

Our town has adopted flood hazard regulations. These regulations are based on the Vermont model flood hazard regulations and provide that new and replacement water supply systems must be designed to minimize or eliminate infiltration of floodwaters into the systems. They also provide that on-site waste disposal systems must be located to avoid impairment to them or contamination of them during flooding. In light of the new state regulations prohibiting municipal regulation of wastewater and water supply systems, are these provisions of our flood hazard regulations still enforceable?

Yes, they are. The state regulations you refer to are the Environmental Protection Rules promulgated by the Wastewater Management Division of the Department of Environmental Conservation. Environmental Protection Rule 1-501 provides, in part, that provisions of existing municipal ordinances and zoning bylaws that establish technical standards and criteria for the design, construction, operation, and maintenance of water supplies and wastewater systems are superseded (i.e., no longer in effect) by the technical standards and criteria of the new state regulations.

The provisions of your flood hazard regulations pertaining to water supply and waste disposal systems are actually requirements of federal law. Forty-four C.F.R. §§ 60.3(a)(5) and (6) state that municipalities which adopt flood hazard area regulations must require, within flood-prone areas, the following:

- new and replacement water supply systems must be designed to minimize or eliminate infiltration of flood waters into the systems;
- and on-site waste disposal systems must be located to avoid impairment to them or contamination from them during flooding.

These requirements are not optional. A municipality that adopts flood hazard area bylaws in order to qualify for the national flood insurance program (NFIP) must adopt and enforce these requirements through its flood hazard bylaws.

At first glance, complying with both Rule 1-501 and 44 C.F.R. §§ 60.3(a)(5) and (6) would appear to be impossible for most Vermont municipalities. Rule 1-501 essentially prohibits municipal regulation of water supply and wastewater systems unless the municipality has taken delegation of the state's regulatory program. At the same time, 44 C.F.R. §§ 60.3(a)(5) and (6) require municipalities participating in the NFIP to regulate wastewater and water supply systems in flood-prone areas. However, according to officials at the Vermont Agency of Natural Resources, wastewater and water supply permits issued by the state will meet the requirements of 44 C.F.R. §§ 60.3(a)(5) and (6). So, notwithstanding the apparent conflict, municipalities can enforce the provisions of their flood hazard regulations relating to water supply systems and on-site waste disposal systems and still abide by Rule 1-501's prohibition against local regulation of water supply and wastewater systems by requiring applicants to produce copies of their state-issued water supply and wastewater permits.

While some municipalities might require applicants to obtain these state permits prior to the issuance of a local permit for construction in the flood hazard area, and while there is arguably authority to do this arising directly from the federal regulations, the better approach may be to require applicants to produce them prior to commencement of construction or issuance of a certificate of occupancy. This can avoid the “killer issue” scenario whereby an applicant is forced to expend significant money to obtain a state wastewater and/or water supply permit, only to be later denied approval of the project because of a relatively inexpensive, but nonetheless insurmountable, issue arising out of the flood hazard bylaw. On the other hand, this approach can cause local zoning officials to have to revisit and amend their previously issued permits if, for example, the state permit requires a redesign or relocation of the project. If this latter approach is followed, municipalities should consider amending their flood hazard regulation to prohibit the initiation of construction in the flood hazard area unless and until the requisite wastewater and water supply permits are issued by the state in accordance with 24 V.S.A. § 4414(13) or providing for the issuance of certificate of occupancy under 24 V.S.A. § 4449(a)(2).

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