

ASSEMBLY CONCURRENT RESOLUTION No. 77

STATE OF NEW JERSEY

INTRODUCED MAY 20, 1996

By Assemblywoman MYERS

1 A CONCURRENT RESOLUTION concerning legislative review of Department  
2 of Environmental Protection regulations pursuant to Article V, Section IV,  
3 paragraph 6 of the Constitution of the State of New Jersey.

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5 BE IT RESOLVED by the General Assembly of the State of New Jersey  
6 (the Senate concurring):

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8 1. Pursuant to Article V, Section IV, paragraph 6 of the Constitution of the  
9 State of New Jersey, the Legislature may review any rule or regulation  
10 adopted by an administrative agency to determine if the rule or regulation is  
11 consistent with the intent of the Legislature as expressed in the language of the  
12 statute which the rule or regulation is intended to implement.

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14 2. The Legislature enacted the "Freshwater Wetlands Protection Act,"  
15 P.L.1987, c.156 (C.13:9B-1 et seq.), for the purposes of: establishing a  
16 program for the systematic review of activities in and around freshwater  
17 wetland areas designed to provide predictability in the protection of freshwater  
18 wetlands; preserving the purity and integrity of freshwater wetlands from  
19 random, unnecessary or undesirable alteration or disturbance; and obtaining  
20 the opportunity to assume freshwater wetlands permit jurisdiction from the  
21 United States Army Corps of Engineers pursuant to federal law.

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23 3. The rules and regulations adopted by the Department of Environmental  
24 Protection to implement the "Freshwater Wetlands Protection Act" include  
25 provisions concerned with minimizing the effect of otherwise permitted  
26 development activities upon historic sites and places. Specifically, those  
27 regulations, which are codified at N.J.A.C.7:7A-9.3(b)(5), provide that in  
28 order for a regulated activity to be authorized under certain Statewide General  
29 Permits established pursuant to the "Freshwater Wetlands Protection Act," the  
30 activity, among other things, cannot "adversely affect properties which are  
31 listed or are eligible for listing on the National Register of Historic Places."  
32 Those regulations further provide that "if the permittee, before or during the  
33 course of work authorized, encounters a probable historic property that has  
34 not been listed or determined eligible for listing on the National Register, but  
35 which may be eligible for listing in the National Register, the permittee shall

1 immediately notify the department and proceed as directed by the  
2 department."

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4 4. a. The "Freshwater Wetlands Protection Act" does not expressly  
5 provide that in order to engage in a permitted or regulated activity under the  
6 act it is necessary for the permittee to avoid adversely affecting historic sites  
7 or places.

8 b. The purposes of the "Freshwater Wetlands Protection Act do not  
9 include historic preservation.

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11 c. Imposing such a condition in order for a permittee to engage in a  
12 permitted or regulated activity under a Statewide General Permit could  
13 possibly constitute a taking of private property without just compensation in  
14 violation of both the United States Constitution and the Constitution of the  
15 State of New Jersey.

16 d. The regulations place upon the permittee an undue and unfair burden  
17 with respect to determining whether or not an affected property is listed, or is  
18 eligible for listing, on the National Register of Historic Places, and whether or  
19 not an affected property is "a probable historic property that has not been  
20 listed or determined eligible for listing on the National Register, but which may  
21 be eligible for listing in the National Register."

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23 5. For all of the above reasons, the Legislature therefore finds that the  
24 regulations requiring certain permittees under the "Freshwater Wetlands  
25 Protection Act" to not adversely affect historic properties, codified at  
26 N.J.A.C.7:7A-9.3(b)(5), are not consistent with the intent of the Legislature  
27 as expressed in the language of the "Freshwater Wetlands Protection Act,"  
28 P.L.1987, c.156 (C.13:9B-1 et seq.), which the regulations are intended to  
29 implement.

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31 6. The Secretary of the Senate and the Clerk of the General Assembly  
32 shall transmit a duly authenticated copy of this concurrent resolution to the  
33 Governor and the Commissioner of Environmental Protection.

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35 7. Pursuant to Article V, Section IV, paragraph 6 of the Constitution of the  
36 State of New Jersey, the Commissioner of Environmental Protection shall have  
37 30 days following transmittal of this resolution to amend or withdraw the  
38 regulations codified at N.J.A.C.7:7A-9.3(b)(5) or the Legislature may, by  
39 passage of another concurrent resolution, exercise its authority under the  
40 Constitution to invalidate those regulations in whole or in part.

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STATEMENT

This concurrent resolution embodies the finding of the Legislature that the regulations of the Department of Environmental Protection concerning controlling the effect or potential effect of certain regulated activities under the "Freshwater Wetlands Protection Act" upon historic properties, codified at N.J.A.C.7:7A-9.3(b)(5), are not consistent with legislative intent pursuant to Article V, Section IV, paragraph 6 of the State Constitution.

The concurrent resolution finds that the regulations requiring persons engaging in regulated activities covered by certain Statewide General Permits authorized pursuant to the "Freshwater Wetlands Protection Act" to not adversely affect historic properties are not expressly authorized by the act, do not serve to protect freshwater wetlands, may cause unconstitutional takings of private property without just compensation, and place an undue and unfair burden upon permittees.

The Commissioner of Environmental Protection will have 30 days to withdraw or amend the inconsistent regulations or the Legislature may, by the passage of another concurrent resolution, invalidate the regulations in whole or in part.

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Determines that certain freshwater wetlands regulations are inconsistent with legislative intent.