

To: New Jersey Law Revision Commission
From: Alexander S. Firsichbaum
Re: Exemptions to the Highlands Water Protection and Planning Act
Date: July 7, 2014

MEMORANDUM

I. INTRODUCTION

This potential project focuses on an issue raised by the New Jersey Superior Court, Appellate Division, in its recent decision in *In re New Jersey Dept. of Environmental Protection Conditional Highlands Applicability Determination, Program Interest No. 435434 (Highlands Applicability)*,¹ in which the court considered whether the construction of an electrical substation by a public utility qualified for an exemption from the Highlands Water Protection and Planning Act² (“the Highlands Act”). The statutory language providing for exemptions, however, may be subject to competing interpretations and could be clarified with additional statutory drafting.³

II. REACH OF “ROUTINE”

The Highlands Act aims to protect the natural resources and beauty of the Highlands region from construction and development which may adversely impact the area.⁴ However, the Legislature recognized the importance of some industrial development to economic viability.⁵ To help strike a proper balance, the Highlands Act exempts “the routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines, rights of way, or systems, by a public utility, provided that the activity is consistent with the goals and purposes of this act...”⁶

In *Highlands Applicability*, the Court was asked to consider whether “routine” modifies merely “maintenance and operations”, or whether it also modifies the subsequent five nouns including “upgrade.”⁷ The court did not resolve the ambiguity, finding the result of either interpretation to be identical under the facts of that particular case,⁸ but nevertheless treated the issue seriously.

¹ *In re New Jersey Dept of Env'tl. Prot. Conditional Highlands Applicability Determination, Program Interest No. 435434*, 433 N.J. Super. 223 (App. Div. 2013) [Highlands Applicability].

² N.J.S. 13:20-1to -35.

³ See N.J.S. 1:12A-8(a)(3) (charging the Law Revision Commission “to clarify confusing ... provisions found in the law”)

⁴ See N.J.S. 13:20-10.

⁵ See N.J.S. 13:20-2.

⁶ N.J.S. 13:20-28(a)(11).

⁷ *Highlands Applicability*, 433 N.J. Super. at 583.

⁸ *Id.* (“...it appears clear that, even if the exemption is interpreted as requiring that an upgrade be ‘routine,’ a project that is limited to what is necessary to satisfy [Jersey Central Power & Light’s] duty to provide ‘regular and uninterrupted electric service to its customers’ falls within the exemption intended by the Legislature.”)

Altering the statute to clarify which nouns are meant to be modified by “routine” could help avoid the need for subsequent litigation addressing this same question.

Friends of Fairmount Historic District (“FFHD”), asking the court to find that the Highlands Act exemption did not apply to Jersey Central Power & Light (“JCP & L”), argued that the substation was not a “*routine* upgrade.”⁹

The Department of Environmental Protection (“DEP”), however, contended that “the Legislature intended the word ‘routine’ to modify ‘maintenance and operations’ and not the other exempted activities,”¹⁰ suggesting that upgrades need not be routine to qualify for an exemption.

The court declined making a firm statutory interpretation and rendered a final decision without ruling on this contentious grammatical debate, noting that even if the modifier was intended to travel, the upgrade could be considered routine.¹¹

For a third interpretation of this statutory provision, one may also take notice of the two coordinating conjunctions within the same series, i.e., the conjunctive “and” at the beginning of the series and the disjunctive “or” at the end of the series.¹² Noting that a court ought to assume “that the Legislature did not use any unnecessary or meaningless language,”¹³ usage of the “and” between “maintenance” and “operations” should be accorded some purpose. One reasonable interpretation would be that this first conjunction coordinates a single noun phrase with a series of nouns. This construction would serve to limit the reach of “routine” such that it would only modify “maintenance” to the exclusion of all subsequent nouns. In effect, this exemption would apply to “routine maintenance” as well as “operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines....”

The solution to this problem would be a clarification of the connection between the word “routine” and the activities that the Legislature intended for it to modify. For the three potential interpretations discussed *supra*, a less ambiguous means of expression may be produced. These potential revisions are summarized in the table on the following page. To highlight the grammatical relationships in the statutory language, the modifier conveying a sense of routine are emboldened and the activities modified are underlined:

⁹ *Id.* (emphasis added).

¹⁰ *Id.*

¹¹ *See id.*; *see also* Highlands Applicability, *supra* text accompanying note 8.

¹² N.J.S. 13:20-28(a)(11).

¹³ *Jersey Cent. Power & Light Co. v. Melcar Utility Co.*, 212 N.J. 576, 587 (2013) (internal quotations omitted) (*quoting* *Patel v. N.J. Motor Vehicle Comm’n*, 200 N.J. 413, 418-19 (2009)).

Table of Interpretations

Interpretation by Friends of Fairmount Historic District	Proposed Statutory Interpretation	“the routine <u>maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade</u> of public utility lines, rights of way, or systems, by a public utility, provided that the activity is consistent with the goals and purposes of this act....”
	Revised Statutory Language	“the <u>maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade</u> of public utility lines, rights of way, or systems, by a public utility, done in a routine manner , provided that the activity is consistent with the goals and purposes of this act....”
	Explanation of Revision	The replacement of the simple premodifier with a past-participial phrase and the repositioning thereof to the middle of a series of conditional clauses applicable to the whole would make clear that this phrase also ought to apply to the whole. As this additional modifying clause is separate from the immediately preceding clause, the last-antecedent rule would not be problematic. ¹⁴
Interpretation by Department of Environmental Protection	Proposed Statutory Interpretation	“the routine <u>maintenance and operations</u> , rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines, rights of way, or systems, by a public utility, provided that the activity is consistent with the goals and purposes of this act....”
	Revised Statutory Language	“the rehabilitation, preservation, reconstruction, repair, upgrade, or the routine <u>maintenance and operations</u> of public utility lines, rights of way, or systems, by a public utility, provided that the activity is consistent with the goals and purposes of this act....”
	Explanation of Revision	The repositioning of the modifier to the end of the series clearly omits the preceding nouns from its purview, but it definitely encompasses both “maintenance” and “operations.”
Interpretation by NJ Law Revision Commission Staff	Proposed Statutory Interpretation	“the routine <u>maintenance</u> and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines, rights of way, or systems, by a public utility, provided that the activity is consistent with the goals and purposes of this act....”
	Revised Statutory Language	“the operations, rehabilitation, preservation, reconstruction, repair, upgrade, or routine <u>maintenance</u> of public utility lines, rights of way, or systems, by a public utility, provided that the activity is consistent with the goals and purposes of this act....”
	Explanation of Revision	Repositioning of “routine” to the position immediately preceding the final element in the series would clearly restrict its reach to “maintenance” only. Separation and repositioning of “operations” would clearly show that it is not modified by “routine.”

¹⁴ See 82 C.J.S. Statutes § 443 (citing *Morella v. Grand Union/New Jersey Self-Insurers Guar. Ass’n*, 391 N.J. Super 231, 240-41 (App. Div. 2007)).

III. MEANING OF “ROUTINE”

Not only does *Highlands Applicability* call attention to the reach of the term “routine” within the statute, but also, more basically, to confusion over the meaning of that word. FFHD argued that the “magnitude of the project” undertaken by the JCP & L exceeds the limit of “routine upgrade.”¹⁵ Assuming, arguendo, that “routine” had been intended to modify “upgrade,” the facts of this case highlight that the distinction between a *routine* upgrade and an *extraordinary* upgrade is elusive.¹⁶ Although the court noted that “[n]either ‘routine’ nor ‘upgrade’ are defined in the statute,”¹⁷ it explained that “a project that is limited to what is necessary to satisfy JCP & L’s duty to provide ‘regular and uninterrupted electric service to its customers’” would be considered a routine upgrade as “intended by the Legislature.”¹⁸

The new substation was found necessary “to ensure adequate voltage levels” because “residential customers in the area increased by thirty-percent between 1999 and 2006, resulting in twenty-percent overloads during peak periods....”¹⁹ While the maintenance of power capacity proportional to the population may be a routine function for a public utility, responses to unusual fluctuations in the demand for energy may need to be unusual themselves. The issue therefore arises as to whether “routine,” if modifying “upgrade,” would refer to its purpose or to its nature.

One solution to this problem would be for the Legislature to clarify which aspect of upgrading is permissible on the grounds of being routine. A second solution, not incompatible with the first, would be for the Legislature to provide examples of such routine upgrades intended for exemption from the Highlands Act.²⁰

IV. POSSIBLE LEGISLATIVE INTENT

Although the statutory language is undeniably ambiguous, other sections of the Highlands Act combined with the regulations passed by the Department of Environmental Protection tend to show that the legislature may have intended to subject public utilities to less stringent restrictions than other types of activity.²¹ Other sources examined by Staff to determine legislative intent that were relevant but not as directly informative included the Coastal Area

¹⁵ *Id.* (recalling the argument of Friends of Fairmount Historic district that “the magnitude of the project here, costing \$5 million, and including a nineteen-foot transformer, a thirty-five foot-tall bus system, electrical control cabinets, switching devices and towers approximately sixty-feet tall is inconsistent with a routine upgrade.”)

¹⁶ *Id.*

¹⁷ *Id.* (quoting N.J.S. 13:20-28(a)(11)).

¹⁸ *Id.* at 237.

¹⁹ *Id.* at 227.

²⁰ *See, e.g.,* N.J.S. 27:5G-14 (“Any county or municipality having jurisdiction over a highway carried by a railroad overhead bridge ... shall have responsibility for routine maintenance of the surface roadway carried by the bridge, including but not limited to snow removal, sidewalk and guiderail repair, lighting, striping, signing, patching, and resurfacing.”); *see also, e.g.,* N.J.A.C. 7:4-1.3 (“ ‘Routine maintenance’ means minor repairs such as in-kind replacement of a broken window pane or in-kind patching of a few roof shingles.”).

²¹ For regulations that were relevant to this inquiry but not discussed herein, see N.J.A.C. 7:38-1.4 (Definitions); - 2.2 (“Major Highlands development” regulated by the Department [of Environmental Protection]); -2.3(a) (Exemptions [from the Highlands Act]); -6.9 (Waiver for the construction of a 100 percent affordable housing development).

Facility Review Act,²² the Pinelands Protection Act,²³ the Freshwater Wetlands Protections Act,²⁴ the New Jersey Register,²⁵ the New Jersey Practice Series: Real Estate Law and Practice,²⁶ the United States Code,²⁷ the Code of Federal Regulations,²⁸ the Federal Energy Regulatory Commission,²⁹ and statutes from other States.³⁰

The statute enabling the Department of Environmental Protection to create rules and regulations acknowledges a distinction regarding public utilities. It provides that regulations shall prohibit “major Highlands development within 300 feet of any Highlands open waters,” but such development “does not include linear development for infrastructure, *utilities*, and the rights-of-way therefor, provided there is no other feasible alternative. . . .”³¹ Unlike other types of development in the Highlands area, utilities are to be significantly less restricted.

²² See, e.g., N.J.S. 13:19-3 (Definitions); -5 (Exemptions); -5.2 (Construction not requiring permit).

²³ See, e.g., N.J.S. 13:18A-3 (Definitions); -5.1 (Exemption from approval for certain dwellings); -29 (Liberal construction); -57 (Pinelands Commission; rural economic development opportunities; pilot program).

²⁴ See, e.g., N.J.S. 13:9B-3 (Definitions); -11 (Factors used to determine if activity is in public interest).

²⁵ See, e.g., N.J.R. 4467(a) (“While some of the individual standards comprising a Highlands preservation area approval do have comparable Federal regulations, the Department has determined that the amendments made to implement the Act do not amend any provision that has a comparable Federal Regulation. No further analysis under Executive Order No. 27 (1994) or N.J.S.A. 52:14B-1 et seq. is required.”).

²⁶ See, e.g., 13C N.J. Prac., Real Estate Law & Practice § 46.36 (2d ed.) (defining “Smart Growth”, as used by the State, “to describe well-planned, well-managed growth that adds new homes and creates new jobs, while preserving open space, farmland, and environmental resources,” and noting that the Highlands Act “is intended to govern land development and planning in the Highlands region in a manner protective of natural resources while providing for smart growth opportunities.”); § 46.50 (Highlands Water Protection and Planning Act).

²⁷ See, e.g., 15 U.S.C. § 5513 (funds for the Next Generation Internet program “may not be used for *routine upgrades* to existing federally funded communication networks”) (emphasis added).

²⁸ See, e.g., 23 C.F.R. § 971.212 (requiring Federal lands safety management systems to provide procedures for “routine maintenance and upgrading of safety appurtenances including highway rail crossing safety devices, signs, highway elements, and operational features . . .”) (“Routine” may modify both “maintenance” and “upgrading,” but the reach of the modifier is unclear.)

²⁹ See, e.g., Primary Power, LLC, 131 FERC ¶ 61015, 2010 WL 1495731, **21 (Apr. 13, 2010) (the Federal Regulatory Energy Commission partially granted a request by a power company for rate incentives for a proposed power transmission project on the grounds that it was not a “routine” investment.) (“ . . . the Commission has found the question of whether a project is “routine” to be particularly probative. The Commission has previously provided guidance on the factors that it will consider when determining whether a project is routine. The Commission stated that it will consider all relevant factors presented by the applicant, including evidence on: (1) the scope of the project (e.g., dollar investment, increase in transfer capability, involvement of multiple entities or jurisdictions, size, effect on region); (2) the effect of the project (e.g., improving reliability or reducing congestion costs); and (3) the challenges or risks faced by the project (e.g., siting, long lead times, regulatory and political risks, specific financing challenges, other impediments.” (internal citations omitted)).

³⁰ See, e.g., Ariz. Rev. Stat. Ann. § 28-9401(I)(2) (“ ‘Major rail project’ means a substantial project by a railroad to build or relocate any rail yard, rail switching facility or railroad tracks. Major rail project does not include routine rail maintenance, upgrade or repair projects or the addition of spurs to serve existing or new customers.”) (“Routine”, as used in this statute, most likely extends to “upgrade,” as a significant upgrade would likely qualify as a major rail project.); Md. Code Ann., State Fin. & Proc. § 3A-301 (“Development” of major information technology does not include “ongoing operating costs, software or hardware maintenance, *routine upgrades*, or modifications that merely allow for a continuation of the existing level of functionality.”) (emphasis added) (Given its position so late in the series, “routine” likely modifies only “upgrade,” and not “operating costs,” “maintenance,” or “modifications.”).

³¹ N.J.S. 13:20-32(a) (emphasis added).

This leeway would also be consistent with the goals of the Regional Master Plan, which seek to “encourage . . . residential, commercial, and industrial development . . . in or adjacent to areas already utilized for such purposes . . . in order to accommodate local and regional growth and economic development. . . .”³² The situation in *Highland Applicability*, in which an upgrade to an existing electrical substation was necessary to support significant population growth,³³ would therefore appear to be supported by the anticipation of “local growth”³⁴ and the special exemption for the “linear development” of “utilities.”³⁵

The Highlands Act features language nearly identical to the exemptions for public utilities³⁶ (“Exemption # 11) when providing for exemptions for transportation or infrastructure systems (“Exemption # 9)³⁷. Exemption # 9 applies to:

the routine maintenance and operations, rehabilitation, preservation, reconstruction, or repair of transportation or infrastructure systems by a State entity or local government unit, provided that the activity is consistent with the goals and purposes of this act and does not result in the construction of any new through-capacity travel lanes....³⁸

Two notable distinctions exist, however, between the two exemptions.

First, Exemption # 11 features an identical list of permitted activities except for “upgrade.” This regulatory distinction may be a manifestation of the distinction provided in the enabling statute, whereby utilities were to be subject to fewer restrictions.³⁹ The Department of Environmental Protection may have additionally excepted “upgrades” pursuant to the legislative exception for “linear development” of utilities.⁴⁰

Second, Exemption # 11 features two limiting clauses at the end. Whereas both sections exempt the list of activities “provided that the activity is consistent with the goals and purposes of this act,” only Exemption # 9 adds “and does not result in the construction of any new through-capacity travel lanes.”⁴¹ The Department of Environmental Protection regulations further clarify that activities relating to transportation or infrastructure systems are automatically exempt, i.e. Highlands Applicability Determination is not required, where “such activity is confined to the existing footprint of development” or “such activity does not result in a cumulative increase in impervious surface.”⁴²

³² N.J.S. 13:20-10(b)(9).

³³ *Highlands Applicability*, 433 N.J.Super at 237.

³⁴ N.J.S. 13:20-10(b)(9).

³⁵ N.J.S. 13:20-32(a).

³⁶ N.J.S. 13:20-28(a)(11).

³⁷ N.J.S. 13:20-28(a)(9).

³⁸ *Id.*

³⁹ N.J.S. 13:20-32(a).

⁴⁰ *Id.*

⁴¹ N.J.S. 13:20-28(a)(11).

⁴² See N.J.A.C. 7:38-2.4(b) (emphasis added):

The attention devoted to these activities highlights the lack of attention given to projects affecting public utilities as described in Exemption # 9. Regulatory language emphasizing the desirability of limiting the spatial occupancy of construction for public utilities is notably absent, and this may give a clue to the legislative intent. Not only have public utilities been afforded an additional activity exempt from Highlands Act restrictions, but those activities as a whole are less regulated.

The Legislature seems to have intended for activities supporting utilities to be subject to less restriction in the Highlands than activities for other purposes. This may have been provided through recognition of a goal of the Highlands Act to encourage “compatible” growth and development in the area.⁴³ Therefore, the Legislature may have intended for significant upgrades to be permitted, rather than merely routine upgrades.

V. CONCLUSION

The threat to the existence of an expensive and controversial electrical substation evaluated in *Highlands Applicability* illustrates the gravity of problem created by the unclear statutory language providing for exemptions to the Highlands Act. The meaning of the simple

“2. Routine maintenance and operations, preservation, or repair of transportation systems by a State entity or local government unit provided such activity is **confined to the existing footprint of development**, and does not create new travel lanes or increase the length of an existing travel lane by more than 2,640 feet, not including tapers;

3. Rehabilitation or reconstruction of transportation systems by a State entity or local government unit provided such activity:

- i. **Does not result in a cumulative increase in impervious surface** by 0.5 acres or more;
- ii. Does not involve the ultimate disturbance of one or more acres of land; and
- iii. Does not create new travel lanes or increase the length of an existing travel lane by more than 2,640 feet, not including tapers;

4. Routine maintenance and operations, rehabilitation, preservation, reconstruction and repair of infrastructure systems by a State entity or local government unit provided such activity is **confined to the existing footprint of development**, and does not increase the conveyance capacity, for example, by increasing the pipe size of a sewer or water system;

5. The construction of transportation safety projects and bicycle and pedestrian facilities by a State entity or local government unit provided the activity **does not**:

- i. Create a new travel lane or increase the length of an existing travel lane by more than 2,640 linear feet, not including tapers;
- ii. **Result in a cumulative increase in impervious surface** of one acre or more; or
- iii. Involve the ultimate disturbance of two or more acres of land; . . .

9. The addition of telecommunications equipment or antennas to a telecommunication facility existing on August 10, 2004, provided the equipment is located within the existing fenced compound or on lawfully existing impervious surface so that it **does not increase impervious surface**; . . .”

⁴³ N.J.S. 13:20-10(b)(9).

word “routine” and the role it plays within the statutory framework are confusing. More costly litigation in the future, however, could be avoided with a few very simple changes. Staff seeks Commission authorization to undertake a project in this area, conduct additional research, and engage in outreach in an effort to draft language to address the issues identified above.