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ENVIRONMENTAL PROTECTION

LAND USE REGULATION

Notice of Action on Petition for Rulemaking

Freshwater Wetland Protection Act Rules, N.J.A.C. 7:7A

Mitigation for a larger disturbance; N.J.A.C. 7:7A-15.6

Petitioner: Ecologic Mitigation Oxford, LLC

Take notice that the Department of Environmental Protection (Department) has determined to deny the petition for rulemaking received on February 20, 2014 from Neil Yoskin, Esq. on behalf of Ecologic Mitigation Oxford, LLC (petitioner). The petitioner, owner and operator of Oxford Western Wetland Mitigation Bank in Oxford Township, Warren County, requested that the Department amend the Freshwater Wetlands Protection Act (FWPA) Rules regarding mitigation for larger disturbances. Particularly, petitioner requests that N.J.A.C. 7:7A-15.6 be amended to create a preference for the purchase of credits from mitigation banks over restoration, creation or enhancement of wetlands at an offsite location where onsite restoration, creation or enhancement is not feasible. The existing rule establishes a hierarchy for mitigating disturbances, but puts the purchase of credits from an approved mitigation bank on an equal footing with offsite, in-kind mitigation. Notice of receipt of the petition was published in the New Jersey Register on April 7, 2014 at 46 N.J.R. 647(a).

Petitioner asserts the requested change would be consistent with Department policies that otherwise discourage the construction of scattered wetlands sites, as well as Federal wetlands

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policy and regulations that petitioner states favor the use of mitigation banks over offsite, in-kind mitigation.

Petitioner also asserts that the current rule differs from the Federal regulations and is thus not consistent with Executive Order 2(2010) which directs State agencies to not exceed the requirements of Federal law unless required by State statute or where an exceedance is necessary to achieve a State specific public policy goal. Petitioner further asserts that the rule is not consistent with Department policy to encourage the use of private capital to construct mitigation banks and that there is no articulated New Jersey- specific public policy that the rule provision advances. Petitioner states that it has purchased land and obtained approvals for its mitigation bank in a location that will provide a degree of ecological benefit there and in the surrounding area that is proportionally greater than a simple increase in the amount of wetland acreage, but that, without a change in the rule, it is likely that neither the petitioner nor any of the other approved wetland banks in the State will be able to provide the ecological benefits that they were created to provide.

Under the FWPA Rules, mitigation projects are split into two categories: those compensating for a smaller disturbance (a disturbance of 1.5 acres or smaller, or a disturbance affecting only ordinary resource value wetlands) and those compensating for a larger disturbance (all disturbances not considered a small disturbance).

This dichotomy reflects the Department's experience with freshwater wetland mitigation projects. Particularly, it has been the Department's experience that larger mitigation projects have a greater success rate than small projects, with a mitigation area of three or more acres having a substantially higher likelihood of success than a smaller

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mitigation area. Since generally the rules require mitigation to be provided at a ratio of two acres of mitigation per acre of disturbance, a disturbance of 1.5 acres (a “smaller disturbance” pursuant to N.J.A.C. 7:7A-15.5) would result in the creation of a three acre mitigation area. Accordingly, a disturbance of 1.5 acres or less is likely to result in a three acre or smaller mitigation area, which will have less potential for success.

In addition to increased potential for success, larger wetland areas can more successfully provide wildlife habitat (which is another function associated with a successful mitigation project) that is farther from human activity, and therefore more beneficial for the species.

Because mitigation areas over three acres in size have a higher success rate and are likely to provide greater environmental benefits than smaller mitigation projects, the FWPA Rules recognize that mitigation for a smaller disturbance is generally better performed offsite through purchase of credits from a mitigation bank rather than these disturbances being mitigated through the creation of small, isolated mitigation projects,. Accordingly, absent a demonstration by the applicant that either onsite mitigation or offsite mitigation in the same area as the disturbance is more environmentally beneficial than purchase of credits from a mitigation bank, the rules require mitigation for smaller disturbances be accomplished through purchase of credits from a mitigation bank. Utilization of mitigation bank credits to satisfy mitigation requirements applicable to smaller disturbances is particularly preferable as mitigation banks are required to demonstrate that various performance criteria have been successfully achieved which has resulted in a successful, functioning wetland system before mitigation credits can be sold. Accordingly, the rules for mitigation of a smaller disturbance

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at N.J.A.C. 7:7A-15.5 reflect the fact that it tends to be more environmentally beneficial to discourage the creation of small, isolated mitigation projects, and to instead aggregate small mitigation projects by purchasing credits from a mitigation bank. However, this tendency may not be applicable in all cases, and therefore the rule contains a process for the applicant to demonstrate that mitigation in its particular case would better be performed by the applicant either onsite or offsite in close proximity to the area of disturbance.

At N.J.A.C. 7:7A-15.6, the FWPA Rules set forth the requirements for mitigation of a larger disturbance. Because mitigation of a larger disturbance will generally result in a mitigation area of three acres or more, eliminating the concerns applicable to smaller disturbances under N.J.A.C. 7:7A-15.5, the rules applicable to mitigation of a larger disturbance place a greater emphasis on the mitigation project occurring either onsite or as close to the area of disturbance as possible. Accordingly, the rule requires that mitigation be carried out onsite through restoration, creation, or enhancement to the maximum extent feasible; only if onsite mitigation is not feasible may other alternatives be considered. Onsite mitigation through restoration, creation or enhancement is the preferred mitigation alternative because compensation for the wetlands impacts will occur as close to the site of impact as possible, thus maintaining the habitat values and other natural functions of the wetlands remaining on site.

Where onsite mitigation is not feasible, the FWPA Rules, at N.J.A.C. 7:7A-15.6(d) through (g), set forth a hierarchy of mitigation alternatives to onsite mitigation through restoration, creation or enhancement. The hierarchy generally requires that, if onsite mitigation is not feasible, the offsite mitigation provided (whether it be through a permittee

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project or purchase of credits at a mitigation bank) must be as closely connected to the area of disturbance as feasible to assure that the benefit provided by the mitigation project offsets the impact to the disturbed wetland as much as possible. While the rules do provide options within each step of the hierarchy, allowing the applicant to determine in N.J.A.C. 7:7A-15.6(d) through (f) between purchase of credits from a mitigation bank or offsite restoration, creation or enhancement to satisfy the mitigation requirements, throughout the hierarchy, the purchase of credits from a mitigation bank is preferred over a monetary contribution, upland preservation, or land donation, with these latter options only being available if neither mitigation bank credit purchase or offsite restoration, creation or enhancement pursuant to N.J.A.C. 7:7A-15.6(d) through (f) is not feasible. This mitigation hierarchy is consistent with the US Environmental Protection Agency and US Army Corps of Engineers 2008 regulations known as the “Compensatory Mitigation for Losses of Aquatic Resources” or the “Federal Mitigation Rule” and is consistent with the Department’s goal of ensuring that mitigation occurs as close to the disturbance site as possible and that the wetlands are replaced using the most successful types of mitigation.

The Department does not agree with the petitioner’s suggestion that the purchase of credits from a mitigation bank should additionally be given a preference over offsite restoration, creation or enhancement. Larger mitigation projects, whether completed by the permittee or through the purchase of credits from a mitigation bank, have a higher probability of offsetting wetlands losses than a smaller disturbance. However, the proximity of the mitigation site to the disturbance is key factor in the probability of successful replacement of the functions and values of the wetlands lost. Therefore, if a permittee is proposing a

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mitigation alternative that is closer to the location of the impacted wetlands than the nearest mitigation bank, provided the permittee's mitigation alternative meets the requirements of N.J.A.C. 7:7A-15, the Department would prefer the permittee's mitigation alternative since the functions and values of the wetland lost are being provided in a closer proximity to the site of impact, therefore providing a greater likelihood that the mitigation project will serve to more directly offset the impacts to the particular functions and values provided by the wetlands to be impacted.

The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to freshwater wetlands. When evaluating compensatory mitigation options, the Department considers what is environmentally beneficial. As previously stated, while generally it is preferential that for smaller disturbances mitigation be provided through a larger project performed by a mitigation bank, in some circumstances mitigating for a smaller disturbance onsite may be environmentally beneficial. As indicated above, for larger impacts falling under N.J.A.C. 7:7A-15.6, concerns applicable to the likelihood of success of smaller mitigation projects are not applicable. Accordingly, for larger impacts where onsite mitigation is not feasible, the Department allows the mitigation to occur offsite (through either permittee purchase of property upon which to conduct mitigation, or permittee acquisition of permission from a property owner to conduct mitigation and to place a conservation restriction on the mitigated portion of the property) or through the purchase of credits from a mitigation bank. The rules do not create a preference for mitigation bank credit purchase to compensate for larger disturbances because a stand-alone mitigation project of a larger size has the same likelihood of success in compensating for lost

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wetland functions and values as a mitigation bank.

Finally, it is unclear why the petitioner believes the Department has a policy regarding the use of public or private funds for mitigation. The Department does not have a policy regarding the use of private or public funds to construct a mitigation bank. Currently, there are 16 Department-approved wetland mitigation banks throughout the State; 15 of which are privately funded and one of which is a publicly funded county mitigation bank. Further, there are eight proposed mitigation banks working through the banking approval process. The Department believes that both privately and publicly owned mitigation banks have served and will continue to serve a valuable function under the rules.

Therefore, in accordance with N.J.S.A. 52:14B-4(f) and N.J.A.C. 1:30-4.2, after careful consideration of the petition, the Department has determined to deny the petition for rulemaking.

A copy of this notice has been mailed to the petitioner as required by N.J.A.C. 1:30-4.2.