

Summary of NJDEP Stormwater Regulations

On February 2, 2004, two sets of new stormwater rules became effective that have a substantial effect on proposed development in the State of New Jersey. The new rules, which are designed to address water quality impacts from existing and future stormwater discharge, impose restrictions on “major development”, which is generally defined as new development that will ultimately result in the disturbance of one or more acres of land or which will increase impervious cover by one-quarter acre or more. Set forth below is a summary of the new rules and pertinent provisions relating to applicability issues and design standards that are required to be met by developers.

The Phase II New Jersey NJPDES Stormwater Regulation Program Rules set forth in N.J.A.C. 7:14A-1.1 et seq. establishes a regulatory program for existing stormwater runoff. The program will require municipalities, public complexes and governmental agencies that operate or maintain highways to obtain permits regulating stormwater discharges. The permit program will establish Statewide Basic Requirements intended to reduce pollutants, including the development of municipal stormwater management plans.

The second set of rules, the Stormwater Management Rules, are set forth in N.J.A.C. 7:8-1.1 et seq. The rules establish design and performance standards for new development relating to groundwater recharge, quantity and quality of stormwater runoff, and buffers of 300 feet for lands adjacent to Category One waters.

Set forth below is a summary of the applicability provisions of the Rules as well as the design and performance standards that will be applied to major development.

A. Effective Date: February 2, 2004; Applicability/Grandfather Provision

a. N.J.A.C. 7:8-1.2 defines “Major development” as any “development” that provides for ultimately disturbing one or more acres of land or increasing impervious surface by one-quarter acre or more. The definition of “Development” includes, among other things, the subdivision of land and the construction of any building or structure for which permission is required under the Municipal Land Use Law (MLUL).

b. N.J.A.C. 7:8-1.3 provides that any questions or submissions under this chapter are to be directed to the Division of Watershed Management, New Jersey Department of Environmental Protection, P.O. Box 418, Trenton, New Jersey 08625.

c. N.J.A.C. 7:8-1.6 defines the applicability of the rules to Major Developments.

N.J.A.C. 7:8-1.6(b)(1) provides that, so long as the development does not require any of the NJDEP permits set forth in N.J.A.C. 7:8-1.6(c), major developments will be exempt from the new regulations (i.e., the existing regulations will continue to apply), if one of the following MLUL approvals is received by February 1, 2004:

- (i) Preliminary or final site plan approval.
- (ii) Final municipal building or construction permit
- (iii) Minor subdivision approval where no subsequent site plan approval is required
- (iv) Final subdivision approval where no subsequent site plan approval is required
- (v) Preliminary subdivision approval where no subsequent site plan approval is required

d. If the development does requires one or more of the NJDEP permits set forth in N.J.A.C. 7:8-1.6(c), then under N.J.A.C. 7:8-1.6(b)(2) the MLUL approval and at least one of the permits listed in N.J.A.C. 7:8-1.6(c) must both be received by February 1, 2004 in order to be exempt. The exemption will only apply if the NJDEP permit for which approval was received includes a stormwater management review component.

e. N.J.A.C. 7:8-1.6(c) provides that for the purposes of this section, the term “permit” shall include transition area waivers under the Freshwater Wetlands Protection Act. In order to qualify for the exemption under (b)2 above, the major development must have obtained by February 1, 2004 at least one Department permit granted under the following statutes that includes a stormwater management review component:

1. Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq.
2. Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq.
3. Coastal Area Facility Review Act, N.J.S.A. 13:19-1 et seq.
4. Waterfront and Harbor Facilities Act, N.J.S.A. 12:5-3 et seq.

f. The exemption under subsection (b) expires upon the expiration, termination, or other loss of duration or effect of either the qualifying local approval or the Department permit, whichever occurs first. The expiration of local approvals under (b)1 [approvals not requiring an NJDEP permit] shall be governed by local ordinance. Once the exemption expires, the major development is subject to all requirements of the new regulation. N.J.A.C. 7:8-1.6(d).

g. N.J.A.C. 7:8-1.6(e) provides that the exemption under (b) are limited to the land area and scope of the project addressed by the qualifying approvals and permits. Exemptions shall be deemed void if revisions are made to the qualifying approval or permit in (b) unless upon application to the NJDEP, the NJDEP determines that each revision will have a de minimis impact on water resources.

B. Design and Performance Standards for Major Developments; N.J.A.C. 7:8-5.1 et seq.

1. This subchapter establishes design and performance standards for stormwater management measures for major development. In the future, the standards in this subchapter will not apply to major development if alternative design and performance standards that are at least as protective are applicable under a regional stormwater management plan. It is likely that it will be some time before the regional plans are in place and unlikely that the standards will be less stringent.

2. Under N.J.A.C. 7:8-5.2 major developments must develop stormwater management measures to meet the (1) erosion control, (2) groundwater recharge, (3) stormwater runoff quantity, and (4) stormwater runoff quality standards set forth in N.J.A.C. 7:8-5.4 and 5.5.

3. The following design requirements appear under N.J.A.C. 7:8-5.4:

(i) The standards for erosion control are those under the Soil Erosion and Sediment Control Act, N.J.S.A. 4:24-39 et seq. and the regulations thereunder.

(ii) As to groundwater recharge, the design engineer shall either:

- a. Demonstrate that the site will maintain 100 percent of the average annual pre-construction groundwater recharge volume for the site; or
- b. Demonstrate that the increase in stormwater runoff volume from pre-construction to post-construction for the two-year storm is infiltrated.

The above requirements do not apply to “urban redevelopment areas” or where stormwater has high pollutant loadings, or is industrial stormwater.

The design engineer shall design the site so as to avoid adverse hydraulic impacts.

(iii) As to **stormwater runoff quantity**, in order to control the development impacts the design engineer must complete **one** of the following:

- a. Demonstrate that for stormwater leaving the site post-construction run-off hydrographs for the 2, 10 and 100 year storm events do not exceed, at any point in time, the pre-construction run-off hydrographs for the same storm events;
- b. Demonstrate that there is no increase, as compared to pre-construction condition, in the peak runoff rates of stormwater leaving the site of runoff for the 2, 10 and 100 year storm events and that the increased volume or change in the timing of stormwater runoff will not increase flood damage at or downstream of the site. This analysis must include analysis of impacts of existing land uses and projected land uses assuming full development under existing zoning and land use ordinances in the drainage area;
- c. Design stormwater management measures so that the post-construction peak run-off rates for the 2, 10 and 100 year storm events are 50, 75 and 80 percent, respectively, of the pre-construction peak runoff rates. The percentages apply only to the post-construction stormwater run-off that is attributable to the portion of the site on which the proposed development is to be constructed; or
- d. In tidal flood hazard areas, the analysis in a-c above will only be applied if the increased volume could increase flood damages beyond the point of discharge.

4. Stormwater runoff quality standards are set forth under N.J.A.C. 7:8-5.5.

a. Stormwater management measures shall be designed to reduce the post-construction load of total suspended solids (TSS) in stormwater runoff generated from the water quality design storm by 80% of the anticipated load from the developed site, expressed as an annual average.

b. Subsection (h) requires the establishment of a 300-foot special water resource protection area buffer along all waters designated Category One and perennial or intermittent streams that drain into or upstream of the Category One waters. The special water resource protection area buffer is to be provided on each side of the waterway.

c. Encroachment into the buffer is permitted only where previous development or disturbance has occurred (e.g. active agricultural use, parking area or maintained lawn area) and only where the applicant can demonstrate that the functional value and overall condition of the special resource protection area will be maintained to the maximum extent practicable. NJDEP

must review and approve the encroachment. In no event shall the remaining special resource protection area be reduced to less than 150 feet.

d. An individual single family lot exemption from the 300 foot buffer requirements is provided. N.J.A.C. 7:8-5.5(h)(5) provides that “This subsection shall not apply to the construction of one individual single family dwelling that is not part of a larger development on a lot receiving preliminary or final subdivision on or before [February 2, 2004], provided that construction begins before five years from [February 2, 2004].”

e. There is no provision for the averaging of the 300-foot buffer, as is permitted with wetlands transition areas.

C. Environmentally Constrained Area

It should be noted that the definition of “Environmentally Constrained Area” appearing in the new regulations at N.J.A.C. 7:8-1.2 indicates that habitats of endangered or threatened species will be identified using the NJDEP’s Landscape Project as approved by the Endangered and Non-game Species Program. In the past, the state had just protected the immediate area of the sighting of a threatened or endangered species. The Landscape Project concluded that where species have been seen contiguous tracts may also contain that species. In other words, if an endangered species were found in a wooded area or wetlands the entire wooded area, as long as it was unbroken, or wetlands connected to wetlands where a sighting was made, would also be considered habitat, whether a sighting was made there or not.

Questions concerning the NJDEP NJPDES Stormwater Regulation Program Rules and/or the Stormwater Management Rules should be directed to the firm’s Commercial Real Estate Department:

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