



# DIMENSIONS

Newsletter of the New Jersey Builders Association

## “Grandfathering” under the New Flood Hazard Rules

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The New Jersey Department of Environmental Protection (“DEP”) published notice on November 5, 2007, of the adopted version of its new Flood Hazard Area Control Act rules. The new rules replace the prior Flood Hazard Area Control rules commonly called the “stream encroachment” regulations. The rule proposal as published on October 2, 2006, contained a very narrow “grandfather” provision for previously approved or partially completed developments. Based on comments submitted by the New Jersey Builders Association (“NJBA”) and others, DEP made changes to the grandfather provision that were intended to clarify its scope and extent. While the revisions addressed some of the issues raised in the public comments on the proposed rules, some ambiguity still remains particularly with respect to projects that were not previously regulated under the prior stream encroachment rules or under the Coastal Area Facility Review Act (“CAFRA”).



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The “grandfather” provision of the new regulations is set forth at N.J.A.C. 7:13-2.1(c). There are four relevant categories of projects that may qualify for an exemption: projects with stream encroachment approval under the prior regulations; certain CAFRA or waterfront approved projects; approved projects within the Hackensack Meadowlands District; and projects with local approvals that did not require stream encroachment, CAFRA or waterfront development approval.

### Stream Encroachment Approvals

A permit is not required under the new rules for an activity that would constitute “regulated activity” under the new rules if:

- DEP received an application for a stream encroachment permit before November 5, 2007;
- the application was complete for review before November 5, 2007;
- DEP issues a stream encroachment permit for the project under the prior regulations;
- the stream encroachment permit applies to and authorizes all activities that were subject to regulation under the old rules, including each building, road or utility crossing within an area regulated under the prior rules; and
- the permit is valid when the regulated activity is



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undertaken (because the regulations do not permit the extension of approvals, the authorized activities must be completed before expiration of the permit).

If an activity was not regulated under the prior rules, but is regulated under the new rules, the activity is “grandfathered” and does not require a permit provided all of the criteria above are satisfied. In its explanatory statement to the rule adoption, DEP uses the example of a 10-unit residential development, of which 7 units were regulated under the old

regulations, and all 10 units would fall under DEP’s jurisdiction if the new regulations were applied. In this scenario, all 10 units are “grandfathered” assuming the applicable criteria are satisfied.

DEP has publicly stated that it will attempt to be flexible with respect to the requirement that the application be complete prior to November 5, 2007, because it recognizes the effect that its own staffing limitations may have on review of applications for completeness. Only one DEP staff person initially

reviews all stream encroachment applications for completeness.

### CAFRA and Waterfront Development Approvals

With respect to CAFRA and waterfront development approvals, the same requirements applicable for grandfathering of stream encroachment approvals apply in that the permit must apply to all activities that were subject to the regulations in effect prior to November 5, 2007, and the permit must be valid when the regulated activity is undertaken. However, while the stream encroachment grandfather only requires that the permit application be complete prior to November 5, 2007, for the CAFRA and waterfront development permit grandfather it must have been "declared complete" by DEP in writing prior to November 5, 2007. Additionally, the grandfather protection only applies to CAFRA or waterfront developments permits for activities within a "tidal" flood hazard area. The rule proposal would have provided grandfather protection for any project with a CAFRA or waterfront development permit that met the other criteria. DEP has explained this new limitation on the grounds that only projects in "tidal" flood hazard areas that obtained a CAFRA or waterfront development permit were exempt from the requirement to obtain a stream encroachment permit under the old rules. CAFRA regulated projects that were not within a "tidal" flood plain were regulated under the prior stream encroachment rules. Thus, the new

rules require that grandfathering for such projects be based on the required stream encroachment permit.

### Hackensack Meadowlands District

The rule adoption document included a new provision that was not part of the rule proposal. This provision applies to activities that would constitute a regulated activity under the new rules in connection with certain projects located within the Hackensack Meadowlands District. The project must be authorized under a valid zoning certificate issued by the New Jersey Meadowlands Commission prior to November 5, 2007, and must not have required a stream encroachment permit, nor been subject to regulation under the Coastal Permit Program Rules or Coastal Zone Management Rules. The grandfather is based on DEP's acknowledgment that the Meadowlands Commission conducts site-specific reviews of potential flooding and water quality impacts.

### Municipal Approvals

The rules also provide grandfather protection to projects that prior to November 5, 2007 did not require a stream encroachment, CAFRA or waterfront development permit, and are not located within the Hackensack Meadowlands District, if certain municipal approvals were obtained or activities were undertaken prior to November 5, 2007. Specifically, regulated activities "authorized under a valid municipal approval . . . which enables commencement of construction of

the regulated activity on a specific lot and/or easement" are exempt. If no "municipal approval" was required, then the grandfather exemption would apply if construction activities were completed on site prior to November 5, 2007, including the foundation of at least one building or structure, all subsurface improvements for a roadway, or installation of all bedding materials for a utility line.

The rule adoption eliminated language from the proposal that based the exemption on the issuance of a "valid, final municipal building or construction permit." Despite eliminating this language, DEP states in the explanatory statement to the adopted rule that "it is the Department's understanding that only a local construction permit or its equivalent allows regulated activities such as lot clearing and foundation work to commence. It is this lot-specific local construction permit or equivalent approval authorizing a regulated activity that the Department requires in order to grandfather activities that would otherwise be regulated under the new rules." The explanatory statement also suggests that projects with site plan or subdivision approval under the Municipal Land Use Law would not qualify for the grandfather protection as DEP does not consider those approvals to enable commencement of construction.

The changes made by DEP fail to clarify the scope and extent of the grandfather exemption. The language

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of the regulation is vague and requires reference to the explanatory section for an understanding of what DEP considers to be a “valid municipal approval . . . which enables commencement of construction.”

Moreover, the characterization of site plan and subdivision approval as approvals that do not enable the commencement of construction is too simplistic and ignores the significant investment backed expectations associated with obtaining those approvals.

### Duration of Grandfather Exemption

DEP has also placed strict limitations on the duration of an applicable grandfather exemption. As noted above, in the context of a qualifying stream encroachment permit, CAFRA or waterfront development permit, the regulated activity must be completed while the permit remains valid. Since stream encroachment permits can not be extended, the work must be completed prior to expiration. CAFRA and upland waterfront development permits may be extended, but the opportunities are limited and discretionary with DEP. Construction must commence while the permit remains valid and continue without interruption for a cumulative period of one year until completion of the project, and a request for written authorization to continue the

construction must be submitted to DEP 20-days prior to expiration of the permit.

Additionally, the grandfather protection is lost in the event that a regulated activity under a qualifying approval is revised unless (pursuant



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to N.J.A.C. 7:13-2.1(d)) you establish that the revision will not:

- increase the area of vegetation disturbed in a riparian zone;
- increase flood storage displacement in a flood hazard area;
- result in additional regulated activities within a regulated area that were not previously reviewed by DEP under the prior stream encroachment rules or in the context of a previously issued CAFRA or waterfront development permit; or
- result in a change in land use and/or alteration of the basic purpose and intent of the project.

The rule adoption did clarify that the exemption is lost only if the new or modified activity occurs within a “regulated area”, addressing the concern that any revision to a project, even if it were not located within a regulated area, could trigger review under the new rules.

DEP’s more recent rulemaking, as exemplified in other contexts such as

the Stormwater Management Rules and the Highlands, demonstrates a concerted effort to narrow “grandfathered” rights. The new Flood Hazard rules are no exception. For projects that have obtained qualifying approvals, careful planning will be necessary to avoid triggering application of the new rules in the event that project modifications are desirable or necessary.



*This information is not to be construed as legal advice.*

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