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57 NJR 3(1)
March 3, 2025
Filed February 5, 2025

PUBLIC NOTICE

ENVIRONMENTAL PROTECTION

OFFICE OF LEGAL AFFAIRS

Notice of Action on Petition for Rulemaking

Watershed and Land Management

Petition for the Department to Amend the Highlands Water Protection and Planning Act

Rules Exemptions at N.J.A.C. 7:38-2.3(a)7

Petitioner: Bill Wolfe.

Take notice that on December 5, 2024, the Department of Environmental Protection (Department) received a petition for rulemaking from Bill Wolfe (petitioner) requesting changes to a portion of the Highlands Water Protection and Planning Act Rules (Highlands Rules), N.J.A.C. 7:38. A notice of receipt of the petition was published in the New Jersey Register on January 21, 2025. See 57 N.J.R. 206(a).

The Petition

The petitioner requested the Department promulgate regulations to:

1. Delete the text “[for public lands]” used at N.J.A.C. 7:38-2.3(a); and
2. Amend N.J.A.C. 7:38-2.3(a)7, to restrict the scope of this exemption to privately owned lands.

The petitioner provided the following supporting rationales:

- The petitioner stated the Department's implementing regulation at N.J.A.C. 7:38-2.3(a)7 is broader in scope and contradicts the Highlands Water Protection and

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- Planning Act (Highlands Act) exemption #7 text at N.J.S.A. 13:20-28.a(7). The petitioner contends the subject regulatory text is *ultra vires*;
- According to the petitioner, the Department's implementing regulations at N.J.A.C. 7:38-2.3(a)7 conflict with the legislative intent of the Highlands Act exemption #7 at N.J.S.A. 13:20-28(a)7; and
 - The petitioner claims the Department's implementing regulation at N.J.A.C. 7:38-2.3(a)7 conflicts with the legislative findings, intent, fundamental purposes, objectives, policies, and standards of the Highlands Act.

The notice of receipt, this notice of action, and the full text of the petition filed in this matter are available on the Department's website at <https://dep.nj.gov/rules/notices-of-rule-petitions/>. In accordance with N.J.A.C. 1:30-4.2, the Department subsequently mailed to the petitioner and filed with the Office of Administrative Law (OAL), a notice of action on the petition. The petitioner referred to the Highlands Act, N.J.S.A. 13:20-28.a(7) and the general powers of the Department, N.J.A.C. 13:1D, in support of the petition. The Department is charged with the implementation of these laws and responds accordingly in this notice.

Response to Petition

Petitioner's First Request

The petitioner requests the Department delete the text "[for public lands]" used within the Highlands Rules at N.J.A.C. 7:38-2.3(a). The petitioner's request has already been resolved.

Upon review, it appears the bracketed phrase "[for public lands]" found in the rule version at N.J.A.C. 7:38-2.3(a)7, the petitioner cited in the petition is part of an amended version of the rule that can be found at 37 N.J.R. 4767(a). Typically, a bracketed phrase in a rulemaking

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indicates that the language encapsulated within the brackets is being deleted from the rule. As a courtesy to the public, the Department will usually post a copy of the rule on its website. The version of the rule that appears on the website is the courtesy copy of the amended version of the rule showing the bracketing, and the section of the rule the petitioner desired to be removed was removed on December 4, 2006. Discussion of this December 4, 2006 amendment is available at 37 N.J.R. 4767(a):

N.J.A.C. 7:38-2.3(a)7 exempts activities conducted in accordance with an approved woodland management plan and normal harvesting of forest products in accordance with an approved forest management plan. The criteria for Woodland management plans are established by the Farmland Assessment Act, N.J.S.A. 54:4-23.3. Woodland management plans are voluntary management plans prepared by landowners that describe various activities to be conducted in a woodland in order to maintain the health of the woodland and to sustain the production of wood over time. Compliance with the woodland management plan must be certified each year by the landowner and an Approved Forester (from a list maintained by the Department in accordance with the Forestry rules, N.J.A.C. 7:3) in order to enable the landowner to obtain reduced property taxes. A forest management plan must be approved by the State Forester and is generally based on guidelines associated with the Federal Forest Stewardship Program. While forest management plans are typically undertaken by public landowners, it is possible that a private landowner, who is not participating

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in the farmland assessment program, may seek a forest management plan in order to qualify for this exemption. As such, the Department is proposing to delete the reference to "public lands" with regard to the forest management plan. Furthermore, the "public lands" qualifier is not in the Highlands Act exemption. The effect of the proposed amendment will enable property owners who have forest management plans approved by the State Forester, but who do not have woodland management plans, to be covered by the exemption.

[37 N.J.R. 4767(a)]

At the same citation, the amendment to the rule text appears as: "7. Any activity conducted in accordance with an approved woodland management plan issued pursuant to the Farmland Assessment Act, N.J.S.A. 54:4-23.3, or [for public lands,] the normal harvesting of forest products in accordance with a forest management plan approved by the State Forester;" and the bracketed portion means that the words inside the brackets will be removed from the rule text.

The current version of this rule is codified as: "7. Any activity conducted in accordance with an approved woodland management plan issued pursuant to the Farmland Assessment Act, N.J.S.A. 54:4-23.3, or the normal harvesting of forest products in accordance with a forest management plan approved by the State Forester." The Department has uploaded an updated version of the rules to reflect these prior amendments.

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Thus, given the amendments and the Department's updated courtesy copy of the rule, the petitioner's first request has been fulfilled.

Petitioner's Second Request

The petitioner asks the Department to amend the Highlands Rules exemption #7 at N.J.A.C. 7:38-2.3(a)7 to add language that explicitly restricts the scope of the exemption to only privately owned lands. The language of Highlands Rules exemption #7 at N.J.A.C. 7:38-2.3(a)7 closely follows the Highlands Act language at N.J.S.A. 13:20-28.a(7), which exempts from the Act and Department rules:

an activity conducted in accordance with an approved woodland management plan pursuant to section 3 of P.L.1964, c.48 (C.54:4-23.3) or a forest stewardship plan approved pursuant to section 3 of P.L.2009, c.256 (C.13:1L-31), or the normal harvesting of forest products in accordance with a forest management plan or forest stewardship plan approved by the State Forester.

[N.J.S.A. 13:20-28.a(7)]

There is no explicit language in the Highlands Act that limits this exemption to privately owned lands. Additionally, pursuant to N.J.S.A. 13:20-28, the Department is without the authority to amend or adopt new rules to narrow the exemption to only privately owned lands. The petitioner provides no specific documentation of legislative findings or intent contrary to the plain language of the statute. Thus, the Department cannot adopt rules that abrogate exemptions

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granted by the Legislature’s plain language, nor can the Department expand the exemptions beyond the plain language of what the Legislature has granted.

The Highlands Act calls for a “comprehensive approach to the protection of the water and other natural resources of the New Jersey Highlands” to reduce loss of forested land and wetlands to fragmentation and unplanned development. N.J.S.A. 13:20-2. While the Department has authority pursuant to the Highlands Act, N.J.S.A. 13:20-32, to prepare rules and regulations establishing the environmental standards for the preservation area, the Department’s delegated rulemaking and regulatory authority is limited by the Highlands Act. The Highlands Act, at N.J.S.A. 13:20-28.a, instructs that the enumerated exemptions are exempt from the Highlands Act itself, the regional master plan, any Department rules and regulations adopted pursuant to the Highlands Act, as well as any amendments to a master plan, development regulations, or other regulations adopted by a local government unit. In the last five years, the Department has released comprehensive publications discussing policies and strategies for the sustainable management of resources, including the Department’s management of forests on public lands that promote environmental stewardship goals and support climate resilience. These publications include the following:

- New Jersey’s Global Warming Response Act 80X50 Report, Evaluating Our Progress and Identifying Pathways to Reduce Emissions by 80% by 2050. October 2020. NJDEP, Trenton, NJ. 178 pp. (<https://dep.nj.gov/climatechange/mitigation/80x50-report/>)
- State Forest Action Plan. December 2020. New Jersey Forest Service, Division of Parks and Forestry, NJDEP, Trenton, NJ. 311 pp. (<https://nj.gov/dep/parksandforests/forest/njsfap/docs/njsfap-final-12312020.pdf>)

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- 2021 New Jersey Climate Change Resilience Strategy. October 2021. NJDEP, Trenton, NJ. 115 pp. (<https://dep.nj.gov/wp-content/uploads/climatechange/docs/nj-climate-resilience-strategy-2021.pdf>)
- New Jersey Department of Environmental Protection and Department of Agriculture. September 2024. A Strategy to Advance Carbon Sequestration on New Jersey's Natural and Working Lands. Trenton, NJ. 69 pages.
(https://dep.nj.gov/wp-content/uploads/climatechange/nwls_final_2024_09_19-2.pdf)

Conclusion

The Highlands Rules exemption #7 at N.J.A.C. 7:38-2.3(a)7 is consistent with and follows the plain language of the Highland's Act exemption at N.J.S.A. 13:20-28.a(7). Accordingly, based on the foregoing, the petitioner's request for rulemaking is denied. A copy of this notice has been mailed to the petitioner as required pursuant to N.J.A.C. 1:30-4.2.