

# New Jersey's Waiver Rule Upheld by Appellate Court

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On March 21, 2013 an Appellate Division panel upheld the New Jersey Department of Environmental Protection's controversial new Waiver Rule. ESA's October 2012 e-newsletter presented an overview of the Waiver Rule and its implications. (Every ESA e-newsletter is archived and available at [www.asksesa.com](http://www.asksesa.com).) NJDEP's Waiver Rule tacitly acknowledges, for the first time ever, that in rare circumstances some environmental regulations may be overly burdensome. Specifically, NJDEP may waive strict compliance with a NJDEP rule when a basis for such a waiver exists. Waivers are granted if one of four discrete circumstances exist:

- Strict compliance is proven to be Unduly Burdensome.
- The waiver of strict compliance yields a Net Environmental Benefit.
- Does strict compliance involve Conflicting Rules--a legal "Catch-22", if you will?
- Does a Public Emergency merit a waiver? Hurricane Sandy, for example.

Let it suffice to say that getting a waiver is not easy. It requires that a large range of criteria be satisfied. NJDEP has published 13 categorical exceptions, any one of which can nullify an applicant's waiver request from the outset. If none of these exceptions apply, the applicant must seek the advice of a qualified environmental attorney and his or her environmental consultant. Obviously, this is an expensive and time-consuming process that must be justified by the anticipated financial and time impacts that would result from full environmental compliance. In my opinion, the number of legitimate applicants for the waiver process is minuscule: rendering its overall impact upon New Jersey's environment virtually unmeasurable.

However, there are always people who believe that environmental regulations are not strict enough. Such people believe fervently that anything less than full environmental compliance presents, at minimum, a disservice to the public. Taking it to the extreme, opponents of the waiver believe that anything less than full compliance will have a measureable and deleterious impact upon the environment. Finally, opponents view the Appellate Court victory as another "slippery slope" upon which further anti-environmental judicial decisions will further erode the progress made by the "green" movement. Indications are that the plaintiffs will ask the State Supreme Court to rule on the Appellate Court's decision.

ESA will provide additional information on this issue as it becomes available.