New Jersey’s Appellate Division Upholds NJDEP’s Waiver Rule, Providing Greater Flexibility To NJDEP And The Regulated Community

On March 21, 2013, the Appellate Division of the New Jersey Superior Court in In Re N.J.A.C. 7:1B-1.1, et seq. provided the New Jersey Department of Environmental Protection (“NJDEP”) and the regulated community with a major victory in upholding NJDEP’s adoption of the so-called “Waiver Rule.” The regulations had been promulgated and adopted by NJDEP in response to Governor Christie’s Executive Order No. 2, which mandated that all State agencies adopt rules for waiver that would “ensure that regulations shall be efficient, consistent…accessible and transparent to all interested parties.” The general waiver rules, contained at N.J.A.C. 7:1B-1 to -2.4, provided a uniform waiver rule applicable to most NJDEP regulations. In upholding NJDEP’s Waiver Rule, the Appellate Division stopped short of providing the State with a total victory, invalidating NJDEP’s waiver “guidance” documents for violating the APA. Nevertheless, the Court’s determination that the Waiver Rule “constituted a valid exercise of DEP’s implied authority incidental to the extensive and expressly broad powers vested in the agency by the Legislature” represents a tremendous step forward in efforts within NJDEP and the regulated community to bring flexibility and “common sense” to our state’s regulatory requirements.

The stated purpose of NJDEP’s Waiver Rule is “to set forth the limited circumstances in which the Department may, in its discretion, waive the strict compliance with any of its rules in a manner consistent with the core missions of the Department to maintain, protect, and enhance New Jersey’s natural resources and to protect the public health, safety, and welfare, and the environment.” N.J.A.C. 7:1B-1.1. The Rule establishes several steps that a waiver applicant must meet for approval:

- First, a successful applicant must demonstrate that their request for waiver complies with one of the four threshold requirements—conflicting rules, undue burden of strict compliance, net environmental benefit, or public emergency.
- Second, the successful applicant must show that its waiver request does not fall within one of the thirteen prohibited categories—for example a rule that implements the requirements of a State or Federal statute, a rule concerning the air emissions trading program or a rule concerning the designation of a rare, threatened, or endangered species or habitat.
- Finally, a successful applicant must satisfy specific evaluation criteria, including that the public has had
sufficient notice of the waiver request, the request is consistent with NJDEP’s core mission, and there is a net environmental benefit achieved from granting of the waiver.

Appellants, a collection of environmental non-profits, citizen groups, and labor groups, argued that the Waiver Rule exceeded NJDEP’s legislative authority because there is no comprehensive legislative scheme that allows for such a broad, “blanket” relaxation of regulation. Appellants also argued the Rule was facially invalid because it lacked appropriate standards to guide NJDEP’s discretion and implementation. Finally, Appellants challenged the guidance documents posted on NJDEP’s website as de facto rulemaking.

Acknowledging that an agency’s power to adopt a uniform waiver rule was a question of first impression, the Appellate Division noted the inherent authority of State agencies to waive their own regulatory requirements through regulations adopted pursuant to the APA. The Court concluded that inherent in the power of an agency to promulgate regulations is the power to suspend or waive these same regulations in well-defined circumstances. Next, the Appellate Court rejected Appellants’ argument that the Waiver Rule “lack[ed] adequate standards” to guide NJDEP; instead finding that the Rule provided adequate guidance to NJDEP in deciding waiver applications. Finally, the Court invalidated the waiver guidance documents found on the NJDEP website, finding these documents announced new substantive requirements, necessitating compliance with the APA, because they did “more than implement the waiver rule, they establish[ed] rules of the game.”

For both NJDEP and the regulated community, this decision is welcome news. Simply put, the Waiver Rule provides NJDEP with the needed flexibility to move beyond the one size fits all approach to many of these regulations. Just by way of example, determinations relating to the manner in which properties and impacted natural resources are investigated and remediated, including blighted areas and Brownfields developments, can now, potentially, be based on facts on the ground, not on paper. Contrary to the arguments by Appellants, these changes will not infringe on the mission of NJDEP, it will make it better.

One cautionary note: the final chapter on the Waiver Rule’s viability has yet to be written. That ending will need to await the determination by the New Jersey Supreme Court, as Appellants have made clear in the days since the Appellate Division’s decision that they will be appealing to the State’s highest Court.

The implications of the Appellate Division’s ruling are wide-reaching in scope and tremendously important to members of the regulated community who may previously have struggled in their efforts to achieve a more flexible, common sense approach to New Jersey’s environmental regulations. If you would like further information about the In Re N.J.A.C. 7:1B-1.1, et seq. decision and how it may affect your company, please contact Kevin J. Bruno or Sandra J. Doyle of Blank Rome LLP’s Environmental Litigation Practice Group.