

300-Foot Buffers Around Category One Waterways Upheld Despite Challenge from Builders

By Jason L. Sobel, Esq.



Despite a challenge from the New Jersey Builders Association (NJBA), the Appellate Division of the Superior Court of New Jersey recently upheld the validity of N.J.A.C. 7:8-5.5(h), a New Jersey Department of Environmental Protection (NJDEP) regulation that created a 300-foot buffering zone on each side of all water bodies which are especially environmentally sensitive and are therefore designated as Category One waterways. Although not expressly authorized by statute, the Court found that the 300-foot buffering zone regulation fell within the scope of NJDEP's delegated authority, which is implicit from its enabling act, as well as from a variety of other statutory schemes which authorize NJDEP to deal with water quality and quantity, stormwater management and nonpoint sources of pollution.

DEFINITION OF STORMWATER, SURFACE WATER QUALITY STANDARDS AND CATEGORY ONE WATERWAYS

Stormwater is water resulting from precipitation that runs off the land's surface. It is widely accepted that stormwater runoff picks up pollutants from the land surface and creates problems for the quality and quantity of water sources.

Surface water quality standards establish the designated uses to be achieved for individual water bodies and specify the water quality criteria necessary to achieve those uses. New Jersey has different levels of antidegradation protection in its surface water quality standards. Category One waters receive near the highest of all levels of protection.

Category One waters are those waters designated in the tables in the New Jersey Administrative Code to be protected from measurable changes in water quality characteristics because of the waterway's clarity, color, scenic setting, aesthetic value, exceptional ecological significance, exceptional recreational significance, exceptional water

supply significance or exceptional fisheries resources. Category One waterways are those that provide drinking water, habitat for endangered and threatened species, and popular recreational or commercial species, such as trout or shellfish. A Category One designation provides additional protections to those water bodies to help prevent water quality degradation and to discourage development where it would impair or destroy natural resources and environmental quality. New Jersey has now labeled 10,219 acres of reservoirs and 3,855 miles of rivers as Category One.

The Special Water Resource Protection Areas (buffers) apply to the areas around Category One waterways. The buffers include an area extending on each side of the waterway 300 feet from the top of the stream bank or from the center channel if the stream has no defined banks. The buffer is intended to be maintained in its natural state and to create an unbroken, undisturbed vegetated area to help prevent water quality degradation and is necessary because it helps to cleanse stormwater and runoff through filtration. These buffers were made a part of a comprehensive stormwater management plan which was adopted by NJDEP in 2004 under Governor James E. McGreevey.

THE 2004 STORMWATER MANAGEMENT PLAN

NJDEP first adopted a set of regulations for stormwater management back in 1983. Those regulations remained in effect without change until 2004, when, in its first major update in over 20 years, reflecting a decade of study, the NJDEP promulgated new stormwater management regulations also taking into account input from a number of public hearings on the topic. The 2004 regulations establish requirements for stormwater planning at the municipal, county and regional levels. The stated goals of the 2004 regulations included the controlling of floods, pollution and erosion, and the maintenance of the integrity of

waterways for their biological functions.

The 2004 stormwater regulations are for the most part applicable to all major development. A "major development" as per the regulations is defined as any new or expanded development that proposes disturbing one or more acres of land or increasing impervious (not able to be penetrated) surface by one-quarter acre or more.

The 2004 stormwater regulations were touted by former Governor McGreevey for once again establishing New Jersey as a national environmental leader due to its protection given to Category One waterways. Environmentalists and other like-minded groups championed the stringent and protective measures being adopted.

BUILDERS CHALLENGE THE 2004 REGULATIONS IN COURT

Just as the 2004 stormwater regulations were being praised by some groups in New Jersey, the New Jersey Builders Association was challenging them in court. The NJBA claimed that the regulations illegally hampered development. The builders argued that lawmakers never empowered the NJDEP to establish 300-foot "no-build zones" around the state's most pristine waterways, effectively putting up to 300,000 acres off-limits to construction. The builders never challenged the proposition that streams and other resources needed protection; however, they suggested that the government find a way to achieve that protection in a way that also allowed the construction of desperately needed homes throughout New Jersey. The NJBA expressed concerns over the regulations' effects on the availability and affordability of housing in the state.

The Appellate Court, who heard the case brought by the NJBA, disagreed with the arguments presented by the builders by stating that the association mischaracterized the

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buffers as “no-build zones.” The court went on to explain that, in fact, the Legislature in a variety of measures has given NJDEP a wide array of powers to address water quality and pollution concerns beyond traditional floodwater control, and to promulgate rules to protect the waters of the state. The court pointed out that not only do the regulations allow existing homes, sheds and other accessory buildings to exist and be constructed within the buffer zones, but also that there were three circumstances where the buffer may be reduced to 150 feet in towns which have stormwater management plans, thereby nullifying the “no-build zone” argument.

The court also disagreed with NJBA’s assertion that there was no statutory authority which enables the creation of the buffers. The court found that the authority to support NJDEP’s use of buffers to prevent pollution is found not only in its enabling statute (N.J.S.A.13:1D-1 to 19), which creates NJDEP and grants it broad powers of conservation and ecological control, but also in the mix of legislative schemes that seek to promote water quality and prevent water pollution. The court justified this finding by stating “a court may look beyond the specific terms of the enabling act to the statutory policy sought to be achieved by examining the entire statute in light of its surroundings and objectives.”

COURT RULING PRAISED BY ENVIRONMENTALISTS

Environmentalists, in the wake of this recent decision upholding the 300-foot buffer areas, saw the ruling as a tremendous victory for the environment in New Jersey, citing their concerns over polluted runoff into the state’s waterways, and denounced the builders’ challenge by suggesting that the builders exaggerated the impact of the regulations on New Jersey’s housing. Other proponents of the decision praised the court and noted that its decision not only ensured protection of New Jersey’s water, but may also prompt other states to follow New Jersey’s lead in the future.

While there is no doubt that the 300-foot buffers created by the 2004 stormwater management regulations are on one hand beneficial to the residents of New Jersey by helping to protect the state’s waterways, one must also question how much New Jersey residents are giving up for this protection. New Jersey still has a tremendous affordable housing problem, which is a problem some residents would argue is not adequately addressed in the New Jersey Council on Affordable Housing’s new third-round rules. This recent court decision only hampers the prospect of the creation of additional affordable housing in the state. However, no matter what their stance on the Court’s decision, builders and architects alike must now learn to live with the 300-foot buffers and assist New Jersey residents in protecting its waterways and abide by the rules promulgated to do so, while still finding new ways to provide additional housing in a state with an insatiable appetite and expanding need for new housing.

Jason L. Sobel is an associate in the law firm of Genova, Burns & Vernoia located in Red Bank, Livingston and Camden, NJ, along with New York City, and is a member of the Commercial Real Estate and Redevelopment Law Practice Group. Mr. Sobel is based in the firm’s Red Bank office and can be reached at jsobel@gbvlaw.com. ■