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Appellate Division Upholds New Jersey Department of Environmental Protection's Waiver Rule

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The Appellate Division of the Superior Court of New Jersey on March 21, 2013 upheld the New Jersey Department of Environmental Protection (DEP)'s Waiver Rule, which took effect on August 1, 2012.

A group of 28 environmental and labor organizations challenged the Waiver Rule, arguing that the Waiver Rule exceeded DEP's legislated authority and is invalid due to lack of adequate standards to guide the agency's discretion and implementation. They also challenged DEP's guidance documents and other postings on DEP's Waiver Rule web site as de facto rulemaking in violation of the Administrative Procedure Act (APA).

The Appellate Division upheld DEP's authority to promulgate the Waiver Rule, finding that DEP has legislative authority to adopt department-wide regulations of general applicability to deal comprehensively with the sheer scope of overlapping statutory programs DEP administers and the volume of interconnected activities DEP must coordinate. The Court also stated that it views DEP's authority to waive its own rules as implicit in the Legislature's delegation of broad rulemaking power to the DEP. In addition, the Court found that the rule contains adequate standards to guide DEP's implementation and discretion. However, the Court found that the documents posted on DEP's website, which explain the Waiver Rule and describe what DEP will require applicants to submit to receive a waiver, go beyond facilitating administrative implementation of the rules and announce new substantive requirements, which necessitates formal rulemaking. Unless the documents on DEP's web site are adopted by rule, DEP cannot use these documents in reviewing applications.

The Waiver Rule allows DEP to grant exemptions from strict compliance with its environmental regulations when the applicant can demonstrate that one or more of the following are present:

1. The waiver is necessary to respond to a declared public emergency;
2. Conflicting rules (between Federal and State agencies or between State agencies) adversely impact a project or prevent the project from proceeding;
3. Net environmental benefit would be achieved; or
4. Undue hardship is being imposed by the rule requirement(s).

DEP has made it clear that there is no automatic right to a waiver. The criteria contained in the Waiver Rule for evaluating each waiver request are very general and provide little guidance for



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applicants. Waivers will be acted on only following a case-by-case review and will require review by the DEP Commissioner.

There is no timeframe within which DEP must act on waiver requests; requests will not be processed on a first-come, first-serve basis. DEP has committed to transparency in the process and will post all Waiver Rule applications and decisions on DEP's website. Additionally, DEP will prioritize review of Waiver Rule requests after gauging the number and type of requests received.

To date, 22 waiver applications have been submitted, none of which have been approved. Two applications have been denied and eight have been rejected as incomplete.

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