

Legal/Legislative

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2012 WRAP-UP

The Legislature and DEP were active during 2012. Several noteworthy initiatives were implemented in the environmental arena. As of May, most on-going site remediation cases were required to move forward with the use of an LSRP. Barnegat Bay has become a significant

environmental cause and appears to be affecting Land Use decisions in the coastal area. DEP's stakeholder process for rule amendments continued though at a slower pace. Proposed amendments for several Land Use programs are on the horizon. DEP recently adopted amendments to its Coastal Rules' public access requirements, establishing provisions for municipal public access plans. The Administration has generally continued to take action with a focus on the ongoing State-wide economic challenges. The Department of Agriculture, however, recently proposed amendments to the Standards for Soil Erosion and Sediment Control that, if adopted as proposed, will significantly increase costs of development. Those proposed amendments have been opposed by NJBA. While challenges remain and new challenges will likely arise, the Administration's actions in the context of the Wastewater Management Planning, Permit Extension Act and Waiver Rule should be viewed favorably.

Wastewater Management Planning: The past year has been mixed in the context of wastewater management planning. NJBA was the driving force behind favorable legislation that was passed in January 2012 (P.L. 2011, c.203) revising aspects of DEP's Water Quality Management Planning Rules and precluding withdrawal of wastewater service areas for a minimum six month period, ensuring that wastewater service areas in existing WMP's and WQMP's would remain valid and not be withdrawn, in April 2012. Each wastewater management planning agency was required to submit at least a sewer service area map to DEP within six months after the date of enactment of the bill. Existing wastewater service area designations remain in effect while DEP reviews the submissions. The law mandated that DEP review applications for site specific amendments or revisions to WMP's and WQMP's after the submission of the proposed wastewater service area plan. While the site specific amendment process is favorable, few if any applications have been submitted and DEP's push to have future

wastewater service area maps completed by wastewater management planning agencies is progressing. County planning agencies have submitted proposed updated sewer service area maps and several have conducted public hearings. The maps often exclude significant developable land areas. Revising the maps before or during the public hearing and comment process often requires difficult negotiations involving the County, municipality and DEP.

Waiver Rule: The "waiver rule", which became effective August 1, 2012, has generated considerable commentary and backlash and an only relatively small number of waiver requests. Those predicting wholesale giveaway of environmental regulatory protections must be disappointed, and are likely now preparing for the December 21, 2012 Mayan End-of-the-World prediction. But the hope and expectation that the waiver rule would create a realistic mechanism for much-needed flexibility in the regulatory process has not yet been realized and the rule remains a work in progress. The rule recognizes that DEP "cannot anticipate every circumstance or personal hardship" when it adopts regulations and that "one size does not fit all." Waivers may be issued only for limited circumstances and most applications have requested a waiver based on the "undue burden" criteria, contending that strict rule compliance would create "

actual, exceptional hardship or excessive cost". The waiver requests are subject to public notice. Facts, data and information supporting the need for a waiver will have to be submitted to DEP with the waiver request. DEP has urged potential applicants to include supporting documentation with their applications, as DEP does not anticipate engaging in post-submission negotiations. Several environmental and labor union groups challenged the validity of rule. NJBA sought unsuccessfully to join the suit in support of the rule. Even with its limitations, the waiver rule should be considered as an option to address DEP's complex regulatory programs in a creative and flexible manner to facilitate well planned development.

Permit Extension Act: Though it took longer than expected, Governor Christie signed legislation in September 2012

extending the Permit Extension Act ("PEA"). Under the prior version of the PEA, qualifying approvals in effect as of January 1, 2007 were set to lapse the end of this calendar year or within a six month period thereafter until June 30, 2013. The law now provides additional relief maintaining the validity of qualifying approvals until at least December 31, 2014 and possibly until June 30, 2015 based upon the additional six month tolling provision. In addition to the extension of the tolling provisions, several other changes were made. The definition of "approval" was expanded to include sewer capacity reservation agreements. Newly defined "extension areas" are not considered to be "environmentally sensitive areas". The "extension areas" definition includes, among others, State Plan endorsed areas, Pinelands growth areas, and the Highlands planning area and

centers. The law is retroactive with respect to approvals for parcels located in the newly defined "extension areas". For Highlands planning areas (with the exception of centers), the tolling provisions are not applicable if, as of May 1, 2012, the subject municipality has adopted a conforming Highlands master plan element, land use ordinance, or environmental resource inventory. This will apply to only a few municipalities. The law provides critical relief for development projects stalled by the economic downturn and provides additional time to pursue opportunities for sites with qualifying approvals.

