



NEW JERSEY HIGHLANDS COALITION
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Janis Hoagland, Esq.
Office of Legal Affairs
NJ DEP
P.O. Box 402
Trenton, NJ 08625

June 8, 2009

Re: DEP Docket 04-09003/710

Dear Ms Hoagland:

I am submitting the following comments on behalf of the New Jersey Highlands Coalition regarding rule proposals and amendments for Determinations of Substantial Reliance on a Letters of Interpretation under the Freshwater Protection Act.

General Comments

In general, we are wary of any regulatory authority that would rely upon the findings of an applicant's contracted professional as the primary source of information in the authority's deliberations that may result in the issuing of a permit for a regulated activity or an exemption from its rules. In the case of NJ DEP's Division of Land Use Regulation, this would include LOI's, requests for extensions of LOI's, or requests for Substantial Reliance on a previously issued LOI that is superseded by new information that would nullify the originally issued LOI. There are too many examples of net losses to wetlands, federally endangered species habitat, and surface water buffers (see 10/31/08 letter from Abigail Fair, representing comments on this docket from ANJEC)—resulting in diminished water quality and quantity, areas the Department is supposed to protect. If, however, the intention of the proposed new rules were to significantly strengthen the standards and limit the conditions upon which a Determination of Substantial Reliance were made, it would be welcome. However, we find that the proposed codification of Substantial Reliance result in rules that would weaken the authority of the Department and put at risk resources of our state.

We are particularly concerned by the extent to which the Department is responding to a single petitioner (an attorney who specializes in representing developers) with the new rule proposals. Yet in the Department's own words, it only "receives about five requests each year" for Substantial Reliance on a superseded LOI (41 N.J.R. 1314[a]).

Specific Comments

7:7A-3.7(a)3 “The findings in the LOI for which the determination of substantial reliance is requested [only when it] did not result from the failure to provide complete and accurate information required under this chapter of which the applicant for the LOI, its consultants, engineers, surveyors or agents are, or reasonably should have been, aware.”

This is vague language that can be easily challenged and the burden of proof is not specified. It should be specifically stated that such a judgment will be made solely by the Department.

7:7A-3.7(b)1(i. through iii.) “In making a determination of substantial reliance on an LOI under this section, the Department shall consider the following factors: 1) The nature and degree of the LOI revision and the effect on a potential project or activity, that is, as a result of the LOI revision, whether the applicant will be able to pursue: i) The same project or activity but with a revised layout; ii) A project or activity that is reduced in scope from the project or activity that was anticipated based on the initial LOI; or iii) No project or activity.”

What is the relative significance and weight of each of these effects on a project by a revised LOI? For example, if a revised LOI resulted in “no project or activity”, would the Department be more likely to grant a determination of substantial reliance, or would the Department be less likely? If a revised LOI resulted in “no project activity”, a request for Substantial Reliance must be denied, as the revised LOI would have mapped the presence of unusually high value wetlands and changes in conditions that could not support the land use proposed by the applicant.

7:7A-3.7(b)2(i. through iv.) “The type of project or activity proposed to be conducted within the wetlands and/or transition areas identified in the revised LOI, specifically whether the proposed project or activity would include any of the following within the wetlands and/or transition areas identified in the revised LOI: i) Installation of a septic system; ii) Placement of any hazardous substance, as defined in the Department’s rules governing hazardous substances at N.J.A.C. 7:1E Appendix A; or pollutant, as defined in the New Jersey Pollutant Discharge Elimination System rules at N.J.A.C. 7:14A; iii) Placement of an outfall structure that would discharge unfiltered or untreated stormwater; or iv) Placement of an aboveground or underground storage tank for storing any substance other than water.

*Although the Summary section of the proposed rules (41 N.J.R. 1314[a]) states, “Each of these elements presents the potential for environmental degradation if placed in or adjacent to a wetland. Therefore, the Department **will require conformance to the revised LOI** (emphasis added) to ensure maximum protection for the wetland and transition area.” However, in the language of the proposed rule there is no such requirement, only that “the Department shall consider [these] factors.”*

7:7A-3.7(b)3(i. & ii.) “The impact and effect that the proposed project or activity would have on the wetlands and/or transition areas identified in the revised LOI if reliance on the initial LOI were to be allowed. The proposed project or activity shall not: i) Destroy, jeopardize or adversely modify a present or documented habitat of a threatened or endangered species; ii) Jeopardize the continued existence of a local population of a threatened or endangered species.”

In the language of the above section, it is unclear that if T&E species habitat is found on or near the project site in a revised LOI, the applicant may be granted substantial reliance if these concerns were addressed, or if the request would be denied and the full terms of the revised LOI would apply. It also should be specified that if a T&E species survey was required because of the presence of suitable habitat, but conducted outside of the seasonal presence of listed T&E species, the request will be denied.

7:7A-3.7(b)2(i. through v.) “The costs incurred by the applicant after the initial LOI was issued but before the revised LOI was issued, and whether the costs were reasonable, as follows: i) Costs actually incurred in acquisition of the property or pursuit of development of the proposed project or activity, including the amount, nature, and date of any investments made to develop the proposed project or activity; ii) Costs incurred in furtherance of a lawful action related to the proposed project or activity. However, if the property owner began the project without the necessary permits, the cost of defending against an enforcement action for a violation shall not be considered a reasonable cost; iii) Costs relating only to the specific property that is the subject of the initial and revised LOI, excluding costs related to other properties; iv) Costs incurred to obtain any State, county, and local approvals related to the proposed project or activity; and v) Any other cost affecting the property or the applicant that affects the reasonableness of the applicant’s investments, expectations, and/or use of the property based on the initial LOI.”

Land development is by nature speculative. The Department should not offer “passes” because of poor business judgment or a developer’s contracting with a less than thorough wetlands consultant or engineering firm. The developer’s recourse should be with the developer’s professionals—not the Department or the quality and quantity of the waters of the state.

7:7A-10.2 (provision for public participation in proposed rules)

The current rules apply to notification procedures and in no way encourage public participation. NJ DEP posts notifications of new applications and current status of applications in the DEP Bulletin, which then triggers a 30-calendar-day public comment period. The relevant application details may only be reviewed once an Open Public Records Act request is filed with the Department and approved. The required travel time to NJ DEP (or the project’s municipal or county office) coupled with the costs for duplication are considerable hindrances to any faithful attempt towards public participation. If the Department were interested in creating meaningful opportunities for public participation, application documents, charts and maps would be scanned into OCR capable pdf files and posted on the NJ DEP website (this would also streamline NJ DEP’s review process as OPRA’d files become unavailable to the permitting division during the period(s) of time the file is transferred to the Office of Records Access every time an OPRA request is received).

Other Comments

Economic Impacts

The economic impacts of Substantial Reliance does not begin and end with the effects upon the applicant. The water resources of the state, particularly in water production areas such as the Highlands and Pinelands, provide considerable economic benefits throughout the state. Any exemptions or rules

that would allow degradation of the fragile environments that support these water resources, in addressing economic impacts, must also consider the impacts upon these valuable resources.

Smart Growth Development Impact

“... An LOI is a planning tool to identify the location and extent of wetlands and wetland transition areas on a site. It assists planners or developers in designing a project or activity to avoid or minimize impacts to these environmentally sensitive areas. In addition, **Planning Areas 1 and 2, and designated centers, tend to be more developed and disturbed than other areas. Consequently, there are fewer wetlands in such areas** (emphasis added). Further, the proposed amendments and new rule provide a process for assessing whether or not an applicant has substantially relied upon an LOI, in those cases where an LOI is revised, thereby providing the possibility that the Department will not require compliance with a revised LOI.”

Where wetlands and other environmentally sensitive areas exist in urban and exurban locations, extraordinary measures are required to maintain their valued presence, minimize further disturbances, and encourage restoration. If substantial reliance is to be allowed at all in Planning Areas 1 and 2, specific urban-centric standards must be developed and applied and those standards must be of the highest order.

New Jersey Highlands Region

The NJ Highlands Regional Master Plan (RMP) references NJ DEP- issued LOI's in many of its program areas including the delineation of 300' buffers for Highlands Open Waters and Highlands Riparian Areas, criteria for allowing development within previously disturbed buffers, restoring buffers when changing from agricultural to other land uses, HRAD procedures, etc. The proposed rules and rule amendments must reference the RMP in the areas the NJ DEP rules and the RMP differ in addition to including such issues and a plan for inter-agency cooperation in the much anticipated Memoranda of Agreement between the two agencies.

Respectfully submitted,



Elliott Ruga