

New Standards Affecting Freshwater Wetlands Regulation in New Jersey: The Recent Freshwater Wetlands Protection Act Rule Adoption

Articles

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On October 6, 2008, the New Jersey Department of Environmental Protection (the "DEP") published a Freshwater Wetlands Protection Act (the "FWPA") rule adoption in the New Jersey Register. These DEP rules impose new application requirements, freshwater wetlands general permit limitations, enhanced protection of historic resources and new standards related to freshwater wetlands transition areas or buffers. The rule adoption, which differs in several areas from the rule proposal published on September 4, 2007, is summarized below.

Definitions. Three definitions are significant under the new rules. "Residential development project" is defined as construction of a structure for residential use and the area within 20 feet on all sides of the structure. This definition reflects an attempt by the DEP to resurrect the 20 foot "buffer on buffer" requirement that had been found to be improper and was stricken by the courts, following the last Freshwater Wetlands Protection Act rule amendment. The definitions of "architectural survey" and "historic preservation restriction or easement" signal the DEP's intent to ensure expert evaluation and protection of historic structures and archeologically significant sites. The easement definition states that a restriction or easement will forbid or limit alteration of exterior or interior features of a structure, changes in appearance or condition of a site, historically inappropriate uses of a structure or site and other acts or uses detrimental to appropriate preservation. Under the new rules, the State Historic Preservation Office will recommend easement terms.

Jurisdiction. The rule adoption makes a property owner, in addition to a permittee who is not the property owner, responsible for ensuring compliance with the FWPA rules and freshwater wetlands permit or transition area waiver requirements, and for failure to obtain the required permits or waivers for regulated activities within freshwater wetlands or wetlands transition areas or buffers.

Letters of Interpretation/Wetlands Mapping. The FWPA is permissive. The DEP cannot require the submission of an application for a wetlands letter of interpretation. However, by rule, the DEP now states that planning boards and zoning boards of adjustment may require letters of interpretation in connection with municipal development applications. All applications to the DEP for FWPA permits and approvals must approximately locate and quantify all wetlands and state open waters on the property beyond the area of proposed regulated activities. This is intended to allow the DEP to establish baseline quantification of the extent of wetlands within the state, and to identify streams subject to riparian buffers created by the recently adopted Flood Hazard Area Control Act rules.

Transition Area Waivers. If a standard freshwater wetlands transition area or buffer of 150 feet or 50 feet adjacent to a wetlands is modified, by transition area averaging plan approval or otherwise, a perpetual easement or restriction must be recorded upon the earlier of the transfer of title to the property or the commencement of authorized activities. The restriction will follow the land even if the project for which approvals were granted is abandoned. For “residential development projects”, a homeowner’s association or other similar entity must own the deed restricted area. No portion of an averaged transition area may be owned by an individual lot owner. A fence at the transition area boundary must be installed prior to commencement of construction and must be maintained in perpetuity. Any former agricultural fields within the restricted area must be allowed to naturally revegetate.

Wetlands General Permits. General Permit No. 6, which previously allowed fill of up to one acre of isolated wetlands is now limited to .5 acres if the wetlands in question is a “water of the United States”. New General Permit No. 6A permits up to .5 acres of disturbance of a transition area adjacent to an isolated wetlands provided that the total disturbance under General Permit Nos. 6 and 6A does not exceed one acre. The new rules do not allow “stacking” of general permits or transition area waivers if the resulting disturbance would exceed the area limitation of a single permit. For example, an applicant cannot combine a General Permit No. 10 minor road crossing permit, limited to .25 acres, with a transition area averaging plan approval in order to obtain authorization for .40 acres of roadway. Multiple minor road crossings of the same wetlands are prohibited unless they are necessary to reach developable uplands portions of a property and common driveways must be utilized to the extent possible.

General Permit Mitigation/Disturbance Minimization. The rule adoption deleted previously proposed minimization and mitigation payment requirements for many general permits. However, the FWPA rule proposal published simultaneously with the rule adoption requires mitigation, presumptively by payment to the Wetlands Mitigation Fund, for those general permits most necessary for development: General Permit No. 2 for utility installations, General Permit No. 6 for isolated wetlands, General Permit Nos. 10a and 10b for minor road crossings, General Permit No. 11 for storm water intake and outfall structures, General Permit No. 21 for aboveground utilities and General Permit No. 7 for redevelopment projects. The proposed rules, if adopted, will establish mitigation payment obligations of \$38,000 per acre of disturbance above .1 acre for a single residential lot and \$300,000 per acre for all other disturbances in excess of .1 acre. The DEP will require compensation for the first .1 acre unless the disturbance is “minimized” to place development, to the extent possible, outside of wetlands boundaries.



Ownership Documentation. All DEP general permit applications must include documentation of the date of the subdivision that created the property and a history of ownership of the subject property and of all contiguous lots from the June 30, 1988, one day prior to the effective date of the FWPA. This will allow the DEP to establish whether general permit disturbance limitations have been exhausted on an adjacent lot currently or formerly in common ownership.

Permit Transfers. Transfer of a FWPA permit or approval requires a permit modification and a notarized statement from the seller, identification of the new owner, proof that any required deed restriction has been recorded and the listing of any adjacent property owned by the prospective owner. In connection with the transfer, the DEP will evaluate whether the “premise” underlying the permit or approval remains valid. The DEP may, for example, refuse transfer of or cancel a General Permit No. 10 for access to a developable portion of the property because the prospective buyer now has access from purchaser-owned adjacent property.

Non-Disclosure Liability. All persons participating in freshwater wetlands permitting application preparation who fail to disclose information, that is known or should have been known, or who fail to disclose later discovered information, may be subject to enforcement action and civil administrative penalties.

Grandfather Protection. The new rules provide no protection for current permits and approvals, some of which contain a recital stating that, if more stringent rules are adopted during the term of the approval, the new rules will apply. Informally, the DEP has indicated that it will not revisit prior approvals and will process pending applications under the prior rules, provided that the application submissions are deemed complete and are subsequently approved.

The rule adoption is more extensive and detailed than a short summary, such as this, can capture, and the impact of the new rules should be evaluated on a case-by-case basis. If you need further information regarding these new freshwater wetlands regulations, please contact Lloyd Tubman, Esquire, in our Flemington office at (908) 788-9700 or **Robert W. Bucknam, Jr.**, Esquire, in our Haddonfield office at (856) 354-3025.

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Related People



Robert W. Bucknam, Jr.

Partner

✉ rbucknam@archerlaw.com

☎ 856.354.3025



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