

Protecting the Resources of the New Jersey Highlands



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Fulfillment of the Highlands Regional Master Plan's Resource Protection Goals in the Highlands Planning Area



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The New Jersey Appellate Division recently announced that:

“The DEP¹ shall not issue *any* permit the DEP determines, in consultation with the Highlands Council,² to be incompatible with the resource protection goals in the RMP. ... The DEP cannot issue a permit for the planning area if the permit is incompatible with the goals of the RMP.” (*emphasis in original*)³

Executive Summary

Prior to the 2004 enactment of the Highlands Act, tens of thousands of acres of Highlands open space were lost due to uncoordinated land use regulations and inadequate environmental protections. Today, the Highlands Council imposes a coordinated regional system of land use planning and strong environmental protections through the Highlands Regional Master Plan. The overarching goal of the Regional Master Plan, which was adopted in 2008, is to protect and enhance the Highlands’ natural resources. The Highlands is divided into the Preservation Area and the Planning Area; the Regional Master Plan provides different protections to these two areas. This paper concerns NJDEP review of projects in the Planning Area.

In August 2004, the Legislature set forth ten Resource Protection Goals that the Regional Master Plan must fulfill in the Planning Area. NJDEP subsequently adopted a Rule making those goals binding requirements for all Planning Area projects. Under that Rule, NJDEP must deny permits for any project that the agency, in consultation with the Highlands Council, finds inconsistent with those goals. NJDEP **and** the Highlands Council **both** have a duty to ensure fulfillment of the Resource Protection Goals in the Planning Area. In May 2017, the Appellate Division confirmed that long-held position, stating that for each individual Highlands Planning Area project permit application:

- (1) NJDEP must give great consideration and weight to the Regional Master Plan, including the Land Capability Zone Map;**
- (2) NJDEP must engage in a meaningful on-the-record consultation with the Highlands Council;**
- (3) The Highlands Council must provide a written assessment of whether the project is consistent with the Resource Protection Goals; and**
- (4) NJDEP must deny permit applications for any project that is inconsistent with any of the Resource Protection Goals. This applies regardless of whether the municipality has completed the Plan Conformance Process.**

Prior to 2004, each of the Highlands' eighty-eight municipalities imposed different land use regulations. Many, if not most, did not impose adequate environmental protections. This uncoordinated system of land use governance failed to protect the Highlands' water resources and natural resources: 65,000 acres of Highlands open space were lost to development in the two decades between 1984 and 2004.⁸ The degradation of the Highlands jeopardized the entire State, "...because of [the Highlands'] vital link to the future of the State's drinking water supplies..."⁹

The Highlands Act

In August 2004, the Legislature declared that "the existing land use and environmental regulation system can not protect the water and natural resources of the New Jersey Highlands against the environmental impacts of sprawl development." The Legislature passed the Highlands Act to impose limits on "the amount and type of human development and activity" in the Highlands, realizing that if human development and activity exceeded those limits, then the region's water resources and environmental resources could no longer be sustained.¹⁰ The Highlands Act divides the region into the Preservation Area and the Planning Area.¹¹



The Highlands Act imposes different limits on development and activity, based on whether the property in question is in the Preservation Area or the Planning Area. This paper focuses on projects in the Planning Area.

The Highlands Regional Master Plan

Through the Highlands Act, the Legislature replaced “uncoordinated land use decisions” with a “regional approach to land use planning” and “stringent environmental regulatory standards...”¹² To define that regional approach and set those environmental standards, the Legislature created the Highlands Council.¹³ The Highlands Council was directed to create a Regional Master Plan to govern development across the region.¹⁴ The preparation of the Regional Master Plan was an intensive process involving numerous stakeholders, including the New Jersey Highlands Coalition.¹⁵ All of New Jersey, including the courts, understood the vital importance of this work: “The significance of the Plan in its scope and purpose cannot be overemphasized.”¹⁶

The Regional Master Plan’s Resource Protection Goals

The overarching goal of the Regional Master Plan, for both the Preservation Area and the Planning Area, is “to protect and enhance the significant value of the resources” of the Highlands Region.¹⁷ The Legislature, therefore, intended for the Regional Master Plan to not only protect the Highlands’ existing resources but also to regain resources that were lost before passage of the Highlands Act.

The Legislature set forth ten broad goals for the Regional Master Plan to accomplish in the Planning Area.¹⁸ First and foremost, the ten Resource Protection Goals protect the Highlands’ water resources and environmentally sensitive lands. Next, these goals protect the Highlands’ farms and outdoor recreation opportunities. Finally, these goals specify limited areas for “smart growth” in the Highlands Planning Area.

The Resource Protection Goals of the Regional Master Plan

- (1) Protect, restore, and enhance the quality and quantity of surface and ground waters therein;**
- (2) Preserve to the maximum extent possible any environmentally sensitive lands and other lands needed for recreation and conservation purposes;**
- (3) Protect and maintain the essential character of the Highlands environment;**
- (4) Preserve farmland and historic sites and other historic resources;**
- (5) Promote the continuation and expansion of agricultural, horticultural, recreational, and cultural uses and opportunities;**
- (6) Preserve outdoor recreation opportunities, including hunting and fishing, on publicly owned land;**
- (7) Promote conservation of water resources;**
- (8) Promote brownfield remediation and redevelopment;**
- (9) Encourage, consistent with the State Development and Redevelopment Plan and smart growth strategies and principles, appropriate patterns of compatible residential, commercial, and industrial development, redevelopment, and economic growth, in or adjacent to areas already utilized for such purposes, and discourage piecemeal, scattered, and inappropriate development, in order to accommodate local and regional growth and economic development in an orderly way while protecting the Highlands environment from the individual and cumulative adverse impacts thereof; and**
- (10) Promote a sound, balanced transportation system that is consistent with smart growth strategies and principles and which preserves mobility in the Highlands Region.**

It is critical to note that the Resource Protection Goals apply to both new permit applications **and** applications to renew existing permits. “Because the ... rule does not distinguish between a new permit and renewal permit, it is irrelevant whether the DEP is confronted with an application for a new permit as opposed to an application for the renewal of a permit acquired before the RMP was adopted.”¹⁹

The Land Use Capability Zone Map

The Regional Master Plan includes a Land Use Capability Zone Map, which applies the Resource Protection Goals to each property in the Highlands. The Map includes exhaustive analysis of critical environmental areas where development should be limited for one or more of the following reasons:²⁰

- The property is significantly constrained by environmental limitations such as steep slopes, wetlands, or dense forests.
- The property is a prime agricultural area.
- The property is far from existing development or infrastructure.

The Land Use Capability Zone Map places environmentally valuable properties in the Conservation Zone, with the most sensitive lands in the Protection Zone.²¹ The Highlands Act discourages development of such properties.²²

The Municipal Plan Conformance Process

The Highlands Council offers technical assistance and financial benefits to Planning Area municipalities that choose to amend their land use regulations to conform to the Regional Master Plan.²³ This includes the Resource Protection Goals: the regulations in conforming municipalities must “support the goals and requirements of the [Regional Master] Plan.”²⁴ Conformance to the Resource Protection Goals also offers legal benefits: the land use regulations of conforming municipalities “shall be entitled to a strong presumption of validity”, and anyone challenging a land use decision in a conforming municipality bears the burden of proof “to demonstrate by clear and convincing evidence that the act or decision of” the municipality “was arbitrary, capricious, or unreasonable or in patent abuse of discretion.”²⁵

NJDEP Must Deny Any Planning Area Project That Is Inconsistent With The Regional Master Plan’s Resource Protection Goals

Development projects that impact the resources of the Highlands Planning Area must undergo NJDEP review and obtain NJDEP permits. For example, the Water Pollution Control Act²⁶ protects the Highlands’ water resources. The Freshwater Wetlands Protection Act²⁷ protects the Highlands’ wetlands and critical wildlife habitats. N.J.A.C. 7:38-1.1 “establishes the environmental standards and procedures by which [NJDEP] shall review any ... permit or plan reviewed by the Department in the Highlands Region.”

If a project is inconsistent with the Resource Protection Goals of the Regional Master Plan, then NJDEP must deny permits for the project: "...the Department **shall not** issue any approval, authorization or permit that the Department determines, in consultation with the Highlands Council, to be incompatible with the resource protection goals in the [Regional Master Plan] ... " (emphasis added)²⁸

For example, in July 2014, NJDEP renewed a permit, originally issued in 1998, allowing the discharge of treated wastewater into Rockaway Creek from a proposed 700,000 square foot office development in Tewksbury Township (in the Planning Area).²⁹ NJDEP issued the discharge permit without adequately analyzing whether the project was consistent with the Resource Protection Goals, and NJDEP failed to consult with the Council.³⁰ For those reasons, the Appellate Division voided the permit in 2017 and remanded it to NJDEP, ruling that "[t]he DEP cannot issue a permit for the planning area if the permit is incompatible with the [Resource Protection Goals] of the [Regional Master Plan]."³¹

NJDEP Must Give Great Consideration and Weight To The Regional Master Plan, Including the Land Use Capability Zone Map

As detailed above, the Highlands Council maintains and updates a Land Use Capability Zone Map, which provides a detailed description of the environmental value of each Highlands property. The Highlands Act discourages development of environmentally valuable properties, zoned in the Map in the "Conservation Zone" or the "Protection Zone." NJDEP's analysis of each Highlands project must include the project site's classification in the Land Use Capability Zone Map. If the Map has already identified the project site as a property where development is discouraged, then NJDEP must "give great consideration and weight" to that determination, because the Map is an integral part of the Regional Master Plan.³²

Further, if the agency wishes to approve development of a site in the Conservation Zone or the Protection Zone, then NJDEP must give a thorough explanation why the agency is making a decision that conflicts with the Map and the Regional Master Plan, and the agency must consult with the Highlands Council.

Returning to the example of the Tewksbury wastewater discharge permit application: the Land Use Capability Zone Map placed the project site in the Protection Zone and identified Rockaway Creek as a high resource value watershed. Nevertheless, NJDEP approved wastewater discharge into Rockaway Creek. This approval clearly conflicted with the Land Use Capability Zone Map, and thus the Regional Master Plan.

NJDEP's decision, subsequently remanded, violated the requirement to give "great consideration and weight"³³ to the Regional Master Plan because the agency did not acknowledge the Land Use Capability Zone Map's classification of the property and Rockaway Creek. NJDEP further violated the requirement by not giving any explanation of the agency decision that conflicted with the Regional Master Plan, and by failing to consult with the Highlands Council.

To Determine Consistency With the Regional Master Plan's Resource Protection Goals, NJDEP Must Conduct a Thorough On-The-Record Consultation With the Highlands Council

NJDEP does not determine a project's consistency with the Resource Protection Goals on its own; the agency must make that determination "in consultation with the Highlands Council..."³⁴ "To ensure the DEP does not grant a permit that is incompatible with the [Regional Master Plan]'s goals, the DEP must consult with the Highlands Council on permit applications for the planning area."³⁵ During that consultation, the agencies must produce a record that reflects what was discussed.³⁶ If the Regional Master Plan or the Land Use Capability Zone Map includes information on the project site, then certainly those must be part of the consultation as well.

In addition, the Highlands Council must explicitly state "whether the Highlands Council view[s] the proposed permit to be incompatible with the [Regional Master Plan]'s goals."³⁷ Issuing that type of statement would be nothing new for the Highlands Council: since May 2011, the Council has issued written statements on Regional Master Plan consistency for at least twenty different Planning Area projects.³⁸ In fact, the Highlands Council has created a detailed template to review whether a project is consistent with each goal, policy, and objective of the Regional Master Plan.³⁹ These Highlands Council statements carry great weight; "...the ramifications of [the Highlands Council's] determinations would be difficult to overstate."⁴⁰

In the Tewksbury wastewater discharge permit application mentioned above, the interaction between NJDEP and the Highlands Council was limited to a single conference call.⁴¹ The Appellate Division was not satisfied:

...the record does not reflect what was discussed during this call, including whether the Highlands Council expressed its position on the draft renewal permit. In fact, there is no record of the Highlands Council's assessment of the draft renewal permit at all.⁴²

The Appellate Division found that the limited interaction between NJDEP and the Highlands Council did not satisfy the requirement for a "consultation" and remanded the matter, requiring NJDEP "to engage in the required consultation with the Highlands Council."⁴³

Municipal Plan Conformance Is Irrelevant to the Requirement of Consistency With Regional Master Plan's Resource Protection Goals

Returning to the example of the Tewksbury wastewater discharge permit application: the Appellate Division noted that when NJDEP received the June 2008 application to renew the original discharge permit, Tewksbury had not yet completed the Municipal Plan Conformance Process.⁴⁴ The Appellate Division did not consider this relevant to its decision, because individual permit applications in the Planning Area must be consistent with the Resource Protection Goals, regardless of whether the municipality has completed the Plan Conformance Process.

However, if a municipality has completed the Plan Conformance Process, then its local permitting decision will include an assessment of whether a project meets the Resource Protection goals. Therefore, a conforming municipality will have a voice in the reviews detailed herein, alongside NJDEP and the Highlands Council. Further, any reviewing court would give "extraordinary deference" to the municipality's determination.⁴⁵

Conclusion

In August 2004, the Legislature set forth ten Resource Protection Goals for the Regional Master Plan to accomplish in the Highlands Planning Area. NJDEP subsequently adopted a Rule making those goals binding upon all Planning Area development permit applications. NJDEP must deny permits for any project that the agency determines, in consultation with the Highlands Council, is inconsistent with the Resource Protection Goals.

The Resource Protection Goals are binding on both new applications and applications to renew existing permits. The goals are binding regardless of whether the municipality has completed the Plan Conformance Process or not. The purpose of strict adherence to the Resource Protection Goals is to ensure fulfillment of the Regional Master Plan's overarching goal: to protect and enhance the value of the natural resources of the Highlands.

Endnotes

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- ¹ New Jersey Department of Environmental Protection
- ² Highlands Water Protection & Planning Council
- ³ In re Final Surface Water Renewal Permit Action NJPDES Permit No. NJ0102563, Docket # A-5801-13T1, 2017 WL 1550009 at *4 (App.Div. 2017)(internal citations removed, emphasis in original). This Appellate Division opinion will hereinafter be referred to as Bellemead.
- ⁴ Highlands Regional Master Plan p. 1.
http://www.highlands.state.nj.us/njhighlands/master/rmp/final/highlands_rmp_112008.pdf
- ⁵ <http://www.state.nj.us/njhighlands/news/brochures/factsheet.pdf>
- ⁶ N.J.S.A. 13:20-2
- ⁷ N.J.S.A. 13:20-2
- ⁸ N.J.S.A. 13:20-2
- ⁹ N.J.S.A. 13:20-2
- ¹⁰ N.J.S.A. 13:20-11(a)(1)(a)
- ¹¹ N.J.S.A. 13:20-7
- ¹² N.J.S.A. 13:20-11(a)(1)(a)
- ¹³ N.J.A.C. 13:20-5
- ¹⁴ In December 2006, NJDEP adopted the Highlands Water Protection and Planning Rules (N.J.A.C. 7:38). The Regional Master Plan is incorporated into the Highlands Rules. N.J.A.C. 7:38-1.1(l).
- ¹⁵ N.J.S.A. 13:20-9.
- ¹⁶ OFF, L.L.C. v. State, No. MRS-L-000160-05, 2005 WL 3058157 at *11 (N.J. Super. Ct. Law Div. Nov. 15, 2005), aff'd, 395 N.J. Super. 571, 930 A.2d 442 (App. Div. 2007), aff'd, 197 N.J. 418, 963 A.2d 810 (N.J. 2008)
- ¹⁷ N.J.S.A. 13:20-10(a)
- ¹⁸ N.J.S.A. 13:20-10(c)
- ¹⁹ Bellemead p. 4
- ²⁰ N.J.S.A. 13:20-11(6)(c), (d)
- ²¹ http://www.highlands.state.nj.us/njhighlands/master/tr_land_use_capability_zone_map.pdf
- ²² N.J.S.A. 13:20-11(6)(c), (d)
- ²³ N.J.S.A. 13:20-15
- ²⁴ http://www.highlands.state.nj.us/njhighlands/master/highlands_plan_conformance_guidelines.pdf
- ²⁵ N.J.S.A. 13:20-22
- ²⁶ N.J.S.A. 58:10A-1 to -35
- ²⁷ N.J.S.A. 13:9B
- ²⁸ N.J.A.C. 7:38-1.1(h)(emphasis added). N.J.A.C. 7:38-1.1(k) imposes a similar requirement on NJDEP review of proposed amendments to municipal, county or state Water Quality Management Plans: ““The Department shall approve a Water Quality Management Plan amendment only after receiving from the Highlands Council a determination of consistency with the Regional Master Plan...the Department shall not approve a Water Quality Management Plan amendment for a project proposed in the planning area or preservation area without first obtaining a recommendation from the Highlands Council.”
- ²⁹ Bellemead p. 1
- ³⁰ Bellemead, pp. 1-2, 4
- ³¹ Bellemead, p. 4
- ³² N.J.A.C. 7:38-1.1(g), Bellemead p. 4
- ³³ Bellemead p. 4
- ³⁴ N.J.A.C. 7:38-1.1(h)
- ³⁵ Bellemead p. 4
- ³⁶ Bellemead pp. 4
- ³⁷ Bellemead pp. 4
- ³⁸ http://www.highlands.state.nj.us/njhighlands/projectreview/project_review_tracking.pdf
- ³⁹ http://www.highlands.state.nj.us/njhighlands/projectreview/consistency_determination_review_template_0609.pdf
- ⁴⁰ In re New Jersey Highlands Water Prot. & Planning Council Approval of Petition for Plan Conformance for Town of Clinton, No. A-3223-10T1, 2013 WL 297935, at *1 (App. Div. 2013). The Highlands Council is “independent of any supervision or control” by NJDEP. N.J.S.A. 13:20-4.
- ⁴¹ Bellemead pp. 2, 4
- ⁴² Bellemead p. 2
- ⁴³ Bellemead p. 4
- ⁴⁴ Bellemead, pp. 3-4
- ⁴⁵ N.J.S.A. 13:20-22