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For Immediate Release
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Appeals Court reverses NJDEP permit approval for failing to consult with Highlands Council

Court affirms authority of Highlands Council and Regional Master Plan in permitting decisions in Highlands Planning Area

(Boonton, NJ) A New Jersey Appellate Court ruled this week that the New Jersey Department of Environmental Protection violated the Highlands Act and the Department's own rules, by issuing a permit for a proposed wastewater treatment facility to discharge into the Rockaway Creek, in Tewksbury Township in Hunterdon County, without first consulting with the Highlands Council.

In an appeal by the New Jersey Highlands Coalition, the Township of Readington, the Raritan Headwaters Association and the Sierra Club, attorney Aaron Kleinbaum of the Eastern Environmental Law Center, argued that NJDEP failed to follow procedures when it renewed a discharge permit for a wastewater treatment plant to Bellemead Development Corp. The discharge permit is designed to serve an eventual office park on a 74-acre property it owns in Tewksbury Township in the Highlands Planning Area. The Court held that vital evidence is missing because there is no record of the Highlands Council's assessment of the permit even though a telephone conference call between the Department and the Highlands Council took place in September 2011.

As established in the DEP Highlands Rules, the Court asserted that, "the DEP cannot issue a permit for the planning area if the permit is incompatible with the goals of the RMP (Regional Master Plan)" and that "to ensure the DEP does not grant a permit that is incompatible with the RMP goals, the DEP must consult with the Highlands Council on permit applications for the planning area." The Court remanded the permit decision to the DEP, "with the instruction it consult with the Highlands Council as required by and issue, if necessary, an amended final permit decision within sixty days."

"This is a significant victory for water quality in the Highlands Region, which is source of pristine drinking water for millions of New Jersey residents," **said attorney Aaron Kleinbaum**, **Executive Director of the Eastern Environmental Law Center**, "NJDEP should have rejected Bellemead's application for a waste water discharge permit outright. It fails to meet the basic waste water planning requirements of the Highlands Regional Master Plan — furthermore NJDEP failed to consult with the Highlands Council, as required by law."

"This is an immense victory for regional planning in New Jersey. The court made clear that DEP cannot issue or renew a permit that is inconsistent with the goals of the Highlands Regional Master Plan," said **Bill Kibler, Policy Director of Raritan Headwaters Association and Chair of the New Jersey Highlands Coalition Policy Committee**.

The Bellemead property and the location of the proposed wastewater discharge are in the Highlands Planning Area. Unlike the mostly forested Preservation Area, where development is severely limited in order to maintain the ecological functions that produce 30% of the State's drinking water supplies, in the Planning Area development that is compatible with the resource protection goals of the RMP is encouraged.

"What is interesting is that the Court made no distinction between conforming and non-conforming municipalities in the Planning Area," said **Elliott Ruga, Policy Director of the New Jersey Highlands Coalition**. "Whereas towns in the Planning Area are free to decide whether or not to align local land use ordinances to be consistent with the Highlands Regional Master Plan, it has always been our position that State agencies, such as the DEP, in support of the goals and objectives of the Highlands Act, should uphold the resource protection goals of the RMP in its permit decisions by consulting with the Highlands Council, regardless of the municipality's conformance status. . That the Court has signaled it agrees with our position is a huge win."

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5803-13T1

IN RE FINAL SURFACE
WATER RENEWAL PERMIT
ACTION NJPDES PERMIT
NO. NJ0102563.

Argued October 13, 2016 – Decided May 1, 2017

Before Judges Lihotz and O'Connor.

On appeal from New Jersey Department of Environmental Protection, Docket No. NJ0102563.

Aaron Kleinbaum argued the cause for appellants New Jersey Highlands Coalition, Township of Readington, Raritan Headwaters Association and the Sierra Club (Eastern Environmental Law Center, attorneys; Mr. Kleinbaum, on the brief).

Debra S. Rosen argued the cause for respondent Bellemead Development Corporation (Archer & Greiner, attorneys; Ms. Rosen and Lloyd H. Tubman, on the brief).

Jacobine K. Dru, Deputy Attorney General, argued the cause for respondent New Jersey Department of Environmental Protection (Christopher S. Porrino, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Ms. Dru, on the brief).

PER CURIAM

Appellants are the New Jersey Highlands Coalition, the Township of Readington, the Raritan Headwaters Association, and the Sierra Club. They appeal from the New Jersey Department of Environmental Protection's (DEP) July 1, 2014 permit decision granting respondent-intervenor Bellemead Development Corporation (Bellemead) a New Jersey Pollution Discharge Elimination System renewal permit. Bellemead seeks to build a wastewater treatment facility to serve a proposed office development on property it owns in Tewksbury. The permit enables Bellemead to discharge treated wastewater into the North Branch of the Rockaway Creek (creek).

Appellants contend the permit violates the Water Pollution Control Act (WPCA), N.J.S.A. 58:10A-1 to -35, and the Highlands Water Protection and Planning Act (Highlands Act), N.J.S.A. 13:20-1 to -35, and thus must be vacated. After reviewing the record and the applicable legal principles, we remand for further proceedings.

I

We summarize the pertinent facts. Bellemead's property is located in an area of northern New Jersey known as the Highlands Region, N.J.S.A. 13:20-7(a), which is regulated by the Highlands Act. In 1994, the DEP issued to Bellemead a discharge allocation certificate. This certificate authorized Bellemead

to obtain approvals to design, construct, and operate a wastewater treatment facility on its property. The certificate did not authorize Bellemead to discharge any substances into the creek. However, in 1998, the DEP issued a final New Jersey Pollutant Discharge Elimination System discharge to surface water permit (the 1998 final permit). This permit permitted Bellemead to discharge treated wastewater from a proposed on-site sewage treatment plant, which was to serve 700,000 square feet of office space.

Because the 1998 final permit was to expire in 2003, in 2002, Bellemead submitted an application to the DEP to renew this permit; the DEP did not make its final determination on this application until 2006. Pending disposition of the application, the permit was administratively extended. Meanwhile, in 2004, Tewksbury rezoned Bellemead's property from office to residential use. As a result of the rezoning, Bellemead decided to build a residential instead of an office development.

At the public hearings held on Bellemead's application to renew the 1998 final permit, appellants' representatives and others testified in opposition to the permit. Although the wastewater Bellemead sought to discharge into the creek was to

be treated, witnesses expressed concern the wastewater would pollute the creek and waters downstream.

In December 2006, the DEP denied Bellemead's application to renew the 1998 final permit, and revoked the permit. The DEP did not deny the permit on the ground the anticipated discharge would violate the WPCA. The DEP's principal reason for denying the permit was Bellemead failed to inform the DEP the property on which Bellemead planned to construct the wastewater treatment facility had been rezoned for residential use and that Bellemead sought to build homes instead of offices.

Bellemead contended it had advised the DEP of the rezoning of its property and of its revised plan to construct a residential development. Bellemead requested an adjudicatory hearing to challenge the denial and revocation of the 1998 final permit. In June 2007, the DEP granted Bellemead's request for an adjudicatory hearing and the matter was referred to the Office of Administrative Law. It is not disputed the DEP failed to provide notice to those who testified at the public hearing and other commenters that it had granted Bellemead's request for an adjudicatory hearing, as required by N.J.A.C. 7:14A-17.5.

During a case management conference held before an Administrative Law Judge (ALJ) in May 2008, the DEP advised Bellemead that if it reverted to its plan to construct an office

instead of a residential development, the DEP's revocation of the 1998 final permit would be rescinded and the DEP would review an application to renew the permit. The DEP did not consider its 2006 denial and revocation of the 1998 permit to have been final because of Bellemead's appeal. Agreeable to pursuing this solution, in June 2008, Bellemead submitted an application to renew the 1998 final permit to the DEP.

While not entirely clear from the record, it appears there was little activity of substance for a prolonged period. Then, in September 2010, an ALJ entered an order stating the parties "requested an extended period of inactivity during which documents will be exchanged and settlement discussed." The order provided the matter would be placed on the inactive list until April 1, 2011, and, if not settled, would be scheduled for a hearing.

Then, in January 2011, the DEP issued a draft renewal permit to Bellemead, and a public hearing was scheduled. At one of the public hearings, thirty-five witnesses testified, including representatives of two appellants, Readington Township and the New Jersey Highlands Coalition. In addition, a number of written comments were submitted from various objectors to the draft renewal permit. Among other things, the objectors alleged the draft was inconsistent with the goals of the Regional Master

Plan for the Highlands Region, see N.J.S.A. 13:20-10.[1] In accordance with rules promulgated under the Highlands Act, in September 2011, the DEP requested the Executive Director of the Highlands Water Protection and Planning Council (Highlands Council) to provide the Highlands Council's reaction to the public's comments, see N.J.A.C. 7:38-1.1(h), submitted on the draft renewal permit. There ensued an exchange of emails among staff at the DEP and the Highlands Council to schedule a telephone conference call. An October 25, 2011 email refers to a September 26, 2011 conference call, but the record does not reflect what was discussed during this call, including whether the Highlands Council expressed its position on the draft renewal permit. In fact, there is no record of the Highlands Council's assessment of the draft renewal permit at all.

In July 2012, the DEP realized it had never informed those who provided comments or testified at the public hearings in 2006 that the DEP had, in 2007, granted Bellemead's request for an adjudicatory hearing, as required by N.J.A.C. 7:14A-17.5. The DEP then mailed out the appropriate notice to all interested parties.

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[1] The Regional Master Plan can be found at http://www.highlands.state.nj.us/njhighlands/master/rmp/final/highlands_rmp_112008.pdf.

In August 2012, Readington Township moved to intervene. In their brief before us, appellants the New Jersey Highlands Coalition, the Raritan Headwaters Association, and the Sierra Club claim they also sought to intervene in the "adjudicatory hearing," but their citation to the document in the record purporting to be a copy of their request for intervention is actually Readington Township's request.

In June 2013, the DEP and Bellemead entered into a stipulation of settlement, and Bellemead withdrew its request for an adjudicatory hearing without prejudice. The terms of the settlement were Bellemead would withdraw its appeal, but if aggrieved by the DEP's decision on its application to renew the 1998 final permit, or if the DEP failed to take action on the renewal application within one year of executing the agreement, Bellemead could seek an adjudicatory hearing.

In August 2013, the DEP sent a letter to Readington Township advising that, because the DEP and Bellemead settled, the Township's request to be considered a party to the action was deemed moot. The DEP also claimed the Township's request to join as a party was untimely, because the Township had not submitted a request to become a party within thirty days of the DEP's decision to deny the renewal and to revoke the 1998 final permit, as required by N.J.S.A. 58:10A-7(e). The DEP mailed a

copy of its December 2006 decision to the Township on December 6, 2006.

On July 1, 2014, the DEP issued a final New Jersey Pollutant Discharge Elimination System permit (2014 final permit) to Bellemead. This appeal ensued.

II

On appeal, appellants' primary reasons for challenging the 2014 final permit are as follows. First, appellants argue the application Bellemead submitted in 2008 was for a new permit, not a renewal of the 1998 final permit. Thus, appellants contend, the DEP was required to comply with current law when determining whether to grant the final permit. In particular, appellants maintain the DEP was obligated to comply with the Highlands Regional Master Plan (RMP) and a 2011 Tewksbury Township Water Management Plan (2011 Plan), not by the law as it existed in 1998. It is appellants' position the RMP and the 2011 Plan prohibit "wastewater sewers" in the area where Bellemead's property is located, rendering the 2014 permit invalid.

Second, appellants allege the DEP violated N.J.A.C. 7:38-1.1 (h), because it failed to consult with the Highlands Council and determine if the permit were consistent with the RMP. Third, appellants maintain the DEP's failure to notify them of

its decision in 2007 to grant Bellemead's request for an adjudicatory hearing, as required by N.J.A.C. 7:14A-17.5, also invalidates the 2014 permit.

As for the latter argument, appellants argue that, had they been properly notified, they would have succeeded in becoming a party and would have "insisted" the 2008 application be considered one for a new permit rather than a renewal permit. Thus, the RMP and the 2011 Plan would govern the DEP's determinations. Appellants also maintain, had they successfully intervened, they would have "helped the negotiations and settlement process by identifying and disclosing gaps and inconsistencies by DEP's lack of analysis of the Regional Master Plan and the 2011 Tewksbury Plan Conformance."

Appellate review of a decision of an administrative agency is "limited in scope." Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 9 (2009) (citing In re Herrmann, 192 N.J. 19, 27 (2007)). An appellate court will not set aside an agency's decision unless shown that "it was arbitrary, capricious or unreasonable." Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963). However, in reviewing the decision of an administrative agency, we consider whether the decision "violates express or implied legislative policies," there is substantial evidence to support the factual findings upon which

the decision is based, and, in applying the law "to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors." Circus Liquors, supra, 199 N.J. at 10 (quoting Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)).

In 2004, the Highlands Act was enacted to provide a "comprehensive approach to the protection of the water and other natural resources" in the Highlands region. N.J.S.A. 13:20-2. The Highlands Act "is premised on the need for coordinated land use planning and regulation to protect the important resources of the Highlands Region." N.J. Highlands Water Protection & Planning Council, Plan Conformance Guidelines (2008) (Conformance Guidelines) at 1.[2] The Highlands Act created "two areas within the Region: a preservation area, in which further development is strictly regulated, and a planning area, in which development consistent with the Act's goals is encouraged." OFP, L.L.C. v. State, 395 N.J. Super. 571, 576 (App. Div.), certif. granted, 193 N.J. 277 (2007). The property on which Bellemead seeks to build an office development and wastewater treatment facility is in the planning area of the Highlands Region.

[2] The Conformance Guidelines can be found at http://www.highlands.state.nj.us/njhighlands/master/highlands_plan_conformance_guidelines.pdf.

The Highlands Act created the Highlands Council, which was charged with, among other things, developing and adopting a regional master plan for the Highlands region. See N.J.S.A. 13:20-4; N.J.S.A. 13:20-6(i); N.J.S.A. 13:20-8. The Highlands Council is located within, but is independent of, the DEP. N.J.S.A. 13:20-4. The Regional Master Plan was adopted in 2008.

The Highlands Council also provides technical assistance and financial benefits to municipalities that conform their local master plans to the Regional Master Plan. See, e.g., N.J.S.A. 13:20-13(k), -18(b). The Highlands Act established a "plan conformance" process, "by which Highlands Region counties and municipalities implement relevant aspects of the RMP and gain the benefits of Plan Conformance, such as grants, technical, and planning assistance." RMP at 366.

Here, a significant issue is whether the DEP failed to adhere to N.J.A.C. 7:38-1.1(g), which provides that in all decisions affecting a planning area, the DEP shall give "great consideration and weight" to the RMP. N.J.A.C. 7:38-1.1(g). Moreover, the DEP shall not issue any permit the DEP determines, in consultation with the Highlands Council, to be incompatible with the resource protection goals (goals) in the RMP. N.J.A.C. 7:38-1.1(h). Because the latter rule does not distinguish between a new permit and renewal permit, it is irrelevant

whether the DEP is confronted with an application for a new permit as opposed to an application for the renewal of a permit acquired before the RMP was adopted. The DEP cannot issue a permit for the planning area if the permit is incompatible with the goals of the RMP. Ibid.

The resource protection goals in the RMP are broad. The goals applicable to a planning area are: protecting and enhancing water; protecting and maintaining the "essential character" of the region; preserving and promoting compatible uses; promoting "smart growth" by providing "appropriate patterns of residential, commercial, and industrial development"; and promoting a sound and balanced transportation system that is consistent with that smart growth. See N.J.S.A. 13:20-10(c).

To ensure the DEP does not grant a permit that is incompatible with the RMP's goals, the DEP must consult with the Highlands Council on permit applications for the planning area. See N.J.A.C. 7:38-1.1(h). Here, while there is reference to a telephone conference call among certain staff members of the DEP and the Highlands Council, there is no evidence of what was discussed during that conference call and, more important, whether the Highlands Council viewed the proposed permit to be incompatible with the RMP's goals. The absence of such vital

evidence compels we remand this matter to the DEP to engage in the required consultation with the Highlands Council and alter, if necessary, its final permit decision.

We decline appellants' invitation to find the RMP and the 2011 Plan prohibit the kind of wastewater treatment facility Bellemead seeks to construct on its property. First, the 2014 permit solely concerns the content of the discharge into the creek, not the location, design, or construction of the wastewater treatment facility.

Second, those portions of the RMP to which appellants refer in support of their assertion Bellemead's proposed facility is precluded pertain to "public wastewater collection and treatment systems and community on-site treatment facilities." RMP at 174, 407 (emphasis added). While we question, without deciding, whether these facilities are of the kind Bellemead seeks to construct — the RMP does not define these two kinds of facilities — again, the subject permit does not concern the kind of facility Bellemead wants to construct, but rather Bellemead's anticipated discharge of treated water into the creek. More significantly, whether these facilities are incompatible with the RMP's goals must be determined by the DEP in consultation with the Highland Council, see N.J.A.C. 7:38-1.1(h), in the first instance and not by this court. See Ins. Co. of North Am.

v. Gov't Emps. Ins. Co., 162 N.J. Super. 528, 537 (App. Div. 1978).

Finally, appellants did not provide a copy of or a citation to the 2011 Plan. Rule 2:6-1(a) provides the appendix must contain those parts of the record "essential to the proper consideration of the issues." As the 2011 Plan was not provided, we are without the ability to ascertain whether this plan precludes the kind of activity that is the subject of the 2014 permit.

Because of our disposition, we need not address appellants' remaining arguments. To the extent we have not explicitly addressed an argument a party has advanced, it is because the argument is without sufficient merit to require discussion in a written opinion. See R. 2:11-3(e)(1)(E).

Accordingly, we remand this matter to the DEP with the instruction it consult with the Highlands Council as required by N.J.A.C. 7:38-1.1(g) and (h), and issue, if necessary, an amended final permit decision within sixty days. Any party aggrieved by the outcome of the remand which seeks appellate review must file a timely new appeal from that determination.

Remanded for further consideration in accordance with this opinion. We do not retain jurisdiction.