending the NJDEP back to the drafting room.

Since 2011, NJDEP has sought to amend the complex and occasionally conflicting Flood Hazard Areas Control Act (FHA) rules, N.J.A.C. 7:13-1.1, et seq.; Coastal Zone Management (CZM) rules, N.J.A.C. 7:7E-1.1, et seq.; and Stormwater Management (SWM) rules, N.J.A.C. 7:8-1.1, et seq., in order to create a uniform policy approach to regulating flood hazard areas and the preservation of vegetation within riparian zones. These programs are designed to minimize property damage and environmental degradation by regulating development and other disturbances in flood hazard areas.

The FHA rules define a flood hazard area as the "land and the space above that land, which lies below the flood hazard design flood elevation," N.J.A.C. 7:13-1.2, i.e., the area below the high water mark of a 100-year flood. There are two types of flood hazard areas pursuant to the FHA rules: tidal flood hazard areas (those areas subject to tidal flooding from the Atlantic Ocean) and fluvial flood hazard areas (those areas subject to flooding resulting from stormwater runoff). The FHA, CZM and SWM rules set forth permitting requirements for specific development activities in flood hazard areas, as well as construction standards that must be satisfied.

On June 1, 2015, NJDEP released for public comment proposed changes to several regulatory programs affecting development in flood hazard areas. See 47 N.J.R. 1041.

Generally, the proposed rule changes are designed to:

- Increase the amount of vegetation that may be disturbed within riparian zones and incorporate additional methods of compensation for the disruption of vegetation, which reflects NJDEP's experience in permitting these activities;

- Repeal the "special water resource protection area" rules within the SWM and replace those regulations with the protections that exist under the FHA rules, in order to create a uniform regulatory scheme;
- Give greater control within the FHA and CZM rules to the local Soil Conservation Districts for mitigation of acid producing soil deposits in riparian zones;
- Clarify the 47 existing permit-by-rule provisions within the FHA rules and add 19 new permit-by-rule activities;
- Allow the NJDEP 90 calendar days to review general permit applications under the FHA rules, and add nine new categories of general permits; and
- Streamline the permit programs administered by the Division of Land Use Regulation by, in addition to the foregoing, aligning the rules in a standardized format.

NJDEP's proposal drew the ire of environmental groups and legislators, which denounced the proposal as an evisceration of the state's substantive environmental protections. Environmental lobbyists argued in particular that the proposed rules would allow for greater development and stormwater discharge near environmentally sensitive areas, such as Category One (C1) waterways that are of importance for recreation and drinking water. Several legislators also concluded that the NJDEP rules go beyond a mere "streamlining" of regulations and would, in fact, weaken the protection for flood-prone lands, resulting in greater flooding and water pollution, which go against the legislative intent of the FHA.

In response, the leaders of the State Senate and General Assembly committees with oversight on environmental issues employed a rarely used provision of the New Jersey Constitution that authorizes the legislature to "review any rule or regulation adopted or proposed by an administrative agency to determine if the rule or regulation is consistent with the intent of the Legislature." N.J. Const., art. V, §IV, ¶6. Pursuant to the state constitution, if the legislature approves resolutions establishing that a proposed regulatory action is against legislative intent, the offending agency has 30 days following transmittal of the resolution to amend or withdraw the proposed rules. *Id.* If the agency does not act, the legislature can pass another concurrent resolution to invalidate the rules and regulations in whole or in part.

The State Senate and General Assembly began the invalidation proceedings at the end of 2015, with each house introducing identical resolutions, Assembly Concurrent Resolution (ACR) 249 and Senate Concurrent Resolution (SCR) 180, which declared that the proposal violated the

legislative intent of the enabling statutes, finding that the proposed rules weaken environmental protections and unreasonably permit development in flood-prone areas. NJDEP testified before the Senate and Assembly committees hearing the resolutions that the changes would promote efficiency while maintaining the strictest flood and water quality protections in the nation.

Notwithstanding NJDEP's protests, ACR249 and SCR180 passed both houses in January 2016, giving NJDEP 30 days to amend or withdraw the proposed rules. When the NJDEP failed to respond within the 30-day timeframe provided in the Constitution, the Senate and Assembly introduced resolutions (ACR160/SCR66) to invalidate the proposed rules in their entirety.

The NJDEP eventually responded to the legislative challenge by agreeing to amend the proposed rules, and presented a plan to the Senate Environment and Energy Committee at its May 16 hearing. NJDEP staff testified that the agency intended to adopt the currently pending FHA rules, with minor modifications to address legislative and stakeholder concerns. These modifications included:

- Not adopting proposed changes to the regulations surrounding "headwaters";
- Not adopting certain proposed riparian zone disturbances, including a proposed permit-by-rule for artificial turf athletic field construction; and
- Clarifying the protections for "special water resource protection areas."

On June 1, NJDEP formally adopted the June 2015 FHA rule proposal with minor changes from its original proposal. At the same time, NJDEP put forth a "concurrent proposal" further revising the newly adopted FHA rules. This "concurrent proposal" was designed to address legislative and rule commentator concerns regarding water quality protections by incorporating, among other items, additional protections for work within 150 feet of a C1 waterway or tributary and aligning the flood proofing requirements with the NJ Uniform Construction Code and the National Flood Insurance Program.

While proponents of the changes to the FHA regulatory structures touted NJDEP's actions as illustrative of the needed balance between regulatory reform and environmental protection, those opposed argue that the modifications are window-dressing that failed to fix the fundamental flaws with NJDEP's protection of C1 waterways. There was also significant concern by legislators with NJDEP moving forward on proposed rules without additional public comment. Senator Bob Smith, chairman of the Senate Environment Committee, strongly

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suggested that NJDEP merge the proposed rules and the "concurrent proposal" into a new rulemaking for public comment.

However, on June 1, NJDEP moved forward with its plan and adopted the FHA rules with minor modifications while simultaneously releasing its concurrent proposal. NJDEP viewed its modifications to the 2015 proposal as minor, which did not require further public comment. The agency explained that it took these steps, despite the legislative concerns, in order to have a set of rules in effect for projects currently undergoing the permitting process.

The State Senate and General Assembly appear to be moving forward with ACR160 and SCR66 to invalidate the FHA rules. On June 16, the General Assembly approved ACR160, signaling that body's intent to invalidate the rules. On the same day, the Senate Environment Committee voted to release SCR66, and it now awaits a vote by the full Senate. If the Senate votes in favor of SCR66, the newly adopted FHA rules will be invalidated, the concurrent proposal will become meaningless, and FHA rules will revert back to those in existence on May 31.

As this showdown between NJDEP and the legislature continues to unfold, the regulated community is left to wonder which rules will apply to projects that are in development, and how NJDEP will make decisions on permit applications currently before the agency. Some in the regulated community have responded by presenting their applications in the context of the pre-existing FHA rules, believing that the legislature has all but sent the new rules back to the drawing board. However, at the time of this writing, the full Senate has not yet voted on SCR66, and the newly adopted FHA rules are operative before NJDEP.