

Published Articles

New Jersey Appellate Court Upholds NJDEPs Waiver Rule

Daniel Flynn and David A. Roth

Greenbaum, Rowe, Smith & Davis LLP Client Alert

March 3, 2013

In an important victory for the regulated community, the Superior Court of New Jersey, Appellate Division, affirmed the New Jersey Department of Environmental Protection's (NJDEP) authority to promulgate the 2012 Waiver Rule. The Waiver Rule allows the Department to waive strict compliance with most of its regulations under the following circumstances:

- The rule sought to be waived conflicts with another State or Federal agency rule;
- The rule sought to be waived would be unduly burdensome;
- The project that would be enabled by the waiver would have a net benefit for the environment; or
- Waiver is necessary in order to respond to a public emergency.

A consortium of environmental and labor organizations sought to invalidate the Waiver Rule. They view the rule as a means for circumventing the NJDEP's statutory authority and weakening environmental protections. In upholding the rules, the Appellate Division rejected the consortium's arguments that the Waiver Rule "exceed[ed] the NJDEP's legislated authority" and lacked "adequate standards to guide the agency's discretion and implementation."

Importantly, the Appellate Division invalidated formal guidance documents adopted by NJDEP to help implement the Waiver Rule. The Court found that the guidance documents went "beyond merely facilitating administrative implementation" of the Waiver Rule and "actually, to some extent, announced new substantive requirements" that could not be imposed without following the notice and comment procedures imposed by the NJ Administrative Procedure Act. The Court reasoned that the Waiver Rule contains sufficient detail to allow its implementation by NJDEP without the guidance documents.

The rationale offered by the Appellate Division for its invalidation of the guidance documents could prove beneficial to the regulated community in other NJ regulatory programs. It is not unusual for NJDEP and other agencies to issue forms and guidance documents that impose substantive requirements on the regulated community that are not found in the text of the statutes or regulations. The Appellate Division's decision reminds government agencies of their obligation to follow proper administrative procedures for promulgation of substantive requirements and provides some basis for relief when they do not.

If you have any questions regarding this decision, the applicability of the Waiver Rule to your project or other environmental matters, please contact the authors of this Alert, **Daniel Flynn** and **David A. Roth**, or

Published Articles (Cont.)

any member of our **Environmental Department**.