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## **New Jersey Department of Environmental Protection's Waiver Rule Takes Effect**

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The Waiver Rule, adopted by the New Jersey Department of Environmental Protection (DEP), took effect on August 1, 2012. Applications for waivers are now being accepted by DEP.

In March of 2012, NJDEP adopted the Waiver Rule in direct response to Governor Chris Christie's Executive Order No. 2 encouraging State agencies to implement "Common Sense Principles" to energize and encourage a competitive economy in order to benefit businesses and ordinary citizens. The Waiver Rule allows DEP to grant exemptions from strict compliance with its environmental regulations when the applicant can demonstrate that one or more of the following are present:

1. The waiver is necessary to respond to a declared public emergency;
2. Conflicting rules (between Federal and State agencies or between State agencies) adversely impact a project or prevent the project from proceeding;
3. Net environmental benefit would be achieved; or
4. Undue hardship is being imposed by the rule requirement(s).

DEP has made it clear that there is *no automatic right to a waiver*. The criteria contained in the Waiver Rule for evaluating each waiver request are very general and provide little guidance for applicants. Waivers will be acted on only following a case-by-case review and will require review by the DEP Commissioner.

Initially, DEP is expected to grant waivers for land use and site remediation applications where projects have been halted due to inconsistent rules that make it impossible to move forward. It is also expected that most waiver requests will be based upon a particular regulatory requirement being "unduly burdensome." The Waiver Rule defines "unduly burdensome" as a situation where strict regulatory compliance "would result in either: (1) actual, exceptional hardship for a particular project or activity, or property; or (2) excessive cost in relation to an alternative measure of compliance that achieve comparable or greater benefits to public health and safety or the environment." DEP has stated that the mere fact that compliance with a regulation will be costly will not justify the grant of a waiver – the cost must be genuinely excessive when compared to an alternative approach that achieves a comparable environmental result. The determination of excessive cost is within DEP's discretion. Finally, applicants will likely have an opportunity to propose innovative solutions in their waiver applications to demonstrate "net environmental benefits." This provision relies on subjective measurements and considers a number of factors in determining a net environmental benefit.

There is no timeframe within which DEP must act on waiver requests; requests will *not* be processed on a first-come, first-serve basis. DEP has committed to transparency in the

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process and will post all Waiver Rule applications and decisions on DEP's website. Additionally, DEP will review all waivers for consistency during the first six months that the regulations are in effect, and prioritize review of Waiver Rule requests after gauging the number and type of requests received.

A legal challenge seeking to invalidate the Waiver Rule filed by environmental and labor groups is pending in the N.J. Appellate Division.

If you have questions about the Waiver Rule, or if you would like assistance with a Waiver Rule application, please contact [William F. Harrison, Esq.](#) in the [Commercial Real Estate, Redevelopment and Environmental Law Practice Group](#).

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