

Environmental Law

DEP's Waiver Rules

Does common sense have a role in environmental regulation?

By Andrew B. Robins

On April 2, the New Jersey Department of Environmental Protection (DEP) adopted the "waiver rules," N.J.A.C. 7:1B. Few regulatory initiatives have been met with greater controversy. A coalition of environmental groups immediately challenged the rules in the Appellate Division. The Legislature has also initiated the rule-invalidation process using its constitutional oversight authority. As evidenced by their comments to the rule proposal, many in the regulated community strongly support the injection of a "common sense approach" into DEP's regulatory programs.

The proposal of the waiver rules was, in part, an outgrowth of Gov. Christie's Executive Order No. 2, which directed state agencies to follow a "common sense approach to the administration of regulations." The rules allow DEP to waive compliance with specific regulations under limited circumstances if certain criteria are met. No applications will be accepted by DEP until the Aug.

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1 operative date. Applications will be reviewed on a case-by-case basis. There are no timeframes for DEP's reviews.

Waivers would be approved for the application of a particular rule or set of rules for a specific project or activity, and not as a blanket exception to a rule. N.J.A.C. 7:1B-2.4(b). The rule allows for DEP to waive its own rules under the following circumstances:

- formally declared public emergencies;
- conflicting rules;
- a net environmental benefit would be achieved; or
- an undue hardship is created by the rule(s).

N.J.A.C. 7:1B-2.1(a). The "undue hardship" criterion is perhaps the most criticized element of the rule. The critical term relating to that criterion is "unduly burdensome," which is defined as occurring when strict compliance with a specific department rule would result in either: an "actual, exceptional hardship for a particular project or activity, or property"; or "excessive cost in relation to an alternative measure of compliance that achieves comparable or greater benefits to public health and safety or the environment." N.J.A.C. 7:1B-1.2. Critics of the waiver rules allude to the subjective nature of that definition.

DEP has identified significant limitations as to when relief can be granted under the rule. Waivers cannot be used to alter or waive:

- specific statutory state mandates;
- specific federal mandates;

- federally enforceable program requirements pursuant to a state implementation plan, as defined at N.J.A.C. 7:27-18.1;
- requirements that if waived would result in an action that would not be consistent with New Jersey's participation in the multistate or multijurisdiction program;
- an air emissions trading program requirement;
- numeric or narrative standards protective of human health (such as cleanup standards);
- threatened and endangered species designations;
- certain licensing requirements;
- fees and costs charged by DEP; or
- provisions of the waiver rules.

The rule includes provisions that create many steps designed to insure that the waiver review process is transparent. N.J.A.C. 7:1B-2.3. Notice requirements associated with the rule(s) from which relief is requested must be followed for waiver requests. N.J.A.C. 7:1B-2.3(a). DEP will publish notice of its intent to consider a waiver request and any decision to grant or deny that request. N.J.A.C. 7:1B-2.3(b). DEP publication will be in the "DEP Bulletin" on the department's website. N.J.A.C. 7:1B-2.3(h).

By June, both the State Senate and the General Assembly had initiated efforts to invoke the Legislature's power to invalidate an agency regulation pursuant to Article V, Section 6 of the New Jersey Constitution. *See* Assembly Continuing Resolution No. 37 and Senate Continuing Resolution No. 59. The oversight authority was adopted in 1992, effectively overturn-

ing the Supreme Court's invalidation of the Legislative Oversight Act. *Gen. Assembly of State of N.J. v. Byrne*, 90 N.J. 376 (1982). The oversight provision requires the adoption of a concurrent resolution by both houses, after which the agency that proposed the rule has 30 days to amend or withdraw the rule. If the agency does not withdraw or amend the rule, both houses then must pass a second concurrent resolution to invalidate the rule. The governor has no veto power over the concurrent resolutions. The Legislature has adopted concurrent resolutions initiating the process on three occasions but has never completed the rule invalidation process by adopting a second concurrent resolution.

The comments to the rule proposal and DEP's responses to those comments provide insight into the legal arguments regarding the rule's validity. Many of the same environmental advocacy groups that have challenged the rule in the Appellate Division proffered legal arguments in their comments which included the following:

A state agency may not exceed required statutory policy in the exercise of its rule-making power. *Gladden v. Bd. of Trustees of Public Employees Ret. Sys.*, 171 N.J. Super. 363 (App. Div. 1979); *In re State Bd. of Dentistry Increase in Fees*, 166 N.J. Super. 219 (App. Div. 1979). An administrative official is a creature of legislation who must act only within the bounds of authority delegated to him. *Matter of Jamesburg High School*, 83 N.J. 540 (1980). Similarly, see *Malone v. Fender*, 158 N.J. Super. 190 (App. Div. 1978), *supplemented* 160 N.J. Super. 221 (App. Div. 1978), *rev'd*. 80 N.J. 129 (1979), which held that an agency's implementation of a statute cannot deviate from the principles, practices and policies of the statute. The Department has exceeded statutory policy, acted outside the bounds of the authority delegated to the agency and deviated from the principles and policies of statutes cited as

authority in the promulgation of the waiver rules. The statutes enacted are controlling and the proposed waiver rules are void and unenforceable.

Comment 12, 44 N.J.R. 987

In its responses to comments, the DEP presented its legal arguments supporting the validity of the adoption focusing on the broad discretion our courts have afforded to regulatory agencies in adopting regulatory schemes:

When examining the Legislature's intent, the courts consider not only the particular statute in question, but the entire legislative scheme of which it is a part. *Perth Amboy Bd. of Educ. v. Christie, Governor*, 413 N.J. Super. 590 (App. Div. 2010). A lack of express statutory authorization for waivers does not preclude agency action where, by reasonable implication, the agency's action can be deemed to promote or advance the findings and policies behind the legislation. *In re Stormwater Mgmt. Rules*, 384 N.J. Super. 451, 461 (App. Div. 2006) The Department's adoption of the waiver rule is an exercise of its discretionary authority to decide when and how to regulate or not to regulate. *SMB Assoc. v. N.J. Dep't of Env'tl. Prot.*, 264 N.J. Super. 38, 60 (App. Div. 1993), *aff'd* 137 N.J. 58 (1994). The waiver rules are simply one exercise of the Department's existing statutory authority to adopt reasonable rules and regulations for implementing the policies of its enabling statutes and its various environmental programs. The waiver rules fall well within the Department's broad rulemaking authority under this comprehensive legislation. As the Supreme Court of New Jersey has observed, "an acknowledged advantage of the administrative process has been its flexibility in enabling administrators to deal

justly with unanticipated as well as anticipated situations in accordance with general legislative guides." *Ward v. Scott*, 11 N.J. 117, 127 (1952). The New Jersey courts have held that waivers of regulatory requirements by an administrative agency ordinarily should be authorized by a regulation which has been adopted pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and which establishes appropriate standards for the exercise of the agency's waiver decision-making. *Cooper Univ. Hosp. v. Fred M. Jacobs*, 191 N.J. 125, 143 (2007); *County of Hudson v. Dept. of Correction*, 152 N.J. 60, 71 (1997).

Response to Comments 11-15, 44 N.J.R. 987-988.

DEP also noted that the Department's waivers of DEP's own rules have been previously discussed by our courts. See *In re CAFRA Permit No. 87-0959-5 Issued to Gateway Assocs.*, 152 N.J. 287 (1997); *In East Cape May Assocs. v. N.J. Dep't of Env'tl. Prot.*, 343 N.J. Super. 110 (App. Div. 2001), certif. den. and appeal dismissed, 170 N.J. 211 (2001) (Department must adopt rules in accordance with the Administrative Procedure Act establishing standards for employing regulatory waivers to avoid takings made under the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-22(b)); Response to Comments 24 and 25, 214 N.J.R. 991-992.

It is reasonable to anticipate that DEP will move cautiously giving priority to relatively narrow waivers, waivers for public projects or resolution of clear conflicts of existing rules. It remains to be seen if the new waiver rules can replace decades of prescriptive regulation. As noted by Thomas Paine in his *Common Sense*:

A long habit of not thinking a thing wrong, gives it a superficial appearance of being right, and raises at first a formidable outcry in defense of custom. But the tumult soon subsides. Time makes more converts than reason. ■