

## COMMENTARY

# DEP Waiver Rule Is Alive and Well, If Slightly Illusory So Far

By David P. Steinberger

**O**n March 21, the Appellate Division upheld the validity of the state Department of Environmental Protection's controversial "waiver rule," handing a significant win to the Christie administration.

Very generally, the rule allows the DEP to waive regulatory requirements under certain conditions. It was proposed by the DEP in March 2011, and, after extensive public hearing and comment, made final in March 2012, with an effective date of Aug. 1, 2012.

The rule contains several conditions an applicant must meet before the DEP will waive a regulatory requirement.

First, the waiver request must fall within at least one of four bases for obtaining a waiver: the applicant faces conflicting rules, strict compliance would be unduly burdensome, a waiver would yield a net environmental benefit or a public emergency warrants the waiver.

Second, the waiver cannot fall within any of the 13 categories of DEP rules that are not allowed to be waived, such as federal requirements.

Finally, an applicant must satisfy criteria the DEP established to evaluate waiv-

er requests. The court seemed to indicate that the most significant of these criteria was to ensure that any waivers must be consistent with the DEP's core mission.

Twenty-eight environmental organizations challenged the rule's legality in the Appellate Division, claiming it is invalid because it exceeds the DEP's authority and fails to provide adequate standards governing the rule's implementation.

In upholding the rule, the appeals court first noted that it was required to give great deference to the DEP's interpretations of various statutes for which it is responsible.

Next, the court held that under the environmental statutes the DEP implements, the agency has inherent authority to waive requirements of its own regulations, provided that it does so "in certain limited, well-defined circumstances."

This authority exists where waivers do not violate a statutory requirement or federal law and comport with the agency's core mission. In addition, the agency must issue properly adopted regulations and provide clear standards for how it will issue waivers. The court determined that the rule met these requirements. The environmental organizations have appealed the ruling.

However, the decision was not a total win for the DEP and the regulated community. The rule became effective in April 2012, but the DEP did not accept applications until Aug. 1, 2012.

The DEP gave itself that time gap to establish guidance for implementing the rule. By the time it "went live" in August 2012, several detailed guidance documents were available on the DEP's dedicated waiver-rule web page.

The court ruled that all the guidance documents the DEP created were invalid because they were, in effect, agency rules that had not been issued in compliance with rulemaking requirements of the Administrative Procedures Act.

Nevertheless, the rule remains in effect because the court found that the rule was detailed enough to stand on its own without the need for the guidance documents.

As an aside, it will be interesting to see whether the court's rationale will at some point be used in a challenge to the various guidance documents the DEP has issued in its Site Remediation Program. Those guidance documents were similarly issued without resort to the APA.

However, while the rule has been upheld, after more than six months since it took effect, its benefits seem illusory. To date, 26 waiver applications have been filed with the DEP. Of those, nine were rejected because the applications were deemed incomplete, 14 are administratively complete and are currently under review, and two were denied.

So far, the DEP has not approved a single waiver. From the viewpoint of the environmental organizations challenging the rule, its bark has certainly been worse than its bite.

With respect to applications currently under review by the DEP, the invalidation of the waiver rule guidance documents should not delay DEP review. As the court

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noted, the existing rule provides sufficient guidance to determine whether an application should be approved on its merits.

Presumably, the DEP and the Christie administration have undertaken the significant effort to enact and defend the rule because there were real conflict issues

impacting the regulated community, and some avenue for relief and flexibility was required.

We expect that with the court's approval of the rule, the DEP will begin finding that there are in fact situations warranting the legitimate application of the rule to

afford reasonable relief from various DEP rules. Maybe one of the 14 pending applications might actually be approved? And the actual results to date certainly seem to suggest that the environmental groups may have exaggerated the potential dangers of the rule. ■