

## **New Jersey to Limit the Grandfathering Provision in its New Storm Water Rules**

The New Jersey Department of Environmental Protection (NJDEP) has delayed implementation of its comprehensive and aggressive update of New Jersey's storm water protection and planning regulations. On Sept. 5, 2003, the NJDEP announced a significant change to its regulatory proposal (the proposal was first published in January 2003) that will limit the types of developments that are "grandfathered" and, thus, not subject to the new rules. That change will require another 60-day comment period. Thus, persons wanting to obtain project approvals under the current and less stringent regulations will have at least another two to three months to do so.

The recent proposed change to the storm water regulations would, if approved, significantly limit the types of projects that are grandfathered. Under the January 2003 proposal, "major development" was defined to be:

... any development shown in any site plan or subdivision plan that has not received preliminary or final approval by (the effective date of this chapter) that provides for ultimately disturbing one or more acres of land or increasing impervious surface by one-quarter acre or more ...<sup>1</sup>

Thus, "major developments" with approvals that predated the final implementation of the new regulation were exempt from the new storm water requirements.

After considering the public comments on its January 2003 proposal, NJDEP realized that the grandfathering provision would exempt from the new rules many sites with potentially significant storm water issues, but which had received little or no review in terms of storm water management. Thus, in its September 2003 proposal, the NJDEP limited the sites that are grandfathered to developments of one-acre or more (the new definition of "major development") that either:

- have obtained preliminary or final site plan approval prior to implementation of the new rules and that also have obtained at least one NJDEP permit that involved some level of water quality review

<sup>1</sup> See 35 N.J.R. 119, 144-145 (Jan. 6, 2003).

(e.g., wetlands, coastal area facility, waterfront and harbors, or flood hazard area control permits),  
or;

- have obtained preliminary or final site plan approval prior to implementation of the new rules and that do not require any NJDEP water quality-related permits.<sup>2</sup>

NJDEP's recent proposed change to the storm water rules in effect converts the grandfathering provision to only a *temporary* grandfathering provision. Under the proposed rule, the exemption expires with the expiration or termination of the local land use approvals or NJDEP permits (if any) obtained for the development, whichever comes first. Thus, once these approvals expire, the development is subject to the new, more stringent storm water requirements.

In the NJDEP's view, this proposal balances the desire to allow projects that already are well into the pipeline to proceed while ensuring some state-level review of storm water impacts.<sup>3</sup>

Comments to this latest proposal are due on Nov. 14, 2003. Developers who are concerned about the fate of their projects under this rule proposal are encouraged to voice those concerns to the NJDEP.

*This Environmental Update was written by Jane Kozinski, a Partner at Saul Ewing and member of the Firm's Environmental Department. Ms. Kozinski can be contacted at (609) 452-3108 or jkozinski@saul.com. The statements contained in this Update are intended for general information and do not constitute legal advice.*

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<sup>2</sup> Certain developments undertaken by government entities are also grandfathered.

<sup>3</sup> As in the original January 2003 rule proposal, this current proposal still would not grandfather sites that had obtained General Development Plan approval under Section 40:55-45.1 *et seq.* of the Municipal Land Use Law prior to the effective date of the regulations.

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