

# Appellate Division Doesn't "Waiver" on NJDEP Rule But Invalidates Guidance

by William C. Sullivan on April 12, 2013

The Appellate Division recently upheld regulations promulgated by the New Jersey Department of Environmental Protection (NJDEP) known as the "waiver rules." The controversial rules allow the agency to waive compliance with environmental regulations under certain circumstances, including if there is a conflict among regulations; if they impose an undue economic burden; if there is a public emergency; or if there is a net environmental benefit if the waiver is issued.

## *The Facts of the Case*

The rules in question were made possible through an Executive Order signed by Gov. Chris Christie. It gave state agencies the authority to "adopt rules for 'waivers' which recognize that rules can be conflicting or unduly burdensome and shall adopt regulations that allow for waivers from the strict compliance with agency regulations and such waivers shall not be inconsistent with the core missions of the agency."

Several environmental groups challenged the resulting NJDEP waiver rules, arguing that the agency exceeded its authority. They further maintained that guidance documents regarding how to obtain a waiver were invalid because the NJDEP did not follow the rulemaking process mandated by the Administrative Procedures Act (APA).

## *The Court's Decision*

The Appellate Division upheld NJDEP's waiver rules. In doing so, it noted that "[a]gency regulations are accorded a presumption of validity and reasonableness," but also acknowledged that "an administrative agency may not give itself authority not legislatively delegated."

Within this framework, the court determined that the NJDEP did have the power to waive certain regulations. It was not swayed by arguments that the New Jersey Legislature did not explicitly grant the agency a "general" power to waive its own regulations. Rather, the panel viewed that authority as "otherwise implicit in the Legislature's delegation of broad rulemaking power to the agency."

"In sum, we conclude that the waiver rules contain adequate regulatory standards that guide DEP in deciding waiver rule applications," the panel stated in its 54-page opinion.

However, the court ruled against NJDEP on another important aspect of the case. The Appellate Division sided with the environmental groups regarding the guidance documents posted to the NJDEP's website. As explained by the court, "[T]hese postings

do more than implement the waiver rule; they establish rules of the game. By elaborating upon and clarifying the very standards by which applicants will be held and the outcomes of their applications determined, these newly posted measures will have a substantial impact on the regulated community as well as the public in general. As such, they form integral, substantive components of the waiver rules, subject to rulemaking in accordance with the APA.”

Accordingly, the NJDEP has removed the guidance documents from its site and will need to readopt them under the APA process, including the opportunity for public comment.

As for the waiver rules, the environmental groups have already indicated that they plan to appeal the decision to the New Jersey Supreme Court. It seems likely that NJDEP will appeal that part of the decision related to its guidance practices. If that aspect of the ruling is upheld, it could have broad ramifications for the many other NJDEP programs that rely extensively on guidance.

For more information about this case or the legal issues involved, we encourage you to contact a member of Scarinci Hollenbeck’s Public Law Group.