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NJDEP Proposes Common Sense Waiver Rule

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On March 7, 2011, the New Jersey Department of Environmental Protection (“NJDEP”) proposed a rule that would enable them to relax standards set-forth in existing rules under appropriate circumstances. The goal of the proposed rule is to remove unreasonable impediments to economic growth while ensuring net environmental benefit for the State. The proposed rule establishes the conditions and procedures for the NJDEP “to approve waivers from strict compliance with its rules where rules conflict, or rules are unduly burdensome in specific application, or net environmental benefit would be realized, or public emergency exists.” The idea is to prevent or minimize the circumstances where strict compliance with a rule would lead to an unreasonable, unfair, or unintended result which in turn could adversely effect the applicant, the public, and/or the environment.

This proposed rule is consistent with Governor Chris Christie’s Executive Order No. 2, which sought to establish “Common Sense Principals” of governance. As we have consistently been hearing from the NJDEP and

the Governor's office recently, it appears that the State is willing to listen to the regulated community as to the rules effecting employers, job creators, local government and families throughout the State. NJDEP Commissioner, Bob Martin has stated, "[w]e have an opportunity to change how government operates in a positive way. We can cut through unnecessary red tape and provide real solutions to real world problems, while maintaining our high protective standards."

The NJDEP would consider a waiver application only if one or more of the following conditions exists:

- Conflicting rules – the requirements sought to be waived conflicts with another NJDEP or other State or Federal agency rule;
- Unduly burdensome – Strict application of a rule creates an exception and undue hardship (similar to criteria for local zoning variances), or where another method of compliance would have the same or better results but at a significantly lower cost;
- Net environmental benefit – The environment would be enhanced by a project enabled by the waiver; mitigation would be allowed to be considered; and
- Public emergency – NJDEP would waive a rule to respond to an emergency.

The Commissioner makes clear that this proposal would not allow waivers to be routinely or commonly granted, but will be issued on a site by site

and case by case basis. NJDEP officials have said that it needs some flexibility to decide what makes more sense in making government work.

Critics of the proposed rule say that this is just merely a way to turn over decision making power to the NJDEP to circumvent existing environmental rules. Their concern is that the rules should apply across the board and the subjectivity of this proposed rule could counteract the application of the existing rules and regulations. Regardless of which side of the fence you fall, this proposed rule could have significant impacts on future development, re-development, as well as how property is investigated and cleaned up in New Jersey.

A public hearing on the proposed waiver rule is scheduled for April 14, 2011 at 3:00 p.m. at the NJDEP's Headquarters in Trenton. Written comments may be submitted to NJDEP through May 6, 2011. The proposed rule is available on line at <http://www.nj.gov/dep/rules/notices.html>.

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