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'Ground-Truthing' Needed for Environmentally Sensitive Areas

NJDEP applies the Landscape Project to limit the benefits of the mainland coastal center rule

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One of the hallmarks of administrative agencies is the consistent application of rules and standards on the regulated public. This ensures that applicants and interested parties "know the rules of the game" and are treated uniformly and fairly.

The New Jersey Department of Environmental Protection has failed to adhere to this principle in applying its recently adopted "mainland coastal centers" rule in the context of development applications for sites that contain habitat mapped as threatened or endangered species habitat under the Landscape Project. The mainland coastal center rule was adopted to re-establish certain coastal centers in the CAFRA area to provide relief from stringent impervious

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and vegetation cover standards that took effect in 2005 upon the expiration of various coastal centers under NJDEP's rules. NJDEP excluded several categories of environmentally sensitive areas, such as threatened and endangered species habitat, from the relaxed mainland coastal center standards. In applying the exclusion for threatened and endangered species habitat, however, NJDEP has taken the position that it will not consider site-specific studies of the presence or absence of threatened or endangered species habitat to confirm or refute the data on which the Landscape Project Maps are based for projects in mainland coastal centers.

NJDEP's refusal to consider site specific information in this context is inconsistent with its own regulations concerning use of the Landscape Project in other contexts and undermines NJDEP's asserted rationale in support of the Landscape Project Maps in the context of the Freshwater Wetlands Protection Act (FWPA). The Landscape Project Maps are based on aerial photography and geographic information system (GIS) data. While such information may be useful as a planning tool, there are many instances when information derived from GIS and aerial photography data is not reflective of actual field conditions, given the inherent fallibility of map compilation techniques. NJDEP recognizes this in

other regulatory contexts where only studies of actual site conditions are accepted for jurisdictional determinations. Because interpretation of aerial photography and GIS data is prone to error, it is inherently unfair to preclude an applicant from using site specific information to attempt to demonstrate that the data on which the Landscape Project Maps are based is incorrect and that the more lenient mainland coastal center impervious cover limits and vegetative cover percentages should apply to a particular site.

NJDEP adopted a rule on Feb. 6 reinstating certain mainland coastal centers that had expired on February 7, 2005. Pursuant to the Coastal Zone Management Rules adopted on February 7, 2000, (32 N.J.R. 503(a)), the amount of impervious cover allowed and the percentage of vegetative cover required in connection with the development of land located in the CAFRA area is based on a site's location in a "coastal center," a "Coastal Planning Area," a "CAFRA center," "CAFRA core" or "CAFRA node," or on a military installation. N.J.A.C. 7:7E-5B.1(a). CAFRA centers, cores and nodes and Coastal Planning Area boundaries are based on the boundaries of centers, cores, planning areas and nodes approved by the State Planning Commission formally designated by the State Development and Redevelopment Plan (State Plan). N.J.A.C. 7:7E-5B.3(a). NJDEP included "coastal centers" in the Coastal Zone Management Rules in recognition that very few centers with specific boundaries formally designated

by the State Plan were created in the CAFRA area, and that additional center areas were needed to accommodate necessary growth.

NJDEP relied on input from municipalities and the public regarding center designation generated from the Office of State Planning's cross acceptance process to select appropriate areas to designate as coastal centers. The coastal centers delineated by NJDEP include the different types of center categories under the State Plan, including urban centers, regional centers, towns, villages and hamlets — each of which has a different impervious cover limit. Those limits range from 90 percent for urban centers to 50 percent for hamlets.

NJDEP distinguished between coastal centers located on barrier islands, ocean-fronts or peninsulas, and those located on the mainland. The former are permanent designations. The latter, "mainland" or "interim" coastal centers, were to expire five years from Feb. 7, 2000. The mainland coastal centers did expire Feb. 7, 2005. At the time of expiration, only roughly 32 of the 114 coastal centers designated in the rules were formally designated as centers in the State Plan. These expired centers were classified as "coastal planning areas." The reclassification resulted in a significant reduction in allowed impervious cover for many of these areas, with limits of 30 percent impervious cover for suburban planning areas within a sewer service area and 5 percent outside of a sewer service area, and 3 percent for environmentally sensitive areas.

NJDEP's Feb. 6 rule was intended to accommodate municipalities that committed substantial time and money in an effort to obtain plan endorsement from State Planning Commission and to "allow for further economic development and encourage smart growth." 38 N.J.R. at 930, 932. The rule reinstated mainland coastal centers in those municipalities that either (1) conducted a plan endorsement prepetition meeting with the Office of Smart Growth prior to July 5, 2005, or (2) requested a prepetition meeting prior to Aug. 4, 2005, and held the meeting by Oct. 15, 2005. The reinstated mainland coastal centers remained in effect for

those municipalities in which the Executive Director of the Office of Smart Growth determined, prior to March 15, that the municipality's initial petition for plan endorsement was complete. Any reinstated mainland coastal centers will expire on March 15, 2007.

Developments in re-established mainland coastal centers may use the higher impervious cover and vegetative cover percentages unless any part of a proposed development site is located outside of the mainland coastal center, or if any part of a proposed development contains certain environmentally sensitive areas, including endangered or threatened wildlife species habitat as shown on NJDEP's Landscape Project Maps; most Natural Heritage Program Priority Sites; government owned land dedicated to recreation, conservation, or wildlife management; special water resource protection areas along Category-One waters; wetlands; and Coastal Critical Environmental Sites.

In 2004, NJDEP published The Landscape Project, Version 2.0. The Landscape Project is used by NJDEP as, among other things, a tool for identifying and protecting threatened and endangered habitat. The Landscape Project focuses on habitat areas required to support local populations of threatened or endangered wildlife species. The stated goal of the Landscape Project is to "protect large, contiguous blocks of forest, grasslands and wetlands to assure the survival of rare species over the long-term." In furtherance of this goal, NJDEP's Endangered Species and Nongame Species Program developed maps of "critical wildlife habitat." These maps are known as "Landscape Project Maps"

The Landscape Project Maps have been developed for the entire state by compiling data concerning classes of habitat throughout the state and information concerning the sightings of endangered and threatened species information. The maps were based on aerial photography-based land use/land cover data and visual photo interpretation to differentiate land cover, a technique that is subject to error based on various factors. Relevant classes of habitat types (forest, grassland,

forested wetlands, emergent wetland and beach/dune) were taken from satellite-derived land use/land cover data. Contiguous areas of similar habitat referred to as "habitat patches" were delineated using major roadways as boundaries. Endangered and threatened species location data dating back to 1970 was then overlaid on these habitat patches, and each patch was ranked based on the types of species theoretically associated with the patch, with 1 being the lowest and 5 the highest rank. The maps are not "field checked" by NJDEP to determine whether the aerial photography and species sighting data remain current and reflect actual site conditions.

NJDEP has adopted several regulations that incorporate and utilize the Landscape Project as a tool for identification and protection of endangered and threatened species habitat. The Coastal Zone Management Rules incorporate the Landscape Project Maps for identification of endangered and threatened wildlife or plant species habitats in the context of permit applications under CAFRA, the Coastal Wetlands Act of 1970 and the Waterfront Development Law. N.J.A.C. 7:7E-3.38. The FWPA Rules incorporate the Landscape Project in the classification of the freshwater wetlands as "exceptional resource value," the highest level of protection afforded to freshwater wetlands. Any freshwater wetland that contains "documented habitat for threatened or endangered species" as identified under the Landscape Project Maps is classified by the NJDEP as exceptional resource value. N.J.A.C. 7:7A-2.4(c).

In each of these contexts, NJDEP's regulations account for the inaccuracies that are often associated with aerial photography and GIS data by affording property owners the opportunity to conduct in-field site investigations to confirm or refute the data and information contained in the Landscape Project Maps. Under the Coastal Zone Management Rules, an applicant is afforded the opportunity to demonstrate "that the proposed site is not an endangered or threatened wildlife species habitat and this rule does not apply by conducting an Endangered or Threatened Wildlife Species Habitat

Evaluation.” N.J.A.C. 7:7E-3.38. Under the FWPA Rules, an applicant has the opportunity to submit evidence based on actual site conditions, including the long-term loss of one or more habitat requirements of a documented threatened or endangered species, that the site should not be classified as exceptional resource value. N.J.A.C. 7:7A-2.4(c). This appropriately accounts for the errors associated with GIS and aerial photography derived data, and is a common sense approach, as the NJDEP staff has extensive expertise in using filed investigation studies to confirm GIS data or refute erroneous GIS information.

In an action involving the FWPA Rules that incorporated the Landscape Project, the Appellate Division upheld NJDEP’s use of the Landscape Project method for the identification of exceptional resource value wetlands under the FWPA. 365 N.J. Super. 255 (App. Div. 2003). One of NJDEP’s primary arguments, in support of the validity of the rule was that the regulations afforded property owners and applicants the opportunity to contest the wetlands classification based on Landscape Project data by conducting actual in-field, on-site investigations to confirm or refute the data.

NJDEP’s reliance on the Landscape Maps for determinations of endangered or threatened species habitat within mainland coastal centers without affording property owners/applicants the opportunity to conduct on-site inspections is contrary to its regulations that

incorporate the Landscape Project under the Coastal Zone Management Rules and FWPA. Additionally, this practice undermines the arguments — made before the Appellate Division in support of use of the Landscape Project Maps in the wetlands context — that the regulations would be protective of property owner’s rights and would not be overbroad as land owners would have the opportunity to test the mapping data through in-field investigations. NJDEP should apply the Landscape Project in the context of mainland coastal centers rule consistently with its use in other contexts. The Landscape Project has not changed; it is only being applied in a different context. There is no justification for applying the Landscape Project in a different manner.

Moreover, the Landscape Project Maps should not be used in the context of the mainland coastal centers rule or any other context as a substitute for actual field conditions derived on a case-by-case, site specific basis. The Landscape Project Maps are based on aerial photography and GIS data that must be reviewed and interpreted and, thus, are subject to human error. GIS, such as the Landscape Project, are intended to be used for planning or information purposes, rather than jurisdictional determinations, because of the inherent fallibility of map compilation techniques, such as remote sensing and aerial photograph interpretation. It is only through the process of “ground-truthing,” such as site-specific surveys, that actual site conditions can be fully understood. The

necessity for confirming GIS data through studies of actual field is substantiated by various regulatory programs where only in-field, ground work is accepted for jurisdictional matters. Thus, while the Landscape Project Maps may aid the site investigation process and have some usefulness as a planning tool, the Maps should not be used by NJDEP to make binding jurisdictional determinations.

The exclusions to the mainland coastal center rule are intended to protect environmentally sensitive areas. But if the data on which habitat is classified as threatened or endangered species habitat under the Landscape Project is wrong, then the area is not environmentally sensitive and special protection is not warranted. It is inherently unfair for property owners to be required to meet more restrictive impervious cover limitations based on incorrect information. This is particularly true when the cost of testing the information is borne by the property owner and the state has the technical expertise to review the field specific information.

When actual field conditions confirm that the Landscape Project Maps incorrectly classify a site as endangered or threatened species habitat, municipalities that have invested in the planning process and applicants for sites in the mainland coastal centers should be permitted to enjoy the benefits of the mainland coastal centers rule. ■