June 1, 2022

NJDEP Announces Emergency Rulemaking to Flood Hazard Area Control Act Rules

The New Jersey Department of Environmental Protection (NJDEP) announced at a stakeholder meeting on Wednesday, May 25, that it is using emergency rulemaking powers to adopt Protecting Against Climate Threats regulations, amending Flood Hazard Area Control Act Rules (FHA Rules), N.J.A.C. 7:13 et seq. Because the changes, discussed below, will impact the regulated community, industry groups are preparing for the emergency rules that will go into effect in the next few weeks. The New Jersey Builders Association held a Q&A session on Friday, May 27, to further discuss the emergency rules and insights, incorporated below. As a preliminary matter, while the NJDEP has not confirmed the exact date the emergency rules will be adopted, the NJDEP has said that it intends to adopt the emergency rules in mid-June. Under the New Jersey Administrative Procedure Act, N.J. Stat. § 52:14B et seq., the emergency rules will become effective upon filing with the New Jersey Office of Administrative Law and will be valid for 60 days. The NJDEP says that it will file both the emergency rulemaking and a concurrent proposal to enable the emergency rule provisions to remain in place past the 60 days. Both the emergency rulemaking and concurrent proposal will be published in the *New Jersey Register*, with a 30-day public comment period following. While the specific language of the emergency rules is not anticipated to become public until the NJDEP files the emergency rules, the NJDEP has said that its emergency rules will make the following changes to the FHA Rules:

- Raising the requirement for design flood elevation in a fluvial (nontidal) flood hazard area.
- Requiring the use of projected future precipitation when calculating design flood elevation by raising the existing design flood elevation by two feet, which will expand the flood plain and require that first floors of all buildings in the flood plain be the NJDEP base flood elevation plus two feet and Federal Emergency Management Agency (FEMA) 100-year elevation plus three feet.
- We note that these increases in elevation may impact the feasibility of a project due to access issues.
- Incorporating new precipitation projections (year 2100) into stormwater best management practices designs, which will impact the size of stormwater management systems.
- We note that the new rainfall rates vary by county.
- Removing the use of Rational and Modified Rational methods for stormwater calculations.
- Ensuring that permits and authorizations under FHA Rules meet minimum FEMA National Flood Insurance Program standards as well as standards in relevant sections of the Uniform Construction Code.

Of additional relevance, existing FHA verifications without a related permit may no longer be valid; if a verification is based on a calculation of a flood plain, it will no longer be valid unless it is accompanied by a permit. Further, the NJDEP recommends that any applications that may be impacted be submitted to the NJDEP on or before Friday, June 10, in order to be grandfathered in, subject to the existing FHA Rules. All such applications must be deemed complete upon submission in order to be reviewed under the existing FHA Rules. Additionally, if a project is not currently within the regulated flood plain but will be within the regulated flood plain under the emergency rules, the NJDEP has said that the project must be under construction to be exempt from the emergency rules. If one has a permit for the construction, one can rely on that permit. The stormwater provisions will rely on Section 1.6 of the Stormwater Rules as to whether the project will have to comply with the new precipitation projections, which will require, among other things, that the projects have received all federal, state and local approvals. Day Pitney will continue to monitor and provide updates as the emergency rules are published and become

effective. Should you have any questions regarding the emergency rulemaking and/or the FHA Rules more broadly, please feel free to contact any of the attorneys listed in the sidebar.

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