

NJDEP'S WAIVER RULE

By William L. Warren

Introduction

The concept of a "Waiver Rule" to be promulgated by the New Jersey Department of Environmental Protection ("NJDEP" or "Department") created both excitement within the New Jersey regulated community and consternation among environmental groups. Business and development interests saw a Waiver Rule as a long overdue attempt by NJDEP to bring some flexibility into the State's environmental regulatory experience. Environmentalists were convinced the Waiver Rule concept would open the door for polluters and greedy developers to complete an end run around New Jersey's complex environmental statutory and regulatory scheme. A coalition of environmental and conservation groups initiated litigation challenging the adoption of the Waiver Rule. The environmentalists argued their case against the validity of the Waiver Rule before a three-judge appellate panel on January 14. In response to this argument, representatives of the business community told the court that a common sense approach to environmental regulation in New Jersey, as embodied in the Waiver Rule, is needed to spur economic development. It is likely this issue will end up before the New Jersey Supreme Court.

[The Waiver Rule, N.J.A.C. 7:1B](#) became reality in response to [Governor Chris Christie's Executive Order No. 2](#), which attempted to instill "common sense principles" into the governing of New Jersey. Executive Order No. 2 and the Waiver Rule promised a better environmental regulatory climate to improve the State's economy.

Will the Waiver Rule, effective as of August 1, 2012, actually make a difference? In its first five months, the Waiver Rule does not yet seem worthy of the regulated community's early enthusiasm or the trepidation of the environmental groups. To date, NJDEP has still not approved a waiver under the Waiver Rule and, according to NJDEP's Office of Permit Coordination & Environmental Review, only fourteen waiver applications have been accepted for review by NJDEP since August 1st.

NJDEP's philosophy on the implementation of the Waiver Rule may well be embodied in N.J.A.C. 7:1B-1.1(b) which states: "[i]t is not the purpose of this chapter to allow for the routine circumvention of any Department rule." The NJDEP guidance makes clear that application of the Waiver Rule will be limited. Only NJDEP (and not any Licensed Site Remediation Professional) is allowed to grant a waiver under the Waiver Rule. Will NJDEP ever get to "yes" on a waiver application? Time will tell.

How Do You Qualify for a Waiver?

In order to qualify for a waiver from an NJDEP rule, at least one of the following four conditions must be met to NJDEP's satisfaction as part of an application:

Conflicting Rules: The conflict between Departmental rules, or a Department rule and the rule of another State or Federal agency, must make compliance "impossible" (i.e., a party can not physically or temporally comply with both rules) or "impracticable" (i.e., it is possible to comply with both rules, but "extremely difficult to do so."). Any cost considerations are not part of the "conflicting rules" analysis (such cost considerations

are part of the “Unduly Burdensome” analysis discussed below). The Waiver Rule applies only to NJDEP regulations and not to a permit or permit conditions.

Unduly Burdensome: A showing must be made of an “actual, exceptional hardship” and “excessive cost in relation to an alternative measure of compliance.” A detailed description of the alternative measure must be included in the Waiver Rule application along with a statement about its “comparable or greater benefit to public health and safety, or the environment.” If the underlying program contains a waiver, variance or exemption provision, the applicant must explain the reasons for pursuing the application of the Waiver Rule and not these provisions. It is possible that a failure to exhaust regulatory waiver or variance provisions will provide NJDEP with an easy reason to deny a Waiver Application.

Net Environmental Benefits: The definition of Net Environmental Benefit lists several criteria that must be met by an applicant to qualify for a waiver:

“A situation in which the quantitative or qualitative benefit to a natural resource or other related environmental good for which the Department has responsibility would substantially outweigh any detriment to that natural resource or environmental good, which would result from a waiver. There must be an adequate geographic and resource nexus between the environmental offset and the natural resource or other environmental good that is protected by the rule being waived. The net environmental benefit may include mitigation, but it must be beyond what the waived rule would have required independent of the waiver.” N.J.A.C. 7:1B-1.2.

It will not be easy to prove to NJDEP’s satisfaction that a Net Environmental Benefit has been achieved by a waiver applicant.

Public Emergency: To qualify for this criteria, the applicant must be involved in “a situation in which a Federal or State official with the authority to do so declares a public emergency.” (See definition of “Public Emergency” at N.J.A.C. 7:1B-1.2). The recent devastation caused by Superstorm Sandy along the Jersey shore is the best example of a public emergency declared by the Governor within the meaning of the Waiver Rule. It is possible that some waiver approvals might result from Sandy. Any such public emergency waiver application must demonstrate that the requested waiver is a reasonable and effective response to a public emergency. However, NJDEP guidance makes it clear that the “[w]aiver request should be limited to a remedy within the scope of the declared emergency.”

When Does the Waiver Rule Not Apply?

The Waiver Rule does not apply in several important situations. For example, the following circumstances would not give rise to an approvable waiver from NJDEP:

A requirement of, or duty imposed by, a Federal or State statute or Federal regulation, unless that statute or regulation provides for such a waiver;

A rule providing for a Federally delegated, authorized, or assumed program where the waiver would not be consistent with New Jersey's delegation, authorization, or assumption of authority pursuant to a Federal program;

A rule that is part of a collaborative program involving multiple states or jurisdictions where the waiver would not be consistent with New Jersey's participation in the multi-state or multi-jurisdiction program;

A rule that implements a Federally enforceable program pursuant to a State Implementation Plan ("SIP");

A rule concerning an air emissions trading program;

A rule providing for a numeric or narrative standard protective of human health;

A rule providing for public participation or notice; and

A rule providing for a fee, oversight cost or other Departmental cost.

These exceptions further reduce the potential utility of the Waiver Rule for New Jersey businesses. Prior to submission of any waiver application, it is important to review the full list of rules not covered by the Waiver Rule at N.J.A.C. 7:1B-2.1(b).

NJDEP's Waiver Rule Evaluation Criteria

The Waiver Rule does not put NJDEP under any obligation to grant a waiver. An approval or denial is fully within the discretion of the Department. According to NJDEP guidance, the ultimate approval or denial will take into consideration several factors:

Sufficient Public Notice: NJDEP has prepared a ["Public Notice Rules Summary Chart"](#) which identifies whether specific regulations include public notice requirements.

Sufficient Information Supporting Waiver Request: Any documentation, technical information, site plans and resource data needed to back up a waiver application

Statement of the Specific Circumstances for the Need of the Waiver: NJDEP is looking for a project summary narrative and other detailed information about the proposed waiver.

Statement Explaining Whether the Applicant Directly Caused or Contributed to the Circumstances Resulting in the Waiver Request: The Department will not look favorably on a party that seeks a waiver to correct its own mistake.

For a Net Environmental Benefits Waiver: A statement that the waiver would facilitate or enhance the remediation and/or redevelopment of a contaminated site, or the expansion of an existing development. This type of consideration is consistent with the objective of the Waiver Rule and Executive Order No. 2.

Consistency with NJDEP's Core Mission: A statement that the requested waiver is consistent with the NJDEP's "core mission to maintain, protect, and enhance New Jersey's natural resources and to protect public health, safety, and welfare, and the environment..." (See N.J.A.C. 7:1B-2.2(a)(6))

All decisions by NJDEP to approve or deny a waiver of strict compliance with any rule will be made in a writing, including setting out any conditions related to any approval. NJDEP has no timeframes for the review and issuance of its decision on a waiver application.

Any Departmental waiver of a rule will apply only to the limited request made in the application and will not be considered a waiver of the rule generally. Waivers granted by NJDEP will be valid only to the person, project or activity identified in the waiver. (See N.J.A.C. 7:1B-2.4(b)). However, it would seem to be difficult for NJDEP not to consider past approvals (or denials) in subsequent waiver decisions. For an applicant, it would be helpful to cite in their own waiver applications any prior NJDEP waiver approvals with similar facts.

All waivers are not automatically renewable, except as permitted by the underlying regulatory provision waived. A waiver is not a defense to a judicial or administrative enforcement action for a violation that predates the waiver, and waivers do not excuse prior violations. On the other hand, waivers may be used to resolve contested cases or other disputes.

Public Notice of Waiver Rule Decisions and NJDEP Waiver Rule Web Site

NJDEP is required to publish notice of both its determination to consider and, ultimately, its decision on each waiver application. If a particular rule requires public notice in the DEP Bulletin, the Department will follow this procedure and publish notice of the waiver application. In cases where DEP Bulletin notice is not required, NJDEP will provide notice on its website.

In addition to public notice related to Waiver Rule applications and decisions, the [NJDEP Waiver Rule web site](#) is an excellent source of information and guidance. An applicant can file a waiver request electronically as well as search for applications filed by others. Any future updates on the Waiver Rule program by NJDEP are to be posted on the web site.

Will NJDEP Actually Issue Waiver Approvals?

Presently, any waiver application received by the Department is reviewed for administrative completeness by the Office of Permit Coordination & Environmental Review. Once deemed administratively complete, the waiver application is sent to the relevant NJDEP program for review and further action. The ultimate decision on a waiver application is made by the assistant commissioner of the relevant NJDEP program. Again, the Department's assistant commissioners are not under any regulatory timeframes to complete waiver reviews. For the first batch of waiver decisions, it appears that an additional review will also be conducted by the office of the NJDEP Commissioner. It is anticipated that the Commissioner will not be involved after the waiver program is fully up and running.

According to NJDEP's web site, most of the first fourteen waiver applications approved for review involve the Department's Land Use programs, such as the Coastal Area Facilities Act ("CAFRA") and Flood Hazard Area programs. For example, some of the CAFRA waiver applications involve issues related to dock construction, a shellfish habitat designation and filled waters edge issues in a residential construction situation. Another of the current waiver applications involves the type of engineering control required under the Site Remediation program. In particular, the applicant wants a waiver from the requirement for a two foot and permission to utilize a two inch clean soil cap. The granting of this waiver would result in a

savings of approximately \$250,000. On January 8, 2013, NJDEP issued its first decisions on waiver applications.

NJDEP's First Decisions Under the Waiver Rule

On January 8th, the Department issued a denial of an application for the waiver of the Filled Water's Edge rule, N.J.A.C. 7E-3.23(c), at a residential/marina project in Cape May. Filed on August 1, 2012, the waiver application stated that the proposed development of approximately fifteen residential units lacked adequate water for boat mooring, public access, any significant marina support facilities, parking, sidewalks and open/green spaces

The January 8th denial of this CAFRA waiver request strictly interprets the four criteria for waivers discussed above. For example, the NJDEP found in its review of the "Unduly Burdensome" criteria that: "[t]he mere fact that an applicant's proposed development does not comply with a Department rule does not satisfy the requirement that an applicant seek a waiver due to an "actual, exceptional hardship." NJDEP was similarly strict in its review of the "Net Environmental Benefit" criteria finding that: "[t]he Waiver Request fails to offer any documentation to explain why the proposed project would provide a net environmental benefit that is significantly greater than that which would be provided by strict compliance with the rule."

On January 8, 2013, NJDEP also denied the waiver application related to the type of engineering control required for a site remediation project in Paterson. The Department concluded that it "cannot determine from the facts presented which remedy is to be implemented, how much either remedy would cost, or how the implementation of either the "landscape cap" remedy or removing 2 feet of soil would be unduly burdensome." In addition, NJDEP explains that it is unable to determine, based on the facts presented, how the "landscape cap" remedy did not comply with the Industrial Site Remediation Act requirements, as stated in the waiver application.

The Department included a final paragraph in each of the January 8th denial letters informing the applicants of their right to request a hearing with the Office of Administrative Law. As a result, the two denials of waiver applications may be challenged.

Conclusion

Is regulatory relief on the way in New Jersey under the Waiver Rule? Frankly, it is too early to evaluate the program. A careful review will be needed of the NJDEP's approvals and denials of waiver applications. Unfortunately, it is likely that the Waiver Rule may only provide limited relief to the regulatory burdens of applicants under the jurisdiction of the Department's various Land Use programs.

Watchful waiting is the order of the day on the Waiver Rule program. However, the New Jersey regulated community, including developers, should consider whether the Waiver Rule might provide a way around obstacles both to their projects and to goals created by strict compliance with NJDEP's regulations.