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ENVIRONMENTAL PROTECTION
COMMISSIONER'S OFFICE
OFFICE OF LEGAL AFFAIRS

Waiver of Department Rules

Proposed New Rules: N.J.A.C. 7:1B

Authorized by: Bob Martin, Commissioner, Department of Environmental Protection

Authority: N.J.S.A. 12:5-3, 13:1B-1 et seq., 13:1B-15.4 et seq., 13:1B-15.12a et seq., 13:1B-15.100 et seq., 13:1B-15.108 et seq., 13:1B-15.128 et seq., 13:1B-15.151 et seq., 13:1B-30 et seq., 13:1D-1 et seq., 13:1D-29 et seq., 13:1D-35 et seq., 13:1D-124, 13:1D-125 et seq., 13:1D-134 et seq., 13:1E-1 et seq., 13:1E-100 et seq., 13:1F-1 et seq., 13:1G-1 et seq., 13:1H-1 et seq., 13:1H-8 et seq., 13:1K-1 et seq., 13:1K-6 et seq., 13:1K-19 et seq., 13:1L-1 et seq., 13:8-30 et seq., 13:8A-1 et seq., 13:8A-19 et seq., 13:8A-35 et seq., 13:8C-1 et seq., 13:9A-1 et seq., 13:9B-1 et seq., 13:13A-1 et seq., 13:19-1 et seq., 13:20-1 et seq., 23:1-1 et seq., 23:2A-1 et seq., 23:2B-14, 26:2C-1 et seq., 26:2C-8 et seq., 26:2C-8.1 through 26:2C-8.5, 26:2C-8.11, 26:2C-9.2, 26:2C-9.5, 26:2C-37 et seq., 26:2C-45 et seq., 26:2D-1 et seq., 26:2D-21, 26:2D-70 et seq., 26:3A2-21 et seq., 34:5A-1 et seq., 39:3-33.1, 39:8-61, 40:55D-1 et seq., 40:55D-93 et seq., 40A:11-1 et seq., 45:1-9, 45:5AA-1 et seq., 45:15C-1 et seq., 47:1A-1 et seq., 48:3-1 et seq., 48:13A-1 et seq., 48:13A-7.1 et seq., 50:1-1 et seq., 50:1-5, 50:1-5 et seq., 50:1-23, 50:1-27, 50:2-7 through 50:2-12, 50:3-1 et seq., 52:14B-3, 52:14B-4, 52:14B-4(b), 52:27D-222 through 52:27D-228, 54:4-3.63 et seq., 54:4-23.1 et seq., 54:10A-5.31, 54:10A-5.32, 54:32B-8.36, 58:1A-1 et seq., 58:1B-1 et seq., 58:1B-7, 58:2-1 et seq., 58:4-1 et seq., 58:4A-4 et seq., 58:4A-4.1 et seq., 58:10-23.11, 58:10-23.11 et seq., 58:10-23.11a et seq., 58:10-23.16, 58:10-23.20 through 58:10-23.24, 58:10-46 through 58:10-50, 58:10A-1 et seq., 58:10-16, 58:10A-21 et seq., 58:10B-1 et seq., 58:10B-1 through 58:10B-4, 58:10B-8, 58:10B-11 through 58:10B-13, 58:10B-17.1, 58:10B-20, 58:10B-26, 58:10B-28, 58:10B-29, 58:10B-31, 58:10C-1 et seq., 58:11-9.1 et seq., 58:11-23 et seq., 58:11-49 through 58:11-58, 58:11-49 et

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seq., 58:11-59 et seq., 58:11-64 et seq., 58:11A-1 et seq., 58:12A-1 et seq., 58:12A-22 through 58:12A-25, 58:12A-26 et seq., 58:16A-50 et seq., 58:23.11b, 58:23.11e2, 58:23.11f, 58:23.11g, 58:23.16, 58:24-1 et seq., 58:25-23 et seq. and 58:29-1 et seq.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

DEP Docket Number: 03-11-02

Proposal Number: PRN 2011-

A public hearing concerning this proposal will be held on Thursday, April 14, 2011 at 3:00 P.M. at:

New Jersey Department of Environmental Protection
Public Hearing Room
401 East State Street
Trenton, NJ 08060

Submit written comments by May 6, 2011, to:

Gary J. Brower, Esq.
Office of Legal Affairs
Attn: DEP Docket Number: 03-11-02
NJ Department of Environmental Protection
401 East State Street, Floor 4
P.O. Box 402
Trenton, NJ 08625-0402

The Department of Environmental Protection (Department) requests that commenters submit comments on CD or DVD as well as on paper in order to facilitate incorporation of submitted comments into its comment-response document. For this purpose, the comments on CD or DVD should not be access-restricted (locked or read-

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only). The Department prefers Microsoft Word 6.0 or above. MacIntosh formats should not be used. Submission of a CD or DVD is not a requirement. Each comment should be identified by the applicable N.J.A.C. citation, with the commenter's name and affiliation following the comment.

The rule proposal can be found at the Department's website (www.nj.gov/dep).

The agency proposal follows:

Summary

As the Department has provided a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

The Department proposes new N.J.A.C. 7:1B, Waiver of Department Rules, to establish the conditions and procedures for the Department to approve waivers from strict compliance with its rules where appropriate to address situations where rules conflict, or a rule is unduly burdensome in specific application, or a net environmental benefit would be realized, or a public emergency exists.

The Department promulgates rules to meet its statutory obligations and to satisfy its core missions of protecting the air, waters, land, and natural and historic resources of the State to ensure continued public benefit. These core missions are to be advanced through effective and balanced implementation and enforcement of environmental rules to protect these resources and the health and safety of New Jersey's residents and visitors. However, it is apparent that, in certain limited circumstances, strict compliance with a rule or provision of a rule can lead to an unreasonable, unfair, or unintended result, which can adversely affect a prospective applicant, the public, and/or the environment. In order to prevent, or at least minimize, such adverse results, Governor Christie articulated a set of "Common Sense Principles" in Executive Order No. 2 (2010). Through this executive order, the Governor directed all State agencies to adopt rules that allow for waivers of

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rules that either conflict or are unduly burdensome. According to Executive Order No. 2, an agency can only waive the strict compliance with a regulation if the waiver would not be inconsistent with the core missions of the agency.

This Common Sense Principle concerning waivers harmonizes well with two other Common Sense Principles that the Governor further articulated in Executive Order No. 2. First, the Governor directed all agencies to take action to cultivate an approach to regulations that values performance-based outcomes and compliance. For example, under the proposed rules for waivers that would yield a net environmental benefit, there might be opportunity to satisfy requirements using new technology or new or nontraditional methods and/or materials or other innovative options. Second, the Governor directed all agencies to draft all proposed rules and processes so that they promote transparency and predictability regarding regulatory activity, consistency of business regulation within the State, appropriate flexibility, and a reasonable balance between the underlying regulatory objectives and the burdens imposed by the regulatory activity. With these rules for waivers the Department is promoting both the transparency and predictability that the Governor mandated, as well as the flexibility needed to obtain the appropriate balance between the underlying regulatory objectives and the burdens imposed by the regulatory activity.

SUBCHAPTER 1. GENERAL PROVISIONS

Subchapter 1 sets forth the purpose and applicability of the rules; definitions; and severability.

N.J.A.C. 7:1B-1.1 Purpose and applicability

The purpose of the chapter is to establish the limited circumstances in which the Department will waive strict compliance with any of its rules. When promulgating its rules, the Department cannot anticipate every circumstance or personal hardship that may arise in relation to the implementation of those rules. The Department recognizes that situations arise when strict compliance with a provision of a rule can inadvertently be

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unduly burdensome, prevent full compliance with another rule, or perhaps stand in the way of accomplishing an environmentally beneficial result that safeguards the public health, safety, and welfare. In specific and infrequent cases, waiving compliance with a given rule could help more effectively accomplish the Department's core missions than requiring adherence with every aspect of a particular standard or requirement.

The Department does not intend to use this chapter to waive strict compliance with a given rule repeatedly or for multiple persons such that use of a waiver would become a way to routinely avoid compliance with that rule. Nor will these proposed rules limit the use or availability of any other Department rule that provides an exception, variance, or waiver from strict compliance, or the availability of emergency authorizations. The rules will provide an additional means of relief from strict compliance with Department rules when appropriate. Importantly, these proposed rules will not entitle any person or entity to a waiver nor will they oblige the Department to waive a rule in any situation or for any applicant. The proposed rules establish criteria to enable the Department to approve waivers in certain circumstances consistent with carrying out its core missions to maintain and protect the environment and protect the public health, safety, and welfare. The proposed rules will not vest entities to which the Department has delegated any authority to make permit decisions or take other actions on its behalf with the authority to waive any Department rule. Waivers under this chapter shall be determined and approved only by the Department.

N.J.A.C. 7:1B-1.2 Definitions

Proposed N.J.A.C. 7:1B-1.2 sets forth definitions for several terms used in the chapter. The terms for which definitions are proposed include "waiver," and the terms used at N.J.A.C. 7:1B-2.1(a) that describe the situations in which the Department will consider waiving a rule, specifically, "conflicting rules," "unduly burdensome," "net environmental benefit," and "public emergency." See discussion of proposed N.J.A.C. 7:1B-2.1 below.

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N.J.A.C. 7:1B-1.3 Severability

Proposed N.J.A.C. 7:1B-1.3 provides that if a court determines that a portion of this chapter is invalid or unconstitutional, the remainder of the chapter shall not be affected.

SUBCHAPTER 2. WAIVER

Subchapter 2 establishes the situations in which a waiver will be considered and identifies the Department rules that cannot be considered for a waiver under this chapter; the criteria the Department will evaluate in determining whether to approve a waiver; public notice requirements for waivers; the requirements for documenting the waiver decision; conditions that may be attached to a waiver when issued; and limitations on the scope and applicability of any given waiver when issued.

N.J.A.C. 7:1B-2.1 Basis for a waiver

Waivers under this chapter will be prospective only. They will address proposed, future activities rather than regulated activities that have already taken place, with or without prior Department authorization.

In order for the Department to waive its rules, it must determine that at least one of four situations exists. A waiver will be considered if 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. For example, one Department rule may require a regulated person or entity to take a certain action, while another Department rule (under the same or another chapter) may prevent that person or entity from undertaking the required action. In cases where the Department's

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requirements are in opposition, these rules will enable the Department to evaluate which requirement might be waived in order to best preserve public health, safety, and welfare, and the environment.

The Department will consider a waiver when a prospective applicant asserts that strict compliance with a rule would be unduly burdensome because it imposes actual, exceptional hardship or excessive cost in relation to an alternative measure of compliance that achieves comparable or greater benefits.

A waiver of strict compliance might be appropriate where the waiver could result in a net environmental benefit. The quantitative or qualitative benefit to a natural resource or related environmental good from waiving a rule has to substantially outweigh any detriment to the resource or environmental good resulting from the waiver. In addition, there will have to be an adequate geographic or resource nexus between the environmental offset, i.e., the quantitative or qualitative environmental improvement resulting from the waiver, and the resource or good protected by the rule being waived. If the net environmental benefit includes mitigation, the mitigation must exceed what would have been required under the waived rule.

Finally, a waiver might be appropriate when a public emergency has been declared by a Federal or State official, if doing so best ensures protection of the public health, safety, and welfare, and the environment.

Not every Department rule can be considered for a waiver under these proposed rules. Proposed N.J.A.C. 7:1B-2.1(b) lists the Department rules that cannot be waived. The Department's rules implement a wide variety of statutory mandates, and in certain cases the Department's programs include delegations of Federal authority. The list of rules that cannot be waived under this chapter includes rules where the approval of a waiver would violate either a condition of a Federal delegation, would violate a specific statutory duty assigned to the Department under State statute or would be inconsistent with the Department's core mission of protecting human health and safety. The list also includes approvals for which the Department has determined either the existing program rules already provide an adequate waiver process or the regulatory requirement is not

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sufficiently burdensome to justify Department consideration of waiver requests (for example, boat, hunting, fishing and trapping licenses).

N.J.A.C. 7:1B-2.2 Waiver evaluation criteria

In determining whether a waiver should be approved, the Department will consider the extent to which the criteria at proposed N.J.A.C. 7:1B-2.2(a) are met. The criteria address whether (1) the public has been provided notice that a waiver is being considered, (2) the Department has been provided sufficient information to support a waiver, (3) circumstances support the need for a waiver, (4) the person seeking a waiver has caused or contributed to the circumstances that the person asserts have resulted in a rule being unduly burdensome, (5) there is a net environmental benefit from the waiver, including, as appropriate, the impact of the waiver on the remediation or redevelopment of a contaminated site or on the expansion of an existing development, (6) the consistency of the activity to be authorized under the waiver with the purposes and objectives of applicable statutory requirements, (7) consistency of the waiver with the Department's core missions to maintain, protect, and enhance the State's natural resources and protect public health, safety, and welfare, and the environment, and (8) the waiver would result in a reasonable and effective response to a public emergency.

N.J.A.C. 7:1B-2.3 Notice of the waiver

Provision of public notice of permit applications and other Department actions is mandatory under most of the Department's enabling statutes. Public notice is also key to promoting transparency and predictability of agency rules and processes in conformance with Executive Order No. 2. A number of the Department's regulatory programs require the person or entity seeking approval of a particular project, action, or other regulated activity to provide public notice. Accordingly, proposed N.J.A.C. 7:1B-2.3(a) requires a person requesting a waiver to include notice of the waiver request in any public notice the

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person is otherwise required to provide. In addition to the public notice the waiver applicant would provide, the Department under proposed N.J.A.C. 7:1B-2.3(b)1 will publish in the DEP Bulletin notice of its determination to consider a waiver. Thereafter, the Department will publish in the DEP Bulletin notice of its decision on the waiver.

N.J.A.C. 7:1B-2.4 Rule waiver and limitations

The Department will document each of its waiver decisions in writing to the person to whom the waiver will apply. As set forth at proposed N.J.A.C. 7:1B-2.4(a), the waiver decision will specify the location to which the waiver applies, the rule provisions to which it applies, and the basis for the approval (or denial, should the waiver not meet the standards of this proposed chapter). The written decision will specify the duration, scope, and extent of the waiver, and may contain conditions necessary to protect natural resources and/or the public health, safety and welfare, and the environment. Conditions may include, for example, monitoring and reporting of impacts of activities approved under the waiver, and conditions necessary to ensure that environmental offsets are implemented in order to realize a net environmental benefit. In addition, the written waiver decision will explain any applicable procedural rules governing duration, renewal, revocability, and transfer that apply to the waiver because they apply to a corresponding permit or authorization. The waiver decision will give notice that the waiver may be revoked for noncompliance with any condition or for submittal of false or inaccurate information. The written waiver decision will also give notice that the person to whom it applies will be subject to enforcement for noncompliance with the waiver and its conditions.

Any waiver decision that the Department issues under these proposed rules will be subject to the limitations set out at proposed N.J.A.C. 7:1B-2.4(b). The limitations will ensure that the issued waiver is consistent with the purpose of these proposed rules to allow discrete, circumscribed waivers of specific Department rules where such a waiver is determined necessary in order to address a rules conflict, to avoid a rule being unduly

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burdensome, to enable an environmental benefit, or because there is a public emergency.

Accordingly, a waiver under these proposed rules will be a waiver only of the application of the particular rule provision identified in the written waiver decision, and it will not be a waiver of that rule generally or of any provision of any other rule not specified in the waiver decision. Nor will the waiver constitute approval of any activity other than that approved under the waiver, whether at the location that is the subject of the waiver or any other location. The waiver will be valid only as to the person identified in the waiver, or to the particular project or location that is the subject of the waiver, unless applicable Department program rules provide otherwise. The waiver will not be automatically renewable, unless the waiver or applicable Department program rules so provide. The waiver will not constitute a defense to an enforcement action for any violation that predates the waiver, and it will not justify or excuse prior violations. The waiver could, however, be used to resolve a contested case or other dispute.

Social Impact

The proposed new rules will allow the Department to waive strict compliance with provisions of the Department's rules in limited cases in a manner which is anticipated to result in a positive social impact.

While many of the Department's rules already contain provisions to allow the Department to react in emergency situations where strict compliance with the normal permitting/review process, for example, would not allow timely response, the rules provide assurance that the Department will be able to respond to situations that may arise under any of its rules where a public emergency exists.

The rules additionally allow the Department to approve waivers of strict compliance in appropriate circumstances where necessary to avoid unreasonable, unfair or unintended results, while assuring continued protection of public health, safety and the environment. In this manner, the rules will allow the Department to allow appropriate

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activities to occur, but, through mechanisms such as the specific prohibition of any waiver of a narrative or numeric standard protective of human health, the rules will also assure that public water supplies and public health continue to be protected and that any adverse impacts resulting from the waivers are minimized.

Economic Impact

The Department anticipates that the proposed new rules will have a positive economic impact, although it is not possible to quantify the economic results of future waiver applications and potential approvals of waiver from strict compliance.

The proposed new rules will allow the Department to review cases to determine where a waiver of strict compliance with certain Department rule requirements is appropriate to avoid unreasonable, unfair or unintended results, while assuring continued protection of public health, safety and the environment.

The ability to obtain relief from the strict application of a requirement that qualifies for consideration for waiver under the rules is anticipated to result in a positive economic impact in some cases by allowing appropriate activities which would not otherwise be allowed to proceed and other activities to be conducted at an increased level than would otherwise be allowed if the rule requirement were to be strictly applied. Positive economic impacts from jobs created to carry out the activity, purchase of goods utilized in the activity, or increased operational efficiency will likely result.

Depending upon the requirement which is sought to be waived and the basis upon which the waiver is requested, a person seeking a waiver from the Department may incur costs related to development of information the person wishes to provide to the Department in support of the waiver request or, in the case of waiver requests based upon net environmental impact, in providing proposed mitigation or other environmental benefits to offset any negative environmental impact resulting from approval of a requested waiver of strict compliance. The exact amount of any such cost will depend upon the type and size of project involved and the specific requirement from which

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waiver is sought. However, as request of a waiver is purely voluntary, the Department anticipates that a waiver request will only be made when the person requesting the waiver has determined that a net economic or other benefit will be achieved by obtaining the waiver of strict compliance, and that the net economic or other benefit to be achieved outweighs any cost associated with seeking the waiver, including costs related to provision of alternate environmental benefits to offset any impacts from the waiver of strict compliance.

Accordingly, the Department anticipates that the proposed new rules will result in an overall positive economic impact.

Environmental Impact

The rules would allow the Department to waive strict compliance with some provisions of the Department's rules, which will allow some activities to proceed that would otherwise not be allowed, with corresponding negative environmental impacts.

However, the proposed new rules will apply only in limited circumstances and contain limitations designed to assure that unacceptable environmental and public health impacts do not occur. The Department will only consider a request for a waiver of strict compliance if one of four specified conditions is present. To qualify for consideration for a waiver, the Department must be able to determine that the requirement sought to be waived conflicts with another Department or other State or Federal agency rule, application of the rule in the specific circumstances present would be unduly burdensome (defined to include only actual, exceptional hardship), there would be a net environmental benefit achieved through the approval of the waiver or there is a public emergency that must be addressed.

Even when one of those four eligibility requirements is present, the rules specifically prohibit waivers of certain standards and requirements, including specific requirements or duties imposed by State statute or under Federal statute or regulation. Also prohibited is waiver of numeric or narrative standards protective of human health.

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Further, the rules contain criteria at proposed N.J.A.C. 7:1B-2.1 that will be considered by the Department in determining if strict compliance should be waived, including factors such as whether a waiver to allow the activity to proceed would be consistent with the purposes and objectives of all applicable statutory requirements.

The limited bases for waiver contained at proposed N.J.A.C. 7:1B-2.1(a), the limitations on the types of rules that may be considered for waiver specified at proposed N.J.A.C. 7:1B-2.1(b), and the criteria to be considered in the Department's determination as to whether to approve or deny a waiver request specified at proposed N.J.A.C. 2.2, in conjunction with the overarching requirement of proposed N.J.A.C. 7:1B-1.1(a) that any waiver of strict compliance must be consistent with the core missions of the Department to maintain, protect and enhance New Jersey's natural resources and to protect public health, safety and the environment, will assure that waivers are approved only in limited, appropriate circumstances and that any adverse environmental impacts are minimized.

In addition to situations where limited adverse environmental impacts may be allowed to occur, the rules additionally allow the Department to consider waiver of standards not specifically precluded under proposed N.J.A.C. 7:1B-2.1(b) in situations where waiver of strict compliance with the specific standard will result in a net environmental benefit. Where this is the basis for approval of a waiver of strict compliance with a Department rule, a positive environmental impact will occur.

The Department anticipates that any negative environmental impact from approvals of waivers based upon conflicts between rules, or a rule being unduly burdensome or when necessitated by public emergency will be partially offset by positive environmental impacts from waivers approved based upon net environmental benefit and the human health and safety concerns addressed in situations of public emergency.

Federal Standards Statement

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. (P.L. 1995 c. 65) require State agencies which adopt, readopt or amend State regulations that exceed any

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Federal standards or requirements to include in the rulemaking document a Federal standards analysis.

The proposed new rules do not impose any new standards. Instead, the rules simply provide a mechanism for the consideration of relaxation of standards in the Department's existing rules in appropriate circumstances. Accordingly, nothing in this proposed new rule exceeds any Federal standards or requirements.

The proposed new rules will apply to Department rules that are in some cases subject to Federal standards or requirements and in other cases based entirely upon State statutory authority. An analysis of the Federal standards applicable to each of those rules is presented upon readoption or amendment of each of those individual rule chapters.

The proposed rules specifically provide that no waiver will be approved in accordance with this proposed new chapter of a specific requirement of, or a specific duty imposed by, a Federal statute or regulation, unless that statute or regulation provides for such a waiver. Further, waivers are precluded of standards contained in 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 that Federal program. Accordingly, the proposed rules are consistent with any Federal statute or regulation applicable to any of the affected Department program rules.

Because the proposed rules do not include standards that exceed any applicable Federal standard or requirement and are consistent with any applicable Federal waiver standards, no further analysis is required under Executive Order No. 27(1994) and N.J.S.A. 52:14B-1 et seq.

Jobs Impact

As indicated in the Economic Impact analysis, the Department anticipates that the proposed rules will allow certain activities that otherwise would not be approvable under the strict terms of the Department's rules to proceed and may allow other activities that would be limited by a specific provision of the Department's rules to proceed at an

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increased level than would otherwise be allowed if the rule requirement were to be strictly applied. Where this is the case, the rules may provide increased job opportunities in fields related to the activity including construction, professional services such as engineering and surveying, and industries that supply these activities, such as building supplies. The rules may additionally provide some increase in jobs in professions that could be involved in making a request for a waiver and developing supporting information, such as legal professionals and accountants, biologists or others retained to develop information demonstrating an actual, exceptional hardship that would result from the strict application of a rule provision or that a proposed waiver would result in a net environmental benefit.

While the Department anticipates that the rule will have a modest positive jobs impact, as the circumstances where a waiver will be approved are intentionally limited to assure that any appropriate activities are allowed to occur consistent with maintenance, protection and enhancement of New Jersey's natural resources and public health, safety and the environment, it is not anticipated that there will be a significant impact on jobs.

Agriculture Industry Impact

The proposed new rules do not impose any new standards applicable to any activity, including agricultural operations. Instead, the rules provide a mechanism for the consideration of a waiver from strict compliance with any Department rule in appropriate circumstances.

Many of the Department's rules provide exemptions for agricultural operations. However, the proposed rules will provide agricultural operations that are subject to Department rules with a mechanism to seek waiver of requirements applicable to them in appropriate circumstances. Accordingly, any impact on the agricultural industry is anticipated to be positive.

Regulatory Flexibility Analysis

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In accordance with the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has determined that some of those that may be affected by the proposed new rules may be “small businesses” as defined in the Act. The rules’ compliance requirements are described in the summary above and the costs of compliance are discussed in the Economic Impact Statement above.

As indicated above, the proposed new rules do not impose any new standards applicable to any activity, whether that activity is conducted by an individual, a large corporation or a small business. Instead, the rules provide a mechanism for the consideration of relaxation of standards in the Department’s existing rules in appropriate circumstances.

Depending upon the requirement which is sought to be waived and the basis upon which the waiver is requested, a small business seeking a waiver from the Department may decide to retain professional assistance to develop information the small business wishes to provide to the Department in support of the waiver request, for example, if the waiver sought is of a technical nature, such as a waiver from an engineering standard. Similarly, professionals such as accountants may be retained to support a waiver request based upon undue hardship. However, retention of professional assistance is not required. If the small business did determine to retain professional assistance, the cost involved will vary depending upon the type and size of project involved, and the specific requirement from which waiver is sought.

Accordingly, any impact on small businesses is anticipated to be positive. Therefore, the Department does not believe it would be appropriate to provide any differing standard for approval of a waiver that would be applicable to small businesses.

Smart Growth Impact

Executive Order No. 4(2002) requires State agencies that adopt, amend or repeal

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State regulations to include in the rulemaking document a Smart Growth Impact statement that describes the impact of the proposed rule on the achievement of smart growth and implementation of the State Development and Redevelopment Plan (State Plan).

The proposed new rules are consistent with State Planning Goals 2, 3 and 4.

State Planning Goal 2: Conserve The State's Natural Resources and Systems, provides that the State's natural resources (including rivers, fresh and saltwater wetlands, habitats of unique flora and fauna) have significant intrinsic value as critical elements of the State's quality of life. The implementing strategy calls for conserving the State's natural resources.

State Planning Goal 3, Promote Beneficial Economic Growth, Development and Renewal for All Residents of New Jersey, provides that socially and ecologically beneficial economic growth is to be promoted as is growth in locations and ways that are both fiscally and environmentally sound.

Goal 4 Protect the Environment, Prevent and Clean Up Pollution, provides that "A clean, safe and attractive environment is essential to assuring the health of our citizens. Sustainable supplies of clean water, clean air and an abundance of open space and recreational opportunities also will assure a sustainable economy." The implementing strategy is to "Protect the environment by planning for growth in compact forms, at locations and densities of use that make efficient use of existing and planned infrastructure and by increasing infrastructure capacities and growth potential in areas where development will not damage water resources, critical habitats or important forests..."

The proposed new rules are intended to allow the Department to waive strict compliance with standards contained in any of the Department's rules in appropriate circumstances where a waiver of strict compliance is appropriate to avoid unreasonable, unfair or unintended results, thus potentially encouraging economic development. One of the criteria that will be considered by the Department in determining whether to approve a waiver request is the impact of the waiver on the remediation and redevelopment of a

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contaminated site, or on the expansion of an existing development. However, consistent with the limitations in Goal 3 that economic growth be environmentally sound, the rules contain limitations that assure any relaxation allowed by approval of a waiver will be consistent with the core missions of the Department to maintain, protect and enhance New Jersey's natural resources and to protect public health, safety and the environment, thus assuring the goals incorporated in Goals 2 and 4 continue to be achieved by the Department's other rules. Further, as summarized in the Environmental Impact statement, the rules specifically exclude from consideration for approval of a waiver rules such as numeric or narrative standards protective of human health.

Therefore, the proposed new rules comport with the goals of smart growth and implementation of the State Plan as required in Executive Order No. 4(2002).

Housing Affordability Impact

In accordance with N.J.S.A. 52:14B-4, as amended effective July 17, 2008, by P.L. 2008, c. 46, the Department has evaluated the proposed new rules for purposes of determining their impact, if any, on the affordability of housing.

The proposed new rules will allow the Department to consider appropriate relaxation of regulatory requirements in certain circumstances which could result in allowing activities that would otherwise be precluded or the conduct of an activity at an increased level than would otherwise be allowed if the rule requirement were to be strictly applied. In some limited number of cases, activities allowed could include projects that include residential housing units and could result in the ability for additional units to be constructed.

While there is some potential that the new rules could have a minor positive impact on the number of units of housing that could be constructed in certain circumstances, the Department does not anticipate that the proposed rules will have any impact on the affordability of those houses in particular and believes that it is extremely

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unlikely that the proposed new rules would evoke a change in the average costs associated with housing.

Smart Growth Development Impact

In accordance with N.J.S.A. 52:14B-4, as amended effective July 17, 2008, by P.L. 2008, c. 46, the Department has evaluated the proposed new rules for purposes of determining their impact, if any, on smart growth development.

As indicated in the Housing Affordability Impact statement, in certain circumstances approval of a waiver of strict compliance under the proposed new rules could result in allowing activities that would otherwise be precluded or the conduct of an activity at an increased level than would otherwise be allowed if the rule requirement were to be strictly applied. In some limited number of cases, activities allowed could include projects that include residential housing units and could result in the ability for additional units to be constructed with some portion of these units potentially including affordable housing as well as housing in State Development and Redevelopment Plan (State Plan) Planning Areas 1 and 2 and designated centers.

While there is some potential that the new rules could have a minor positive impact on the number of units of housing produced within Planning Area 1 or 2 or within designated centers, the Department believes that it is extremely unlikely that the proposed new rules would evoke a change in housing production within these areas.

Full text of the proposed new rules follows:

CHAPTER 1B

WAIVER OF DEPARTMENT RULES

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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:

“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.

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“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 property; or (2) excessive cost in relation to an alternative measure of compliance that achieves comparable or greater benefits.

“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 or property, on the basis of the particular circumstances of that person 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

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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:

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 waive any rule concerning:

1. A specific requirement of, or a specific duty imposed by, a Federal or State statute or Federal regulation, unless that statute or regulation provides for such a waiver;
2. 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 that Federal program;
3. A rule that implements a Federally enforceable program pursuant to a State

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Implementation Plan (SIP), as defined at N.J.A.C. 7:27-18.1;

4. Part of a collaborative program involving multiple states or jurisdictions where the waiver would not be consistent with New Jersey's participation in the multi-state or multi-jurisdiction program;

5. The air emissions trading program;

6. Numeric or narrative standards protective of human health;

7. The designation of rare, threatened, or endangered status of any species of flora or fauna, or habitat for such species;

8. A remediation funding source, claim or other reimbursement, grant, loan, or other financial assistance;

9. A license, certification, or registration for a vehicle, boat, individual, or business;

10. A license or approval for hunting, fishing, or trapping;

11. Public participation or notice; or

12. A fee, oversight cost, and other Department cost.

7:1B-2.2 Waiver evaluation criteria

(a) The Department shall consider the extent to which the following criteria

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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 activity authorized by the waiver would be consistent with the purposes and objectives of all applicable statutory requirements; and

7. 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

8. The waiver would result in a reasonable and effective response to a public emergency.

7:1B-2.3 Notice of the waiver

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(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 the waiver is requested.

(b) The Department shall publish, in the DEP Bulletin, notice of:

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

7:1B-2.4 Rule waiver and limitations

(a) If the Department decides to waive the 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;
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

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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 activity approved as part of the waiver;

ii. Reporting of any environmental impacts of the 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, 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

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;

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3. Not constitute an approval of any other 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 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.