

NJ PACT Heating Up

By: Steven M. Dalton, Esq. and Michael P. Castore, Esq.

The poet Bob Dylan wrote “Try imagining a place where it’s always safe and warm. Come in, she said, I’ll give ya shelter from the storm.” NJDEP provided its first glimpse of New Jersey Protection Against Climate Change (“NJ PACT”) in response to the storm believed to be coming – increased flooding and negative environmental impacts from climate change. Glaringly absent from NJDEP’s vision is any indication of where people will shelter.

On January 27, 2020, Governor Murphy, coincident with the issuance of an updated Energy Master Plan, issued Executive Order No. 100 (2020), directing NJDEP to amend its regulations to “integrate climate change considerations, such as sea level rise and chronic flooding” and “prevent further increases of harmful greenhouse gas emissions and other climate pollutants that could prevent the State from reaching its clean energy goals and exacerbate the current climate crisis”. On the same day, NJDEP Commissioner McCabe issued Administrative Order 2020-01, directing NJDEP to produce various climate change reports and incorporate climate change considerations into NJDEP’s various permitting rules.

In response, NJDEP commissioned and produced several reports, each adhering to the conclusion that a 17% probability exists that sea level rise (“SLR”) will exceed 5.1 feet by Year 2100. It also informally released contemplated regulatory changes to the public for discussion via two stakeholder sessions in December 2020 and January 2021. The proposals are extensive and, if adopted as presented, will have Statewide impacts on development and redevelopment.

The NJ PACT amendments will implement a “watershed based” approach to regulation,



intended to address environmental impacts of development “holistically” rather than incrementally. NJDEP’s rulemaking will be guided by its conclusion that SLR, extreme weather, and chronic flooding are “unavoidable impacts of climate change”, justifying reliance upon future projected “expectations” of SLR instead of past flood event data in the regulatory framework. Brief highlights are provided below.

- A new regulatory **inundation risk zone (“IRZ”)** will be established consisting of land expected to be tidally flooded based on the NJDEP-sponsored Rutgers report which estimates a 17% chance of 5.1 feet of SLR by Year 2100, characterized as the “moderate” SLR risk”. The limits of the IRZ are established by adding five feet to the mean high water elevation.
- Development within the IRZ zone will be subject to severe restrictions. New buildings (including redevelopment) will require a hardship exception. New and substantially damaged residential buildings would be required to construct to one foot above the to-be-created **Climate Adjusted**

Food Elevation (“CAFE+1”). Nonresidential and non-critical buildings may be flood-proofed to CAFE+1 if elevating is impracticable.

- Many roadway improvements within the IRZ zone will require a hardship exception and submission of a climate impact statement.
- To account for projected SLR, the tidal flood hazard will be expanded to the CAFE (100-year elevation plus five (5) feet).
- NJDEP proposes a new fluvial CAFE relying upon one future rainfall study not specific to New Jersey. NJDEP presented several options: an additional foot of elevation above the FEMA 500-year flood; the addition of 2 feet of elevation above NJDEP’s design flood; or, 3 feet above the FEMA 100-year flood. Alternatively, hydrologic and hydraulic calculations may be used to calculate fluvial CAFE based on 125% of the future 100-year discharge.
- The rules will implement technical changes regarding flood hazard area and net fill / flood storage displacement calculations.
- Projects that have not commenced work in a flood hazard area within 180 days of approval will need to register on-line before starting work to re-certify consistency with the NFIP.
- Residential and critical buildings must have a first floor elevation of CAFE+1. Other buildings may flood-proof to that elevation. New and redeveloped roads must be elevated to CAFE+1 as practicable taking into account existing conditions. However, applicants will need to demonstrate the existence of an “evacuation” route meeting CAFE+1

Continued on page 16

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NJ PACT Heating Up

Continued from page 3

- or obtain a hardship without the same “practicability” consideration, making the leniency provided for new/redeveloped roadway provision suspect.
- Stormwater rules will be amended to require onsite retention of the water quality storm and 80% TSS removal for redeveloped motor vehicle surfaces. Major development projects requiring wetland permits will be subjected to Stormwater compliance.
- CAFRA permitting will require approved developments to meet traffic LOS D. Currently, applicants are not required to mitigate for existing roadway conditions where LOS D is already exceeded.
- Under the flood hazard program, regulated waters will be expanded to include isolated waters that drain less than 50 acres. Riparian zones (“RZ”) will be expanded (including addition to the non-ocean side of barrier islands) and made more restrictive, and mitigation requirements enhanced.
- Climate change related conditions will be added to wetland permitting including among others demonstrating “necessity” for proposed General Permit impacts, vernal habitat assessments for proposed isolated wetland fills, enhanced mitigation requirements, expansion of minimum distances (25-foot) from wetlands and deed restriction requirements (entire modified buffer) for buffer averaging.
- Mitigation for all Land Use permitting programs will require consideration of future climate change.
- NJDEP will remove Department-delineated coastal centers from the Coastal Rules and instead rely solely on State Plan designations for impervious cover allowances.
- Procedural changes are contemplated to automate many permit condition compliance obligations, and establish a new “Permits-by-Registration”

category replacing most of the current Permits-By-Rule.

NJDEP’s NJ PACT presentation signals an intentional shift toward enhanced environmental protection to counter projected climate change threats. The agency’s initial contemplated framework of climate change restrictions on development begs the question, where will housing be incentivized to allow folks to “shelter from the storm”?

Construction Contracts During And Post-Pandemic

Continued from page 4

by the pandemic, government order or quarantine restrictions to be force majeure events warranting extensions or excuse of performance. Directly addressing the issue will help to avoid or minimize further unnecessary delays and costly dispute resolution.

The COVID-19 pandemic has created challenges specific to construction businesses, as is the case with nearly every business sector. This article is the first in a series that is designed to encourage contracting parties to caucus with their in-house or outside legal teams to consider the unique new challenges each project presents and negotiate upfront who will bear responsibility for each. It will be time, energy and resources well spent.

The Pitfalls of Litigation to the Bitter End

Continued from page 8

Both of these cases involved needless expenditures of money on experts and attorneys that could have been avoided with the application of a little common sense. The defendants in the *Site Enterprises* matter should have folded their tents and negotiated a payoff once they learned that their former employee was going to substantiate the plaintiff’s claims. Both of the parties in the *Lakehill* matter spent large amounts on legal fees for a trial that now will have to be redone unless the parties settle now.

The opinion in *Lakehill* makes it clear that the plaintiff there was a contentious litigant. The defendants in *Site Enterprises* clearly held onto their position long past its viability. Both chose not to compromise. Both are paying for that choice now. Sometimes a party has no choice but to continue litigating rather than settling. But the danger there, as illustrated by these two cases, is that unanticipated, and expensive, results can occur.