
August 1, 2006

Tom Micai, Director
Land Use Regulation
PO Box 439
Trenton, NJ 08625

Dear Mr. Micai,

Thank you for taking time to meet with us on July 18th. We are pleased to hear of your resolve to improve conditions for your overworked staff. The loss of 14 of your staff represents a catastrophic impairment of the program. We would support program management improvements that increase staff productivity, while delivering stronger wetlands and ecological protections, expanding public involvement, and ensuring science based transparent decision-making. However, we are very concerned about the potential for management reforms designed to reduce the "paperwork burden" that would compromise these objectives, particularly attempts to streamline reviews based on location or to advance the development and redevelopment policies of the State Plan. Following are most of the particular issues we discussed that may help you with the challenge:

Use of Technical Guidance

We support development of technical manuals to improve decision-making. However, adoption of technical manuals do not require formal rulemaking procedures or public participation requirements. Therefore, we are concerned about the potential implications of inadvertently compromising the degree of protection, DEP regulatory oversight, and public involvement. Accordingly, we want to be closely involved in developing any technical manuals. Issues for the guidance include:

- classification of wetlands during the LOI to bring consistency to decisions throughout the bureau.
- time-of-year identification of threatened and endangered species to insure accurate classifications and avoid use of "reliance" and frustration of individuals and groups who discover threatened and endangered species during the correct time of year.
- permit renewals to assure a fresh look at an expiring permit and to insure conditions have not changed or to identify what changes have occurred.

Intra-Department Process

- Coordination with the stormwater program is important to insure that not just the direct impact to wetlands be addressed, but the "off-wetlands" stormwater treatment that causes the impact.
- Work with the water allocation program to tighten their regulations to insure that their decisions do not result in dried up wetlands.
- The overlap between CAFRA and the wetlands regulations must be addressed.
 - o CAFRA applications requiring wetlands permits should consider wetlands impacts and receive staff approval only when based on affirmative findings of no significant adverse impact as required by CAFRA's Section 10 (*See* N.J.S.A. 13:19-10).
 - o CAFRA reviews not requiring wetlands permits should consider greater cumulative or adverse impacts that may occur to wetlands from proposed coastal development. Increased water allocation, impervious coverage impacts, soil compaction and increased runoff, fragmentation or loss of coastal forest and potential habitat losses all are to be considered.

- Land Use staff must be aware of and implement the protection of "clipped" Coastal Centers to prevent high amounts of impervious coverage or loss of coastal forest adjacent to wetlands.

Public Inquiry and/or Input

- Opportunity for public input into an application is provided, but rarely is there feedback that acknowledges attention paid to the input. This might be solved for large applications by opening up the pre-application meeting to interested parties.
- Regular meetings with environmental groups would facilitate understanding of issues on both "sides."
- Electronic permitting to give the public full access to applications would be a vast improvement over current dependence on the DEP Bulletin.

Rule Amendment Suggestions

We understand that in September, the Department plans to propose to readopt existing rules without change for a short period to enable it to work on other regulations before proposing to readopt wetlands regulations for the full five-year period. The existing rules need to be improved upon. Rule changes needed include:

- expanded scope of "adverse modification" to capture regulated activity occurring outside wetlands and/or transition areas;
- secondary and cumulative impact methodology
- T&E classifications;
- implementing DEP research recommendations on mitigation reforms;
- integration with stormwater, water allocation, stream encroachment, and other DEP permits; et al.).
- The 2001 amendments involving mitigation need to be checked carefully. The decision to require that all small wetland impacts be taken care of by mitigation banks turns out to be impractical given the few available banks. Watersheds suffer because the mitigation can take place in entirely different drainages because of the scarcity of banks.
- Staff time could be better used if the number of transition area waivers were reduced. They were vastly expanded under the 2001 amendment process. The regulation should be written so the staff can "just say no."
- DEP records should be reviewed and changed to reflect the general permits that are creating more than minimal and cumulative impacts. Records show that GP6 permits account for a large proportion of GPs issued. Several studies document the importance of isolated wetlands to water resource health in a watershed, especially in headwater areas. So, issuance of GP 6 should be excluded from headwaters areas.

Because of all the above concerns, we request that the readoption proposal include specific time bound commitments to propose reform and strengthen existing rules within the next 12 months.

Regulatory Gaps

There may be an emerging regulatory gap over wetlands in the Meadowlands. The FWPA requires a wetlands permit for dredge and fill activities in the Meadowlands:

Activities in areas under the jurisdiction of the Hackensack Meadowlands Development Commission . . . shall not require a freshwater wetlands permit, or be subject to transition area requirements, except that the discharge of dredged or fill material shall require a permit issued under the provisions of the Federal Act, or under an individual and general permit program administered by the State under the provisions of the Federal Act and applicable State laws.

N.J.S.A. 13:9B-6(a) (emphasis added). This somewhat confusing provision means that, in the Meadowlands, no transition area requirements under the FWPA apply for any regulated activity, some regulated activities also do not require any wetlands permit, but that general or individual permits are retained for dredge and fill activities. Presumably the retention of the latter authority was deemed necessary because of the great threat to the Meadowlands posed by continued wetlands destruction. As the Corps has retained some permitting authority in the Hackensack Meadowlands, the Act contemplates that dredge and fill activities will require either a Corps or a DEP permit using the FWPA as the “applicable State law” authority. The state law alternative is important because the Corps has recently denied jurisdiction over wetlands based on its overly broad interpretation of SWANCC decision, and denials will only be more likely in the wake of the Rapanos decision. State law must fill this gap.

The Department’s regulations, however, state that all regulated activities within the Meadowlands District do not require a permit under New Jersey’s Freshwater Wetlands Protection Act. See N.J.A.C. 7:7A-2.9(a). The FWPA itself does not contain such a blanket exclusion, and by purporting to cut off dredge and fill permitting authority in the Meadowlands, the Department’s regulation at N.J.A.C. 7:7A-2.9(a) is ultra vires and void. Accordingly, the FWPA must control.

Over the long term, the Department should amend its regulations at N.J.A.C. 7:7A-2.9(a) to conform to the statute and to be consistent with its view of the nearly identical provision governing the Pinelands. Indeed, the statutory subsection applicable to the Meadowlands does not contain the additional qualifying language in the subsection applicable to the Pinelands (i.e., the language at the end of 7:7A-2.9(b) starting with “provided that . . .”), and therefore provides even stronger support for the Department’s jurisdiction over dredge and fill activities in the Meadowlands than the Pinelands.

We appreciate your suggestion that the Department have a one-day “Permit Session” to make sure we are fully aware of the permit review process and look forward to such a session in late September or early October. Because, as you indicated, reforms of the wetlands rules have been deferred due to competing rulemaking needs, we request that you provide the Department's list of rule proposal priorities and rule proposal schedule.

Again, thank you for meeting with us and we look forward to our next session.

Sincerely,

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