

N.J.A.C. 7:1B

WAIVER OF DEPARTMENT RULES

Statutory authority: N.J.S.A. 12:5-1 through 12:5-11, 13:1B-2 through 13:1B-71, 13:1B-15.4 through 13:1B-15.12, 13:1B-15.12a-1 through 13:1B-12a-10, 13:1B-15.100 through 13:1B-15.107, 13:1B-15.108 through 13:1B-15.121, 13:1B-15.128 through 13:1B-15.132, 13:1B-15.151 through 13:1B-15.161, 13:1B-30 through 13:1B-41, 13:1D-1 through 13:1D-19, 13:1D-29 through 13:1D-34, 13:1D-35 through 13:1D-67, 13:1D-120 through 13:1D-124, 13:1D-125 through 13:1D-133, 13:1D-134 through 13:1D-137, 13:1E-1 through 13:1E-225, 13:1E-100 through 13:1E-116, 13:1F-1 through 13:1F-33, 13:1G-1 through 13:1G-23, 13:1H-1 through 13:1H-7, 13:1H-8 through 13:1H-11, 13:1K-1 through 13:1K-5, 13:1K-6 through 13:1K-18, 13:1K-19 through 13:1K-42, 13:1L-1 through 13:1L-36, 13:8-30 through 13:8-44.2, 13:8A-1 through 13:8A-18, 13:8A-19 through 13:8A-34, 13:8A-35 through 13:8A-55, 13:8C-1 through 13:8C-42, 13:9A-1 through 13:9A-10, 13:9B-1 through 13:9B-30, 13:13A-1 through 13:13A-15, 13:19-1 through 13:19-45, 13:20-1 through 13:20-35, 23:1-1 through 23:12-2, 23:2A-1 through 23:2A-15, 23:2B-1 through 23:2B-22, 26:2C-1 through 26:2C-25.2, 26:2C-37 through 26:2C-57, 26:2D-1 through 26:2D-88, 26:3A2-21 through 26:3A2-38, 34:5A-1 through 34:5A-44, 39:3-33.10 through 39:3-33.11, 39:8-59 through 39:8-78, 40:55D-1 through 163, 40A:11-1 through 40A:11-51, 45:1-8 through 45:1-9, 45:5AA-1 through 45:5AA-11, 45:15C-1 through 45:15C-32, 47:1A-1 through 47:1A-13, 48:3-1 through 48:3-107, 48:13A-1 through 48:13A-7, 48:13A-7.1 through 48:13A-7.23, 50:1-5 through 50:1-36, 50:1-23 through 50:1-33, 50:2-7 through 50:2-12, 50:3-1 through 50:3-5, 52:14B-1 through 52:14B-15, 52:27D-222 through 52:27D-228, 54:4-3.63 through 54:4-3.71, 54:4-23.1 through 54:4-34, 54:10A-5.31 through 54:10A-5.32, 54:32B-8.36, 58:1A-1 through 58:1A-17, 58:1B-1 through 58:1B-25, 58:2-1 through 58:2-5, 58:4-1 through 58:4-14, 58:4A-4.1 through 58:4A-29, 58:10-23.11a through 58:10-23.11z, 58:10-23.15 through 58:10-23.19, 58:10-23.20 through 58:10-23.24, 58:10-46 through 58:10-50, 58:10A-1 through 58:10A-14.6, 58:10-15 through 58:10A-20, 58:10A-21 through 58:10A-35, 58:10B-1 through 58:10B-31, 58:10C-1 through 58:10C-29, 58:11-9.1 through 58:11-11, 58:11-23 through 58:11-48, 58:11-49 through 58:11-58, 58:11-59 through 58:11-63.4, 58:11-64 through 58:11-73, 58:11A-1 through 58:11A-16, 58:12A-1 through 58:12A-21, 58:12A-22 through 58:12A-25, 58:12A-26 through 58:12A-37, 58:16A-50 through 58:16A-102, 58:24-1 through 58:24-14, 58:25-23 through 58:25-33, and 58:29-1 through 59:29-8.

New rules effective: April 2, 2012

Operative date: August 1, 2012

For regulatory history and effective dates, see the New Jersey Administrative Code

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SUBCHAPTER 1. GENERAL PROVISIONS

7:1B-1.1 Purpose and applicability

(a) The purpose of this chapter 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.

(b) It is not the purpose of this chapter to allow for the routine circumvention of any Department rule.

(c) This chapter does not preclude the availability of any rule concerning an exception, variance, waiver, or emergency authorization pursuant to any other chapter in Title 7 of the New Jersey Administrative Code.

(d) This chapter does not create in any person a right to a waiver.

(e) This chapter does not authorize any other entity to approve a waiver.

7:1B-1.2 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

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"Conflicting rules" means a situation in which two or more Department rules, or a Department rule and the rule of another State agency or a Federal agency, conflict so as to make compliance with both rules impossible or impracticable.

"Department" means the New Jersey Department of Environmental Protection.

"Net environmental benefit" means a situation in which the quantitative or qualitative benefit to a natural resource or other related environmental good for which the Department has responsibility would substantially outweigh any detriment to that natural resource or environmental good, which would result from a waiver. There must be an adequate geographic and resource nexus between the environmental offset and the natural resource or other environmental good that is protected by the rule being waived. The net environmental benefit may include mitigation, but it must be beyond what the waived rule would have required independent of the waiver.

"Public emergency" means a situation in which a Federal or State official with the authority to do so declares a public emergency.

"Unduly burdensome" means a situation in which the strict compliance with a specific

Department rule 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 achieves comparable or greater benefits to public health and safety or the environment.

"Waiver" means a decision by the Department pursuant to this chapter that relaxes strict compliance with a specific Department rule, in whole or part, as applied to a specific person,

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project or activity, or property, on the basis of the particular circumstances of that person, project or activity, or property.

7:1B-1.3 Severability

A finding by a court of competent jurisdiction that any section, subsection, provision, clause, or portion of this chapter is invalid or unconstitutional shall not affect the remainder of the chapter.

SUBCHAPTER 2. WAIVER

7:1B-2.1 Basis for a waiver

(a) Except as provided in (b) below, the Department may, in accordance with this chapter, prospectively waive the strict compliance with any of its rules only when it determines that at least one of the following exists and all other requirements of this chapter are met:

1. Conflicting rules;
2. The strict compliance with the rule would be unduly burdensome;
3. A net environmental benefit; or
4. A public emergency.

(b) The Department shall not under this chapter waive:

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1. A requirement of, or duty imposed by, a Federal or State statute or Federal regulation, unless that statute or regulation provides for such a waiver;
2. A rule providing for a Federally delegated, authorized, or assumed program where the waiver would not be consistent with New Jersey's delegation, authorization, or assumption of authority pursuant to a Federal program;
3. A rule that implements a Federally enforceable program pursuant to a State Implementation Plan (SIP), as defined at N.J.A.C. 7:27-18.1;
4. A rule that is part of a collaborative program where the waiver would not be consistent with New Jersey's participation in the multi-state or multi-jurisdiction program;
5. A rule concerning the air emissions trading program;
6. A rule providing for a numeric or narrative standard protective of human health;
7. A rule concerning the designation of rare, threatened, or endangered status of any species of flora or fauna, or habitat for such species;
8. A rule providing for a remediation funding source, claim or other reimbursement, grant, loan, or other financial assistance;
9. A rule providing for a license, certification, or registration for a vehicle, boat, individual, or business;
10. A rule providing for a license or approval for hunting, fishing, or trapping;
11. A rule providing for public participation or notice;

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12. A rule providing for a fee, oversight cost, or other Department cost; or

13. Any provision of this chapter.

7:1B-2.2 Waiver evaluation criteria

(a) The Department shall consider the extent to which the following criteria support a waiver of the strict compliance with a rule in accordance with this chapter:

1. The public has had sufficient notice of the waiver in accordance with applicable rules;
2. The Department has been provided with information and data sufficient to support a waiver;
3. There are circumstances that support the need for a waiver;
4. The person seeking the waiver may have directly caused or contributed to the circumstances that resulted in the rule being unduly burdensome;
5. There is a net environmental benefit, including the consideration, when appropriate, of the impact of the waiver on the remediation and redevelopment of a contaminated site, or on the expansion of an existing development;
6. The waiver would be consistent with the Department's core missions to maintain, protect, and enhance New Jersey's natural resources and to protect public health, safety, and welfare, and the environment; and
7. The waiver would result in a reasonable and effective response to a public emergency.

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7:1B-2.3 Notice of the waiver

(a) Any person requesting a waiver shall include notice of the waiver request in any public notice the person must provide in accordance with the public notice requirements of the rules from which waiver is requested.

(b) The Department shall publish notice of:

1. Its determination to consider a waiver; and
2. Its decision on each waiver.

(c) The Department shall publish the notice required under (b) above as follows:

1. In the DEP Bulletin, where the waiver relates to rules for which the Department publishes notice of permit decisions in the DEP Bulletin. The DEP Bulletin is posted on the Department's website at <http://www.state.nj.us/dep/bulletin/>; or
2. On the Department's website, <http://www.state.nj.us/dep/>, where the waiver relates to rules for which the Department does not publish notice of permit decisions in the DEP Bulletin.

7:1B-2.4 Rule waiver and limitations

(a) If the Department decides to approve or deny a waiver of strict compliance of any of its rules, it shall document its decision in writing to the person to whom the waiver applies, including:

1. The name and address of the person to whom the waiver applies;

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2. The specific location to which the waiver applies;
3. The specific rule provision(s) to which the waiver applies;
4. The basis for its decision on the waiver;
5. The duration, scope, and extent of the waiver;
6. Any conditions on the waiver necessary to maintain, protect, and enhance New Jersey's natural resources and to protect the public health, safety, and welfare, and the environment, including, but not limited to:
 - i. Monitoring of the environmental impacts of the project or activity approved as part of the waiver;
 - ii. Reporting of any environmental impacts of the project or activity approved as part of the waiver; and
 - iii. Implementation of environmental offsets, if applicable, to ensure that the waiver would result in a net environmental benefit;
7. An explanation, if applicable, that the procedural rules applicable to a permit authorization being issued concerning duration, modification, renewal, revocability, and transfer apply to the waiver;
8. Notice that the Department may revoke the waiver for noncompliance with any condition in the waiver, or for the submission of false or inaccurate information; and

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9. Notice that the person to whom the waiver applies shall be subject to enforcement for noncompliance with any condition in the waiver.

(b) The Department's waiver of the strict compliance with one of its rules shall:

1. Be considered a waiver only of the application of the particular rule provision that the

Department identifies in its waiver decision issued under (a) above;

2. Not constitute a waiver of the rule generally or any other provision of any other rule not specified in the waiver;

3. Not constitute an approval of any other project or activity, whether at the location that is the subject of the waiver or another location;

4. Be valid only as to the person identified in the waiver or the particular project or activity, or location that is the subject of the waiver, except as the applicable program specific rules provide;

5. Not be automatically renewable, except as the waiver or applicable program-specific rules provide;

6. Not constitute a defense to a judicial or administrative enforcement action for a violation that predates the waiver; and

7. Not justify or otherwise excuse prior violations, but may be used to resolve contested cases or other disputes.