A Municipal Role to Implementing the Highlands Water Protection and Planning Act

The Highlands Water Protection and Planning Act (Highlands Act) was enacted on Aug. 10, 2004 with the purpose of protecting the region's great wealth of natural resources, including the waterbodies that supply drinking water to more than half of the state's population. The Highlands Act defined both a Highlands Preservation Area and a Highlands Planning Area. The regulatory program established by the Highlands Act applies only to Major Highlands Development in the Highlands Preservation Area. An interactive map (i-map) of the Highlands Region is available at www.nj.gov/dep/highlands. The Highlands Special Adoption Rules were adopted on May 9, 2005 and became immediately effective.

Municipalities play an important role in the successful implementation of the Highlands Act. This information sheet is provided to assist municipalities in understanding the Highlands Act and its requirements.

Summary of Important Definitions

"**Development**" means the same as that term is defined in the Municipal Land Use Law (N.J.S.A. 40:55D-4)

"**Major Highlands Development**" - the Highlands Act regulates only those projects and activities that meet the definition of Major Highlands Development. Major Highlands Development means any one of the following:

- Any non-residential development in the preservation area; or
- Any residential development in the preservation area that either:
  - Requires an environmental land use or water permit from the Department of Environmental Protection (DEP). (Some examples: treatment works approvals (TWA), water main extensions, NJPDES discharge permits, freshwater wetlands permits, stream encroachment permits, transition area waivers, etc.); or

- Results in the ultimate disturbance of 1 acre or more of land (meaning all existing and proposed disturbance must stay under 1 acre in total); or
- A cumulative increase in impervious surface by 0.25 acres or more.

- Any activity undertaken or engaged in the preservation area that is not a development (as defined in the Municipal Land Use Law) but
  - Results in the disturbance of 0.25 acres or more of forested area; or
  - Results in a cumulative increase in impervious surface by 0.25 acres or more on a lot.

- Any capital or other project of a state entity or local government unit in the preservation area that
  - Requires an environmental land use or water permit from the DEP; or
  - Results in the disturbance of 1 acre or more of land; or
  - A cumulative increase in impervious surface by 0.25 acres or more

- Major Highlands Development shall not mean an agricultural or horticultural development or agricultural or horticultural use in the preservation area.

Jurisdictional Determinations

This voluntary determination provides an applicant with an official DEP determination as to whether their property is located within the boundaries of the Highlands Preservation Area. This determination is both voluntary and free. An individual may alternatively determine whether their property is in the Highlands on their own by using the DEP's interactive mapping system (i-MapNJ). A Jurisdictional Determination will not provide the applicant with any information regarding whether or not a project is regulated pursuant to the Highlands Act.

Exemption Reviews

The Highlands Act identified 17 types of projects and activities that are exempt. The DEP has implemented a program to review project applicability and exemption requests. This review, called a Highlands Applicability Determination (HAD), will determine if a project is a Major Highlands Development, and thus regulated, or qualifies for an exemption from the Highlands Act.

HADs are voluntary, except for projects that require any permits from the DEP (such as freshwater wetlands permits, transition area waivers, etc.), projects that have local approval that require an exemption from the DEP, or those projects that qualify under Section 2.4(b) of the Special Adoption Rules (see General Pointers on page 6).

To initiate a HAD, applicants may submit the form titled: *Highlands Applicability and Water Quality Management Plan (WQMP) Consistency Determination Application Form*, which may be found on the DEP's Web site www.nj.gov/dep/highlands/consistency.pdf. The DEP's review will result in one of two determinations, exempt or not exempt.

■ **Exempt** - The project/activity qualifies for one of the 17 exemptions set forth in the Highlands Act. This means the project/activity is not regulated by the Highlands regulations described in the Highlands Act and Special Adoption Rules. However, the project must secure all other necessary federal, state and local approvals for the project/activity (i.e. freshwater wetlands or stream encroachment permits).

■ **Not Exempt** - The project/activity is not exempt and is regulated by the Highlands Act. Therefore, the project/activity is now subject to the Highlands regulations. This does not mean it isn't possible for a project/activity to receive approval to construct. It means the project/activity has to apply for and receive a Highlands Preservation Area Approval (HPAA) issued by the DEP's Division of Land Use Regulation, prior to construction, including site preparation.

If a project/activity is determined to be a Major Highlands Development, and does not qualify for one of the 17 exemptions, a Highlands Preservation Area Approval is required from the DEP.

Municipal Role in Implementation of the Highlands Act

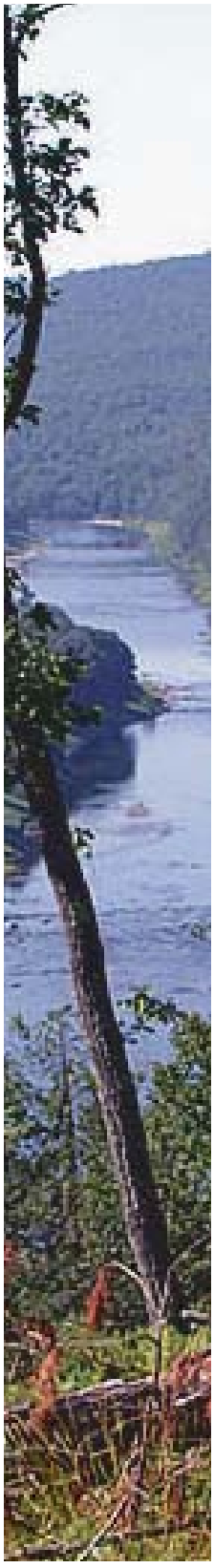
A municipality **can not** issue an official exemption to a project. The Highlands Act establishes a regulatory program within the DEP, therefore only the DEP can issue a formal exemption determination. If a municipal official can conclude by inspection that a project is not a Major Highlands Development or is exempt from the Highlands Act, then the municipality may issue all of the local permits that are needed for the project to begin construction, absent the requirement of a HAD from the DEP. However, the municipality does not have the authority to issue a letter declaring the project exempt from the Highlands Act.

■ When a municipality is unable to determine with certainty that a project is not a Major Highlands Development or is exempt, two courses of action may be taken depending on the municipal ordinances governing the local approval process. The municipality should require, either as part of its application or as a condition of its approval, that an applicant provide a copy of either a HAD that states the project is exempt or a HPAA issued by the DEP.

Below are examples of Highlands Act exemptions that are more easily determined by inspection. Where the municipality can conclude by inspection that these projects qualify for exemption from the Highlands Act, the municipality need not require a DEP-issued exemption determination:

■ Improvements or additions to a single-family dwelling that existed on Aug. 10, 2004: The determination may be made by the municipality for a dwelling that existed on or before Aug. 10, 2004 provided that the addition does not result in a new dwelling unit.

■ Construction of a new single-family dwelling on a lot that existed on Aug. 10, 2004: There are multiple factors that must be considered in making this determination. There are two different exemptions in the Highlands Act that may apply to the construction of a new single-family dwelling:
1. The construction of a home for use by the property owner or an immediate family member; and
2. The construction of a single-family home for subsequent sale.



The following are some factors to consider:

- In order to qualify for either of these exemptions the lot must have existed on Aug. 10, 2004. If the property was subdivided, or if a lot line has been moved after Aug. 10, 2004, then the lot did not exist prior to enactment and neither exemption is applicable to the property.

- To qualify for an exemption for a single-family home for an individual's own use or that of an immediate family member, that lot must have been owned by the applicant on Aug. 10, 2004 (or under binding contract by May 17, 2004). Proof of ownership should be required. In addition, the DEP requires a notarized affidavit that the proposed house is for the applicant's own use. No other limitations are placed on this exemption.

- To qualify for an exemption for a single-family home for sale, there are limitations on both the amount of disturbance and the amount of new impervious cover. A project that proposes to disturb 1 acre or more (including existing and proposed disturbances), or that proposes to place 0.25 acres or more of impervious surface, does not qualify for this exemption. Please note that the statutory definition of impervious surface includes porous paving, paver blocks, gravel, crushed stone, decks, patios, elevated structures and other similar structures. The DEP requires that a metes and bounds description of the limits of disturbance be shown on the approved site plan and that an approved conservation restriction be placed on the lot to ensure long-term compliance with these limitations.

The Highlands Act may also not regulate single-family home construction if the project does not meet the definition of a Major Highlands Development (defined above). Critical to this determination is whether the lot on which the home is to be constructed was created through subdivision after Aug. 10, 2004. If the lot was created after this date, then all disturbance and new impervious surface on the parent lot (the lot as it existed on Aug. 10, 2004) must be considered when determining if the project is a Major Highlands Development. In any case where a municipality believes that a permit is required from the DEP for construction of the single-family home, it should assume the project is regulated by the Highlands Act and require an exemption determination or HPAA from the DEP, regardless of the amount of disturbance or impervious surface proposed.

Example: A 20-acre lot is subdivided into 10, 2-acre lots after Aug. 10, 2004. Even though there are now 10 lots on this property, the original 20-acre lot is the tract that would need to be considered when determining whether a project is exempt from the Highlands Act. This situation can be problematic if none of the lots would need any DEP permits, and all of the proposed homes are each under 1 acre of ultimate disturbance and 0.25 acres of impervious covering. Individually, it would appear that the homes may not be a Major Highlands Development. However, the project must consider all disturbance and impervious surface on the lot as it existed at the time the Highlands Act was signed into law. Because the lots did not exist on Aug. 10, 2004, the cumulative total disturbance and impervious surface proposed on all lots must be considered and the development of each lot is subject to a HPAA.

Example: A 3-acre lot contains a single-family dwelling with a disturbed area of 2 acres. The property owner proposes to subdivide the lot to build and sell a new single-family dwelling. In order for this

project to continue without a HPAA, the new dwelling must not be a Major Highlands Development. To do so, the new dwelling must not result in 0.25 acres or more of new impervious surface or 1 acre or more of ultimate disturbance on the lot that existed on Aug. 10, 2004. Ultimate disturbance means all existing and proposed disturbance must stay under 1 acre in total. Since there is already 2 acres of existing disturbance on the lot, a metes and bounds description of the ultimate disturbance area must be provided, and it must include the existing dwelling, associated structures and cleared area, as well as the new dwelling and its associated structures and lawn area. Together, the metes and bounds descriptions of the two lots must encompass less than 1 acre. The area of the lot outside of described area of disturbance is required by the DEP to have a conservation restriction attached to it via the deed, such that the ultimate disturbance remains below the 1-acre threshold.

- When municipal determinations are made regarding the applicability of the Highlands Act to a project, it is recommended that all deed restrictions required by the DEP also be required by the municipality. This would mean that a metes and bounds disturbance area delineation line would be required to prove the project is staying under 1 acre of ultimate disturbance. Projects that would require this restriction are single-family dwellings on a lot that existed on Aug. 10, 2004 not for the individual's own use (exemption 2), or a project that does not meet the definition of Major Highlands Development.

It should be noted that when the DEP requires a deed restriction for a project, it is also required that proof of filing of the restriction in the deed be submitted to the DEP prior to project construction.

Projects that do not meet the criteria of a Major Highlands Development and projects that qualify as the construction of a single-family dwelling not for the individual's own use should be deed restricted to reflect that no disturbance beyond 1 acre of ultimate disturbance is allowed. A restriction should be added to the deed and a metes and bounds line should be required by the municipality. This is to ensure that disturbance does not occur beyond the 1-acre threshold and the placement of new impervious surface beyond the 0.25-acre threshold does not occur.

- Access Roads

Any new access roads that are required by a municipality for development of a single-family home are **not** exempt under the Highlands Act unless they are exempt because they received local and DEP approvals prior to March 29, 2004. This exemption expires by statute on Aug. 10, 2007. These exemptions are often complicated and the DEP encourages the municipality to require a HAD from the DEP in these cases. In some cases, a municipality may require the incremental improvement of a paper street as part of a single-family home construction. These new roads should not be included in the exemption for the construction of a single-family dwelling. New roads are not residential development and the extension of new roads in the Highlands Preservation Area violates the intent of the Act by providing access for potential future development. Therefore, new roads require a HPAA. If a single-family home requires access, a driveway can be included to provide that access as long as the disturbance and impervious surface required for that driveway are included in the disturbance and impervious surface calculations for the dwelling.

General Pointers

■ There are a few situations when a project requires a DEP permit (other than a NJPDES or TWA permit), but is not required to receive a HAD. These situations are outlined in Section 2.4(b) or the Special Adoption Rules and below:

- Improvements to a legally existing single-family dwelling in existence on Aug. 10, 2004, provided that the lot upon which the home is situated has not been further subdivided.

- Routine maintenance, rehabilitation, reconstruction and repair of transportation or infrastructure systems by a State entity or local government unit, provided such activity is confined to the existing footprint of development and does not increase the conveyance capacity.

- The construction of transportation safety projects and bicycle and pedestrian facilities by a State entity or local government unit, provided the construction does not create new travel lanes or increase the length of an existing lane by more than 2,640 linear feet; result in the cumulative increase in impervious surface by 1 acre or more; or involve the ultimate disturbance of 2 or more acres.

- Any activity that is part of an agricultural or horticultural development or agricultural or horticultural use.

- Any activity conducted by a landowner in accordance with an approved woodland management plan issued pursuant to the Farmland Assessment Act, or for public lands, the normal harvesting of forest products in accordance with a forest management plan approved by the State Forester.

■ If there is any question as to the applicability of the Highlands Act to a project/activity, the municipality should direct the applicant to apply to the DEP to receive a formal written determination in the form of a HAD. The application may be found on the DEP's Web site www.nj.gov/dep/highlands/consistency.pdf.

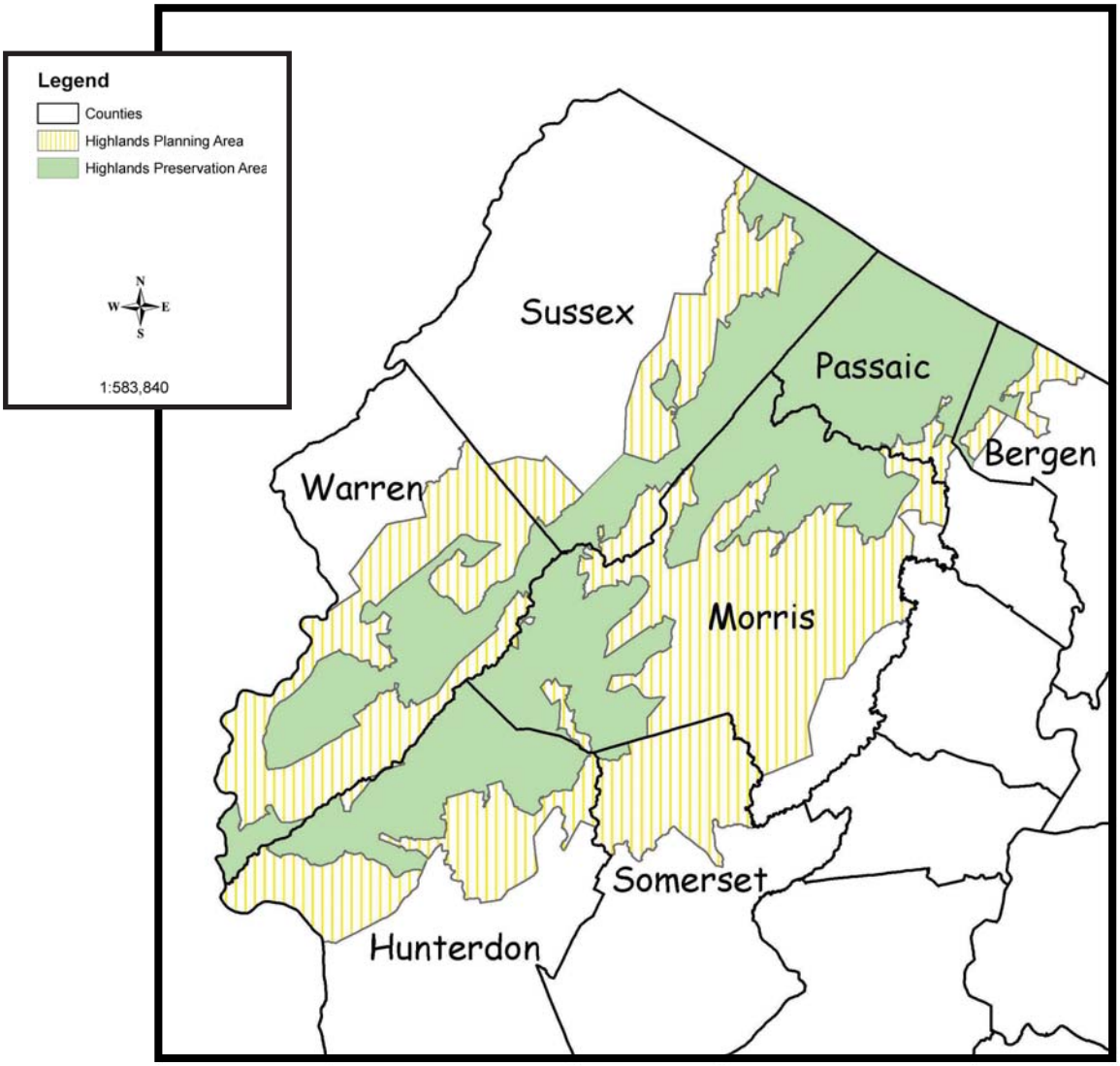
■ If a municipality can determine with certainty that a project is not regulated by the Highlands Act, there is still the possibility that the State, at some point, may require proof of exemption from the project owner. This could occur in a situation where a concerned citizen brings to the DEP's attention that construction of a development is occurring without a HPAA. It would be beneficial for an applicant to receive a formal written determination in the form of a HAD from the DEP to remove any question that the project is exempt, thereby eliminating potential construction delays that may result from an enforcement investigation.

■ When local approvals (such as a subdivision or site plan approvals) are given for a Major Highlands Development before a HAD is issued by the DEP and the municipality is unable to conclude that the project would be exempt, a condition should be included in the municipal approval requiring that the applicant receive a HAD or HPAA before the municipal approval becomes final.

- When a subdivision occurs after Aug. 10, 2004, the allowable disturbance and impervious surface must be considered for all of the new lots, not just each new lot individually. In other words, the lot that should be considered is the lot that existed on Aug. 10, 2004. When considering the lots as a whole, the DEP will check whether any permits are applicable to any of the lots.

- When a lot is created after Aug. 10, 2004 and the proposed development on that lot is not a Major Highlands Development and, therefore, is not required to receive a HPAA from the DEP, language should be added to the deed for each of the new lots to ensure that the square footage of disturbance and impervious areas are not exceeded in the future. No new disturbed areas or impervious surfaces beyond the allowable limits of the original lot may be added in the future after the construction of the proposed development. This provides future owners with notice that further development may be restricted.

New Jersey Highlands Preservation and Planning Areas



Contact Information

For more information on the Highlands Act, visit www.nj.gov/dep/highlands

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