

NJDEP's Amazing New Waiver Rule

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My mother used to say, “If you live long enough, you’ll see it all”. She was indeed a wise woman because I never thought I would see the day when the New Jersey Department of Environmental Protection (NJDEP) would selectively waive NJDEP regulations for the benefit of the regulated community. This, of course, is not a carte blanche waiver, but nonetheless, the Waiver Rule is a boon for those to whom it applies. This landmark benefit for the regulated community was passed by Governor Chris Christie and went into effect this past August 1.

This essay summarizes and describes the key points of the Waiver Rule. Of course getting a waiver is not as simple as it seems; there are many issues and criteria that need to be examined and evaluated. The actual waiver rule can be found at <http://www.state.nj.us/dep/waiverrule>. Therein you will find standards for waiver prohibitions, the basis for a waiver, and evaluation criteria.

What is the Waiver Rule?

NJDEP may waive strict compliance with a NJDEP rule when a basis for such a waiver exists. Waivers are granted if one of four criteria is met: Unduly Burdensome, Net Environmental Benefit, Conflicting Rules and Public Emergency.

Things Every Applicant Should Know Before Applying:

NJDEP presents a series of items that each applicant should know, understand and follow before beginning the waiver application process.

1. First, refer to the waiver prohibitions in N.J.A.C. 7:1B-2.1(b) for a list of rules that NJDEP cannot waive under any circumstance.
2. The applicant is responsible to provide information that supports that basis for their waiver.
3. The applicant is further responsible to demonstrate that all applicable criteria and requirements of the Waiver Rule are met.
4. The Waiver Rule applies in limited circumstances. That is, the Waiver Rule does not allow routine circumvention of any NJDEP rule. It is therefore incumbent upon the applicant to support the waiver request with as much information as possible.

Criterion No. 1: “Unduly Burdensome”

This criterion contains two separate and distinct provisions under which an applicant can apply. Thus, an applicant can provide information for one or both provisions within their waiver request. The first provision states, *“Actual, exceptional hardship for a particular project, or activity, or property.”* To use this provision, the applicant must state how the circumstances manifest an exceptional hardship and how a waiver will relieve this hardship. The other provision states, *“Excessive cost in relation to an alternative measure of compliance that achieves comparable or greater benefits to public health and safety or the environment.”*

When using either of these provisions, the applicant must fully substantiate the hardship and how a waiver will benefit them. Moreover, and this is critical, the applicant must further substantiate that the public health and safety will not be contravened in any way.

Criterion No. 2: “Net Environmental Benefit”

The definition for Net Environmental Benefit is detailed. *“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.”*

I am privy to a recent waiver application where soil remediation was required...in a floodplain...in a wetland. Remediation clearly would disturb the wetland. Moreover, if the applicant installed an impervious cap and filed for a deed notice then the flood-mitigating ability of the floodplain would be contravened. Thus, a waiver was filed citing the conflicts inherent to the site. As of this newsletter’s publication date, this waiver is still under review.

Criterion No. 3: “Conflicting Rules”

“Means a situation in which two or more Department rules, or a Department rule and the rule of another State agency or a Federal agency, conflict so as to make compliance with both rules impossible or impracticable.”

Applicants must demonstrate how two or more specific rules conflict with one another. There are two scenarios under which the Conflicting Rule provision can be applied. The first is when compliance with two rules is deemed “impossible”. In the second scenario, compliance may be possible, but is so unreasonably difficult to achieve that compliance is deemed “impracticable”. NJDEP cautions that if cost considerations are manifested here, that aspect should be addressed under the prior section, “Unduly Burdensome”.

Criterion No. 4: “Public Emergency”

The definition of the Public Emergency basis directs the applicant to provide information on how the emergency impacts the applicant’s ability to strictly comply with the rule sought to be waived.

“A situation in which a Federal or State official with the authority to do so declares a public emergency.”

This requires that the emergency be declared by either the Governor of New Jersey, the President of the United States, or an administrative agency with the power to declare a state of emergency.

What is the Full Scope of Waiver Applications?

The possibility of a waiver is certainly enticing. But under what circumstances are waivers made? Specific information about waiver rule applicability in each of the following NJDEP programs can be found here: <http://www.state.nj.us/dep/waiverrule/progfaq.html>.

- Compliance and Enforcement
- Environmental Management
- Land Use Regulation
- Site Remediation Program (SRP)
- Water Resource Management

Who Should Be Helping the Applicant?

NJDEP is not going to grant waivers capriciously. Therefore, prior to submitting a waiver application you must be certain that your case is clear and compelling. The waiver application is going to cost money. And if you are committed to making this financial investment then your waiver arguments must be solid and very well stated, accounting for the confusing language endemic to many rules and regulations.

Therefore, it seems reasonable that the application should be a joint effort between your environmental consultant and your environmental attorney. The consultant will provide the scientific basis for your arguments and the attorney will incorporate the scientific argument into a well-constructed legal position statement.

Conclusion

The Waiver Program is brand new. Therefore ESA will provide additional information on this program as it becomes available.