

Protecting the Source of Clean and Plentiful Water for One-Half of New Jersey's Population: The Highlands Water Protection and Planning Act¹

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Water from the Highlands Region provides over half of the potable water supplied by public water systems in the entire state.³ It is the source of potable water for 5.4 million of New Jersey's 8.5 million residents, including all the residents within the Region.⁴ This water is, of course, critical to sustaining the social and economic viability of the entire state. Sprawl has threatened to cut off this water supply at its source.

The New Jersey legislature has decided to apply land use controls to preserve this irreplaceable water supply and other natural resources of the state's Highlands Region. This legislative model could be useful in other states where spreading land development threatens the long-term sustainability of water supplies.

I. The Highlands Region and the New Jersey Water Supply

The Highlands Region includes 1,343 square miles,⁵ or about 800,000 acres,⁶ covering approximately 13% of the land area of the state.⁷ It crosses seven counties in the northwest

¹ N.J. STAT. ANN. §§ 13:20-1-13:30-35. The Highlands Area is "an essential source of drinking water, providing clean and plentiful drinking water for one-half of the State's population." *Id.* § 13:20-2.

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³ N.J. STAT. ANN. § 13:20-2; *see also* STATE OF NEW JERSEY HIGHLANDS WATER PROTECTION AND PLANNING COUNCIL, HIGHLANDS WATER RESOURCES VOLUME II: WATER USE AND AVAILABILITY TECHNICAL REPORT 98 (2008), *available at* http://www.highlands.state.nj.us/njhighlands/master/tr_water_res_vol_2.pdf (last visited May 28, 2009).

⁴ *Id.*

⁵ HIGHLANDS WATER PROTECTION AND PLANNING COUNCIL, HIGHLANDS REGIONAL MASTER PLAN 25 (2008) *available at* http://www.highlands.state.nj.us/njhighlands/master/rmp/final/highlands_rmp_112008.pdf (last visited May 28, 2009).

⁶ N.J. STAT. ANN. § 13:20-7(a).

⁷ *Id.* § 13:20-2.

tier of New Jersey⁸ and includes 88 municipalities.⁹ The region has been settled for over 200 years, but 75% of it remains undeveloped land¹⁰ and much of it (54%) is forested.¹¹ Almost 275,000 acres, comprising over 30% of the Region, are preserved as undeveloped land or farmland, under a variety of federal, state, municipal, nonprofit, or private ownership.¹² The Highlands mostly comprises the low hills and ridges of the easternmost range of the Appalachian Mountains, west of the geological piedmont province and east of the valley and ridge province.¹³ Much of it lies along the Reading Prong geological formation.¹⁴ It is part of the federally recognized Highlands Region,¹⁵ an area of 3.5 million acres extending from southeastern Pennsylvania through northwest New Jersey, southeast New York, and northwest Connecticut.¹⁶

The Highlands Region is a headwaters area from which rivers flow in almost every direction. The Highlands Region generates more than 864 million gallons of water a day (mgd), which is used for drinking, industry, and agricultural uses.¹⁷ Reservoirs in the Highlands provide over 600 mgd of potable water to public water supply systems in areas of northern and central New Jersey outside the Region.¹⁸ During 2003, for example, reservoirs in the Highlands Region provided 115 billion gallons of drinking water to public water supply systems in New Jersey located outside the Highlands.¹⁹ Potable water supplies used within the Highlands Region, primarily groundwater withdrawals, account for less than 20% of the total potable water use from the Region.²⁰ Agricultural uses within the Highlands Region account for less than 1% of the maximum monthly water use.²¹

The Highlands Region contains

exceptional natural resources such as clean air, contiguous forest lands, wetlands, pristine watersheds, and habitat for fauna and flora, includes many sites of historic significance, and provides abundant recreational opportunities for the citizens of the State.²²

⁸ Bergen, Passaic, Sussex, Morris, Warren, Hunterdon, and Somerset Counties. *Id.* § 13:20-7(a). New Jersey has a total of 21 counties.

⁹ The region extends from Phillipsburg in the southwest to Mahwah in the northeast. *Id.*

¹⁰ Highlands Regional Master Plan, *supra* note 5.

¹¹ *Id.* at 215.

¹² *Id.* at 72, 73.

¹³ *Id.* at 1-2, 25.

¹⁴ *Id.* at 25. The Reading Prong is a belt of ancient, hard crystalline rock extending across the Highlands Region. UNITED STATES GEOLOGICAL SURVEY, GEOLOGY OF THE NEW YORK CITY REGION, THE HIGHLANDS PROVINCE (2003), available at

<http://3dparks.wr.usgs.gov/nyc/highlands/highlands.html> (last visited June 30, 2009).

¹⁵ See Highlands Conservation Act of 2004, 108 Pub. L. No. 421, 118 Stat. 2375 (2004).

¹⁶ Highlands Regional Master Plan, *supra* note 5, at 8, 9.

¹⁷ Highlands Water Resources Volume II, *supra* note 3, at 98.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² N.J. STAT. ANN. § 13:20-2.

These natural resources are vital to the residents of the most densely populated state,²³ in the most densely populated area of the country.²⁴ The Region is suffused with an extensive network of water bodies: 3,605 miles of rivers and streams; 32,213 acres of mapped open waters (i.e., lakes, rivers and streams); and 90,091 acres of mapped wetlands. Over 40% of the Region is mapped riparian areas, which includes all open waters and the immediately adjacent lands. Approximately 110,000 acres are agricultural lands in active production, and the agricultural industry is a vital component of the regional economy.²⁵

The Highlands was once a quiet rural area, distant from New Jersey's crowded cities. After World War II, population growth in New Jersey shifted to its suburbs, which expanded and covered the coastal and piedmont areas.²⁶ In the 1970s and 1980s, sprawl began to spread development into the Highlands.

Congress first initiated protection efforts for the Highlands Region through provisions in the Food, Agriculture, Conservation, and Trade Act of 1990.²⁷ That Act appropriated funds for the 1992 U.S. Forest Service study.²⁸ The 1992 study identified the Highlands as an area of national significance and identified various possible strategies, such as a regional transfer of development rights, to conserve its forest and water resources.²⁹ In October 2000, Congress passed Public Law 106-291, which in fiscal year 2001 appropriated \$750,000 for the Forest Service's 2002 Update of the Highlands Regional Study.³⁰

Governor James E. McGreevey created the Highlands Task Force on September 19, 2003.³¹ The Task Force, whose findings served as the blueprint for the current legislation, issued a report in March 2004 setting forth its findings on the effects of development on the Region and recommending urgent action:

The Highlands is under threat, though, from population growth, large-lot residential subdivisions, increased deforestation and fragmentation and sprawl. *Within the five-year period between 1995 and 2000, the Highlands lost – perhaps forever – 17,000 acres of forest and 8,000 acres of farmland. Growth pressures continue in the region with the trend for land consumption expected to average 3,000 acres every year.*

²³ Highlands Regional Master Plan, *supra* note 5, at 215; N.J. STAT. ANN. § 52:18A-196(a). See also N.J. STAT. ANN. § 13:20-2 and

http://en.wikipedia.org/wiki/List_of_U.S._states_by_population_density (last visited Mar. 31, 2009).

²⁴ "One in nine Americans lives within a 2-hour drive of the Highlands." U.S. DEPARTMENT OF AGRICULTURE, FOREST SERVICE, NORTHEASTERN AREA STATE AND PRIVATE FORESTRY, NEW YORK – NEW JERSEY HIGHLANDS REGIONAL STUDY: 2002 UPDATE, NA-TP-02-03 at 2 (Dec. 2002) *available at* http://na.fs.fed.us/pubs/stewardship/ny_nj_highlands02_lr.pdf (last visited May 28, 2009).

²⁵ N.J. STAT. ANN. § 13:20-2.

²⁶ See Highlands Regional Master Plan, *supra* note 5, at 4.

²⁷ Pub. Law. No. 101-624, 104 Stat. 3547 (1990).

²⁸ *Id.*

²⁹ 2002 USFS Study, *supra* note 24, at 138; see *id.* at 187, 190.

³⁰ Food, Agriculture, Conservation and Trade Act of 1990, Pub. Law. No. 101-624, § 1244(b), 104 Stat. 3547 (1990); 2002 USFS Study, *supra* note 24, at 4.

³¹ State of New Jersey Executive Order No. 70 (2003), *available at* <http://www.state.nj.us/infobank/circular/eom70.htm> (last visited Mar. 14, 2009).

Unless these trends are altered and an effective regional approach to the Highlands adopted, the harm to the region will be severe and permanent.³²

By this time, sprawl had begun to devour the region and imperil its water supply. When it enacted the Highlands Act in 2004, the Legislature found that

since 1984, 65,000 acres, or over 100 square miles, of the New Jersey Highlands have been lost to development; that sprawl and the pace of development in the region has dramatically increased, with the rate of loss of forested lands and wetlands more than doubling since 1995.³³

The legislature also found that

because of its proximity to rapidly expanding suburban areas, [the Highlands Region] is at serious risk of being fragmented and consumed by unplanned development; and that *the existing land use and environmental regulation system cannot protect the water and natural resources of the New Jersey Highlands against the environmental impacts of sprawl development.*³⁴

Thus, the Legislature recognized an urgency to act quickly to protect and preserve the source of drinking water for over half the State's population. The Legislature also recognized that municipal land use controls were inadequate and that a comprehensive regional approach was needed.

II. The Highlands Act: Using Water Preservation to Guide Regional Land Use

The Highlands Water Protection and Planning Act (Highlands Act) was formally introduced in the Legislature as Senate Bill 1 on March 29, 2004.³⁵ The Act, signed into law by Governor McGreevey on August 10, 2004, regulates land use throughout the Highlands Region. The Act included a limited exemption for any "major Highlands development" that had obtained all necessary approvals and permits before the date the Act was introduced in the legislature.³⁶ For most purposes, the Act upon enactment became retroactively effective to March 29, 2004.

³² NEW JERSEY HIGHLANDS WATER PROTECTION AND PLANNING COUNCIL, 2004 ANNUAL REPORT at 3 (2004) (*quoting* Highlands Task Force Report, Executive Summary, March 2004), *available at* http://www.highlands.state.nj.us/njhighlands/news/publ/annual_report.pdf (last visited Apr. 15, 2009) (emphasis added).

³³ N.J. STAT. ANN. § 13:20-2.

³⁴ *Id.* § 13:20-2 (emphasis added).

³⁵ 2004 N.J. Sess. Law Serv. Ch. 120 (SENATE 1) (West). The Highlands Act is codified at several locations, primarily N.J. STAT. ANN. §§ 13:20-1 to 13:20-35, and included amendments to several other statutes. The full text of the Highlands Act is available at http://www.highlands.state.nj.us/njhighlands/actmaps/act/highlands_bill.pdf (last visited Mar. 14, 2009).

³⁶ N.J. STAT. ANN. § 13:20-28.

A. *The Highlands Act: The Statute*

The Highlands Act was adopted by the Legislature to protect the quality and quantity of essential drinking water at its source, ensuring a sustainable water supply for the long term.³⁷ The Legislature found and declared that

protection of the New Jersey Highlands, *because of its vital link to the future of the State's drinking water supplies and other key natural resources*, is an issue of State level importance that cannot be left to the uncoordinated land use decisions of 88 municipalities, seven counties, and a myriad of private landowners; that the State should take action to *delineate within the New Jersey Highlands a preservation area of exceptional natural resource value that includes watershed protection and other environmentally sensitive lands where stringent protection policies should be implemented*. . .³⁸

The Legislature's findings included the determination that thousands of acres of land in the region were being lost annually to development and that it needed to act "as soon as possible."³⁹ The Highlands Act was based, in part, on the March 2004 Report of the Governor's Highlands Task Force.⁴⁰

The Act requires regional, as well as local land use planning, focused on limiting sprawl across the area. The Legislature declared that

it is appropriate to encourage in certain areas of the New Jersey Highlands, consistent with the State Development and Redevelopment Plan⁴¹ and smart growth strategies and principles, appropriate patterns of compatible residential, commercial, and industrial development, redevelopment, and economic growth, in or adjacent to areas already utilized for such purposes, and *to discourage piecemeal, scattered, and inappropriate development*, in order to accommodate local and regional growth and economic development in an orderly way while protecting the Highlands environment from the individual and cumulative adverse impacts thereof. . .⁴²

Nevertheless, individual municipalities continue to regulate local land use in the Highlands under their own zoning and planning ordinances.⁴³

The Act divides the Highlands Region into two regulatory areas: "a preservation area, in which further development is strictly regulated, and a planning area, in which development

³⁷ *Id.* § 13:20-2.

³⁸ *Id.* (emphasis added).

³⁹ *Id.*

⁴⁰ See Highlands Act, *supra* note 35, at §7(b) ("The preservation area shall consist of that area described by the Highlands Task Force, established by Executive Order No. 70 of 2003, and based upon natural resource data assembled by the United States Forest Service, Rutgers, The State University, and the New Jersey Water Supply Authority. . .").

⁴¹ See N.J. STAT. ANN. § 52:18A-200.

⁴² *Id.* § 13:20-2 (emphasis added).

⁴³ As per the Municipal Land Use Law, *id.* §§ 40:55D-1–40:55D-163.

consistent with the Act's goals is encouraged."⁴⁴ These areas are almost equal in size, with about 415,000 acres in the preservation area and 445,000 acres in the planning area.⁴⁵

The Highlands Act delineates the boundaries of the two areas,⁴⁶ based upon regional and town centers designated by the State Planning Commission under the State Planning Act,⁴⁷ and extensive natural resource data.⁴⁸ That natural resource data was assembled by the U.S. Forest Service; Rutgers, The State University; and the New Jersey Water Supply Authority.⁴⁹

Conceptually, the Act seeks to direct development away from the preservation area and toward the planning area. The Highlands Act builds upon existing statewide land and water use statutes. The Act does this by strictly regulating any "major Highlands development" within the preservation area.⁵⁰ The Act defines "major Highlands development" very broadly:

- 1) Any non-residential development in the preservation area;
- 2) Any residential development in the preservation area that requires *an environmental land use or water permit* or that results in the ultimate disturbance of one acre or more of land or a cumulative increase in impervious surface by one-quarter acre or more;
- 3) Any activity undertaken or engaged in the preservation area that is not a development but results in the ultimate disturbance of one-quarter acre or more of forested area or that results in a cumulative increase in impervious surface by one-quarter acre or more on a lot; or
- 4) 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* or that results in the ultimate disturbance of one acre or more of land or a cumulative increase in impervious surface by one-quarter acre or more. Major Highlands development shall not mean an agricultural or horticultural development or agricultural or horticultural use in the preservation area.⁵¹

⁴⁴ *OFP, L.L.C. v. New Jersey*, 395 N.J. Super. 571, 576-77 (App. Div. 2007), *aff'd*, 197 N.J. 418 (2008); see N.J. STAT. ANN. §§ 13:20-7(b), (c); 13:20-10(b), (c).

⁴⁵ Highlands Regional Master Plan, *supra* note 5, at 11-12; see N.J. STAT. ANN. §§ 13:20-7(b), (c).

⁴⁶ *Id.* § 13:20-7(d).

⁴⁷ *Id.* §§ 52:18A-196 - 52:18A-208.

⁴⁸ See Highlands Act, *supra* note 35, at §7(b) ("The preservation area shall consist of that area described by the Highlands Task Force, established by Executive Order No. 70 of 2003, and based upon natural resource data assembled by the United States Forest Service, Rutgers, The State University, and the New Jersey Water Supply Authority, which is to be translated, allowing for reasonable variations, by the Highlands Task Force with the assistance of Rutgers, The State University, the Department of Environmental Protection, and other appropriate entities, to appropriate and nearest practicable, on-the-ground, and easily identified reference points, such as, but not limited to, road descriptions, survey lines, and municipal boundaries, by May 1, 2004 or as soon thereafter as may be possible. This narrative description of the preservation area shall be enacted into law.").

⁴⁹ *Id.*

⁵⁰ N.J. STAT. ANN. § 13:20-30(a).

⁵¹ *Id.* § 13:20-3 (emphasis added).

The Act defines “environmental land use or water permit” very broadly, to include the most significant of a broad range of statutes.⁵²

The legislature intended for the Highlands Act to place immediate and specific limits on development activities in the Highlands Region. The sponsors’ statement with the introduction of the initial bill made this intent abundantly clear and built it into the structure of the bill. The bill directed the Department of Environmental Protection (DEP) to:

Develop and enforce two chronologically sequential environmental permitting programs and standards in the preservation area of the Highlands, [to govern] permits for major [Highlands] development.

The first DEP permitting program [took] effect [immediately] upon enactment of the bill, [consisting] of the regulatory requirements of existing environmental land use and water permits, as well as additional statutorily established standards in the bill that are self executing, which is to say that no rules and regulations would be required to implement them. . .

The second and permanent DEP permitting program for the preservation area, the Highlands permitting review program, would be adopted as immediately effective rules and regulations within nine months after enactment of the bill. . . These rules and regulations would establish a Highlands permitting review program, the structure and requirements for which would essentially track the requirements for the statutorily established Highlands Preservation Area approval.⁵³

The Act contains detailed and stringent legislatively mandated environmental standards for the preservation area that went into effect immediately upon its enactment. Those standards include, for example:

- “[A] prohibition on major Highlands development within 300 feet of any Highlands open waters, and the establishment of a 300-foot buffer adjacent to all Highlands open waters. . .”⁵⁴
- “[T]he quality of all Highlands open waters and waters of the Highlands within the preservation area [is] to be maintained, restored, or enhanced, . . . and any new or expanded point source discharge, except discharges from water supply facilities, shall not degrade existing water quality”⁵⁵

⁵² “[A] permit, approval, or other authorization issued by the Department of Environmental Protection pursuant to the ‘Freshwater Wetlands Protection Act,’ [N.J. STAT. ANN. § 13:9B-1 *et seq.*], the ‘Water Supply Management Act,’ [N.J. STAT. ANN. § 58:1A-1 *et seq.*], the ‘Water Pollution Control Act,’ [N.J. STAT. ANN. § 58:10A-1 *et seq.*], ‘The Realty Improvement Sewerage and Facilities Act (1954),’ [N.J. STAT. ANN. § 58:11-23 *et seq.*], the ‘Water Quality Planning Act,’ [N.J. STAT. ANN. § 58:11A-1 *et seq.*], the ‘Safe Drinking Water Act,’ [N.J. STAT. ANN. § 58:12A-1 *et seq.*], or the ‘Flood Hazard Area Control Act,’ [N.J. STAT. ANN. § 58:16A-50 *et seq.*].” *Id.*

⁵³ New Jersey Senate Committee Statement, S.B. 1, § V (June 7, 2004).

⁵⁴ N.J. STAT. ANN. § 13:20-32(a).

⁵⁵ *Id.* § 13:20-32(b).

- “[A]ny diversion of more than 50,000 [gpd], and multiple diversions by the same or related entities for the same or related projects or developments of more than 50,000 [gpd], of waters of the Highlands shall require a permit . . . and any permit issued pursuant thereto shall be based on consideration of individual and cumulative impacts of multiple diversions, maintenance of stream base flows, minimization of depletive use, maintenance of existing water quality, and protection of ecological uses”;⁵⁶
- A zero net fill requirement for flood hazard areas.⁵⁷

Certain activities are exempt from the Highlands Act, including the construction of a single-family home on an existing lot that disturbs less than one acre or increases impervious cover by less than one-quarter acre; a major Highlands development that received all necessary land use approvals before the Act’s introduction on March 29, 2004; and the remediation of contaminated sites.⁵⁸ The Act also allows a waiver of strict compliance with the Highlands regulations when necessary to avoid a regulatory taking.⁵⁹ The Act provides for both civil and criminal penalties for violations.⁶⁰

B. *The DEP Highlands Preservation Area Rules*

As directed by the Act,⁶¹ the DEP has “establish[ed] a Highlands permitting review program to provide for the coordinated review of any major Highlands development in the preservation area.”⁶² That regulatory program⁶³ requires a Highlands Preservation Area Approval (HIPAA) for any major Highlands development in the preservation area.⁶⁴ The Highlands regulations incorporate from the Highlands Act the broad definition of “major Highlands development”⁶⁵ and the exemptions for agricultural or horticultural activities or development in the preservation area.⁶⁶ The New Jersey Department of Agriculture regulates agricultural and horticultural activities in the preservation area.⁶⁷ In addition to statewide New Jersey Department of Agriculture and State Soil Conservation Service rules, the Department of Agriculture regulates agricultural and horticultural uses and

⁵⁶ *Id.* § 13:20-32(d).

⁵⁷ *Id.* § 13:20-32(f). This provision is pursuant to the Flood Hazard Area Control Act, N.J. STAT. ANN. §§ 58:16A-50 *et seq.*; 13:20-30(b)(1) to -(4).

⁵⁸ *Id.* § 13:20-28(a)(2), (3) and (15).

⁵⁹ The “narrative” criteria in § 36 of the Highlands Act which seek to reduce the adverse environmental effects of development may be waived to avoid a regulatory taking. *Id.* § 13:20-34(b).

⁶⁰ *Id.* § 13:20-35.

⁶¹ *Id.* §§ 13:20-31, 13:20-32.

⁶² *Id.* § 13:20-33(a).

⁶³ Highlands Water Protection and Planning Act Rules, N.J. ADMIN. CODE tit. 7, ch. 38, adopted Nov. 1, 2006, effective Dec. 4, 2006. These DEP regulations do not apply in the planning area. N.J. STAT. ANN. §§ 13:20-30(d), 13:20-31(c).

⁶⁴ N.J. ADMIN. CODE. § 7:38-6.1 to -6.9.

⁶⁵ *Id.* § 7:38-1.4.

⁶⁶ N.J. STAT. ANN. §§ 13:20-29; 13:20-3 (“Major Highlands development shall not mean an agricultural or horticultural development or agricultural or horticultural use in the preservation area.”).

⁶⁷ *See id.* § 13:20-29; *see also id.* § 4:1-21.5.

development in the Highlands under its “Agricultural Development in the Highlands” rules.⁶⁸

The Highlands Water Protection and Planning Act Rules elaborate on the legislatively mandated environmental standards for the preservation area. The DEP is responsible for implementing the Highlands Act through the issuance or denial of HIPAAs and other permits required for any major Highlands development in the preservation area.⁶⁹ The primary goal of the Highlands regulations is to preserve “surface and ground water quality and supply” for human consumptive activities and ecosystem functioning.⁷⁰ The regulations seek to encourage development to proceed in areas that do not threaten the long-term viability of water resources and prioritize the preservation of undeveloped land in the preservation area. Nevertheless, the rules allow or even encourage development of certain types of land even within the preservation area, such as redevelopment of existing developed or brownfield (polluted) sites.

To obtain a HIPAA, the applicant must demonstrate that the proposed regulated activity will comply with the strictest DEP land use and water regulations of statewide applicability as well as with all DEP regulatory standards for the Highlands preservation area.⁷¹ The DEP’s regulatory standards for the preservation area govern water supply diversion sources,⁷² public community water systems,⁷³ state-regulated stormwater and wastewater discharges,⁷⁴ impervious surfaces,⁷⁵ Highlands open waters,⁷⁶ flood hazard areas,⁷⁷ steep slopes,⁷⁸ upland forested areas,⁷⁹ historic and archeological areas,⁸⁰ rare, threatened or

⁶⁸ N.J. ADMIN. CODE § 2:92-1.1 to -5.1; Highlands Regional Master Plan, *supra* note 5, at 11-12. These rules require, for example, preparation of a Farm Conservation Plan or a Resource Management System Plan if agricultural or horticultural development results in an increase in impervious cover of, respectively, greater than three or nine percent. N.J. ADMIN. CODE § 2:92-3.1, -4.1.

⁶⁹ N.J. STAT. ANN. § 13:20-30.

⁷⁰ N.J. ADMIN. CODE § 7:38-1.1(i)1.

⁷¹ *Id.* § 7:38-6.1.

⁷² *Id.* § 7:38-3.2.

⁷³ *Id.* § 7:38-3.3.

⁷⁴ *Id.* § 7:38-3.4. Under 33 U.S.C. §§ 1344-1387, the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, and the Army Corps of Engineers have authorized the State of New Jersey to regulate waters within the state. 47 Fed. Reg. 17,331 (Apr. 22, 1982). The state regulates its waters through the New Jersey Pollution Discharge Elimination System (NJPDES). *See* N.J. ADMIN. CODE tit. 7, ch. 14A. The NJPDES regulations must be at least as stringent as, but may be more stringent than, the federal regulatory programs. *See In re Freshwater Wetlands Protection Act Rules*, 238 N.J. Super. 516, 520 (App. Div. 1989). The New Jersey courts recently rejected a challenge to the Highlands Water Protection and Planning Act Rules which alleged that DEP regulation of Highlands waters is impermissibly strict. *In re Highlands Water Protection and Planning Act Rules*, Docket No. A-3-34-06T1, slip op. (N.J. Super. Ct. App. Div. April 24, 2009).

⁷⁵ N.J. ADMIN. CODE § 7:38-3.5.

⁷⁶ *Id.* § 7:38-3.6.

⁷⁷ *Id.* § 7:38-3.7.

⁷⁸ *Id.* § 7:38-3.8.

⁷⁹ *Id.* § 7:38-3.9.

⁸⁰ *Id.* §. 7:38-3.10.

endangered plant and animal species,⁸¹ and unique or irreplaceable land types and existing public scenic attributes.⁸²

Those standards are strict. The preservation area open waters rule,⁸³ for example, establishes a 300-foot buffer zone within which there may be no site disturbance. The development also must cause no more than *de minimis* harm to water quality or other natural resources.⁸⁴ If DEP grants the HIPAA, the owner must record on the undeveloped portion of the parcel a binding conservation restriction preserving the balance of the site in its natural state.⁸⁵

If the proposed development requires construction of a water supply system, it must comply with the Safe Drinking Water Act rules.⁸⁶ Development that requires a New Jersey Pollutant Discharge Elimination System (NJPDES) permit or treatment works approval to discharge to Highlands open waters must comply with the antidegradation provisions of the Surface Water Quality Standards⁸⁷ and the Stormwater Management rules⁸⁸ applicable to the highest quality "Category One" waters. Pursuant to N.J. Stat. Ann. §13:20-6n, the DEP may not issue a HIPAA for any regulated activity in an area identified in the Highlands Regional Master Plan (see Section II.C below) as a special area. Development is prohibited within special areas to protect water resources and environmentally sensitive lands.⁸⁹

C. *The Highlands Council, Regional Master Plan, and Land Capability Maps*

Through the Act, the Legislature established a new state agency, the Highlands Water Protection and Planning Council, comprised of state and local officials to implement the statute.⁹⁰ The Council is an independent agency with fifteen members, appointed by the Governor.⁹¹ The Act charges the Highlands Council with adopting a regional master plan to guide land use planning in the Highlands Region.⁹² The Council finalized the Highlands Regional Master Plan in July 2008.⁹³

To prepare the Regional Master Plan, the Highlands Council studied all the natural resources governed by those rules: water supply diversion sources, public community water systems, NJPDES permitted discharges and wastewater facilities, impervious surfaces, Highlands open waters, flood hazard areas, steep slopes, upland forested areas, historic and

⁸¹ *Id.* § 7:38-3.11.

⁸² *Id.* § 7:38-3.12.

⁸³ *Id.* § 7:38-3.6.

⁸⁴ *Id.* § 7:38-6.2.

⁸⁵ *Id.* § 7:38-6.3.

⁸⁶ *See id.* § 7:10.

⁸⁷ *See id.* § 7:9B.

⁸⁸ *See id.* § 7:8.

⁸⁹ *Id.* § 7:38-6.1. Within the Highlands preservation area, even development with an adequate water supply must comply with the stringent DEP environmental standards discussed above. *See id.* § 7:38-3.

⁹⁰ N.J. STAT. ANN. §§ 13:20-4, 13:20-5.

⁹¹ The powers delegated to the Council are listed in N.J. STAT. ANN. § 13:20-6.

⁹² *Id.* § 13:20-6, -8.

⁹³ *See* Highlands Regional Master Plan, *supra* note 5.

archeological areas, rare, threatened or endangered and animal species, and unique or irreplaceable land types and existing public scenic attributes.⁹⁴

For the entire Region, the purpose of the Master Plan is to establish standards to “protect and enhance the significant values” of the abundant and critical resources of the Highlands Region.⁹⁵

The goals of the Regional Master Plan with respect to the Preservation Area are to:

- 1) Protect, restore, and enhance the quality and quantity of surface and ground waters therein;
- 2) Preserve extensive and, to the maximum extent possible, contiguous areas of land in its natural state, thereby ensuring the continuation of a Highlands environment which contains the unique and significant natural, scenic, and other resources representative of the Highlands Region;
- 3) Protect the natural, scenic, and other resources of the Highlands Region, including but not limited to contiguous forests, wetlands, vegetated stream corridors, steep slopes, and critical habitat for fauna and flora;
- 4) Preserve farmland and historic sites and other historic resources;
- 5) Preserve outdoor recreation opportunities, including hunting and fishing, on publicly owned land;
- 6) Promote conservation of water resources;
- 7) Promote brownfield remediation and redevelopment;
- 8) Promote compatible agricultural, horticultural, recreational, and cultural uses and opportunities within the framework of protecting the Highlands environment; and
- 9) Prohibit or limit to the maximum extent possible construction or development which is incompatible with preservation of this unique area.⁹⁶

The goals of the Regional Master Plan with respect to the Planning Area are to:

- 1) Protect, restore, and enhance the quality and quantity of surface and ground waters therein;
- 2) Preserve to the maximum extent possible any environmentally sensitive lands and other lands needed for recreation and conservation purposes;
- 3) Protect and maintain the essential character of the Highlands environment;
- 4) Preserve farmland and historic sites and other historic resources;
- 5) Promote the continuation and expansion of agricultural, horticultural, recreational, and cultural uses and opportunities;
- 6) Preserve outdoor recreation opportunities, including hunting and fishing, on publicly owned land;
- 7) Promote conservation of water resources;
- 8) Promote brownfield remediation and redevelopment;
- 9) Encourage, consistent with the State Development and Redevelopment Plan and smart growth strategies and principles, appropriate patterns of compatible

⁹⁴ See N.J. ADMIN. CODE §§ 7:38-3.2 to 7:38-3.11.

⁹⁵ N.J. STAT. ANN. § 13:20-10; Highlands Regional Master Plan, *supra* note 5, at 12.

⁹⁶ N.J. STAT. ANN. § 13:20-10(b).

residential, commercial, and industrial development, redevelopment, and economic growth, in or adjacent to areas already utilized for such purposes, and discourage piecemeal, scattered, and inappropriate development, in order to accommodate local and regional growth and economic development in an orderly way while protecting the Highlands environment from the individual and cumulative adverse impacts thereof; and

- 10) Promote a sound, balanced transportation system that is consistent with smart growth strategies and principles and which preserves mobility in the Highlands Region.⁹⁷

The legislature directed the Highlands Council to conduct a resource assessment that would serve as the foundation for a Regional Master Plan.⁹⁸ The Regional Master Plan is to “determine the amount and type of human development and activity which the ecosystem of the Highlands Region can sustain.”⁹⁹

In response, the Council analyzed the natural resources of the Region and identified areas of greater ecological importance with the primary goal of preserving water resources. The Master Plan seeks to preserve water supply and quality by intergovernmental planning and coordination for the location and methods for development that can allow sustainable water resources. The Council conducted thorough technical studies of the ecological values of land throughout the Highlands. The Council conducted most of these analyses in collaboration with the U.S. Geological Survey (USGS). Development of the Regional Master Plan also included extensive consultations with State agencies, municipalities located within the Region, and various interest groups, as required by the Highlands Act.¹⁰⁰

Those studies focused especially on identifying areas with the highest priority for preserving water resources. Those include land around and near reservoirs, lakes, streams, and aquifer recharge areas. The studies evaluated the ecological importance of specific lands within each watershed and sub-watershed.

The Highlands Council organized that data into maps showing the relative availability of and burdens upon the natural resources of the Region. The Council created a Land Use Capability Map Series.¹⁰¹ The Council developed detailed underlying topographic maps from aerial overflight studies using LIDAR (Light Detection and Ranging) technology. It then superimposed a variety of resource-oriented data layers to produce an interactive database capable of generating maps with the desired set of information.

These maps are very detailed. The Highlands Council studied all 183 sub-watersheds in the Highlands Region using the Hydrological Unit Code 14 (HUC-14) model.¹⁰² The more digits

⁹⁷ *Id.* § 13:20-10(c).

⁹⁸ *See id.* §§ 13:20-8, 13:20-6.

⁹⁹ Highlands Regional Master Plan, *supra* note 5, at 12.

¹⁰⁰ N.J. STAT. ANN. § 13:20-9.

¹⁰¹ *Id.* § 13:20-1(a)(6)(a).

¹⁰² N.J. ADMIN. CODE § 7:38-1.4. The boundaries of HUC 14 subwatersheds in New Jersey are available from the N.J. Department of Environmental Protection’s Geographic Information Systems (GIS) downloads web page, <http://www.nj.gov/dep/gis/download.htm> (last visited June 30, 2009).

in the sub-watershed unit code, the smaller the area; since HUC-14 uses 14 digits, it surveys quite small areas.¹⁰³

Using those maps, the Council developed a scheme to regulate land uses in the Region to preserve the highest-priority natural resources and to direct development to less environmentally sensitive areas. It divides the Region into three zones and four sub-zones. The three zones are the protection, conservation, and existing community zones. The four sub-zones are: (1) the conservation zone - environmentally constrained sub-zone; (2) the existing community zone - environmentally constrained sub-zone; (3) the lake community sub-zone and (4) the wildlife management sub-zone.

The protection zone consists of high resource value lands. Land acquisition is a priority in the protection zone and development activities are extremely limited by statute and regulation. The conservation zone consists of areas with significant agricultural lands interspersed with associated woodlands and environmental features. The existing community zone consists of areas with regionally significant concentrated development signifying existing communities.¹⁰⁴

The conservation zone, an environmentally constrained sub-zone, consists of agricultural lands with some environmental constraint, such as a limited water supply, steep slopes, or forest adjacent to critical habitat. The existing community zone is an environmentally constrained sub-zone that consists of already developed land, and is therefore appropriate for development or redevelopment, but faces some environmental constraint.

The lake community sub-zone contains already existing development but poses special risks to water quality. These communities are located near a lake shore and often rely on aging, overtaxed, or poorly maintained infrastructure, frequently involving septic and drainage systems.

The wildlife management sub-zone involves wildlife habitat areas. While the Highlands contains several large areas of contiguous undeveloped land, wildlife habitat in the Region faces a number of threats. Many wildlife management properties are owned by private conservation groups or municipalities and are often small. Others are privately owned lands that serendipitously remain undeveloped since no other environmental law protects them. In addition to the threat from further sprawl, habitat areas are often fragmented.

As directed by the Act, the Preservation Area includes “special environmental zones,” identified by resource assessments as having very high ecological value.¹⁰⁵ The Legislature directed that, in those areas, “development shall not occur in order to protect water resources and environmentally sensitive lands.”¹⁰⁶ Since enactment of the Act, the Highlands Council has worked to identify those special areas and develop strategies to preserve them. These special environmental zones amount to a total of about 19,000 acres of the approximately 800,000 acres (approximately 2.5%) of the entire Highlands area.¹⁰⁷

¹⁰³ Highlands Water Resources Volume II, *supra* note 3, at 1.

¹⁰⁴ Highlands Regional Master Plan, *supra* note 5, at 177-78.

¹⁰⁵ N.J. STAT. ANN. §§ 13:20-6(n), 13:20-12(a).

¹⁰⁶ *Id.* Opponents of the Highlands scheme refer to these as “no-build” areas.

¹⁰⁷ *See* Highlands Regional Master Plan, *supra* note 5, at 230.

Within the preservation area, strict DEP permitting requirements apply and municipalities must conform their master plans and ordinances for development with the Highlands Regional Master Plan. In the planning area, municipal ordinance conformance with the Highlands Regional Master Plan is voluntary.¹⁰⁸ The Highlands Council works with municipalities to adopt land use ordinances that encourage development to use best management practices to protect water resources.

The planning area, on the other hand, is exempt from a number of other environmental restrictions that apply in the preservation area. These include, most importantly, the DEP Highlands permitting review program and its regulations, which apply only in the preservation area.¹⁰⁹

The Highlands Council approved the Highlands Regional Master Plan on July 17, 2008.¹¹⁰ Governor Jon Corzine ratified the Master Plan by Executive Order on September 5, 2008.¹¹¹ That Executive Order also directed the New Jersey DEP to restrict permits for new development that drains water from undeveloped regions in the Highlands Planning Area where water is deficient and directed the Highlands Council to make all future planning decisions in an open and transparent process, open to public comment.

In general, the Regional Master Plan and the Highlands regulations seek to preserve the flow of water into existing reservoirs by limiting upstream use of groundwater and surface water. Under the New Jersey Water Supply Authority Act,¹¹² the State Bureau of Water Allocation regulations govern the allocation of water from the reservoirs within the Highlands Region.¹¹³ Those regulations are more stringent in the Highlands area, though. Statewide, the Bureau of Water Allocation normally requires a water allocation permit to withdraw more than 100,000 gpd of groundwater or surface water.¹¹⁴ In the Highlands preservation area, though, a water allocation permit is normally required to withdraw in excess of 50,000 gpd.¹¹⁵ Nevertheless, the Water Supply Authority must consult with the Highlands Council before taking any final action on any of its projects.¹¹⁶ The DEP

¹⁰⁸ See N.J. STAT. ANN. §13:20-11(b); N.J. ADMIN. CODE § 7:38-3.1.

¹⁰⁹ “The requirements and provisions of [N.J. STAT. ANN. §§ 13:20-31 through 13:20-35, 13:9B-5.1, 58:1A-5.1, 58:11-24.1, 58:12A-4.1, 58:11A-7.1, 58:16A-60.1] shall not apply in the planning area.” N.J. STAT. ANN. § 13:20-31(c).

¹¹⁰ The final version of the Highlands Regional Master Plan is available at http://www.highlands.state.nj.us/njhighlands/master/rmp/final/highlands_rmp_112008.pdf (last visited Mar. 17, 2009).

¹¹¹ Governor Corzine ratified the Master Plan by approving the minutes of the Council’s July 17 meeting by issuing Executive Order No. 114 on Sept. 5, 2008. Press Release, New Jersey Governor’s Office, *Governor Corzine Approves Highlands Master Plan, Issues Executive Order To Strengthen Implementation*, (Sept. 5, 2008), <http://www.state.nj.us/governor/news/news/2008/approved/20080905a.html> (last visited June 30, 2009).

¹¹² N.J. STAT. ANN. §§ 58:1B-1 to 58:1B-25.

¹¹³ N.J. ADMIN. CODE § 7:11.

¹¹⁴ See N.J. STAT. ANN. § 58:1A-6.

¹¹⁵ *Id.* § 13:20-30(b)(3); Highlands Regional Master Plan, *supra* note 5, at 87.

¹¹⁶ N.J. STAT. ANN. § 58:1B-6(d).

regulates stormwater management,¹¹⁷ under several statewide statutes,¹¹⁸ for all but the smallest development activity.

Preservation of groundwater involves determining its quantity, flow, and recharge, and limiting the consumption of existing supplies and preserving the recharge capacity by controlling expansion of impervious cover. The Council determines groundwater availability by using stream flow data.¹¹⁹ The Highlands Council has assembled its data on the quality and quantity of water in the Highlands in a two-volume report, available on its web site.¹²⁰

One of the most critical analyses for the hydrological cycle involved identifying Prime Ground Water Recharge Areas.¹²¹

Prime Ground Water Recharge Areas have been mapped for each subwatershed of the Highlands Region, identifying the land areas with the best recharge rates and that, in aggregate, yield 40% of the total recharge volume for that subwatershed during drought periods, when water recharge is most critical.¹²²

The Council and USGS analyzed the amount of water originating within the Region used per year and the amount already allocated by a state permit but not yet used. They found that

Within the Highlands Region, there are 144 water allocation permits covering withdrawals from 581 wells and surface water intakes.

The Highlands Region generates almost 870 mgd to meet the needs of potable drinking water, industry, and agriculture. The Region also includes the State's major reservoir systems providing in excess of 600 mgd of drinking water to the urban areas of northern and central New Jersey. Estimates of future water use projected to full allocation suggest that existing commitments of Highlands waters may be as high as 2.8 billion gallons of water daily, not including domestic use.¹²³

¹¹⁷ N.J. ADMIN. CODE §§ 7:8-1.1, 7:8-1.2 (“Development’ means the division of a parcel of land into two or more parcels”).

¹¹⁸ The Water Quality Planning Act, N.J. STAT. ANN. § 58:11A-1 *et seq.*; the Water Pollution Control Act, N.J. STAT. ANN. § 58:10A-1 *et seq.*; the Flood Hazard Area Control Act, N.J. STAT. ANN. § 58:16A-50 *et seq.*; the Coastal Area Facility Review Act, N.J. STAT. ANN. § 13:19-1 *et seq.*; the Wetlands Act of 1970, N.J. STAT. ANN. § 13:9A-1 *et seq.*; the Waterfront Development Law, N.J. STAT. ANN. § 12:5-3; the Freshwater Wetlands Protection Act, N.J. STAT. ANN. § 13:9B-1 *et seq.*; and the Dam Safety Act, N.J. STAT. ANN. § 58:4-1 *et seq.*

¹¹⁹ Highlands Regional Master Plan, *supra* note 5, at 159.

¹²⁰ The data most relevant to water quantity is in the report “Highlands Water Resources Volume II”. Volume I mainly contains data on water quality. For other technical documents on the natural resources of the Highlands, *see* New Jersey Highlands Council, Chronology of Public Release Documents, <http://www.highlands.state.nj.us/njhighlands/master/chronological.html> (last visited June 30, 2009).

¹²¹ Highlands Regional Master Plan, *supra* note 5, at 80.

¹²² Highlands Water Resources Volume II, *supra* note 3, at 2.

¹²³ *Id.* at 2.

Reservoirs in the Highlands have a capacity of well over 500 mgd, “enough supply to provide water for over five million people during a repeat of the 1960’s drought of record.”¹²⁴ Most of this water is used by heavily developed urban and suburban areas in northern and central New Jersey.

The analysis included identifying areas that have a water deficit, i.e., where current consumptive uses exceed the sustainable recharge capacity of the sub-watershed during a low flow (dry weather) period, and those areas that have a surplus of available water, i.e., water is available for additional human consumptive uses. Of the 183 sub-watersheds in the Highlands, 114 are considered Current Deficit Areas.¹²⁵

The studies included analyzing the ecological effects of depleting Highlands resources. These include a pilot study by the USGS of the biological effects of low flow in Highlands streams, using the low flow margin method, and a Forest Integrity Analysis by Rutgers University. The latter study analyzed the sustainability of the waters in the Highlands Region by first determining the amount of water in the Region, then deciding the amount required to protect the aquatic ecology, and then calculating the amount available for consumptive or depletive uses. The analysis used stream flow as a surrogate for water sustainability to ensure healthy aquatic ecosystems and potable water supplies even during a drought of the magnitude of the 1960s drought of record.¹²⁶

Wastewater disposal capacity, like potable water supply, limits the extent of development an area can sustain over the long term. The Master Plan includes a study of the groundwater nitrogen levels from septic disposal systems and sets standards for the preservation area and for already developed areas.¹²⁷

Another essential technical analysis by the Council calculated the amount and location of land that could be developed sustainably, i.e., without adversely affecting the long-term water supply potential and other ecological resources of the Highlands.¹²⁸

A central goal of the Regional Master Plan is to determine the amount and type of human development and activity that the ecosystem of the Highlands Region can sustain while still maintaining the overall ecological values thereof, with special reference to surface and ground water quality and supply.¹²⁹

The Regional Master Plan contains that “Smart Growth Analysis,” which identifies appropriate areas where discretionary growth may be directed. The Council based its Smart Growth Analysis on the Land Use Capability map series to determine the level of density that is sustainable in each community.¹³⁰ The Council identified and analyzed developed areas based on current land uses, development activities, population density, and impervious surfaces, to reduce the adverse effects of development on more sensitive

¹²⁴ *Id.* at 3-4; *see id.* at 2, 98.

¹²⁵ *Id.* at 3.

¹²⁶ Highlands Regional Master Plan, *supra* note 5, at 78.

¹²⁷ *See, e.g., id.* at 278 (Routine maintenance of residential septic systems).

¹²⁸ *Id.* at 126 (Sustainable Economic Development).

¹²⁹ Highlands Water Resources Volume II, *supra* note 3, at 2.

¹³⁰ *See* Regional Master Plan, *supra* note 5, at 303-12.

undeveloped areas. These areas include brownfield and “greyfield” (paved) sites where redevelopment will pose little environmental risk and if implemented using sustainable practices could improve the environment.¹³¹ The Council also has identified areas, even within the preservation area, that are appropriate for development and redevelopment. Most of these, too, are brownfield or greyfield sites that the Regional Master Plan considers “appropriate for redevelopment.”¹³² For example, the Land Use Capability maps identify over 11,000 acres in the planning area with some degree of existing development where five or fewer units per acre could be met through increased density and infill, and only about 980 acres of undeveloped land where this goal could be met through new development.

The Council and the DEP use this mapped natural resource data to regulate land uses in the Region, with the goals of preserving the highest-priority natural resources and directing development to less environmentally sensitive areas. In addition to DEP’s regulation through its statewide and Highlands rules, the Highlands Council works with municipalities in the Region to conform their local land use ordinances to the Master Plan and Highlands regulations.¹³³ Each municipality in the preservation area must submit its municipal master plan and land use ordinances to the Council for conformance with the Regional Master Plan.¹³⁴ Municipalities in the planning area may petition the Council to review their municipal master plan and land use ordinances for conformance with the Regional Master Plan.¹³⁵ The goal is to preserve the areas with the highest priority natural resources, especially water, based on the Regional Master Plan.

The State has offered several incentives to Highlands municipalities to undertake the Master Plan conformance process. For example, the Council has funding available for municipalities to undertake the conformance process. These include enhanced planning grants of up to \$250,000.¹³⁶

As another example, under its Third Round Rules, the State Council on Affordable Housing (COAH) grants each entity commencing the conformance process a one-year extension on the December 31, 2008 deadline to submit their affordable housing plan.¹³⁷ The municipalities who submitted that notice of commencing the process now have until December 8, 2009 to submit their plan. In addition, COAH must take the Regional Master Plan into account when calculating the allocation of regional fair share housing to municipalities in the Highlands.¹³⁸

The Highlands Act directed the COAH¹³⁹ to

¹³¹ See *id.* at 195. An example of such an improvement might include an abandoned lot with contaminated soil which would be covered by redevelopment. The new structures and pavement would cover the contamination and prevent its spread.

¹³² See *id.*

¹³³ N.J. STAT. ANN. § 13:20-14, -15; see *id.* § 13:20-4.

¹³⁴ *Id.* § 13:20-14.

¹³⁵ *Id.* § 13:20-15.

¹³⁶ *Id.* § 13:20-13(k).

¹³⁷ See N.J. ADMIN. CODE § 5:97. The Substantive Rules of the New Jersey Council on Affordable Housing for the Period Beginning June 2, 2008. See *id.* § 5:97-1.1.

¹³⁸ N.J. STAT. ANN. § 13:20-23.

¹³⁹ The COAH was created under the Fair Housing Act, *id.* § 52:27D-301 *et seq.*

take into consideration the regional master plan prior to making any determination regarding the allocation of the prospective fair share of the housing need in any municipality in the Highlands Region . . . for the fair share period subsequent to 1999.¹⁴⁰

When ratifying the Master Plan, Governor Corzine directed the COAH to work with the Highlands Council to ensure that not even affordable housing needs will impede protection of the Highlands water supply.¹⁴¹

As of spring 2009, the Council is reviewing the land use ordinances of most of the 88 municipalities in the Region who notified the Council of their intent to conform their land use ordinances with the Master Plan.

III. Landowner Compensation under the Highlands Act

In its adoption of the Highlands Act, the Legislature recognized and addressed both landowners' claims for equity and smart growth principles. To affect that balance, the Legislature established several administrative processes that can mitigate the financial effect of development restrictions upon owners of properties identified for preservation based on their high natural resource values. The long-term viability of the Highlands Act, or indeed any ambitious land use regulatory program, largely depends upon adequate provisions to avoid unconstitutional takings of private property without just compensation.¹⁴²

The Highlands Act "recognize[es] the need to provide just compensation to the owners of those lands when appropriate, whether through acquisition, transfer of development rights programs, or other means or strategies."¹⁴³ Those processes include the transfer of development rights,¹⁴⁴ fair voluntary acquisition,¹⁴⁵ exemptions,¹⁴⁶ and approvals and waivers for hardship that would affect an unconstitutional taking of property.¹⁴⁷ All these processes require an administrative determination of whether and how the Highlands Act will affect use of a particular property.

In addition to these administrative processes, the Highlands Act requires that the state allocate funds to purchase and preserve additional lands and to develop other methods to compensate landowners and municipalities for lost development opportunities. Among the

¹⁴⁰ *Id.* § 13:20-23.

¹⁴¹ State of New Jersey Executive Order No. 114 (Sept. 5, 2008), available at <http://www.state.nj.us/governor/news/news/2008/approved/20080905a.html> (last visited June 30, 2009).

¹⁴² See *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

¹⁴³ N.J. STAT. ANN. § 13:20-6(n).

¹⁴⁴ *Id.* § 13:20-13.

¹⁴⁵ *Id.* § 13:20-11(a)(2)(a).

¹⁴⁶ *Id.* § 13:20-28.

¹⁴⁷ Even in the special preservation areas identified under N.J. STAT. ANN. §§ 13:20-6(n) and 13:20-12(a), though, owners may qualify for an exemption from the regulations. Such an exemption may be granted to avoid a financial hardship. *Id.* § 13:20-33(b)(3).

sources are a portion of statewide realty transfer fees, dedicated to the Highlands and Pinelands,¹⁴⁸ and deposited in the new Highlands Protection Fund.¹⁴⁹ The legislature directed deposits into the fund of \$12,000,000 in each of the first ten years after enactment of the Highlands Act and \$5,000,000 in each year thereafter.¹⁵⁰ These funds are a portion of the State's share of fees collected by county recording officers. These measures serve as incentives to channel growth away from areas that are more environmentally sensitive and into more environmentally appropriate areas.

A. *Transfer of Development Rights*

The New Jersey Appellate Division explains the functioning of a transfer of development rights (TDR) program as follows:

A TDR program is a land use tool that permits a public agency to use market forces to encourage the transfer of development potential from areas the agency wants to preserve (sending zones) to areas that are more appropriate for growth (receiving zones). Landowners in sending zones may obtain compensation in the form of TDR credits for restricting development on their properties. Payment for this lost development potential comes from purchasers who buy TDR credits, which then entitle the purchasers to build in a receiving zone at a greater density than permitted by the underlying zoning.¹⁵¹

As directed by the legislature, the Highlands Council established a regional TDR program consistent with the New Jersey Transfer of Development Rights Act.¹⁵² The Highlands TDR program permits the transfer of Highlands Development Credits (HDCs), to further the goals of the Highlands Act. A community may use HDCs to facilitate market forces to encourage the transfer of development potential from higher resource value lands that the community wants to preserve to lands that are more appropriate to accommodate increased growth. Landowners in the Sending Zones receive HDCs as compensation for restricting development on their property. Under the Highlands Act, since Receiving Zones are voluntary, the municipality decides whether it wants denser development.¹⁵³

TDR credits are available to landowners in the "sending" zones as an inducement and compensation for preserving rather than developing their property. Because TDRs provide compensation to landowners, unconstitutional regulatory taking claims can be avoided when the application of the Master Plan results in the denial of a development proposal.

In accordance with the Highlands Act and the Master Plan, the Highlands Council established a Highlands TDR bank "for the purposes of facilitating the transfer of

¹⁴⁸ The Pinelands Area is another special area in southern New Jersey protected under the Pinelands Protection Act, N.J. STAT. ANN. §§ 13:18A-1 to -29, and its regulations, the Pinelands Comprehensive Management Plan, N.J. ADMIN. CODE § 7:50. The Pinelands sits atop a large aquifer of potable groundwater.

¹⁴⁹ N.J. STAT. ANN. §§ 13:20-19, 46:15-8.

¹⁵⁰ *Id.* § 46:15-8.

¹⁵¹ OFP, 395 N.J. Super. at 588-89.

¹⁵² N.J. STAT. ANN. §§ 40:55D-137 to -163; 13:20-13.

¹⁵³ *Id.* § 13:20-13(c).

development potential.”¹⁵⁴ The Highlands TDR bank must operate consistent with the New Jersey Transfer of Development Rights Bank Act.¹⁵⁵ The TDR bank has a nine-member board of directors that includes representatives of several interest groups. These include the State Agriculture Development Committee (SADC), the state’s undeveloped land preservation program (Garden State Preservation Trust), the Water Supply Authority, a farmer, a banker, and a business owner.¹⁵⁶

At the request of Governor Corzine, the legislature appropriated \$10 million for the initial capitalization of the Highlands TDR bank. (The Highlands Council had recommended \$50 million.) The Governor indicated his intention that the TDR Bank begin the process of purchasing development credits from those who want to remain on farmland in the Highlands. The Highlands Act also established a Highlands Protection Fund, dedicated to provide property tax relief, capitalize the TDR program, provide planning assistance, and acquire watershed lands for preservation.¹⁵⁷

A variety of funding sources are available to acquire property for preservation in the Highlands. Funding to acquire lands for public open space is available through the Garden State Preservation Trust Act,¹⁵⁸ as periodically funded by the Legislature,¹⁵⁹ as well as municipal and county open space acquisition funds.¹⁶⁰ The long-term viability of land preservation efforts, through the acquisition of development rights or fee interests or other methods, largely depends upon creating a continuous source of funding. At least one legislative proposal would provide additional funding to acquire watershed lands in the Highlands preservation area by imposing a tax on potable water withdrawn from the Highlands area.¹⁶¹

The Highlands Council’s planning activities include identifying environmental and farmland preservation priorities within the Preservation Area, and designating critical areas within the Planning Area, for preservation or acquisition using HDCs or through purchase.

The Highlands TDR program also includes other incentives for municipalities to participate. Incentives for participating municipalities include increased density, facilitated

¹⁵⁴ *Id.* § 13:20-13(i)(1).

¹⁵⁵ *Id.* §. 4:1C-51.

¹⁵⁶ Press Release, New Jersey Governor’s Office, *HDC Bank Takes First Steps: Bank will oversee Highlands Transfer of Development Rights Program* (Feb. 2, 2009), available at http://www.highlands.state.nj.us/njhighlands/hdcbank/hdc_bank_020209.pdf (last visited June 30, 2009); see *Highlands TDR Program*, powerpoint presentation from HDC Bank Board Meeting, Apr. 2, 2009, available at http://www.highlands.state.nj.us/njhighlands/hdcbank/tdr_program_040209.pdf (last visited June 30, 2009).

¹⁵⁷ N.J. STAT. ANN. § 13:20-19.

¹⁵⁸ *Id.* §§ 13:8C-1 to -42.

¹⁵⁹ See, e.g., New Jersey Green Acres Land Acquisition and Recreation Opportunities Act, *id.* §§ 13:8A-35 to -55.

¹⁶⁰ As per Executive Order No. 114, *supra* note 141.

¹⁶¹ See S. 1454 and A. 3874, which would impose water consumption and diversion user fee of \$.40 per thousand gallons of water delivered to a consumer to fund open space and farmland preservation projects (S. 1454 introduced March 6, 2008 and A. 3874 introduced May 7, 2009), available at <http://www.njleg.state.nj.us> (last visited May 29, 2009).

regulatory approval of development consistent with the Master Plan, and preference for State infrastructure funding.¹⁶²

The TDR process is new, and the Highlands Council anticipates it will take about seven years before it is fully underway. The Highlands TDR process is similar to the Pinelands Development Credits (PDCs) in the Pinelands. There, even with mandatory sending and receiving zones, the PDC process required over twelve years to get fully underway.

IV. Constitutionality of Highlands Act Upheld: *OFFP v. New Jersey*

The New Jersey courts have upheld the Highlands Act against a claim that it serves as an unconstitutional regulatory taking. OFFP, L.L.C., the owner of a 93-acre parcel of undeveloped property in the preservation area, alleged that the statute, as applied to its property, effected an unconstitutional taking of property without just compensation. The courts found that the statute contained a number of options for a property owner to productively use property in the Highlands Region or to receive compensation, but that the developer had failed to pursue those options.¹⁶³

In 1999, OFFP's predecessor in title had secured municipal approval to subdivide the parcel into twenty-six residential lots, subject to a variety of conditions. Some of those conditions involved monitoring to determine if pollutants from an adjacent Superfund site (Combe Fill South)¹⁶⁴ were to begin in the future seeping to the surface on the residential lots. The former owner challenged those conditions in the Superior Court, and also sued the municipality to extend the municipal water line under a public road to the property. Those lawsuits resulted in an order striking and modifying several conditions of the subdivision approval, and a settlement allowing extension of the water line. OFFP, by now the owner, also obtained several land use approvals from the DEP, allowing development activities in and near wetlands and streams on the site. However, OFFP had not yet obtained a permit to construct a potable water system under the Safe Drinking Water Act.¹⁶⁵ The Highlands Act became effective on March 29, 2004, the date of its introduction in the legislature.¹⁶⁶ DEP issued the potable water system permit on May 14, 2004. Accordingly, development of the property was subject to the Act.

OFFP wanted to develop its property as originally planned, without any of the preservation area restrictions that the Highlands Act would have imposed. OFFP sued DEP in Superior Court, alleging that the development restrictions of the Act violated the Fifth Amendment of the U.S. Constitution, and Article I, paragraph 20 of the New Jersey Constitution. OFFP also alleged that the retroactive application of the Act to its property violated the equal protection and due process guarantees of the U.S. and New Jersey constitutions. The developer claimed that compliance with the Act would involve undue delay and would not adequately compensate him for what he had said was the return he expected on his investment in the property. OFFP further alleged that the designation of its property within

¹⁶² N.J. STAT. ANN. § 13:20-13.

¹⁶³ OFFP, 395 N.J. Super. at 590.

¹⁶⁴ See U.S. Environmental Protection Agency, *Superfund Site Progress Profile: Combe Fill South Landfill*, <http://cfpub.epa.gov/supercpad/cursites/csinfo.cfm?id=0200489> (last visited Apr. 20, 2009).

¹⁶⁵ N.J. STAT. ANN. § 58:12A-1 to -37.

¹⁶⁶ *Id.* § 13:20-28.

the preservation area was improper because the Highlands Council had not completed the Master Plan and TDR program within eighteen months of its first meeting, as prescribed by the Act.¹⁶⁷ The courts rejected all these arguments and upheld the Act and its broad and important purposes. The court also noted that the DEP's regulations would allow it to waive any of its own rules, in order to avoid a taking, to allow OFP a use of its property that might be contrary to the Highlands regulations.¹⁶⁸ OFP, however, had never requested approval for any land use other than its original 26-unit proposal.

The court ruled that the developer's taking claim was not ripe because it had not applied for a waiver from the Act under its "hardship" provision. The court relied on the well-established principle that "[a] court cannot determine whether a regulation has gone too far unless it knows how far the regulation goes."¹⁶⁹

The court also found that the Legislature set forth ample rational bases to protect the natural resources of the Highlands Region, including the water supply for over half the population of the State.¹⁷⁰ Legally, as long as a statute is based on a conceivable rational basis, a legislative choice is not subject to fact-finding by the courts.

This case drew national attention because of the important implications for sustainable development, natural resource preservation, and the economics of development. The Highlands Coalition, a group of environmental groups, submitted an *amicus curiae*, or friend of the court, brief to support the application of the Highlands Act before the New Jersey Supreme Court. Two of the Coalition's most important contributions to the Court were to place the case in context by

- 1) Describing the threat to the Highlands area and the State's water supplies from uncontrolled sprawl and how the Highlands Act responds to this threat; and
- 2) Discussing the extensive research that has been conducted in New Jersey and around the country on the effects of comprehensive land use regulatory programs on private property values.¹⁷¹

The Pacific Legal Foundation also submitted an *amicus curiae* brief in opposition to application of the Highlands Act to the OFP site, arguing that a taking already had occurred.¹⁷²

In its own way, the Highlands Act provides a measure of protection foreseen by the State Potable Water Commission almost one hundred years ago:

¹⁶⁷ *Id.* § 13:20-8(a).

¹⁶⁸ OFP, 395 N.J. Super. at 588 (citing N.J. ADMIN. CODE § 7:38-6.4(a)(3)).

¹⁶⁹ MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 348 (1986); OFP, 395 N.J. Super. at 582.

¹⁷⁰ *Id.* at 595-96.

¹⁷¹ Brief of *amicus curiae* Highlands Coalition at 2, May 27, 2008, available at http://www.law.georgetown.edu/gelpi/current_research/documents/RT_Briefs_NJHighlands.pdf (last visited Apr. 20, 2009)

¹⁷² See OFP, L.L.C. v. New Jersey, 197 N.J. 419 (2008).

The Highlands watersheds are the best in the State in respect to ease of collection, in scantiness of population, with consequent absence of contamination, in elevation, giving opportunity for gravity delivery and in softness as shown by chemical analysis. These watersheds should be preserved from pollution at all hazards, for upon them the most populous portions of the State must depend for water supplies. There has been too much laxness in the past regarding this important matter.¹⁷³

V. Conclusion

The Highlands Act is not the first statute in New Jersey or elsewhere to take a regional approach to preserving natural resources and planning for future infrastructure needs. In fact, regulating land use through laws preserving water resources has been a successful strategy.¹⁷⁴ As the Legislature recognized, protecting the main potable water source for over half of the state's population "cannot be left to the uncoordinated land use decisions" of dozens of local government entities and thousands of private landowners.¹⁷⁵

Many laws in New Jersey have placed a high priority on preserving natural resources, especially waters and wetlands. The legislature previously enacted the Delaware River Basin Compact¹⁷⁶ in 1961; the Hackensack Meadowlands Reclamation and Development Act¹⁷⁷ in 1969; the Coastal Area Facility Review Act¹⁷⁸ in 1973; the Delaware and Raritan Canal State Park Law of 1974¹⁷⁹; and the Pinelands Protection Act¹⁸⁰ in 1979. Each of those acts delegated primary responsibility to a state entity to supplement the efforts of local zoning and planning bodies, to protect natural resources by regulating land uses.

The Delaware River Basin Compact, the Delaware and Raritan Canal State Park Law, and the Pinelands Protection Act mainly preserve water courses and land areas that drain into and recharge surface water supplies and aquifers. The Pinelands National Reserve in southern New Jersey, for example, is an almost flat, sandy area of 1.1 million acres, covering 22% of the area of the state, atop an aquifer estimated at 17 trillion gallons of potable groundwater. The Hackensack Meadowlands Reclamation and Development Act and the Coastal Area Facility Review Act preserve a variety of natural resources, with tidal wetlands in the Meadowlands and wetlands and water resources in the coastal area among the resources to be preserved.

In addition to these regional regulations, two state statutes regulate water supply statewide: the Water Supply Management Act¹⁸¹ and the Water Quality Planning Act.¹⁸² The first act recognizes that "the water resources of the State are public assets of the State

¹⁷³ Highlands Council 2004 Annual Report, *supra* note 52, at 1 (*quoting* 1907 Potable Water Commission Report).

¹⁷⁴ For a set of engaging articles on this concept, *see* CRAIG ANTHONY ARNOLD, WET GROWTH: SHOULD WATER LAW CONTROL LAND USE? (Environmental Law Institute 2005).

¹⁷⁵ N.J. STAT. ANN. § 13:20-2.

¹⁷⁶ Adopted by New Jersey through N.J. STAT. ANN. §§ 32:11D-1 to -115.

¹⁷⁷ *Id.* §§ 13:17-1 to -106.

¹⁷⁸ *Id.* §§ 13:19-1 to -44.

¹⁷⁹ *Id.* §§ 13:13A-1 to -15.

¹⁸⁰ *Id.* §§ 13:18A-1 to -58.

¹⁸¹ *Id.* § 58:1A-1 *et seq.*

¹⁸² *Id.* § 58:11A-1 *et seq.*

held in trust for its citizens and are essential to the health, safety, economic welfare, recreational and aesthetic enjoyment, and general welfare, of the people of New Jersey; that ownership of these assets is in the State as trustee of the people.”¹⁸³ The second act commits the State “to restore and maintain the chemical, physical, and biological integrity of the waters of the State, including groundwaters, and the public trust therein.”¹⁸⁴ The Highlands Act joins those laws in ensuring a sustainable future for the environment, the economy, and the people of New Jersey.

¹⁸³ *Id.* § 58:1A-2.

¹⁸⁴ *Id.* § 58:11A-2.