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Environmental Law

Appellate Division Upholds DEP's Endangered Species Initiative

Wetlands that are suitable for use by an endangered or threatened species may be protected — even if the species is not present

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The Landscape Project Rule imposes substantial burdens on developers and those seeking new homes by declaring large masses of land as protected wetlands with exceptional resource value, without any showing that endangered or threatened species have in fact been present on the property.

And in *In the Matter of Adopted Amendments to N.J.A.C. 7:7A-2.4*, 2003 WL 22997803 (App. Div. 2003), the Appellate Division upheld the approach.

To date, protection of endangered and threatened species in New Jersey has been undertaken with respect to only several specific regulatory programs. These include: the Coastal Area Facility Review Act, N.J.S.A. 13: 19-1, et seq.; the Pinelands Protection Act, N.J.S.A. 13:18A-1, et seq.; and the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1, et seq.

In 1987, the Legislature passed the FWPA, thereby assuming control over the protection of endangered and threatened species in New Jersey wetlands from the federal government.

The FWPA specifically addresses the classification of freshwater wetlands and establishes criteria for distinguishing between "exceptional resource value," "intermediate resource value" and "ordinary resource value" wetlands. A wetland's classification determines the width of the buffer or "transition area" that is required around and between the wetlands and the adjoining uplands.

Exceptional resource value wetlands have the largest buffer areas (150 feet) and are those wetlands that have been determined by the Department of Environmental Protection to be either a "present habitat for threatened or endangered species" or a "documented habitat" for such species. N.J.S.A. 13:9B-7(a)(2).

The determination that an area is of exceptional resource value also precludes a property owner from conducting activities under the FWPA's "general permit" that authorizes certain regulated activities in "isolated wetlands."

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Sighting Species

Until the DEP adopted its most recent endangered species initiative — the Landscape Project Rule, N.J.A.C. 7:7A-2.4 — it made its wetlands classification determinations based entirely upon specific sightings of threatened or endangered species.

Once there was a sighting, it was then assumed that the sighted species was located in the middle of its home range. The DEP would determine its habitat by mapping a polygonal shaped area around the location of the sighted species, regardless of whether that area was developed or forested. Using this approach, even a developed area like a parking lot could be considered to be a protected area for endangered species.

The Landscape Project Rule focuses on large land areas called landscape regions. Landscape regions are comprised of a location where threatened or endangered species were documented, as well as those areas with vegetation and characteristics that are similar to those areas where a threatened or endangered species was documented. If similarities exist, the DEP will classify wetlands as exceptional resource value wetlands because the wetlands are suitable for use by the endangered or threatened species, regardless of whether the actual presence of the species was documented within 100 feet or 100 miles of the wetlands in question.

In *In the Matter of Adopted Amendments*, the New Jersey Builders' Association argued that the Landscape Project Rule was not authorized by the FWPA and was therefore ultra vires. It claimed that such a method — which broadens the focus of the habitat classi-

fication process to encompass not only actual sightings, but also habitat characteristics needed and required for an endangered or threatened species population — exceeded the statutory mandate.

The Appellate Division gave short thrift to this contention. Applying well-established principles of judicial deference in reviewing agency actions, the court declared that it would not substitute its judgment for the expertise of the DEP unless the action was not legislatively authorized or was otherwise defective because it was arbitrary or unreasonable.

In the past, the DEP made wetlands classification determinations based on specific sightings of threatened species.

While the court recognized that the enactment of the FWPA had been recognized as reflecting a "delicate compromise" between environmentalists and developers, it held that "where proactive environmental measures are within DEP's enabling authority, they will be upheld." The court determined that the Landscape Project Rule was "neither inconsistent with the governing statute, unsupported by the record, or arbitrary or capricious."

Increased Housing Costs

By requiring larger transition area buffers and restricting the ability of property owners to obtain general permits to use their property, the DEP has taken steps that will drive up the cost of housing. Less land for development coupled with a more onerous and expensive approval process increases developers' costs — costs that are passed on to consumers.

Yet, despite the additional cost and the infringement on the use of property, there has been no evidence produced by the DEP to demonstrate that the landscape maps will actually serve to protect threatened and endangered species. Unless there are sightings on the lands to be protected, the DEP's approach may be burdening property where no such species actually exist.

Furthermore, the landscape maps are based on aerial photography taken in 1995, and conditions on the ground may well have changed in the intervening nine years.

Alternative Approach

A more sophisticated approach, advocated by Amy Greene, a noted New Jersey endangered species expert, is for the DEP to allow property owners to conduct specific challenges to the landscape mapping based upon "habitat assessments" and "targeted species surveys." Such assessments and surveys would involve detailed studies, including field studies, of an area that was identified through landscape mapping as requiring protection, to determine if, in fact, there were threatened and endangered species on the property.

If the study showed no evidence of such habitation, the requirements of the exceptional use value would not be applicable. Taking this approach one step further, even if there was evidence of threatened or endangered species on such property, if the evidence showed that the presence was marginal instead of abundant, the land would not be deemed to require protection.

Practitioners should seek to convince the DEP to accept the habitat assessment approach, and efforts should be made to obtain recognition, by statute or regulation, of habitat assessments as an alternative to blindly following the landscape maps.

Issues concerning endangered species protection will only play a more prominent role in development matters in the years to come. DEP Commissioner Bradley Campbell has announced that the DEP will shortly be proposing regulations to substantially extend the protection of endangered species to upland areas as well as wetlands.

While protection of endangered and threatened species is a valid goal, it should not be the only goal. The active participation of the regulated community in these issues is essential to try to prevent the legislatively countenanced balance between such protection and the development of housing.

Otherwise, the balance will shift even further toward protected species and away from humans. ■