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New Jersey DEP's Resilient Environments and Landscapes (REAL) Regulations: An Overview of the Proposed Rulemaking and Its Impacts on Development

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What You Need to Know

- The New Jersey Department of Environmental Protection has put forward a comprehensive regulatory overhaul proposal to mitigate the risks posed by climate change impacts.
- If adopted, the proposed regulations will significantly impact the process of gaining approval for residential and commercial construction, development, and redevelopment projects throughout New Jersey.
- The deadline for submitting public comments on the proposed rulemaking is November 3, 2024.

The New Jersey Department of Environmental Protection (NJDEP) is immersed in one of the most impactful rulemaking proceedings in the state's history in an effort to implement regulatory changes to address and mitigate the increasing risks posed by climate change.

The proposed rule amendments, referred to as the Resilient Environments and Landscapes (REAL) rules, are in response to global, regional, and New Jersey-specific scientific information related to climate change, and are geared to implement NJDEP's Protecting Against Climate Threats (PACT) initiative. The REAL rules include discussions of the scientific studies reviewed and those relied upon by NJDEP that quantify anticipated sea level rises by the year 2100 and conclude that rising temperatures will result in increased rainfall and flooding.

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The REAL rules, which comprehensively overhaul the state's Land Resource Protection program, were published in the August 5, 2024 edition of the *New Jersey Register* with a directive that persons/entities interested in submitting comments to the 1,000+ page proposal do so by November 3, 2024. Given the breadth and comprehensive scope of the new rules, and their wide-ranging impacts on permitting project development, those interested in submitting comments to the rules should do so promptly considering the impending deadline.

If adopted, the proposed regulations will have a significant impact on the ability to secure required approvals for residential and commercial construction, development and redevelopment projects and substantial improvements to existing development. Not surprisingly, comments during recent stakeholder meetings included opposition to the proposed rules by the building industry, residential homeowners and some municipalities, who cited the increased burdens the rules will inevitably have on development, construction and the utilization of waterfront properties, a lack of economic impact analysis, challenges to implementation, and impacts on property value.

The NJDEP emphasizes that the REAL rules focus on the "long term economic viability of communities" while protecting the current landscape for future generations. It describes its proposed rulemaking as a ground-breaking rule proposal "that will make New Jersey the first state to modernize land-resource protection regulations to address the current and future impacts" of climate change.

Principles Underlying the REAL Rulemaking

The NJDEP announced the following eight general principles guiding its proposed rulemaking:

1. *Increased protection against future flood inundation and damage:* Among other things, the proposed rules establish an "Inundation Risk Zone" (IRZ), a regulated area within tidal flood hazard areas, adopt climate-adjusted flood elevations, and expand tidal flood hazard areas. The IRZ encompasses land projected to be inundated by tidal waters by the year 2100 and includes currently dry land. The proposed rules establish standards for proposed new or improved residential buildings, critical buildings, and critical infrastructure within the IRZ to account for the increased flood risk due to expected sea level rise and more intense storm events. The rules will apply to new development, redevelopment, as well as substantial improvements to existing buildings within areas designated as an IRZ. Additional information will be required from an applicant seeking to build within an IRZ, such as an "Inundation Risk Assessment" that analyzes the potential inundation impacts to people, property, and costs. Further, an analysis that all reasonable steps have been taken to reduce adverse impacts to public health, safety, welfare, and the environment will be required. Like many proposed regulatory changes, REAL has certain exceptions incorporated within the IRZ requirements, where an applicant can make a required regulatory demonstration and receive less stringent requirements.
2. *Protecting critical facilities and infrastructure from the effects of climate change:* The proposed rules include more stringent design and construction standards for critical facilities and

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infrastructure, which are those necessary to provide essential governmental services and emergency response in the face of increased flooding risks. Critical facilities and infrastructure will vary depending on the specific community needs but could include police and fire stations, hospitals, power plants, roads, bridges, storm sewer systems, utilities, and transportation hubs.

3. *Increased protection of land and water resources:* The proposed rules introduce various new requirements intended to reduce degradation associated with sea level rise and storm events including the destruction of tidal marshes and various wildlife and plant habitats, and the introduction of pollutants into waterways from extreme precipitation. Amendments aimed at these protections are to the Coastal Zone Management (CZM) Rules, the Freshwater Wetlands Protection Act (FWPA) Rules, and the Flood Hazard Area Control Act (FHACA) Rules associated with permitted development.
4. *Planning for climate change:* Proposed standards and planning requirements within the Stormwater Management (SWM) and FHACA rules include standards, such as a climate-adjusted flood elevation requirement, that incorporate climate data projections through the year 2100. The proposed Climate Adjusted Flood Elevation (CAFE) is calculated by adding five feet to FEMA's 100-year flood elevation in tidal flood hazard areas and will be included in the FHACA. These standards are intended to protect development in New Jersey from the expected impacts of flooding and extreme storms through the end of the century.
5. *Facilitating nature-based solutions:* The proposed rulemaking would incentivize the permitting and implementation of "nature-based solution" projects as newly defined through amendment to the CZM rules. These projects include biological design components geared to protect, restore, or enhance shorelines, wetlands, and inundated areas. They may include living shorelines, marsh restoration and submerged habitat creation projects.
6. *Encouraging renewable energy:* The proposed rulemaking identifies various ways to incentivize renewable energy initiatives while also protecting land and water resources, through responsible siting of renewable energy projects and components. The proposed changes include added standards to the CZM submerged cable rule for placement of offshore wind cabling which includes mitigation of marine life habitat impacts and amendments to the FHACA rules to discourage solar panel siting in open waters and forested areas.
7. *Improved stormwater management:* The NJDEP explains that "enhanced and more consistent stormwater management will mitigate the increase in stormwater runoff and flooding resulting from increased precipitation and intensity." NJDEP states that the extensive rule amendments which reduce stormwater volume and increase removal of pollutants in stormwater, will provide added benefits of reducing combined sewer overflow and improving water quality throughout New Jersey.
8. *Administrative process improvements:* NJDEP proposes amendments to various permits for the purpose of improved activity tracking. Specifically, it proposes to repeal CZM and FHACA existing permits-by-rule and replace them with: (1) limited categorical exemptions; (2) general permits-by-

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registration; (3) permits-by-certification; or (4) general permits. NJDEP seeks to align the purpose and scope of the individual rules impacted by the REAL rules to reflect a more holistic and consistent approach to permit application review.

Rules Impacted by the REAL Rules

In addition to the proposed amendments, repeals, and additions to the CZM rules (N.J.A.C. 7:7), FWPA rules (N.J.A.C. 7:7A), FHACA rules (N.J.A.C. 7:13), and SWM rules (N.J.A.C. 7:8), several additional rules that refer to these four chapters are proposed to be amended in order to align with the changes.

The other rules impacted by the REAL rules reference standards or use terms associated with CZM, FWPA, FHACA and SWM rules include: Discharges of Petroleum and Other Hazardous Substances Rules (N.J.A.C. 7:1E); Underground Storage Caverns (N.J.A.C. 7:1F); Forestry (N.J.A.C. 7:3-5); Standards for Individual Subsurface Disposal Systems (N.J.A.C. 7:9A); Well Construction and Maintenance; Sealing Of Abandoned Wells (N.J.A.C. 7:9D); the Safe Drinking Water Act Rules (N.J.A.C. 7:10); the NJPDES Rules (N.J.A.C. 7:14A); Solid Waste (N.J.A.C. 7:26); the Recycling Rules (N.J.A.C. 7:26A); Hazardous Waste (N.J.A.C. 7:26G); the Radiation Protection Program Rules (N.J.A.C. 7:28); Green Acres Program (N.J.A.C. 7:36); and Highlands Water Protection and Planning Act Rules (N.J.A.C. 7:38).

The NJDEP asserts that the proposed rules are intended to “work in tandem and collectively help protect New Jersey’s land and water resources, as well as afford protections to public safety, health, and welfare.”

What’s Next

Parties interested in submitting comments on the proposed rulemaking must do so no later than November 3, 2024. Written comments can be submitted electronically at this link.

Greenbaum’s environmental team is continuing to review and evaluate the REAL rulemaking proposal, and will be publishing a series of Client Alerts in the coming days and weeks that provide more detailed information concerning the proposed regulatory reforms outlined in this Alert. We encourage you to contact **Barbara J. Koonz**, the author of this Alert, with questions related to NJDEP’s proposed rulemaking or to discuss impacts on your business in greater detail.

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