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ENVIRONMENTAL PROTECTION  
COMMISSIONER'S OFFICE  
OFFICE OF LEGAL AFFAIRS

Waiver of Department Rules  
Adopted New Rules: N.J.A.C. 7:1B

Proposed: March 7, 2011 at 43 N.J.R. 473(a).

Adopted: \_\_\_\_\_, by Bob Martin, Commissioner, Department of Environmental Protection.

Filed: as R.\_\_\_\_, with substantial changes not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

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.

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DEP Docket Number: 03-11-02

Effective Date: \_\_\_\_\_

Expiration Date: \_\_\_\_\_

Operative Date: August 1, 2012

The Department of Environmental Protection is adopting new rules at N.J.A.C. 7:1B 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.

After an extensive stakeholder outreach process to obtain public input on the development of these new waiver rules, the proposal was published on March 7, 2011 at 43 N.J.R. 473(a). A public hearing was held on the proposal on April 14, 2011, and written comments were accepted through May 6, 2011.

In order to allow time to put in place the electronic system the Department is developing for waiver requests and posting waiver information, which will facilitate the timely processing of waivers, the Department is delaying the operative date of these new rules until August 1, 2012. This adoption document may also be viewed or downloaded from the Department's website at <http://www.nj.gov/dep/rules/adoptions.html>.

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**Summary of Hearing Officer's Recommendations and Agency Response:**

The Department held a public hearing on the proposal on April 14, 2011 in the Public Hearing Room at the Department's headquarters building in Trenton. John Hutchison, Senior Policy Advisor in the Office of the Commissioner, served as the hearing officer. Fifty-one members of the public signed attendance sheets indicating their presence at the hearing and 35 persons presented verbal comments. A majority of commenters at the public hearing opposed the proposal. Other commenters at the public hearing suggested changes or modifications to clarify various aspects of the proposed rules.

The Hearing Officer recommended that the proposal be adopted with the changes described in the responses to comments below. The Department accepts the hearing officer's recommendation.

The record of the public hearing is available for inspection in accordance with applicable law by contacting:

NJ Department of Environmental Protection

Office of Legal Affairs

Attn. DEP Docket Number 03-11-02

Mail Code 401-04L; P.O. Box 402

401 East State Street, 4th Floor

Trenton, New Jersey 08625-0402

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**Summary of Public Comments and Agency Responses:**

The Department accepted comments on the proposal through May 6, 2011. The following persons submitted written and/or oral comments:

1. Abbatiello, Anthony
2. Adair, Claire Rollin
3. Adler, Simone
4. Amato John,
5. Anderson, Estelle
6. Anderson, John
7. Ans, Dinda Ev
8. Antonelli, Lynell
9. Asaro, Sal
10. Bair, John W.
11. Balboa, Alex
12. Bannon, James P.; Nave Newell, Inc.
13. Barbagallo, Mary
14. Barbagallo, Salvatore
15. Barbash, Mark
16. Barber, Edna
17. Barebely, Richard
18. Barebely, Regina C.
19. Bartley, Jenna

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20. Bayard, Judy
21. Bayne, Helen
22. Beatty, Norman E.; First Hope Bank
23. Becker, Jill
24. Belke, Donna
25. Bellissimo, Dorothy; Nave Newell, Inc.
26. Benton, Jim; New Jersey Petroleum Council
27. Bermingham, Jerrold; National Realty & Development Corp.
28. Bhathal, Rajdeep
29. Bihaly, Judith
30. Blackwell, Marcia
31. Bley, John
32. Bley, Leslie
33. Blumberg, Bob
34. Blumstein, Ronald S.; Kaplan Companies
35. Bobrow, Warren
36. Bochiccltio, James
37. Bogan, Marco
38. Bonette, Andrea; Board of Trustees of the Sourland Planning Council
39. Bongiovani, Peter
40. Borbely, Anne
41. Borbely, Zoltan

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42. Boyd, David

43. (Number not assigned.)

44. (Number not assigned.)

45. Brennan, Timothy; Nave Newell, Inc.

46. Brenner, Patricia

47. Brewer, Rosemary

48. Brilliant, Nancy

49. Brown, David

50. Brown, Kenneth

51. Brown, Robert

52. Buckingham, Laura

53. Bungler, Brian

54. Bungler, Christen

55. Bungler, Richard

56. Bungler, Sandra

57. Burg, Jayson

58. Burghardt, Jenifer Nina

59. Burrowes, Dee

60. Burrowes, Paul

61. Byrne, Timothy

62. Cahill, Lea

63. Cahill, Michael

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64. Campasano, Vincent
65. Cane, Lauren
66. Carnevale, Robert
67. Carpasan, Will
68. Cassimatis, Dorathy
69. Catucci, Nick
70. Chamberlain, Dean
71. Chamberlin, Gayle Hoyt
72. Charlton, Barbara
73. Charlton, John
74. Charrette, David; Langan Engineering & Environmental Services
75. Chase, Theodore, Jr.
76. Chittenden, Edward
77. Chiusano, Gary; Assemblyman -- Legislative District 24
78. Choate, Oliver
79. Choate, L.
80. Christansen, Gavin
81. Church, John A., Ph.D.
82. Clark, Mary
83. Clark, Sandra; Nave Newell, Inc.
84. Cobb, Christopher B.; Jersey Shore Premium Outlets
85. Coehlo, Michelle

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86. Coffee, Donna

87. Coffey, Jennifer; Stony Brook-Millstone Watershed Association

88. Conlow, James; Nave Newell, Inc.

89. Cooper, Robert

90. Costello, Michael

91. Covert, William

92. Cowan, Dorothy

93. Cresson, Charles

94. Criscione, Regina

95. Crump, Erin

96. Cunniffe, Rosemary Murray

97. Danko, Melissa; New Jersey Marine Trades Association

98. Daugherty, Sherri; Nave Newell, Inc.

99. Davis, Kathleen; Chamber of Commerce of South Jersey

100. Day, Suzanne

101. De Kovessey, Jane

102. Deal, Harold

103. Deas, Takeena; Somerset County Business Partnership

104. Deck, Nicole

105. Delaney, Sarah

106. DeLillo, John

107. DeTrolio, Nancy



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108. Devone, Kathleen

109. Diamond, Nichole

110. Diaz, Sara

111. DiClemente, Michelle

112. Diemer, Heather; Nave Newell, Inc.

113. Dillingham, Tim; American Littoral Society

114. DiLodovico, Tony; Virtual Services Group

115. DiMarco, Richard

116. DiPaolo, Janet

117. DiPaolo, Stephen

118. Direda, Amy

119. Discenza, Regina

120. Dixon, Sean; Clean Ocean Action

121. (Number not assigned.)

122. Dolobowsky, Abbe

123. Donato, Michele; Save Hamilton Open Space

124. Donovan, Elise

125. Dressel, William G., Jr.; New Jersey State League of Municipalities

126. Dreyling, Roger

127. Drum, John P., Jr.

128. Drum, Patrick

129. Duelks, Robert

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130. Dunn, Jason A.; Dykstra Associates, P.C.

131. Dykstra, Owen; Dykstra Associates, P.C.

132. Dzubak, Cheryl

133. Eckert, Robert

134. Edeleman, Carolyn Foote; D&R Greenway Land Trust

135. Egenton, Mike; New Jersey Chamber of Commerce

136. Engler, Rick; New Jersey Work Environment Council

137. Esposito, Frank

138. Fagan, Delia

139. Fagan, Wes

140. Faigle, Thora

141. Farmer, Rebecca

142. Farmer, Veronica

143. Fasciano, Anthony

144. Fasciano, Michael

145. Fayer, J. S.

146. Faynor, Amanda

147. Feiler, Melvin

148. Ferrand, Daniel

149. Fiala, Herbert

150. Field, Patrick

151. Fink, Michael; Leewood Real Estate Group

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152. Fischer, Elliot

153. Fisher, David

154. Fitamant, Gerard; Langan Engineering & Environmental Services

155. Flores, Gina

156. Foose, Ellen

157. Forest, Ben; New Jersey Friends of Clearwater

158. Fox, Mary

159. Frey, Wilma; New Jersey Conservation Foundation

160. Fulmer, Barry

161. Furst, Charles

162. Furst, Charles; Delaware River Shad Fisherman's Association

163. Gale, Ronald; International Process Plants

164. Gassaway, Robert

165. Gawal, Dorothy

166. Geneve, M.

167. George, Yukon

168. (Number not assigned.)

169. Giberson, Gary; Mayor and Council of City of Port Republic, Atlantic County

170. Giordano, Robert; Mayor, Independence Township, Warren County

171. Glaser, Susan

172. Godber, Alan S.; Lawrence Brook Watershed Partnership, Inc.

173. Goldsmith, Amy

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174. Goldsmith, Janet

175. Goodwin, Chrissi

176. Gorlicki, Coralyn

177. Graborski, John M.

178. Graborski, John M., Jr.

179. Green, Michelle

180. Green, Lisa

181. Greenberg, Molly; Ironbound Community Corporation

182. Greenstone, Katherine

183. Grose, Harriet

184. Gulbinsky, Ellen; Association of Environmental Authorities

185. Haberstroh, Kathleen

186. Hall, David H.

187. Hansen, Than

188. Hart, Sara

189. Havens, Barbara

190. Hayduk, Eddie

191. Hedden, Jerry

192. Helaudais, Brianne

193. Henderson, Helen; American Littoral Society

194. Herbert, William; Dallenbach Sand Company

195. Hernandez, Nikki

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196. Herring, James; Herring Properties

197. Hill, Morgan; Retail Sites, LLC

198. Hill, Robert; Retail Sites, LLC

199. Hittman, Stephen; Crossroads Companies

200. Hluchan, Richard

201. Hoffman, Clint

202. Hogan, John; Nave Newell, Inc.

203. Hogrelios, Ed

204. Honachefsky, William, Jr.

205. Hood, Kim

206. Hsu, Jennifer

207. Huffman, Jewell

208. Hughes, James

209. Humphrey, Lynn

210. Huntsman, Laura

211. Isaksen, Kristen

212. Jackal, Lawrence

213. Jackal, Janet

214. Jackson, Steve

215. Jacobson, Lois

216. Jaffe, Michael

217. Johanson, Kenneth

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218. Johanson, Wynn

219. (Number not assigned.)

220. Johnson, Timothy C.

221. Joline, Dona

222. Jones, Robert

223. Kanwal, Sarbmeza

224. Kanwal, Virender

225. Kaufman, Louis; Shamrock Green, LLC.

226. Kaufman, Roberta

227. Kelly, Kieran

228. Kemple, Jason

229. Kenny, C.

230. Kepner, Laura; Nave Newell, Inc.

231. Ketchen, William; The Pike Company

232. Khademi, ZaSah

233. Kimmel, Jody

234. (Number not assigned)

235. Klein, Harvey; Garden State Laboratories

236. Kness, Catherine

237. Knowlton, Stephen

238. Koven, Thomas

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239. Kraham, Susan, J.; The Environmental Law Clinic, Columbia University School of Law on behalf of: New Jersey Highlands Coalition, Association of NJ Environmental Commissions, Pinelands Preservation Alliance, Environment NJ, Hackensack Riverkeeper, New Jersey Conservation Foundation, South Branch Watershed Association, Edison Wetlands Association, The Land Conservancy of New Jersey, Stony Brook-Millstone Watershed Association, Musconetcong Mountain Conservancy, Musconetcong Watershed Association, Upper Raritan Watershed Association, Tri-State Transportation Campaign, Chatham Township Environmental Commission, and EcoAction of Warren County

240. Kyser, John

241. LaMotte, David

242. Larkins, Joe; Nave Newell, Inc.

243. Lauf, B.

244. Laurizio, Jerry; South Brunswick Environmental Commission

245. Lawrence, Tracey

246. Leitch, Mary

247. Leiter, Dena

248. Lepard, Paul; Nave Newell, Inc.

249. Levin, Jon

250. Levine, Joe

251. Levine, Rozanne

252. Lewis, Nancy

253. Liebttag, Adam; Communications Workers of America, Local 1036

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254. Lin, Nicholas

255. Liparulo, Richard

256. Lomax, Peter; Lomax Consulting Group

257. Longobardi, Raymond

258. Lotfelty, Suzanne

259. Loveland, David

260. Lowrie, Leah

261. Lozano, Christina

262. Ludlum, David

263. Lundy, Joellen; Monmouth County Friends of Clearwater

264. Lupo, Jack

265. Lutkewitte, S.

266. Lutz, Winifred

267. Lynch, Laura

268. Lytle, Denise

269. MacInnes, Diane

270. (Number not assigned.)

271. Maher, Joseph; Atlantic County Department of Regional Planning & Development

272. Maiolo, Rosemarie

273. Malcolm, Brian

274. Malcolm, Eunice

275. Malcolm, John



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276. Malcolm, John R.

277. Malcolm, Linda

278. Malcolm, Richard

279. Malcolm, Trish

280. Malcolm-Liera, Jill

281. Mallalieu, Raoul

282. Maneino, Jospeh

283. Mannarino, Nick

284. Mardle, Tim

285. Marion, Christine; Morris County Planning Board

286. Marks, David

287. Marshall, Clare

288. Marshall, Keith; Nave Newell, Inc.

289. Martucci, Janet

290. Mascaro, James; DP Partners

291. Mastrelli, Joseph

292. Mayberg, Kenneth

293. McCarron, Jerrold; Herskowitz, Glasgow & McCarron

294. McCarthy, Brian

295. McDonnell, Kathleen

296. McDouglas, Agnes

297. McFarland, Brian

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298. McFarland, Isabelle

299. McGreen, Joel

300. McHose, Alison Littell; Assemblywoman -- Legislative District 24

301. McKeon, David; Ocean County Planning Department

302. McKillip, Linda

303. McLaughlin, Bernadette

304. McMinn, Arleen

305. McMorrow, Brian; Bohler Engineering

306. McOrmand, Mark; Osborne Associates

307. McPherson, Robert

308. Meenaghan, Maureen Murray

309. Meissner-Jackson, Margit; New Jersey Sierra Club -- Ocean County Chapter

310. Mellon, Cynthia; Ironbound Community Corporation

311. Mercedo, Lisa

312. Meyers, Christopher

313. Meyrelles, Maureen

314. Miller, Jill

315. Miller, Peter; Bernardsville Environmental Commission

316. Miller, Tom

317. Minervini, William

318. Moffatt, George

319. Molok, Megan

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320. Montagna, John

321. Montgomery, Carleton; Pinelands Preservation Alliance

322. Moody, Miriam

323. Moore, Barbara

324. Morey, Thomas

325. Morrissey, John F.; New Jersey Conference of Mayors

326. Moss, Robert

327. (Number not assigned.)

328. (Number not assigned.)

329. Mulcahey, Marianne

330. Mullaghy, Bernadette

331. Muraski, Tanya S.; Eikon Planning & Design, LLC.

332. Murphy, Susan

333. Murray, Alexandra

334. Murray, Elise

335. Murray, Tom

336. Nalahian, Glen J.

337. Nester, David; Nave Newell, Inc.

338. Newell, Gregory; Nave Newell, Inc.

339. Nieuwenhuis, Richard; New Jersey Farm Bureau

340. Niven, David; Pretium Property Management, LLC.

341. Nordahl, Bill

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342. Nussbaum, Steven; Pasbjerg Development Co.

343. Nutt, Mary Joe

344. Olivo, John

345. Orgo, Thomas

346. Oroho, Steven V.; Senator -- Legislative District 24

347. Orrico, John

348. Otero, Aline

349. Owezack, Myra

350. Pace, Daniel

351. Pagano, Frank

352. Pajack, John; New Jersey Work Environment Council

353. Pannone, Joanne

354. Pannone, Karen

355. Pannone, Kenneth

356. Pantaleo, Tari; Kingston Greenways Association

357. Papp, Susan

358. Parker, Coleen

359. Parrish, Joe; Environmental Commission Diocese of NJ/American Lung Association.

360. Pecha, Rich

361. Peifer, David; Association of New Jersey Environmental Commissions

362. Phillips, Patricia

363. Pisauro, Michael; New Jersey Environmental Lobby

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364. (Number not assigned.)

365. Pizarro, Judy

366. Pluta, Tom

367. Pocorobba, Vic; Savro, LLC.

368. Porraro, Lynn

369. Potaski, Sandra

370. Pray, Peter

371. Prettyman, Jane

372. Pringle, David; New Jersey Environmental Federation

373. Prunetti, Robert; Mercer Regional Chamber of Commerce

374. Pullman, Ian

375. Pumphrey, Eugene

376. Rafferty, John K.

377. Rahman, Nicole

378. Rakowski, Nicholas; Nave Newell, Inc.

379. Read, Nancy

380. Rechten, Arthur

381. Redden, Michaela

382. Regrut, Thomas

383. Reichman, Edward

384. Reina, Bettie

385. Reitz, Bruce

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386. Reitz, Susan

387. Rennie, Paul

388. Rennie, Pauline

389. Rettagliata, Joseph; Monmouth County Planning Board

390. Reynolds, William

391. Rhoads, Jacklyn; Pinelands Preservation Alliance

392. Riordan, Margaret

393. Rizzo, James

394. Rizzo, Janice

395. Robins, Andrew

396. Rocca, Claudia; Bohler Engineering

397. Rodriquez, Orlando R.

398. Rogers, Stephen

399. (Number not assigned.)

400. Romano, David P.; Gordon Byram Associates, LLC and Ronetco Supermarkets, Inc.

401. Romano, Dominick J.; Netcong 201, LLC and Ronetco Supermarkets, Inc.

402. (Number not assigned.)

403. Romano, Dominick V.; P&D Realty and Ronetco Supermarkets, Inc.

404. Romano, Nina; Newton 213, LLC c/o Ronetco Supermarkets, Inc.

405. Romano, Michael A.

406. Romeo, Rocco

407. Rose, Henry; New Jersey Environmental Justice Alliance

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- 408. Rose, Henry; New Jersey Environmental Justice Alliance
- 409. Rose, Kathleen A.
- 410. Rosemele, Ann
- 411. Rosenthal, James
- 412. Ross, Barbara
- 413. Ross, Barbara, T.
- 414. Ross, Scott; New Jersey Petroleum Council
- 415. Rossi, Patricia
- 416. Rossum van, Maya; Delaware Riverkeeper
- 417. Ruga, Elliot; New Jersey Highlands Coalition
- 418. (Number not assigned.)
- 419. Russo, Anthony; Chemistry Council of New Jersey
- 420. Rutkowski, Robert
- 421. Saberi, Poune
- 422. Sachau, Barbara
- 423. Sandin, Ellen
- 424. Santoro, Charles; Saltwater Anglers of Bergen County
- 425. Sass, May
- 426. Scanlon, Deborah; Union County Board of Chosen Freeholders
- 427. Schleifer, Douglas
- 428. Schilp, John J.; NAI James E. Hanson
- 429. Schmid, Ashley

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430. Schodowski, Victoria

431. Schrader, Reinhold

432. Schreier, Thomas; Nave Newell, Inc.

433. Serdynski, Kimberly

434. Serra, Kathleen

435. Shabel, Daniel; Retail Sites, LLC

436. Shaheen, Zoe

437. Shakarjian, Michael; Milltown Environmental Commission

438. Sheats, Nicky; New Jersey Environmental Justice Alliance

439. (Number not assigned.)

440. Shebell, Raymond

441. Shramko, Anne

442. Shramko, Samuel P.

443. Shriner, Gayle

444. Siegel, Larry

445. Siggins, Eric

446. Siggins, Sharon

447. Sime, Sean

448. Simmons, Pamela

449. Simmons, William; Monmouth County Board of Health

450. Sims, Leia

451. Smetana, Matthew



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452. Smith, Kathleen

453. Smith, Susan

454. Smith-Burke, Margaret

455. Snyder, Lee

456. Sollberger, Erica; American Society of Landscape Architects - New Jersey Chapter

457. Soloff, Richard; Soloff Realty & Development, Inc.

458. Soroka, Cynthia

459. Southwell, Michael

460. Spang, Aletha

461. Spann, Frances

462. Spiall, Cammin

463. Spinello, John; K&L Gates LLP

464. Sproi, Salvatore

465. Stanford, Suzanne, on behalf of Borough of Stone Harbor Resolution 2011-S-88

466. Steele, Kathleen

467. Steelmon, Peggy

468. Steinberg, Malcolm

469. Stephens, Alyssa

470. Stephens, Leslie

471. Stern, Edgar E.

472. Stillinger, Dorothea; Township of Chatham Environmental Commission

473. Stimpfel, Teresa

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474. Straniero, Chris

475. Strickland, Karen

476. Sturm, Chris; New Jersey Future

477. Sturm, Rolf

478. Suerig, Sheila

479. Takacs, Joy

480. Takacs, Ryan

481. Tallon, Robert; Craft Creek/Spring Hill Brook Watershed Association, Inc.

482. Tandul, Jeffrey

483. Tatum, Jody

484. Thulax, Michael

485. Tillery, Bonnie

486. Tittel, Jeff; New Jersey Chapter Sierra Club

487. (Number not assigned.)

488. Torres, Licefer

489. (Number not assigned.)

490. Touhey, Timothy J.; New Jersey Builders Association

491. Towey, Penny

492. Trallo, John

493. Trinkl, John; Beach Condominium Association

494. Tuber, Nancy

495. Tully, Cathy

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496. Tweedie, Alexander; Nave Newell, Inc.

497. Uckermann (first name illegible)

498. Van Cleef, C. Scott; Country Classics, Inc.

499. Vega, Aileen

500. (Number not assigned.)

501. Ventresca, David

502. Villere, Sidone

503. Vreeland, Charles

504. Wadon, James; ICL Performance Products, LP

505. Wagner, Margaret

506. Wainberg, Stuart; Benderson Development Co., LLC.

507. Walsh, Brian

508. Walsh, Diane; Commerce and Industry Association of New Jersey

509. Weaver, Robert N.

510. Weaver, Zoe

511. Wefing, Barbara

512. Weindling, Elissa

513. White, Kathy

514. Wildermuth, Gordon

515. Wildman, Kristin F.; Lomax Consulting Group

516. Wilkey, Jeffrey

517. Wolfe, Bill; New Jersey Public Employees for Environmental Responsibility

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518. Wolfe, Martin

519. Young, Marian

520. Young, Lewis

521. Zaccarchi, Gary

522. Zambrana, Felipe

523. Zanetakos, Mary

524. Zeoli, Richard; County of Sussex

525. Zerbe, Faith

526. Zilian, Lauren

527. Zipf, Cindy; Clean Ocean Action

528. The following commenters signed a single letter on behalf of their respective organizations:

Benton, Jim, New Jersey Petroleum Council; Bozarth, Hal, Chemistry Council of New Jersey;

Bracken, Thomas, New Jersey State Chamber of Commerce; Doherty, Linda, New Jersey Food

Council; Kirschner, Philip-New Jersey Business and Industry Association; Maddelon, Jean, New

Jersey Apartment Association; and Touhey, Timothy, New Jersey Builders Association

A summary of the comments and the Department's responses follows. The number(s) in parentheses after each comment identifies the respective commenter(s) listed above.

### **Economic growth and job creation**

**1. COMMENT:** Waivers authorized under the proposed rule would benefit New Jersey businesses and local communities by providing infill, creating new jobs and diverting the tax burden away from residential properties. (1, 4, 9, 13, 14, 17, 18, 36, 39, 85, 90, 115-117, 127-

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129, 137, 143-145, 147, 149, 164, 166, 177, 178, 180, 185, 201, 203, 221, 254, 255, 257, 265, 273, 274, 275-280, 282, 294, 313, 330, 336, 345, 347, 351, 393, 394, 397, 405, 431, 440, 443, 451, 462, 464, 478, 484)

**2. COMMENT:** Conflicting environmental regulations are a significant reason why businesses in New Jersey go elsewhere or stop their operations in the State. The rule provides an effective mechanism to address the unintended consequences of regulations while still protecting the State’s natural resources. (22, 114)

**3. COMMENT:** Businesses are leaving New Jersey due to over-regulation and delays. A number that remain have reported that increased demands and costs are producing income losses and job cuts that negatively impact the State’s economy. The proposed rule would implement a more flexible, “common sense” solution that fosters predictability and decreases the compliance burden on businesses. (103)

**4. COMMENT:** The proposed waiver rule is a common sense rule that does not diminish the value of environmental protection laws, while at the same time removes unintended impediments to economic growth. (373)

**5. COMMENT:** There are situations where projects or site-specific conditions require waiver from strict program compliance. Regulatory programs often do not anticipate every situation encountered for projects. Different regulatory programs can conflict with one

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another. Having this waiver process will allow applicants and the Department, in those special situations, the ability to address unique site conditions, adverse results from regulatory requirements and burdens on business. (12, 25, 34, 45, 84, 88, 98, 112, 154, 163, 196-199, 202, 230, 231, 242, 248, 290, 293, 306, 320, 337, 338, 340, 342, 378, 428, 432, 435, 457, 496, 498, 506)

**6. COMMENT:** Many large companies are sensitive to the environment. If they are looking for opportunities to expand, the State should have the ability to work with them instead of chasing them away and losing those opportunities. New Jersey has lost too many opportunities, jobs, and the ability to grow its economy. The proposed rule will provide the business community with flexibility and predictability. Small businesses do not have the necessary resources to deal with the litany of regulations that come through not only this Department, but several other agencies and State and local government. The small business community needs to have certainty as well, and the ability to state their case, rather than to shut down operations. (135)

**7. COMMENT:** The proposed rule would allow for flexibility in certain limited circumstances where hardship exists, and the relaxation of environmental standards under the proposed rule may permit beneficial growth that will not bring harm to the environment. (170, 339, 367)

**8. COMMENT:** Many environmental regulatory programs adversely impact, through delay

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or denial, otherwise clearly beneficial projects because of the inflexibility of the rules and the failure to recognize unique circumstances. The Waiver Rule will provide for a mechanism that facilitates the balance of development intended to strengthen the State's economy, while still providing for adequate protections of the State's natural resources. (256, 515)

**RESPONSE TO COMMENTS 1 THROUGH 8:** The Department acknowledges the commenters' support of the Department's rulemaking effort.

#### **Legal authority for waiver rules**

**9. COMMENT:** The commenter does not agree with statements, made by some individuals at the April 14, 2011 public hearing, that it is unlawful for the Department to waive a rule unless the statute(s) that authorizes that rule expressly authorizes such waiver. Following are brief excerpts to the contrary from 37 Steven L. Lefelt et al., *New Jersey Practice: Administrative Law and Practice* 3.20 ("Waiver of a Rule") at 142-146 (2d ed. 2000):

"... **An agency has the inherent authority to waive regulatory provisions**, but the exercise of the waiver authority must be prescribed by rule which establishes substantive and procedural standards that govern the agency's decision ..." (p. 142, emphasis added)

"... Thus, it seems that while Federal and state courts believe agencies have **the inherent right to waive rules**, courts will assess the agency's actions for arbitrariness and not all waiver applications will be approved.

"New Jersey courts have also acknowledged an agency's authority to waive rules in certain circumstances and relax rules to achieve sensibility and consistency with legislative intent ... **All**

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**agency action, according to the Supreme Court, must include consideration of particular circumstances."**

"Even though *Dougherty* involved an adjudication, the procedural posture of the case is inconsequential. New Jersey courts will assess the reasonableness of an agency waiver or non-waiver decision, whether or not the agency is acting formally in adjudication or informally upon a waiver request. For waiver or non-waiver is agency action which is reviewable under the arbitrary, capricious or unreasonable standards. When it appears arbitrary for an agency to apply a rule slavishly to certain facts, the agency under the *Dougherty* majority will be directed to consider waiver. To protect against a court's remand or rejection of an agency's strict rule application, **a New Jersey agency must have inherent authority to determine whether to waive its rules in particular instances.**" (pp. 145-146, emphasis added, footnotes omitted) (For further background and context including citations to particular court decisions, see the full text of *New Jersey Practice: Administrative Law and Practice* 3.20.)

Indeed, it appears that under this reasoning, the language in proposed N.J.A.C. 7:1B-1.1(a) and 2.1(b) that absolutely prohibits (except as provided in proposed N.J.A.C. 7:1B-1.1(c)) waivers that are inconsistent with the core missions of the Department, and waivers of rules listed in proposed N.J.A.C. 7:1B-2.1(b), might be too restrictive. The argument supporting that conclusion would be that "**all** agency action," including all Department action regarding any Department rule, "must include consideration of particular circumstances" as related to the "arbitrary, capricious or unreasonable standards." (317)



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**10. COMMENT:** Some statutes that do not expressly authorize waiver of a rule have other provisions that arguably provide a basis for such a waiver. The New Jersey Water Pollution Control Act, for example, authorizes the Department to adopt “reasonable codes, rules and regulations” (N.J.S.A. 58:10A-4). A rule that is reasonable in most circumstances might be unreasonable in other circumstances, and waiver of such a rule in circumstances where that rule is unreasonable might thus be considered consistent with that Act. (317)

**RESPONSE TO COMMENTS 9 AND 10:** The Department acknowledges the commenters’ reasoning regarding authority for the waiver rules. However, the Department does not believe that N.J.A.C. 7:1B-1.1(a), which requires consistency with the Department's core missions, and 7:1B-2.2(b), which precludes certain waivers, are too restrictive. In all its actions, the Department must be cognizant of its core missions and act accordingly. The list of situations at N.J.A.C. 7:1B-2.2(b) where the Department will not approve waivers reflects the Department’s consideration of its core missions, statutory and regulatory constraints and procedural efficiencies.

**11. COMMENT:** There is no statutory authority for the waiver rule (6, 21, 46, 48, 59-61, 64, 92, 94, 104, 108, 124, 138, 139, 146, 148, 152, 174, 212, 213, 223, 224, 226, 263, 298, 309, 311, 358, 392, 409, 411, 441, 442, 452, 460, 474, 475, 486 and 495)

**12. COMMENT:** A state agency may not exceed required statutory policy in the exercise of its rule-making power. Gladden v. Board of Trustees of Public Employees Retirement

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System, 171 N.J. Super. 363 (App. Div. 1979); In re State Board of Dentistry Increase in Fees, 166 N.J. Super. 219, 2233 (App. Div. 1979). An administrative official is a creature of legislation who must act only within the bounds of authority delegated to him. Matter of Jamesburg High School, School District of Jamesburg, Middlesex County, 83 N.J. 540 (1980). Similarly, see Malone v. Fender, 158 N.J. Super. 190 (App. Div. 1978), supplemented 160 N.J. Super. 221 (App Div. 1978), rev'd. 80 N.J. 129 (1979), which held that an agency's implementation of a statute cannot deviate from the principals, practices and policies of the statute. The Department has exceeded statutory policy, acted outside the bounds of the authority delegated to the agency and deviated from the principles and policies of statutes cited as authority in the promulgation of the waiver rules. The statutes enacted are controlling and the proposed waiver rules are void and unenforceable. (51)

**13. COMMENT:** Allowing the DEP Commissioner to waive compliance with 98 Department regulations violates the intent of the Legislature in adopting environmental protections. (486)

**14. COMMENT:** In the enabling authority for the proposed rules, there are some statutes that are cited that do not have waiver provisions in them; therefore, the proposal itself is ultra vires, meaning it is not authorized by legislation. (517)

**15. COMMENT:** It was, and still is, the Legislature's responsibility to determine what elements are passed in State laws, and no statutory authority was given to DEP to override

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these laws and to give generic waivers. So DEP is giving itself the authority to determine where and when waivers occur and overriding the legislative process. (391)

**RESPONSE TO COMMENTS 11 THROUGH 15:** The promulgation of these waiver rules is within the Department's broad regulatory authority delegated to it by comprehensive legislation. Where the Department has the authority to promulgate rules, it also has the authority to modify or waive those rules, provided that the modification or waiver does not violate a statutory requirement or purpose.

In 1970, the Department of Conservation and Economic Development was reorganized, continued and designated as the Department of Environmental Protection and many functions, powers and duties of the former department, including rulemaking powers, were transferred to the Department. N.J.S.A. 13:1D-1; N.J.S.A. 13:1D-2. See N.J.S.A. 13:1B-3. The Department's general enabling statute, N.J.S.A. 13:1D-1 et seq., grants the Department broad authority to formulate comprehensive policies and programs for the conservation of natural resources, the promotion of environmental protection and the prevention of pollution of the environment of the State. N.J.S.A. 13:1D-9. Moreover, the Department's rulemaking authority derives from a wide array of statutes creating specific environmental programs and policies implemented by the Department. Many of these statutes expressly delegate general rulemaking powers to the Department to effectuate the purposes of the legislation. In addition, many of these statutes mandate or authorize specific rulemaking to address particular matters specified in these statutes.

It is well settled that grants of authority to administrative agencies are liberally construed to enable the agencies to accomplish the Legislature's goals. Gloucester Cty. Welfare Bd. v.

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State of New Jersey Civil Service Comm'n, 93 N.J. 384, 389 (1983). The comprehensive legislative scheme establishing the Department's various powers and environmental programs, as interpreted by numerous judicial decisions construing this legislation, provides the necessary authority for the Department's promulgation of these waiver rules. The Department's broad rulemaking authority under its enabling legislation is both express and implied. Express authority is that which is specifically stated in the language of a statute; implied authority may be found by looking beyond a statute's specific terms to the statutory purpose sought to be achieved by examining the statute in light of its purposes, history and context. When examining the Legislature's intent, the courts consider not only the particular statute in question, but the entire legislative scheme of which it is a part. Perth Amboy Bd. of Educ. v. Christie, Governor, 413 N.J. Super. 590 (App. Div. 2010). A lack of express statutory authorization for waivers does not preclude agency action where, by reasonable implication, the agency's action can be deemed to promote or advance the findings and policies behind the legislation. In re Stormwater Mgmt. Rules, 384 N.J. Super. 451, 461(App. Div. 2006).

Several of the Department's enabling statutes mandate or authorize the Department's adoption of specific waiver rules or its approving of specific waivers and or exemptions. The fact, however, that some laws specifically mandate or authorize the Department's adoption of such rules or approving of such waivers, does not mean that the Department is without authority to adopt other waiver rules. No provision in the Department's enabling legislation provides that the Department may not adopt rules authorizing other waivers which the Department determines are necessary or appropriate for effectively implementing its statutory responsibilities. The Department's statutory authority to promulgate rules articulating when and how it will regulate a

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particular activity includes, within that authority, the authority not to promulgate rules regulating a particular activity, provided that the decision not to regulate the activity does not violate a statutory requirement or purpose. The Department's adoption of the waiver rules is an exercise of its discretionary authority to decide when and how to regulate or not to regulate. SMB Assoc. v. New Jersey Dep't of Envl. Prot., 264 N.J.Super. 38, 60, 624 A.2d 14, 26 (App. Div. 1993), aff'd 137 N.J. 58, 644 A.2d 558 (1994). The waiver rules are simply one exercise of the Department's existing statutory authority to adopt reasonable rules and regulations for implementing the policies of its enabling statutes and its various environmental programs. The waiver rules fall well within the Department's broad rulemaking authority under this comprehensive legislation. Under the Department's comprehensive legislation, the Department's fundamental duties include maintaining, protecting and enhancing New Jersey's natural resources, and protecting the public health, safety, welfare and the environment -- that which the Department in its waiver rules refers to as its "core missions" -- and effectuating the purposes of its enabling statutes.

It is well established that administrative agencies have the power to waive administrative regulations for the purpose of addressing unusual circumstances. As the Supreme Court of New Jersey has observed, "an acknowledged advantage of the administrative process has been its flexibility in enabling administrators to deal justly with unanticipated as well as anticipated situations in accordance with general legislative guides." Ward v. Scott, 11 N.J. 117, 127 (1952). The Department has developed the waiver rules based upon its long experience with rulemaking and implementing legislative purposes and its understanding that sometimes the

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strict application of rules, as applied in a particular case or under particular circumstances, can effectively frustrate the very legislative policies the rules were intended to implement.

The New Jersey courts have held that waivers of regulatory requirements by an administrative agency ordinarily should be authorized by a regulation which has been adopted pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and which establishes appropriate standards for the exercise of the agency's waiver decision-making. Cooper Univ. Hosp. v. Fred M. Jacobs, 191 N.J. 125, 143 (2007); County of Hudson v. Dept. of Correction, 152 N.J. 60, 71 (1997). These waiver rules are such a regulation. They were proposed, subject to public review and comment, and are being adopted by the Department in accordance with the procedural and substantive requirements of the Administrative Procedure Act.

**16. COMMENT:** Before an administrative regulation has the force and effect of law it must comply with the following requirements:

- a) The statute which created the administrative agency must comply with constitutional requirements of substance and procedure;
- b) The statute must authorize specifically or by necessary implication the issuance of the rules and regulations of the agency; and
- c) The rule or regulation adopted must be within the authority of the agency and must have been adopted according to the procedure prescribed by the statute.

The legislative act is the charter of the administrative agency and administrative action beyond the authority conferred by the statute is *ultra vires*.

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If the delegation of rule-making is unconstitutional, the legislature in making it has acted *ultra vires*, and regulations issued in pursuance thereof are void. If the delegation is found to be constitutional, the second requirement is that the administrative authority act strictly in accordance with its terms. Otherwise, the administrative authority has acted *ultra vires* and its regulations are void. *Hart, An Introduction to Administrative Law*, 170 (1940)

An administrative regulation must be consistent with the constitution; however, this alone is not enough. It must also be authorized by the statute creating the agency. Miller v. United States, 294 U.S. 435, 439, 55 S. Ct. 440, 79 L. Ed. 977 (1935), Port of Boston Shipping Ass'n, 420 F.2d 419 (1<sup>st</sup> Cir. 1970), cert. granted, 397 U.S. 1035, 90 S. Ct. 1360, 25 L. Ed. 646 (1970) and judgment rev'd on other grounds, 400 U.S. 62, 91 S. Ct. 203, 27 L. Ed. 2<sup>nd</sup> 203 (1970), Hotel Suburban System, Inc. v. Holderman, 42 N.J. Super. 84, New Jersey (1956), New Jersey Highway Authority v. Drenth, 44 N.J. Super. 327 (1957).

A regulation which ... operates to create a rule out of harmony with the statute is a mere nullity. Lynch v. Tilden Produce Co, 265 U.S. 315, 320-322, 44 S. Ct. 388, 68, L. Ed. 1034 (1924).

Because the central legislative body is the source of an administrative agency's power, the provisions of the statute will prevail in any case of conflict between a statute and an agency regulation. The Waiver of Department Rules at N.J.A.C. 7:1B are beyond the authority conferred by the statutes cited, and are *ultra vires* and unconstitutional. Because the statutes cited as authority in the proposed rule are clear and unambiguous, with limited exception, (where the statute clearly authorizes waivers), the Department is prohibited from amending, altering, enlarging or limiting rules outside the confines of enabling legislation.

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The fact that the agency may have acted in good faith when it issued the proposed waiver rule is of no consequence. Reasonable doubt exists whether the N.J. Legislature provided the Department the power to promulgate the waiver rules, and, therefore, the Department's exercise of the power to issue the waiver rules is *ultra vires* and void. (51)

**RESPONSE:** The Department acknowledges that its rules must be consistent with the State Constitution and must be within the authority of its enabling statutes. Please see the Department's response to Comments 11-15 for a detailed discussion of the Department's authority for the waiver rules.

**17. COMMENT:** Not all agency interpretations merit 'Chevron Deference', Echazabal v. Chevron USA, Inc., 226 F.3d 1063(8<sup>th</sup> Cir. 2000), rev'd on other grounds, 536 U.S. 73, 122 S.Ct. 2045, 153 L.Ed.2d 82. Where the statute indicates no intent to delegate general authority to make rules with the force of law, or where such authority was not invoked, an agency interpretation is entitled to respect only to the extent that it has the power to persuade. Washington v. HCA Health Services of Texas. Inc., 152 F 3d. 464, 5<sup>th</sup> Cir. 1998), cert granted, judgment vacated on other grounds, 527 U.S. 1032, 119 S. Ct. 2388, 144 L. Ed. 2d 790.

In general, regulations issued under a statute control the interpretation of the statute as long as the interpretation is permissible. Where an agency pronouncement fails to meet Chevron deference, persuasiveness is determined by weighing the thoroughness evident in the pronouncement's consideration, the validity of its reasoning, its consistency with earlier and later



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pronouncements, and all the factors which give power to persuade. Additionally, courts decline to defer to an agency's interpretive guidelines where they lead to a result contrary to the result called for under U.S. Supreme Court precedent, Duncan v. Washington Metropolitan Area Transit Area Authority, 201 F. 3d 482, reh'g en banc granted opinion vacated, and on reh'g, 240 F. 3d 110, cert denied 534 U.S. 818, 122 S. Ct. 48, 151 L. Ed. 2<sup>nd</sup> 20, or where the interpretation is clearly incorrect. The proposed waiver rule is not persuasive because the statutes cited as authority do not indicate the intent to delegate or invoke the authority to issue waivers of Department rules and, therefore, it is void and unenforceable. (51)

**18. COMMENT:** The Supreme Court is the final arbiter of the meaning of a statute, as expressed in the words of the statute. The U.S. Supreme Court and/or the N.J. Supreme Court will be the final arbiter of whether the statutes cited as authority in the proposed rules authorize the issuance of waivers. (51)

**RESPONSE TO COMMENTS 17 AND 18:** The commenter argues that Federal law principles described in the comment support the conclusion that the Department's waiver rule is void and unenforceable. Even if the Department were to accept the Federal law principles stated by the commenter as applicable to the waiver rules, these principles would not support the conclusion that the rules are invalid. Contrary to the commenter's premise, the Department's enabling State legislation is replete with expressions of legislative intent to delegate general authority to the Department to adopt rules as it deems necessary or appropriate for effectuating the purposes of the State legislation. See, e.g., N.J.S.A. 13:1D-9; 13:1E-6 (Solid Waste

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Management Act); N.J.S.A. 13:9B-25 (Freshwater Wetlands Act); N.J.S.A. 13:19-17 (Coastal Area Facility Review Act); 26:2C-8 (Air Pollution Control Act); N.J.S.A. 58:10A-4 (Water Pollution Control Act); N.J.S.A. 58:16A-55 (Flood hazard Area Control Act). The Department's promulgation of these rules, which enable the Department to waive existing Department rules in certain limited cases, is a valid exercise of its express and implied rulemaking powers. That the Legislature in certain statutes has expressly authorized or mandated the Department's promulgation of specified waiver rules is not an indication of legislative intent that the Department is otherwise powerless to promulgate other rules involving waivers or exemptions.

The Department agrees that the New Jersey courts are the final arbiter of the meaning of a statute and the authority that a statute delegates to an administrative agency. Please see the Department's response to Comments 11-15 for a detailed discussion of the Department's authority for the waiver rules.

It might also be noted that "persuasiveness," to use this commenter's terminology, is not the standard of review of administrative rulemaking employed by the New Jersey courts. The scope of judicial review of administrative rulemaking is a limited one. Reviewing courts do not determine the legal validity of administrative regulations based upon their persuasiveness. Parties challenging regulations in court must demonstrate that the rules are arbitrary, capricious and unreasonable, or incompatible with the statutes they purport to implement. The waiver rules adopted by the Department are consistent with the agency's broad rulemaking authority under the statutes it is administering and not arbitrary, capricious or unreasonable.

**19. COMMENT:** We believe that this rule is in non-compliance regarding the statutory

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authority of the NJDEP to grant waivers of its own rules and regulations or to grant waivers on the basis of conflicting rules or undue burden on regulated entities, unless specifically authorized by legislative statute. (21, 46, 48, 64, 92, 94, 104, 124, 138, 139, 146, 148, 152, 174, 212, 213, 223, 224, 226, 298, 311, 392, 441, 442, 452, 460, 474, 475, 495)

**RESPONSE:** The Department does not agree that specific statutory authorization is required in order to promulgate these waiver rules. Please see the Department's response to Comments 11-15 for a detailed discussion of the Department's authority for the waiver rules.

**20. COMMENT:** By enacting environmental laws, the legislature has spoken as to when it allows DEP to waive the State's environmental protections, and why. DEP has no authority to circumvent legislative requirements by granting waivers under any other circumstances. That the Waiver Rule Proposal cites for its statutory authority the Freshwater Wetlands Protection Act, the Highlands Water Protection and Planning Act, CAFRA, and over a hundred other statutes that give DEP no authority to enact the waiver rule proposal, the proposed rule is not only inexplicable but nonsensical. DEP cannot rely on the environmental law for authority to negate the environmental law. (239)

**RESPONSE:** The waiver rules do not negate environment law. Please see the Department's response to Comments 11-15 for a detailed discussion of the Department's authority for the waiver rules. Furthermore, far from being "nonsensical," the waiver rule makes good sense. The waiver rules serve a salutary regulatory purpose not addressed by existing Department rules

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and resolve potential conflicts in the existing regulatory scheme. The rules provide a carefully circumscribed, criteria-bound mechanism for approving waivers in certain limited individual cases that satisfy the requisite grounds for a waiver, the substantive standards and the procedures in the rules. As a threshold matter, the waiver cannot conflict with any Federal statute or regulation or any State statute. Under the rules, the Department's waiver discretion is limited to cases where it is shown that at least one of the following requisite bases for obtaining a waiver is satisfied and that all other requirements of the rules are met: (1) existing rules conflict so as to make compliance impossible, as defined in the rules, or (2) the strict application of existing rules to an applicant's situation would be unduly burdensome, as defined in the rules, or (3) a net environmental benefit as defined in the rules can be achieved by the waiver, or (4) a public emergency exists. An acknowledged advantage of the administrative process is its flexibility in dealing justly with unanticipated as well as anticipated situations in accordance with general legislative guides. Ward v. Scott, *supra*, 11 N.J. at 127.

The Department has the authority to adopt a single set of rules that apply to different environmental programs and rules under various statutes. Society for Environmental Economic Development v. New Jersey Department of Environmental Protection, 208 N.J. Super. 1, 7-8 (App. Div. 1985). For example, the Coastal Permit Program Rules, N.J.A.C. 7:7, establish procedures by which the Department reviews permit applications and appeals from permit decisions under the Coastal Area Facility Review Act (CAFRA), the Wetlands Act of 1970, and the Waterfront Development Law. N.J.A.C. 7:7-1.1(a). Among other things, N.J.A.C. 7:7-1.10 provides that the Department may, in its discretion, relax the procedures in those rules, and also that the Department may reconsider the application of substantive standards in the Coastal Zone

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Management Rules, N.J.A.C. 7:7E, which are used in reviewing permit applications under CAFRA, the Wetlands Act and the Waterfront Development Law. Similarly, the Department's rules at N.J.A.C. 7:18 govern the certification of laboratories performing sample analyses for compliance with many statutes, and establish the criteria and procedures that certified environmental laboratories must follow in collecting, handling, preserving, and analyzing regulatory samples in connection with various Department programs under various statutes. In addition, the Department's Stormwater Management Rules, N.J.A.C. 7:8, apply to programs under the Water Quality Planning Act, the Water Pollution Control Act, the Flood Hazard Area Control Act, CAFRA, the Wetlands Act of 1970, the Freshwater Wetlands Protection Act, the Waterfront Development Law and the Dam Safety Act.

**21. COMMENT:** The proposed waiver rule is *ultra vires*. "A regulation may not alter a statute or frustrate legislature policy." In re Adoption of N.J.A.C. 7:26E-1.13, 377 N.J. Super. 78, 98 (App. Div. 2005). (363)

**22. COMMENT:** There is nothing in the Department's empowering statute that provides the Department with the authority to create a blanket waiver rule. The Department relies on several statutes for the authority to promulgate this waiver rule. For example, N.J.S.A. 12:5-3 is cited as an authority. There is nothing in N.J.S.A. 12:5-3 that discusses waivers, variance, etc. N.J.S.A. 13:1B-1 et seq. also does not provide any basis for the promulgation of a blanket waiver rule. While many of NJ's environmental statutes provide for relief from strict compliance, those circumstances are usually circumscribed and the statutes also do not

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provide for the authority for a blanket waiver rule. “Public awareness of an agency’s intention to reserve the power to grant variances may impact an interested party’s evaluation of the agency’s substantive regulations. A body of rules adequate on its face may be deemed inadequate in light of a reservation of broad waiver authority.” SMB Associates v. New Jersey Dept. of Environmental Protection, 264 N.J. Super. 38, 54-55 (App. Div. 1993). (364)

**RESPONSE TO COMMENTS 21 AND 22:** The waiver rules do not alter any statute or frustrate legislative policy. The Department promulgates rules with the intent to effectuate the requirements and purposes of all applicable statutes. However, based on years of experience with rulemaking and implementing its regulatory programs, the Department has found that strict compliance with existing rules can sometimes produce unreasonable, unfair or unintended results that may actually frustrate, rather than advance, the legislative purposes of its enabling statutes or existing rules. The waiver rules will afford the Department the ability and regulatory flexibility to consider waiving strict compliance with existing rules where it is shown that the four requisite grounds, or bases, in the rules for a waiver are satisfied, provided that all other requirements and limits are met.

The Department disagrees with the commenter’s characterization of the waiver rules as a “blanket” rule, which suggests the rules have no boundaries. The waiver rules constitute a general rule in the sense that they may be applied to waive strict compliance with rules that implement environmental programs under a number of different statutes. However, the Department’s waiver authority under the rules is carefully circumscribed. A waiver cannot be

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approved by the Department unless the applicant demonstrates compliance with the standards, limitations and procedural requirements in the waiver rules.

In opposition to the waiver rules, the commenter cites SMB Associates v. New Jersey Dept. of Environmental Protection, 264 N.J. Super. 38, 54-55 (App Div. 1993). There, the court held that waivers of regulatory requirements by an administrative agency ordinarily should be authorized by a regulation, adopted pursuant to the Administrative Procedure Act, providing substantive standards guiding the agency's exercise of its waiver authority. The Department is adopting the waiver rules in this case in accordance with the principles of SMB Associates.

The commenter cites N.J.S.A. 12:5-3 and N.J.S.A. 13:1B-1 et seq. as examples of statutes which the Department cites as authority for the waiver rules which, the commenter argues, may not be used as sources of authority. The commenter is mistaken as to N.J.S.A. 13:1B-1 et seq., which established the Department of Conservation and Economic Development and authorized its Commissioner to "adopt, issue and promulgate, in the name of the department, such rules and regulations as may be authorized by law," N.J.S.A. 13:1B-3.e, and to "formulate and adopt rules and regulations for the efficient conduct of the work and general administration of the department, its officers and employees," N.J.S.A. 13:1B-3.f. In 1970, the Department of Conservation and Economic Development was reorganized, continued and designated as the Department of Environmental Protection and many functions, powers and duties of the former department, including rulemaking powers, were transferred to the Department. See N.J.S.A. 13:1B-3; N.J.S.A. 13:1D-1; and N.J.S.A. 13:1D-2. As to the commenter's reference to N.J.S.A. 12:5-3, the Department's authority for the waiver rule derives not from a single statute, or from a single rulemaking provision of a statute, but from the entirety of its statutes considered as a

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whole, including their language, their purposes, their history and context. Please see the Department's response to Comments 11-15 for a detailed discussion of the Department's authority for the waiver rules.

**23. COMMENT:** To determine whether an agency has adopted a permissible interpretation of a statute, the first question is whether the Congress has spoken directly on the precise question at issue. Echazabal v. Chevron USA, Inc., 226 F.3d 1063 (8<sup>th</sup> Cir. 2000), rev'd on other grounds, 536 U.S. 73, 122 S. Ct. 2045, 153 L. Ed. 2d 82. To determine whether Congress has spoken on the question at issue, the Federal appellate courts employ traditional tools of statutory construction, such as ascertaining and giving effect to legislative intent. The N.J. Legislature has spoken directly on the issue of the waiver of N.J. Department of Environmental Protection regulations where the enabling statute clearly authorizes such waivers. Because the intent of N.J. Legislature is clear, that is the end of the matter. A court as well as the agency must give effect to the unambiguously expressed intent of the N.J. Legislature to only allow waivers when a statute authorizes such waivers. The adoption of the proposed waiver rules at N.J.A.C. 7:1B is contrary to clear N.J. Legislature intent and frustrates environmental policy the N.J. Legislature sought to implement except in limited exceptions where the enabling statute authorizes such waivers, and thus the rules are void and unenforceable. (51)

**RESPONSE:** The commenter does not identify any statutes that "unambiguously express" a legislative intent to allow only those waivers specifically authorized in the statute. There are no



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such statutes. As set forth in the Department's response to Comments 11-15, the waiver rules fall within the broad rulemaking authority of the Department granted to the Department by its comprehensive enabling legislation. The Department's promulgation of a rule permitting certain limited waivers of strict compliance with existing Department rules is simply one exercise of its broad rulemaking authority. The fact that some laws mandate or authorize the Department's approving of specified waivers does not mean the Department is without authority to adopt other rules consistent with the purposes of its enabling legislation

The commenter does not specify why or how the waiver rules frustrate legislative policy. The Department believes that the rules advance, rather than frustrate, legislative purposes.

Based on years of experience with rulemaking and implementing its regulatory programs, the Department has found that strict compliance with existing rules can sometimes produce unreasonable, unfair or unintended results that may actually frustrate, rather than advance, the general legislative purposes of its enabling statutes or existing rules. The waiver rules will afford the Department the ability and regulatory flexibility to consider waiving strict compliance with existing rules where it is shown that the four requisite grounds, or bases, in the rules for a waiver are satisfied and that all other requirements of the rules are met.

As stated in N.J.A.C. 7:1B-1.1, the purpose of the waiver rules is to set forth those limited circumstances in which the Department may, in its discretion, waive the strict compliance with existing Department 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." See N.J.A.C. 7:1-1 and the Department's 2010 Vision Statement regarding the Department's core missions. N.J.A.C. 7:1B-

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2.2(a) establishes waiver criteria to be applied by the Department on reviewing a waiver application. N.J.A.C. 7:1B-2.2(a)6 (recodified from (a)7 on adoption as explained below), provides that the Department must consider, as one of the criteria, the extent to which the activity authorized by 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.

Moreover, N.J.A.C. 7:1B-2.2(a)6, as proposed, provided that the Department must also consider, as another criterion, the extent to which the activity authorized by the waiver would be consistent with the purposes and objectives of all applicable statutory requirements. N.J.A.C. 7:1B-2.1(b) lists those Department rules that cannot be waived under these waiver rules. As proposed, N.J.A.C. 7:1B-2.1(b)1 provided that the Department shall not waive a specific requirement of, or a specific duty imposed by a Federal or State statute or regulation, unless that statute or regulation provides for such a waiver. In order to alleviate any confusion regarding these two provisions, the Department is modifying the rules on adoption to clarify N.J.A.C. 7:1B-2.1(b)1 and to delete proposed N.J.A.C. 7:1B-2.2(a)6. The Department has determined that weighing the consistency of an activity that would be authorized by a waiver with the purposes and objectives of statutory requirements is rendered unnecessary by the prohibition in N.J.A.C. 7:1B-2.1(b)1 against the issuance of a waiver under these rules of any requirement or duty imposed by Federal statute or regulation or by State statute unless the statute or regulation specifically provides for a waiver. The clarifying changes on adoption at N.J.A.C. 7:1B-2.1(b)1 delete "specific" as a modifier of requirement or duty, since the Department does not have the authority to waive requirements or duties imposed by a Federal or State statute or a Federal

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regulation of any sort, whether general or specific. As a result of these changes, proposed N.J.A.C. 7:1B-2.2(a)7 requiring consideration of the Department's "core missions" is recodified on adoption at N.J.A.C. 7:1B-2.2(a)6.

Further modifications for clarity are also made on adoption at N.J.A.C. 7:1B-2.1(b) to include reference to "this chapter" in the lead-in language consistent with N.J.A.C. 7:1B-2.1(a) and to delete the phrase "any rule concerning" as the preface to the listed items that the Department will not waive. Corresponding adjustments are made at (b)2, 4, 5, 6, and 8 through 12 to include reference to "rule" as appropriate for the respective items described.

**24. COMMENT:** DEP may not circumvent the requirements of the environmental law for any individual applicant absent statutory authority. The New Jersey courts have held, for example, that the Legislature has given DEP no express or implied power to waive strict compliance with CAFRA even if the DEP imposes conditions on the waiver, and even if it finds the waiver to comport with the best interests of the environment and to be consistent with the purposes of the statute. Dragon v. New Jersey Dept. Environmental Protection, 405 N.J. Super. 478,488,496 (2009), denied, 199 N.J. 517 (2009). In enacting CAFRA, the Legislature has already balanced the State's interests in coastal development against the importance of protecting the coastal environment: DEP's regulation under CAFRA invokes *these* competing policy considerations (Id. at 494), as reflected in the language of the statute. *Any* exceptions to compliance must be based on that language (See id. at 494-96 (emphasizing that under CAFRA, a permit "shall be required" and noting that no statutory exceptions apply to the appellant for whom DEP waived compliance)), or implied in the

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specific intent of that statute (id. at 496 (administrative permits-by-rule are not specifically contemplated by CAFRA, but "are essentially the exercise of DEP's implied power *under* CAFRA to allow development that will have minimal potential for environmental impact.")) (emphasis added)). DEP has no authority to make new exceptions to compliance based on policy interests of its own choosing.

The specificity of existing environmental regulations to the resources they protect, and the legislation that authorizes the DEP to regulate at all, demonstrate the need for attention to each individual subject of regulation. More importantly, it stands in stark contrast to the utter inappropriateness and folly of a proposal to replace the entire range of environmental regulations with a single, virtually contentless general test balancing vaguely-defined factors according to an unknown standard in an administrative judgment that is as a result virtually unaccountable.

An agency must "demonstrate at a minimum that its [rules] can be understood to be consistent with the underlying legislative mandate." In re Township of Warren, 132 N.J. 1, 42 (1993), citing Williams v. Dep't of Human Serv., 116 N.J. 102, 109 (1989); Texas v. Dept. of Human Servs., 88 N.J. 376, 387 (1982). The draft rule lists 124 statutory sections impacted by the Waiver Rule Proposal. (The impacted statutes are listed by DEP, curiously, in the statutory authority section where the laws granting DEP authority to enact the Waiver Rule Proposal should be cited.). It does not, however, explain how the Waiver Rule Proposal is consistent with *any* of these statutes or its underlying legislative goals. Neither does it purport to address any specific gap in the regulatory scheme. The Waiver Rule Proposal explains itself only by the wholly unremarkable general assertion that "strict compliance with a rule ... can lead to an unreasonable, unfair, or unintended result, which can adversely affect a prospective applicant,

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the public or the environment.” Waiver Rule Proposal, 3. In the absence of any specific factual support, content or context for this assertion, the justifications cited for the Waiver Rule Proposal are speculative at best.

The generality of these justifications is matched by that of the criteria that the Waiver Rule Proposal allows DEP to consider in waiving environmental regulations: these criteria are *not* limited to environmental concerns even in the broadest terms. An environmental rule or standard imposes an “undue burden” and can be waived if it imposes “excessive costs”, and a waiver would achieve “comparable” benefits. (239)

**25. COMMENT:** Nothing prevents the DEP from disregarding environmental concerns outright: indeed, the Waiver Rule Proposal acknowledges that negative environmental impacts will be only “partially offset”. (239)

**RESPONSE TO COMMENTS 24 AND 25:** The commenter reasons that the specificity of waivers authorized by some of the Department’s governing statutes establishes the Legislature’s intent to limit the Department’s waiver authority to just those waivers. The Department disagrees. Please see the Department’s response to Comments 11-15, 23, 24-25, 27-29, 31-32, and 39 for a detailed discussion of the Department’s authority for these waiver rules.

The commenter further asserts that “nothing prevents the DEP from disregarding environmental concerns outright.” The commenter overlooks important legal principles and specific provisions of the waiver rules directly addressing environmental concerns, which strictly limit and control the exercise of the Department’s discretion to approve waivers under these

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waiver rules. As stated in the Department's response to Comments 11-15, the Department's fundamental duties include maintaining, protecting and enhancing New Jersey's natural resources, protecting the public health, safety, welfare and the environment, and effectuating the purposes of its enabling statutes. As stated in N.J.A.C. 7:1B-1, the limited purpose of the waiver rules is to provide that, in certain limited circumstances, the Department may waive strict compliance with existing regulations "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, welfare, and the environment." N.J.A.C. 7:1B-2.2(a), which establishes waiver criteria to be considered by the Department on reviewing a waiver application, specifically provides at N.J.A.C. 7:1B-2.2(a)6 (recodified from (a)7 on adoption; see explanation in response to comment 23) that the Department must evaluate whether 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. Moreover, N.J.A.C. 7:1B-2.1(b)(as modified on adoption; see response to comment 23) provides that the Department shall not waive a requirement of, or duty imposed by, a Federal or State statute or regulation, unless that statute or regulation provides for such a waiver.

The waiver rules bear no resemblance to the commenter's description of a "virtually contentless" rule containing "unknown standards." The summary, the statement of purpose, the four bases for considering a waiver, the decision-making criteria and the limitations provided in the waiver rules all limit and control the Department's exercise of waiver discretion. These standards articulate the Department's fundamental environmental concerns and provide ample

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safeguards to ensure any waiver issued will be consistent with the Department's core missions and its responsibilities to effectuate the purposes of its enabling statutes.

The court's opinion in Dragon v. Dep't of Envir'l Prot., New Jersey Dept. of Environmental Protection, 405 N.J. Super. 478 (App. Div. 2009), certif. denied, 199 N.J. 517 (2009), does not support the commenter's opposition to the rules. There, the reviewing court held that, in the factual context of that case, the Department could not use the litigation settlement process to circumvent CAFRA's substantive permitting requirements. The court was not concerned with the Department's authority to promulgate rules providing a procedure for obtaining waivers of existing regulations. It may be noted, however, that the court in Dragon did recognize the Department's implied authority under CAFRA to grant permits-by-rule, even though such permits were not specifically contemplated by that statute. Dragon, supra, 405 N.J. Super. at 496. The Department does agree that any waiver must meet CAFRA statutory requirements.

Finally, contrary to the commenter's observation, the waiver rules serve an important regulatory function generally not addressed by the existing regulatory scheme. As stated in the Department's summary of the proposed rules:

[I]t is apparent that, in certain limited instances, 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

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that allow for waivers of 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. . . . 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 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.

Based upon years of experience with rulemaking and implementing legislative policies, the Department has found that strict compliance with existing rules sometimes produces unreasonable, unfair or unintended results which can frustrate, rather than advance, the general legislative purposes of its enabling statutes and existing rules. With this regulatory experience in mind, and consistent with provisions of Executive Order No. 2 (2010), the Department



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developed and proposed the waiver rules to afford the Department the ability and regulatory flexibility to consider waiving strict compliance with existing rules in certain limited situations. As set forth in N.J.A.C. 7:1B-2.1(a), an applicant for a waiver must demonstrate that it satisfies at least one of four requisite grounds, or bases, for the Department to consider granting a waiver and, further, that all other requirements of the rules are met.

Decisions of the New Jersey courts were instructive in development of the waiver rules. In SMB Assocs. v. N.J. Dep't of Env'tl. Prot., 264 N.J.Super. 38 (App. Div.1993), aff'd on other grounds, 137 N.J. 58 (1994), the Appellate Division held that an agency seeking to waive a provision of its rules must adopt a rule pertaining to such waivers setting forth appropriate standards to govern agency decision-making. In that case, the court held that, in the absence of such a Department rule with appropriate standards governing waivers, the Coastal Area Review Board did not have authority to grant a waiver from certain requirements of N.J.A.C. 7:7E-3.24 (Bay Island Corridor Policy) prohibiting a proposed development that was subject to the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 to -21, and that the project violated N.J.A.C. 7:7E-5.1 et seq. (General Land Area Policy). The Board's waiver of applicable CAFRA regulations was therefore reversed.

In re CAFRA Permit No. 87-0959-5 Issued to Gateway Assocs., 152 N.J. 287 (1997), the Supreme Court held that an appeal by the American Littoral Society challenging the Department's decision to waive the Bay Island Corridor Policy for another proposed development subject to CAFRA was time-barred. While not necessary to its disposition of that case, the Court observed that, in the absence of a statute or regulation authorizing the waiver of administrative rules, an agency seeking to waive substantive rules generally should adopt a rule

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pertaining to such waiver and setting forth appropriate standards to govern the agency's decision-making.

In the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-22b affords the Department the option of modifying its actions in order to minimize the detrimental effect of an approval, modification or denial of a permit and avoid a regulatory taking. In East Cape May Assocs. v. New Jersey Dep't of Env'tl. Protection, 343 N.J.Super. 110 (App. Div. 2001), certif. den. and appeal dismissed, 170 N.J. 211 (2001), the Appellate Division held that, before the Department could avail itself of this statutory option, the Department must adopt rules in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, establishing standards for doing so. The Court remanded the case to allow the Department to draft appropriate rules for this purpose.

In Dragon v. New Jersey Dep't of Env'tl Prot., 405 N.J.Super. 478 (App. Div. 2009), certif. den., 199 N.J. 517 (2009), the Appellate Division held that the Department could not use the litigation settlement process to circumvent compliance with CAFRA rules requiring a permit for a proposed development. Finding that CAFRA did not expressly or impliedly authorize the Department to use the settlement process to deviate from its own regulations in order to avoid potential litigation risks, the court invalidated a Department "letter of authorization" approving the proposed development in lieu of a permit which it had issued in accordance with the terms of a negotiated settlement of litigation challenging the Department's earlier denial of a permit.

In Cooper Univ. Hosp. v. Fred M. Jacobs, 191 N.J. 125 (2007), citing SMB Assocs. v. N.J. Dep't of Env'tl. Prot., 264 N.J. 38 (App. Div. 1993), aff'd, 137 N.J. 58 (1994), the Supreme Court affirmed that waivers of regulatory requirements generally must be embodied in a regulation, adopted pursuant to the Administrative Procedure Act, authorizing waivers and

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establishing appropriate standards for exercising that waiver authority. In that case, the Court held that a regulation pursuant to which the Commissioner of the Department of Human Health and Senior Services issued a “call,” which invited health care facilities to apply for certificates of need to conduct certain elective surgery procedures in a demonstration project, was the equivalent of a waiver of existing regulations without adequate standards. As a result, the court invalidated certificates of need issued by the Commissioner to hospitals which responded to the call.

These court decisions underscored the need for drafting waiver rules providing the Department with more flexibility for implementing the legislative purposes of its enabling statutes and its rules. In accordance with the legal principles set forth in these decisions, the Department developed and proposed the waiver rules and, after public review and comment, adopted the rules, with modifications described elsewhere in responses to public comments, in compliance with the Administrative Procedure Act.

An acknowledged advantage of the administrative process is its flexibility in enabling agencies to deal justly with unanticipated as well as anticipated situations in accordance with general legislative guides. Ward v. Scott, 11 N.J. 117, 127 (1952).

**26. COMMENT:** The constitutional mandate of the Executive Branch is to implement each law that is passed by the Legislature through a good faith interpretation. It is not to implement a general policy decision by the Executive, the Governor. Each law is supposed to be interpreted, fleshed out and the details filled in. Each law must be looked at individually. DEP regulates in many areas, including parks and forestry, streams,

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wastewater, discharges, sites that need remediation, and air pollution. Some of the laws are written precisely, deliberately allowing little room for maneuver on the part of the people who administer the law. Others are written more broadly, allowing more discretion to the Executive Branch. The idea of a blanket waiver rule, even across one Department like DEP, is suspect. (326)

**RESPONSE:** The Department is charged with implementing and enforcing a large number of diverse environmental statutes and programs. The stated purpose of the waiver rules is to set forth limited circumstances in which the Department may, in its discretion, waive strict compliance with existing rules in a manner that is consistent with statutory requirements and purposes and the agency's core missions to maintain, protect and enhance New Jersey's natural resources and to protect the public health, safety and welfare and the environment.

The Department agrees that its mission is to fulfill the policies and mandates of its enabling legislation. With this in mind, the commenter expresses some concern about adopting waiver rules of this breadth. In this regard, it should be noted that the waiver rules are not undiscerning "blanket" rules, but carefully drawn general rules that can be applied to different Department programs with different sets of existing rules in appropriate cases. Examples of other Department rules that apply to multiple programs include the Coastal Permit Program Rules, N.J.A.C. 7:7; the Stormwater Management Rules, N.J.A.C. 7:8; and the rules governing the certification of laboratories and collecting, handling, preserving, and analyzing of samples, N.J.A.C. 7:18. The waiver rules include a statement of purpose, substantive standards, criteria for the Department's evaluation of waiver applications, and strict limitations upon the Department's

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approving of waivers, all of which carefully circumscribe and control the discretion the Department may exercise under these general waiver rules and applicable statutes.

**27. COMMENT:** N.J.S.A. 13:1D-9, Powers of the Department, does not grant the Department the power to waive rules and regulations pertaining to laws duly promulgated through the legislative process, unless such laws provide for waivers. Likewise, NJDEP has not been delegated authority to provide waivers based on USEPA rules. Of the more than 100 statutes listed as granting NJDEP authority for proposed N.J.A.C. 7:1B, only six acts address waivers:

- Industrial Site Recovery Act: waivers against “closing operation” determination and “area of concern” determination
- Freshwater Wetlands Protection Act: transition area waiver and grant waiver
- Coastal Area Facility Review Act: waiver of permits due to storm, natural disaster, acts of God
- Highlands Water Protection Planning Act: case-by-case waiver if determined necessary to protect health and safety, waiver for redevelopment of existing development, waiver to avoid taking property without just compensation, and the limitation of all waivers to rules and regulations adopted for section 34 of the Act.
- Air Pollution Control Act: explicitly calls for the use of reduction credits in lieu of waivers
- Flood Area Control Act: waivers for bridge and culvert construction.

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NJDEP has adopted only 13 rules pertaining to these waivers. (21, 46, 48, 64, 92, 94, 104, 124, 138, 139, 146, 148, 152, 174, 213, 212, 223, 224, 226, 298, 311, 392, 441, 442, 452, 460, 474, 475, 491, 495)

**28. COMMENT:** There are several statutes that have waiver provisions, as for example, the Freshwater Wetlands Protection Act and the Flood Hazard Control Act. Where they exist, such waivers were carefully crafted by the New Jersey Legislature through a publicly vetted process, in which consensus was reached among the members of the Legislature who represent the citizens of the State. Other statutes may not have waiver provisions built into them, and that is by intent because there are circumstances where one cannot say that there will be a net environmental benefit by allowing statutory provisions to not be followed. (391)

**29. COMMENT:** This waiver rule violates numerous laws that provide no waiver provisions or in some cases limited waiver provisions, narrowly defined by the Legislature. (486)

**RESPONSE TO COMMENTS 27 THROUGH 29:** As noted by the commenters, certain statutes mandate or authorize the Department to approve specified waivers or exemptions from existing rules and regulations. In fact, one basis for considering a waiver under the Department's waiver rules comports with a specific mandate of one of the statutes cited by the commenter. The Flood Hazard Area Control Act states: "Provision shall be made by the department for the waiver, according to definite criteria, of strict compliance with the rules and regulations, where necessary to alleviate hardship." N.J.S.A. 58:16A-55(b). Statutes authorizing specified waivers

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or exemptions are not limited to those cited by the commenters. Other such statutes include the Solid Waste Management Act (see N.J.S.A. 13:1E-4.a), the Comprehensive Regulated Medical Waste Management Act (see N.J.S.A. 13:1E-48.4.b), the Brownfield and Contaminated Site Remediation Act (see N.J.S.A. 58:10B-2.b) and the Safe Water Drinking Act (see N.J.S.A. 58:12A-5).

The waiver rules do not violate Federal statutes or regulations or State statutes. Please see the Department's response to Comments 11-15, 24-25 and 26 for a detailed discussion of the Department's authority for the waiver rules. In addition, N.J.A.C. 7:1B-2.2(a), which sets forth criteria to be considered by the Department on reviewing a waiver application, provides, at N.J.A.C. 7:1B-2.2(a)6 (recodified from (a)7 on adoption; see response to comment 23) that the Department must evaluate whether the activity authorized by 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. Finally, N.J.A.C. 7:1B-2.1(b) specifically states that the Department cannot issue a waiver that violates requirements of Federal statutes or regulations or State statutes. As adopted, the rule provides that the Department shall not waive 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; 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 that Federal program; or 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.

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**30. COMMENT:** The rule summary states the waiver “rules will provide an additional means of relief from strict compliance with Department rules when appropriate.” (43 N.J.R. 474) However, many of the Department rules already have waiver provisions. These existing waivers are based on the environmental and public health and safety intent and goals of the Legislature in adopting certain protections and establishing certain regulatory programs. In adopting laws to protect our environment, the Legislature specifically determined where and when waivers would be appropriate and this new rule undermines their authority and the separation of powers between branches of State government. The DEP has no authority to grant waivers under any circumstances other than those consistent with the legislative requirements. (486)

**RESPONSE:** The waiver rules are within the Department’s broad regulatory authority under its comprehensive enabling legislation. Moreover, the waiver rules are consistent with and subject to statutory requirements. Please see the Department’s response to Comments 11-15, 24-25, 26 and 27-28 for a detailed discussion of the Department’s authority for the waiver rules.

**31. COMMENT:** In SMB Associates v. Department of Environmental Protection, 264 N.J. Super. 38, 50 (App. Div. 1993), aff’d 137 N.J. 58 (1994), the Appellate Division ruled that in order for the NJDEP to have authority to grant a waiver of requirements contained in the Coastal Area Facility Review Act, there must be adopted regulations authorizing waivers and establishing appropriate standards for the exercise of waiver authority. The Court stated that: [T]he public and any affected or interested parties were without any firm knowledge of the



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factors that the agency would deem relevant and that might influence its ultimate decision.

The public had no meaningful opportunity to shape the criteria that ultimately affected their interests. *Id.* at 51.

Similarly, in In re CAFRA Permit No. 87-0959-5 Issued to Gateway Assocs., 152 N.J. 287, 308 (1997) the appellate court again declared that waiver of environmental regulations requires rule-making to set forth appropriate standards to govern agency decision-making.

The SMB decision is instructive in several ways. First, the Court clearly stressed that the public must be able to address the criteria for the waiver. Secondly, any waiver must have appropriate standards for the exercise of waiver authority. The proposed waiver rule violates the instructions of the SMB court in that the standards for the exercise of waiver authority are vague, indefinite and overbroad. Secondly, the public will not have a reasonable opportunity to address the waiver criteria due to the vague and overbroad nature of the language in the proposed rule and the nature of NJDEP proceedings. Most importantly, the proposed regulation violates one of the most essential tenets of administrative law requiring adequate standards so as to prevent arbitrary action.

In another decision, the Appellate Division provided specific guidance with regard to the grant of exceptions from environmental restrictions. In East Cape May v. State, 343 N.J. Super. 110 (App. Div. 2001), the Appellate Division underscored the importance of having specific standards, noting that the absence of standards “encourages arbitrary action,” deprives the public of a meaningful understanding of the process, and inhibits judicial review of agency action, quoting SMB Assocs. v. New Jersey Dep't of Env'tl. Prot., 264 N.J. Super. 38, 54 (App. Div. 1993), aff'd, 137 N.J. 58 (1994).

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The East Cape May case involved the waiver of standards contained in the Freshwater Wetlands Protection Act (FWPA) for the purpose of devising an offer to prevent the inverse condemnation of property. The Appellate Division recognized that the waiver obviously clashes with the public's right to demand that the environment be protected by the State agency charged with that function. By enacting the FWPA, the Legislature found that freshwater wetlands “preserve drinking water supplies,” “provide a natural means of flood and storm damage protection,” “retard soil erosion,” “provide ... habitats for a major portion of the State's fish and wildlife,” and help preserve surface waters particularly during drought periods. N.J.S.A. 13:9B-2. Moreover, the statement of the legislative purposes of CAFRA emphasizes the importance of preserving coastal areas: “The Legislature finds and declares that New Jersey’s . . . [coastland areas including wetlands] constitute an exceptional, unique, irreplaceable and delicately balanced physical, chemical and biologically acting and interacting natural environmental resource. . . .” N.J.S.A. 13:19-2. Consequently, the DEP's role in enforcing its regulations under the FWPA and CAFRA is daunting. It must be diligent in preventing the yard-by-yard destruction of environmentally sensitive land. “[L]and itself is a diminishing resource . . . [and] [e]nvironmentally-sensitive land is all the more precious. Hence, a proposed development that may constitute only a small insult to the environment does not lessen the need to avoid such an offense.” Id. at 132-133 (citations omitted) (emphasis supplied).

The East Cape May Court enunciated the standards governing waivers, standards that govern the waiver rule that the NJDEP currently proposes. The Court stressed that the State's strong interest in protecting wetlands and preserving coastal areas must be fundamental to the waiver guidelines. The Court stated:

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Therefore, the guidelines by necessity must identify the substantive policies of the governing legislation and set forth specific factors relevant to the agency's decision that waiver will not run counter to those legislative goals. At the very least, the process must identify what regulation or standard will be waived, and how that waiver will not compromise the overall regulatory scheme (emphasis supplied). *Id.* at 133-134.

The proposed waiver rule falls far short of conforming to the guidelines enunciated by the Court in the East Cape May decision. The proposed rule fails in several respects:

1. The proposed rule does not identify the substantive policies of the various governing statutes. Instead, the NJDEP proposes in one fell swoop to authorize waivers from all but a limited group of regulations, without identifying the substantive policies at stake.
2. The proposed rule does not set forth specific factors to assure that the waiver will not run counter to the identified legislative goals. Instead, the NJDEP *asks the public to trust* that it will grant the waivers in a reasonable and fair manner.
3. The rule does not identify how the wide-ranging waivers will not compromise the overall regulatory scheme. Instead, the NJDEP asks the public to allow its "core mission" to determine the result, when the most recent articulation of the core mission includes stimulating the economy. The waiver rule encourages the arbitrary and uneven exercise of waiver authority.

Our Courts have not allowed administrative agencies to have *unbridled* discretion. Due process requires that "administrators must do what they can to structure and confine their discretionary powers through safeguards, standards, principles and rules." Crema v. New Jersey Department of Environmental Protection, 94 N.J. 286, 301 (1983) (quoting City of Santa Clara v. Kleppe, 418 F. Supp. 1243, 1261 (N. D. Cal. 1976), aff'd in part and rev'd in part on other

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grounds sub nom. City of Santa Clara v. Andrus, 572 F.2d 660 (9th Cir.), cert. denied, 439 U.S. 859, 99 S.Ct. 177, 58 L.Ed. 2d 167 (1978)). The proposed waiver rule flies in the face of this statutory guidance.

It is therefore essential that the NJDEP follow the rulings of our Courts. If a waiver provision is to be enacted, separate waiver language for each delegated statutory task is essential. Each waiver must follow this guidance or will surely be declared invalid. (123)

**32. COMMENT:** For the purpose of a constitutional challenge based on vagueness, a statute is vague not when it prohibits conduct according to an imprecise but comprehensive normative standard, but rather in the sense that no standard of conduct is specified at all. The proposed waiver of Department rules at N.J.A.C. 7:18 is constitutionally vague because no clear standard of conduct is specified for determining how waivers will be granted. (51)

**RESPONSE TO COMMENTS 31 AND 32:** In accordance with the principles stated in SMB Associates v. New Jersey Department of Environmental Protection and In re CAFRA Permit No. 87-0959-5 Issued to Gateway Associates, the Department is adopting waiver rules with substantive standards, criteria and limitations guiding future decision-making. The rules were proposed, subject to public review and comment, and adopted in accordance with the requirements of the Administrative Procedure Act. The public had a meaningful opportunity to comment and shape the terms of the rules.

The Department does not agree that the standards in the rules for approving a waiver are vague, indefinite and overbroad. There are ample substantive standards in the waiver rules on

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the basis of which the Department will evaluate waiver applications. The rules carefully circumscribe the Department's discretion by setting forth a statement of purpose emphasizing that waivers shall be consistent with its core missions to maintain, protect and enhance New Jersey's natural resources and to protect the public health, safety, welfare and the environment; by establishing four threshold requirements, or bases, for Department consideration of a waiver; by providing additional, detailed criteria that must be applied by the Department in its review and evaluation of waiver applications; and by imposing limitations significantly curbing the scope of the Department's waiver authority. The Department's statement of purpose, the four alternative bases for considering a waiver, the detailed criteria for the Department's evaluation of waiver requests and the limitations on the Department's waiver discretion in the rules provide appropriate safeguards against the potential for arbitrary or uneven exercises of waiver authority.

Decisions under the waiver rules will not run counter to legislative goals. The rules enable the Department to consider waiving strict compliance with existing rules in four limited situations set forth in the rules. Based on years of experience with rulemaking and implementing its regulatory programs, the Department has found that strict compliance with existing rules can sometimes produce unreasonable, unfair or unintended results that may actually frustrate, rather than advance, the general legislative purposes of its enabling statutes or existing rules. The waiver rules will afford the Department the ability and regulatory flexibility to consider waiving strict compliance with existing rules where it is shown that the four requisite grounds, or bases, in the rules for a waiver are satisfied and that all other requirements of the rules are met. The waiver rules advance, rather than frustrate, the purposes of the Department's enabling statutes. The commenter argues that there must be separate waiver rules and separate language for each

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individual statute and set of rules implicated by a waiver application. The Department disagrees. As explained in response to Comment 20, the Department may deal comprehensively in a single set of rules with the overlapping subjects of its various environmental statutes and programs, even where redundancies may result.

**33. COMMENT:** There are no standards by which to judge a waiver request. The ambiguousness is fatal to the validity of this rule and is counter to Governor Christie's Executive Order No. 2. While it is admirable that the government seeks to act transparently and predictably, the proposed rule is anything but transparent or predictable. It inserts a level of secrecy and unpredictability that the State has not seen. The courts have already ruled that there must be uniform standards that give predictable outcomes, and the rule does not provide for that. For all of these reasons, it is strongly urged that the Department withdraw this rule. (75, 87, 136, 157, 159. 193, 352, 363, 481, 491)

**RESPONSE:** The Department believes that the rules achieve an appropriate balance between uniform standards and regulatory predictability on the one hand and administrative flexibility on the other. There are ample standards in the waiver rules to guide and control the Department's evaluations of waiver applications. See the Department's responses to Comments 24-25, 31-32, 54, 79-80, 149-159, 160-170, and 174 for a detailed discussion of the substantive standards and procedural safeguards in the waiver rules.

Under the waiver rules, transparency in the Department's review and disposition of future waiver requests is provided by the public notice requirements of N.J.A.C. 7:1B-2.3 and by

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N.J.A.C. 7:1B-2.4, which requires reasoned waiver decisions by the Department in writing. Under N.J.A.C. 7:1B-2.3(a), the waiver applicant must provide notice in accordance with the public notice provisions of the rules for which a waiver is requested. Under N.J.A.C. 7:1B-2.3(b), as proposed, the Department must publish notice regarding waivers in the DEP Bulletin.

In reviewing the notice provisions, the Department has determined it is necessary to modify the requirements relating to the Department's publication of notice regarding waivers since the DEP Bulletin is not the appropriate vehicle for all such notices. On adoption, the Department is modifying N.J.A.C. 7:1B-2.3(b) to delete reference to the DEP Bulletin and is adding new N.J.A.C. 7:1B-2.3(c). New N.J.A.C. 7:1B-2.3(c) provides that the Department will publish the notices of waivers in the DEP Bulletin, which is published only as an on-line publication, or elsewhere on the Department's website depending on whether the waiver relates to rules for which the Department publishes notice of permit decisions in the DEP Bulletin. N.J.A.C. 7:1B-2.3(c)1 provides that, where the waiver relates to rules for which the Department publishes notice of permit decisions in the DEP Bulletin, notice of the waiver will likewise be published in the DEP Bulletin. N.J.A.C. 7:1B-2.3(c)2 provides that where the waiver relates to rules for which the Department does not publish notice of permit decisions in the DEP Bulletin, notice of the waiver will be posted on the Department's website. The Department publishes notice in the DEP Bulletin for permits issued in accordance with the 90-day Construction Permits law, N.J.S.A. 13:1D-29 et seq., including Coastal Area Facility Review Act and Waterfront Development permits, Flood Hazard Area Control Act permits, and treatment works approvals. The Department also publishes notice in the DEP Bulletin for Freshwater Wetlands Protection Act permits, New Jersey Pollutant Discharge Elimination System permits, and solid and

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hazardous waste facilities permits. Accordingly, notice of waivers for these programs will be published in the DEP Bulletin. However, since the Department does not publish notice in the DEP Bulletin for various other regulatory programs, for example, Air Quality, Site Remediation, and Water Supply, notice of waivers relating to these programs' rules will be posted on the Department's website at a clearly defined location identified on the DEP homepage.

The Department will also be posting on its website information regarding the implementation of the waiver rules and other information regarding waiver decisions pursuant to these rules. The Department believes that the availability on its website of notice of waivers under consideration under these rules and of waiver decisions, as well as other waiver information, will be more effective than newspaper notice, as newspaper circulation is declining. In most cases, those seeking information specifically regarding Department actions can more conveniently check the Department's website rather than searching through local or regional newspaper legal advertisements.

The Department is developing an internal review process to ensure consistency in the Department's future review and disposition of waiver applications pursuant to these rules. The Department believes that this process, coupled with the substantive standards, decision-making criteria, and limitations in the rules and the posting of notice of waiver decisions and information pursuant to these rules, will result in coherent, principled and consistent consideration and disposition of waiver applications.

### **Rules' relationship with statutes**

**34. COMMENT:** The proposed Waiver of Department Rules at N.J.A.C. 7:1B are in conflict



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with the statutes cited as the authority for the rules and therefore, the statutes prevail and the proposed regulations are void. It is well settled that an agency must engage in the construction of the language of the enabling statute if it is fairly susceptible of more than one meaning. However, if the legislation's terms are clear and unambiguous, then it is prohibited from fashioning rules which amend, alter, enlarge or limit the confines of the enabling legislation. New Jersey Chamber of Commerce v. New Jersey Election Law Enforcement Comm., 83 N.J. 57 (1980), Hotel Suburban System, Inc. v. Holderman, 42 N.J. Super. 84 (app. Div. 1956). Because the statutes cited as authority in the proposed rule are clear and unambiguous, with limited exception (where the statute clearly authorizes waivers), the Department is prohibited from amending altering, enlarging or limiting rules outside the confines of the enabling legislation.

It is axiomatic that when any rule contravenes a statute, the rule has no force, and the statute will control. Accord, N.J. Atty. Gen. Op. 6, 1957. In deciding whether an administrative regulation is valid, courts are required to determine whether the regulation is consistent with the policy which motivated the enabling legislation. Matter of Schedule of Rates for Barnett Memorial Hospital, 92 N.J. 31 (1983). Generally, regulations which are promulgated by an administrative agency pursuant to statutory authority are valid if they are reasonably related to the purposes of the enabling legislation. Seritella v. Engleman, 462 F.2d. 601 (3<sup>rd</sup> Cir. 1972).

The proposed rules contravene the statutes cited as authority and therefore have no force or effect and the statute will control. The proposed rules are not consistent with the policy which motivated the enabling legislation and are not reasonably related to the purposes of the enabling legislation and are therefore void. (51)

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**35. COMMENT:** Liberal construction does not mean one that flies in the face of the structure of the statute. The proposed waiver rules fly in the face of the structure of the statutes cited as authority and are therefore void and unenforceable. (51)

**36. COMMENT:** The N.J. State legislature explicitly authorized the N.J. Department of Environmental Protection to promulgate regulations under the respective enabling statutes. Such regulations must be given legislative and controlling weight unless they are arbitrary, capricious, or plainly contrary to the enabling statute. The proposed waiver of rules are arbitrary, capricious, or plainly contrary to the enabling statutes cited as authority and are therefore void and nonenforceable. (51)

**RESPONSE TO COMMENTS 34 THROUGH 36:** The waiver rules do not conflict with or contravene the language, structure or policies of the Department's enabling statutes. Please see the Department's response to Comments 11-15, 23, 24-25, 27-29 and 31-32 for a detailed discussion of the Department's authority for the waiver rules.

**37. COMMENT:** The statutes cited as authority for the proposed waiver rule contain 'deliberate commands' that preclude further application of other rules of construction, thereby rendering the proposed rules void. Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma, 426 U.S. 776, 96 S. Ct. 2439, 49 L.Ed.2d. 205. (51)

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**RESPONSE:** By “deliberate commands,” the Department assumes the commenter is referring to those statutes that mandate the Department’s promulgation of specified waiver rules or the approving of specified waivers. Please see the Department’s response to Comments 11-15, 24-25, 26, 27-28 and 31-32 for a detailed discussion of the Department’s authority for the waiver rules.

**38. COMMENT:** Where a statute expressly provides a particular remedy or set of remedies, courts must be cautious reading other remedies into it. The N.J. Department of Environmental Protection has read other remedies into the statutes cited as authority that expressly provide a particular remedy and therefore the proposed rules are void. (51)

**RESPONSE:** Several statutes provide for the Department’s adoption of particular rules, or “remedies,” for implementation of Department programs. In many cases, these statutes also grant general rulemaking authority to the Department for effectuating the purposes of these statutes. The Department does not read the statutes governing its powers and individual programs in isolation. Please see the Department’s response to Comments 11-15, 23, 24-25, 27-29 and 31-32 for a detailed discussion of the Department’s authority for the waiver rules.

**39. COMMENT:** The proposed rule unlawfully exceeds the DEP’s authority, expanding DEP’s power far beyond the limited discretion allowed by the legislature in any applicable statute. DEP authority is limited to the authority granted it by the New Jersey Legislature in each of its individual enabling statutes. In re Amendment of N.J.A.C 8:31B-3.31 & N.J.A.C.

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8:31B-3.51, 119 NJ. 531, 545 (1990) ("In determining whether the promulgation of a particular regulation is within the agency's authority, a court "may look beyond the specific terms of the enabling act to the statutory policy sought to be achieved by examining the entire statute in light of its surroundings and objectives, in order to ascertain whether the requisite authority may be said to be implicitly implied.") (citations omitted). State law prevent an agency from enacting and waiving any and every rule that regulators want, for any reason they please: "[a]n agency may not arrogate to itself the power to achieve goals not within its legislative charge." Saint Peters' Univ. Hosp. v. Lacy, 372 N.J. Super. 170, 178 (2004).

DEP asserts that these rules are proposed to enable consistency with its "core mission." This reliance on core mission or mandate is wholly insupportable. No statute gives DEP the general 'core' regulatory mandate cited in the Waiver Rule Proposal. (DEP was established in 1970, when environmental and public health departments from several New Jersey agencies were reorganized under the umbrella of a single agency. Successive subsequent reorganization finally gave rise to the current DEP in 1994. See, e.g., N.J.S.A. 13: 1D-1. ) However, none of the statutes reorganizing DEP purports to state its "mission". The substance and intent of New Jersey environmental laws varies widely, and DEP's regulatory duties and powers to pursue those statutory goals varies accordingly -- each statute and its corresponding regulations address a different, specifically articulated environmental protection or public health goal. Some environmental statutes allow for waivers of their subordinate regulations, where the legislature has weighed fairness, public benefit, harm and administrative feasibility of waiving specific regulations, and identified objective standards for determining when a waiver is appropriate.

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Where the environmental law provides for *no* waiver, the legislature has decided *not* to authorize DEP to grant waivers under special circumstances.

Each of DEP's existing waiver provisions is a component of a specific regulatory structure, promulgated under authority that the State has granted to DEP in specific enabling statute. These regulatory structures allow some waivers and exceptions, but in accordance with the legislature's purposes, they control the potential environmental harms and hazards of a waiver -- and guard against abuse of discretion by officials -- by describing in detail the circumstances under which a waiver is to be granted and the duties and conditions imposed on the grantee.

The Freshwater Wetlands Protection Act, for example, explicitly allows DEP to waive the requirement to maintain "transition areas" of minimum width to buffer protected wetlands, only if the applicant's proposed activities will have no substantial adverse impact on the adjacent wetland; if necessary to avoid substantial hardship to the applicant due to circumstances peculiar to the property; or if necessary for construction of a stormwater facility. N.J.S.A. 13:9B-18(a). The Highlands Water Protection and Planning Act allows DEP to waive Highlands permitting requirements only if necessary to protect public health and safety; for redevelopment in previously developed areas; or to avoid a taking of the property without just compensation. N.J.S.A. 13:20-33(b). The specificity of these statutory waivers indicates that the State legislature intended to give DEP only limited authority to waive compliance with these laws.

The administrative rules and standards enacted pursuant to this authority give meaningful definition to those limits: DEP's regulations pursuant to the Freshwater Wetlands Protection Act include examples of presumptive "substantial impact," N.J.A.C. 7:7A-6.2(c), (d); duties of a

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waiver recipient, including minimization of environmental impacts, N.J.A.C. 7:7A-13.1; and specific minimum conditions the permittee must observe, including permanent fencing of the transition area, monitoring for acid-producing deposits, and execution of a conservation easement. N.J.A.C. 7:7A-6.1(b). DEP may *only* grant a waiver upon a minimum showing of specified criteria: for example, that property for which a wetlands permit is being waived is not adjacent to a State or Federal park, or that it will not be used for mining or for a solid waste facility. N.J.A.C. 7:7A-6.4(b).

Similarly, DEP's regulations under the Highlands Water Protection and Planning Act further clarify the Legislature's standards for determining when a waiver is necessary to protect public health or safety or to avoid a fifth amendment taking of property, or when a waiver is appropriate to allow development in previously developed areas. For example, DEP may grant a public health and safety waiver only when there is no other practicable means of correcting or avoiding a threat to life or health, severe loss of property, or severe environmental degradation, N.J.A.C. 7:38-6.5(b), (b)(1), *and* when the waiver permits an activity serving already-existing public health and safety needs, not those of future development. N.J.A.C. 7:38-6.5(b)(3). Construction of a fire station and replacement of a failed septic system are two examples of activities eligible for the public safety and health waiver. N.J.A.C. 7:38-6.5(c). Further, a waiver is granted *only* on a showing that all practicable alternatives to the proposed activity would have other adverse environmental consequences. N.J.A.C. 7:38-6.5(d)(2). Any waiver is explicitly conditioned on the grantee's maximum possible compliance with regulations protecting the Highlands. N.J.A.C. 7:38-6.2(d).

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In both of those cases, the legislature *has already made it clear* under which circumstances strict compliance with its permit requirements is not appropriate: *in those circumstances, the statute defines a waiver and authorizes DEP to enact regulations implementing that waiver.*

Environmental statutes such as the Coastal Area Facility Review Act (CAFRA), on the other hand, give minimal waiver authority to DEP. CAFRA authorizes DEP to waive the requirement of an environmental impact statement for development in coastal areas. N.J.S.A. 13:19-6. DEP is also authorized to waive the CAFRA permit requirement for grading or excavation of a dune by a government due to an act of God. N.J.S.A. 13:19-5.3. CAFRA defines *no* other waiver, and the creation of a waiver not allowed *under CAFRA* is outside the scope of DEP's delegated authority. (239)

**RESPONSE:** The waiver rules do not expand the Department's power beyond the discretion allowed by the Legislature in applicable statutes. Please see the Department's response to Comments 11-15, 24-25, 26, 27-28, 29 and 31-32 for a detailed discussion of the Department's authority for the waiver rules. In support of the commenter's contention that the waiver rules exceed the Department's authority, the commenter cites specific authority delegated to the Department by the Freshwater Wetlands Protection Act, the Highlands Water Protection and Planning Act (Highlands Act) and the Coastal Area Facility Review Act (CAFRA). The commenter argues that by delegating these particular rulemaking powers to the Department, the Legislature "has decided *not* to authorize DEP to grant waivers under special circumstances."

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Addressing these statutes in order, the Department disagrees with this analysis. Under the Freshwater Wetlands Protection Act, the Legislature, in addition to charging the Department with adopting rules and regulations for the transition area waivers described in the statute, authorized the Department to adopt “any rules and regulations necessary to implement the provisions of this Act.” N.J.S.A. 13:9B-25. In the Highlands Act, the Legislature, in addition to mandating the Department’s establishment of a permitting program providing for specific waivers described in the statute, also provided in N.J.S.A. 13:20-32 in broad terms:

The Department of Environmental Protection shall prepare rules and regulations establishing the environmental standards for the preservation area upon which the regional master plan adopted by the council and the Highlands permitting review program administered by the department pursuant to this act shall be based. These rules and regulations shall provide for *at least* the following [listing of specific rules omitted]. (Emphasis added)

In CAFRA, the Legislature, in addition to authorizing the Department’s granting of waivers specified in the statute, provides:

- a. The department shall, pursuant to the provisions of the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), adopt rules and regulations to effectuate the purposes of this act.
- b. Within one year of the enactment date of P.L.1993, c.190 (C.13:19-5.1 et al.), the department, in consultation with the State Planning Commission and county and municipal governments located in the coastal area, as defined in section 4 of P.L.1973, c.185 (C.13:19-4), shall adopt new rules and regulations to implement P.L.1993, c.190 [N.J.S.A. 13:19-5.1 authorizing the



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Department's granting of general permits and its adoption of rules and regulations in that regard]. [N.J.S.A. 13:19-17]

Moreover, the Department's general enabling legislation, N.J.S.A. 13:1D-1 et seq., includes, among many other Department powers, authority to implement comprehensive policies and programs "for the conservation of the natural resources of the State, the promotion of environmental protection and the prevention of pollution of the environment of the State." None of these statutes provides that the Department may not adopt reasonable rules and regulations, including waiver rules, which the Department determines are necessary or appropriate for effectuating the purposes of these and other laws.

In arguing that the Department's reliance on its core missions in adopting the waiver rules is unsupportable, the commenter misconstrues the waiver rules. As stated in N.J.A.C. 7:1B-1.1(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." However, as discussed above, the Department is relying not on its core missions, but on its comprehensive legislation, as the source of authority for promulgating the waiver rules.

**40. COMMENT:** The new rule would conflict with existing environmental statutes, each of which either allows no waivers or provides for more limited waivers for specific standards. (61, 108, 263, 309, 358, 411)

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**41. COMMENT:** The proposed rule actually conflicts with the listed statutes, because each of these statutes either provides for specific waivers or does not provide for any waivers. The many separate choices to include a waiver provision for a given requirement, or not to do so, reflect decisions made by the legislature in the framing and passage of each statute. For example, the Freshwater Wetlands Protection Act, provides for “transition area waivers” under specified conditions, and the statute details the types of waivers, the circumstances justifying waivers, and the application requirements. See N.J.S.A. 13:9B-12, -17 & -18. The Flood Area Hazard Control Act allows for waiver of its provisions, but only to address hardship – not for “undue burden,” to achieve a “net environmental benefit,” or to avoid “conflicting rules.” See N.J.S.A. 16A:58-55(b). The Coastal Area Facility Review Act (CAFRA) also provides for waiver of certain requirements under specified conditions, but not others. Specifically, CAFRA allows waivers, under differing conditions, for grading or excavating a dune and for environmental impact statements, but not for any of its other myriad requirements. The CAFRA statute does not authorize the alteration of these requirements in exchange for mitigation. See N.J.S.A. 13:19-6, especially sections 5.3 and 6. The Water Pollution Control Act does not provide for the waiver of any of its permitting requirements. See N.J.S.A. 58-10A-1 et seq. (321)

**RESPONSE TO COMMENTS 40 AND 41:** The Department agrees that statutes requiring or authorizing the Department to promulgate specified rules or waivers reflect determinations by the Legislature that such rules or waivers should or may be adopted. The Department does not agree, however, that statutes not explicitly requiring or authorizing the Department to promulgate

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specified rules or waivers reflect a determination by the Legislation to preclude other rulemaking by the Department concerning waivers. Please see the Department's response to Comments 11-15, 24-25, 26, 27-28, 29 and 31-32 for a detailed discussion of the Department's authority for the waiver rules.

**42. COMMENT:** This rule will alter many of the statutes entrusted to the Department and will frustrate their legislative policy. (364)

**RESPONSE:** The waiver rules legally cannot, and will not, alter environmental statutes that are the source of the Department's powers and rulemaking authority. Please see the Department's response to Comments 11-15, 24-25, 26, 27-28, 29 and 31-32 for a detailed discussion of the Department's authority for the waiver rules. The waiver rules are designed to advance, not frustrate, the purposes of the statutes which the Department is charged with implementing. Based on years of experience with rulemaking and implementing its regulatory programs, the Department has found that strict compliance with existing rules can sometimes produce unreasonable, unfair or unintended results that may actually frustrate, rather than advance, the general legislative purposes of its enabling statutes or existing rules. The waiver rules will afford the Department the ability and regulatory flexibility to consider waiving strict compliance with existing rules where it is shown that the four requisite grounds, or bases, in the rules for a waiver are satisfied and that all other requirements of the rules are met.

**43. COMMENT:** The proposed waiver rule is in direct conflict with Department

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requirements because it does not have statutory authority, conflicts with existing statutes and is in direct conflict with the Department's core mission. (409)

**RESPONSE:** The waiver rules do not conflict with existing statutes. Please see the Department's response to Comments 11-15, 24-25, 26, 27-28, 29 and 31-32 for a detailed discussion of the Department's authority for the waiver rules. Nor do the waiver rules conflict with the Department's core missions. The rules expressly provide that their purpose "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." When reviewing a waiver application under the rules, the Department must determine whether "[t]he 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." N.J.A.C. 7:1B-2.2(a)6 (recodified from (a)7 on adoption; see response to comment 23).

**44. COMMENT:** There are conflicts with the current criteria, factors and procedures in DEP waiver rules. While the waiver proposal is seeking to reconcile inconsistent regulations to waivers, it itself is inconsistent with the waiver rules. (517)

**RESPONSE:** The commenter does not identify any criteria, factors or procedures in the Department's existing waiver rules which are inconsistent with these new waiver rules, and the

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Department sees none. That question should not be confused with one of the functions of the new waiver rules, which is to enable the Department to waive strict compliance with an existing rule where two or more existing rules conflict with one another, as defined by the waiver rules.

**45. COMMENT:** There are conflicts with the laws that do have waiver provisions. This proposal is broader in many senses than the current waiver restriction under currently authorized, statutorily authorized waivers. If a waiver was denied under the applicable statute then it would be against the statutory authority and legislative policy to provide a waiver under this rule. (364, 517)

**RESPONSE:** While the scope of the waiver rules may be broader than specific waiver provisions of existing statutes or Department rules, the waiver rules do not exceed the Department's statutory rulemaking authority or conflict with legislative policy. The availability of waiver in certain individual and limited situations not specifically addressed by existing statutes does not mean that the waiver rules conflict with these laws. Please see the Department's response to Comments 11-15, 24-25, 26, 27-28, 29 and 31-32 for a detailed discussion of the Department's authority for the waiver rules.

The waiver rules fulfill a salutary regulatory purpose not addressed by existing waiver rules of the Department. Many of the Department's existing waiver rules were adopted for the essential, but limited, purpose of implementing specific statutory provisions mandating or authorizing the Department's approving of certain waivers. As explained in the Department's summary of the proposed waiver rule:

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However, it is apparent that, in certain limited circumstances, strict compliance with a rule or a 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).

The waiver rules authorize the Department to consider relieving applicants from strict compliance with existing rules in four limited circumstances which some of the Department’s existing waiver rules and processes do not address: (1) where existing rules conflict so as to make compliance with both rules impossible or impracticable; or (2) where the benefit to a natural resource or other environmental good for which the Department has responsibility would substantially outweigh any detriment to the same and there is an adequate geographic and resource nexus between the environmental offset and the natural resource or environmental good; or (3) where the strict application of existing rules would be unduly burdensome in that it would either result in an actual exceptional hardship for a particular project or property, or it would result in excessive cost in relation to an alternative measure of compliance that achieves comparable or greater benefits “to human health and safety or the environment”, or (4) where a public emergency is declared by a State or Federal official with authority to do so. The Department developed the waiver rules based on its experience with rulemaking for implementing statutory policies and recognition that strict compliance with existing rules, which ordinarily do not address the limited situations described in the waiver rule, can produce

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unreasonable, unfair or unintended results not contemplated and addressed in the Department's existing rules.

### **Separation of powers**

**46. COMMENT:** DEP rules have enabling legislation. The proposed waiver rule will frustrate legislative intent and will violate separation of powers in that the DEP would grant itself the authority to waive rules that do not have built-in waiver provisions contained in the enabling legislation. As referenced above, some DEP rules have waiver provisions already contained (and limited) to that specific rule, and this waiver is legislatively codified. The proposed rule would apply waiver provisions to rules with no legislative support or authority for such waiver. (253)

**47. COMMENT:** Proposed N.J.A.C. 7:1B violates the separation of powers because the DEP would be acting beyond the scope of its granted authority from the Legislature. When the Legislature wants an agency to grant waivers, it provides for that power in the agency's enabling statute. In this case, the DEP is granting waivers without clear authority to do so from the legislature. Proposed N.J.A.C. 7:1B thus violates the separation of powers and should be abandoned. (136)

**48. COMMENT:** Implementing a broad waiver provision violates the separation of powers between branches of government, because essentially with this rule the Executive Branch is attempting to rewrite legislation. (486)

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**RESPONSE TO COMMENTS 46 THROUGH 48:** Promulgation of the waiver rules is within the Department's broad rulemaking regulatory authority delegated to it by its comprehensive legislation. Please see the Department's response to Comments 11-15, 24-25, 26, 27-28, 29 and 31-32 for a detailed discussion of the Department's authority for the waiver rules. Accordingly, there is no violation of the separation of powers principle described by the commenters. The Department does not seek to rewrite legislation, nor does it intend to approve waivers where doing so would violate any statutory requirements.

#### **List of enabling statutes**

**49. COMMENT:** The list of statutes invoked as authority for this particular rule proposal is perplexing. How is the Municipal Land Use Law, particularly the section on preparation of stormwater control ordinances, authority for creating a waiver rule? (361)

**50. COMMENT:** The rule proposal lists more than 100 statutes as authority, but fails to cite any specific statutory provision in any one of these statutes as authorizing a generic waiver provision, either within each listed statute or for all environmental standards. This inability to cite an actual authority for a generic waiver provision is not surprising: there is no such statutory authority. The dizzying list of laws, nearly all carefully expanded with an "et seq." to cover entire statutes, seems aimed at overwhelming the reader rather than providing any genuine guidance at finding and analyzing the claimed authority. For example, what is the reader to do with general citations to the entirety of the Freshwater Wetlands Protection Act



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(identified as 13:9B-1 et seq. in the rule proposal)? Mistakes like listing “50:1-5” and “50:1-5 et seq.,” of which there are several, further illustrate the fact that this list is not a serious attempt to identify an actual legal authority. (321)

**51. COMMENT:** Some of the statutes in the authorities list could not be found at the indicated citations. (361)

**52. COMMENT:** Please identify, by name, each of the 98 statutes referenced in the ‘rulemaking authority’ section of the proposal. Please identify the statutory language from each individual statute referenced in this proposal that grants DEP the authority to waive strict compliance with any implementing rules. (509)

**RESPONSE TO COMMENTS 49 THROUGH 52:** The waiver rules could potentially apply to any of the Department's rules, with the exception of those excluded at N.J.A.C. 7:1B-2.1(b) and the waiver rules themselves. (See the response to comment 210 regarding the modification on adoption of N.J.A.C. 7:1B-2.1(b), adding any provision of the waiver rules to the list of rules that cannot be waived.) Therefore, the Department compiled the list of authorities by assembling all of the statutes that the Department has cited as legal authority for each of its existing rules. See New Jersey Administrative Code, Title 7, Statute-to-Rule Table, pp. T1-1 through T1-3. The Department specifically included the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., in the list of authorities for these waiver rules because this statute is cited as legal authority for the New Jersey Pollutant Discharge Elimination Rules, N.J.A.C. 7:14A. In circumstances such as these,

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the Department may identify general statutory authority in lieu of specific authority when it is relying on its general or residual statutory powers as authority for a proposal. See the Office of Administrative Law's Rules for Agency Rulemaking at N.J.A.C. 1:30-5.1(b)6. The Department, therefore, is not required to identify the language from each individual statute referenced in this proposal that grants DEP the authority to waive strict compliance with any implementing rules. Please see the Department's response to Comments 11-15, 24-25, 26, 27-28, 29 and 31-32 for a detailed discussion of the Department's authority for the waiver rules.

In an effort to make the authorizing statutes easier to identify, the Department has, in this adoption notice, provided a revised and simplified list. This simplified list replaces the use of the Latin abbreviation "et seq." (meaning *et sequentia* or "and the following") with specific sequences of section numbers. For example, instead of citing the Industrial Site Recovery Act as N.J.S.A. 13:1K-6 et seq., the revised list of statutes uses the citation form N.J.S.A. 13:1K-6 through 13:1K-18. The Department has also corrected errors in the list of authorizing statutes, which were identified by commenters. The Department will also post the simplified list on its website. Also posted on the website will be a version of the list that includes the common name of each statute, in order to help readers understand the authority for the waiver rules.

### **Interpreting enabling statutes**

**53. COMMENT:** Public officials, when reviewing applications, are bound to follow existing regulations, which have the force of law. They are not authorized to interpret the statutes. But under the current proposal, when the relevant regulation does not already include a waiver provision, they will be confronted with N.J.A.C. 7:1B-2.2(a)6, requiring them to

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determine whether a waiver is consistent with applicable statutes. Such a determination is necessarily a determination that the statutes, read as a whole, can rationally be interpreted to allow a waiver in at least some circumstances. But that is exactly the sort of interpretation that may only be done in accordance with the Administrative Procedure Act. (326)

**RESPONSE:** As a preliminary matter, as discussed above in response to comment 23, the Department is modifying the rules on adoption to clarify N.J.A.C. 7:1B-2.1(b)1 and to delete proposed N.J.A.C. 7:1B-2.2(a)6 in order alleviate any confusion regarding the juxtaposition of these two provisions in the rules as proposed. Interpreting the environmental statutes that serve as the source of the Department's regulatory powers and duties is one of its fundamental responsibilities. The Department necessarily engaged in an interpretation of its enabling statutes in the process of developing and proposing the waiver rules, as it has in developing all of its existing rules. The Administrative Procedure Act establishes certain procedures for administrative agency rulemaking. The purpose of these procedures is "to give those affected by the proposed rule an opportunity to participate in the rule-making process, not just as a matter of fairness but also as a means of informing regulators of possibly unanticipated dimensions of a contemplated rule." In re Commissioner's Failure to Adopt 861 CPT Codes, 358 N.J.Super. 135, 142-43 (App. Div. 2003) The waiver rules were proposed, subject to public review and comment, and adopted by the Department in accordance with the procedural requirements of the Administrative Procedure Act. As the commenter correctly notes, the Department will have future occasions to interpret the particular statutes involved when reviewing future waiver applications. However, when reviewing future waiver applications, the Department will not be

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engaged in a rulemaking exercise subject to the requirements of the Administrative Procedure Act.

### **Effect on environmental protection**

**54. COMMENT:** The adoption of this rule will lessen those protections found in the various environmental regulations that they apply to; therefore, the Department is without the authority to adopt this proposed rule. (364)

**RESPONSE:** The Department's promulgation of the waiver rules is within the broad regulatory authority delegated to the Department by its comprehensive legislation. Please see the Department's response to Comments 11-15, 24-25, 26, 27-28, 29 and 31-32 for a detailed discussion of the Department's authority for the waiver rules. Further, the commenter's concerns about lessened environmental protection are not justified. The waiver rules contain carefully crafted standards, criteria and limitations guiding and controlling the Department's future review and disposition of waiver applications. The waiver rules fulfill a salutary regulatory purpose not addressed by existing rules of the Department governing individual regulatory programs. As explained in the Department's summary of the proposed waiver rules:

However, it is apparent that, in certain limited circumstances, strict compliance with a rule or a 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,

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Governor Christie articulated a set of “common sense principles” in Executive Order No. 2 (2010).

The rules authorize the Department to consider a waiver to relieve applicants from strict compliance with existing rules in four limited circumstances which the Department’s existing waiver rules and processes generally do not address. Please see the Department’s responses to Comments 24-25, 31-32, 79-80, 120-132, 149-159, and 160-170, for a discussion of the standards, criteria and limitations of the waiver rules guiding and controlling the Department’s future decision making under the waiver rules.

The waiver rules contain numerous environmental protections and safeguards addressing the commenter’s concerns. As stated in N.J.A.C. 7:1B-1, the purpose of these waiver rules is to provide for limited circumstances in which the Department may waive strict compliance with existing 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, welfare, and the environment.” The waiver rules provide at N.J.A.C 7:1B-2.1(b)1 (as modified on adoption; see response to Comment 23) that the Department will not waive 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. One of the criteria set forth in the waiver rules that the Department must consider when reviewing a waiver application is whether 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. See N.J.A.C. 7:1B-2.2(a)6 (recodified from (a)7 on adoption; see response to comment 23).

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Rather than lessening environmental protections found in existing rules, the waiver rules will advance and promote statutory policies for existing programs that may not be served by strict compliance with existing rules in the limited circumstances addressed by the waiver rules.

**55. COMMENT:** Given the fact that all of the referenced statutes and implementing rules are designed to protect the environment and the public health, safety and welfare, and since this proposal does not include specific standards to inform the public how the agency will make decisions on potential waivers, this proposal represents an inherent conflict with those statutory requirements and is inconsistent with the requirements of the Administrative Procedure Act governing agency rulemaking. Therefore, the regulated public and residents of New Jersey cannot ascertain the full scope of potential impact that these broad waivers will have on the environment and the public health, safety and welfare and cannot adequately comment on the impact of this proposal. (509)

**RESPONSE:** The Department does not agree that the waiver rules lack specific standards to inform the public how the agency will make decisions on potential waivers. Please see the Department's responses to Comments 24-25, 31-32, 54 and 79-80 for a discussion of the standards, criteria and limitations of the waiver rules guiding and controlling the Department's future decision-making under the waiver rules. The waiver rules have been adopted in accordance with the public notice and participation requirements of the Administrative Procedure Act. In that process, the Department received numerous and thoughtful public comments on the proposed rules. The rules do not conflict with existing statutory requirements

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or rules. Promulgation of the Department's waiver rules is within the Department's broad regulatory authority under its comprehensive legislation. For a detailed discussion of the Department's authority for the waiver rules, please see the Department's responses to Comments 11-15, 24-25, 26, 27-28, 29 and 31-32.

### **Relationship to statutory waivers**

**56. COMMENT:** Many statutes provide for relief from strict compliance with the statute or its implementing rules. Additional waiver opportunities are not necessary. (364)

**57. COMMENT:** The proposal acknowledges that there already exist in law provisions for waivers and variances -- so this rule is not needed, nor is it therefore appropriate. The waivers and variances in place were the subject of thoughtful consideration and debate by the legislature, regulators and/or the public within the specific context they were to be applied. A blanket waiver of environmental protection laws with such a broad brush is truly an overreach. (416)

**RESPONSE TO COMMENTS 56 AND 57:** The Department believes that the waiver rules are necessary and appropriate to enable it to address certain limited circumstances, those identified and defined in the rules, that are not addressed in the existing regulatory scheme. As stated in the Department's summary of the proposed rules: "[I]t is apparent that, in certain limited instances, strict compliance with a rule of 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

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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 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.”

The waiver rules will afford the Department the ability and regulatory flexibility to consider waiving strict compliance with existing rules in the four defined and limited situations set forth in the rules. The waiver rules are not overreaching, as explained in the Department’s responses to Comments 24-25, 31-32, 54 and 79-80, which discuss the standards, criteria and limitations of the waiver rules guiding and controlling the Department’s future decision making under the waiver rules.

**58. COMMENT:** Allowing the DEP Commissioner to waive compliance with 98 Department regulations violates the democratic principle of public oversight. (486)

**RESPONSE:** The Department disagrees with the assertion that the waiver rules violate the democratic principle of public oversight. The waiver rules were proposed and adopted by the Department in accordance with the procedural and substantive requirements of the Administrative Procedure Act, including the requisite public notice and opportunity for public comment. The rules specifically require that the person requesting a waiver furnish public notice in accordance with the existing public notice requirements for the rule from which the waiver is



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requested. N.J.A.C. 7:1B-2.3(a). The rules also require that the Department publish notice of its determination to consider a waiver and notice of its decision on each waiver. N.J.A.C. 7:1B-2.3(b). Please see the Department's responses to Comment 33 for a detailed discussion of the public notice requirements of the waiver rules. In addition, please see the responses to Comments 24-25, 31- 32, 54, and 79- 80, discussing the standards, criteria and limitations of the waiver rules guiding and controlling the Department's future decision making under the waiver rules.

**59. COMMENT:** The proposed regulation on "Conflicting Rules" is arbitrary, capricious and unreasonable because it does not define conflict. The willingness of the U.S. Supreme Court to find conflict between State and Federal regulations has varied dramatically over time. In accordance with contemporary decisions, the majority ruled in 1937 that "[t]he principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so "direct and positive" that the two acts cannot "be reconciled or consistently stand together." Kelly v. State of Washington ex re. Foss Co., 302 U.S. 1, 10, 58 S. Ct. 87, 82 L. Ed. 3 (1937). U. S. Supreme Court cases repeatedly identify two different tests for conflict: (1) unacceptable conflict arises when "compliance with both Federal and State regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963) and (2) State law will not be allowed which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399,

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85 L. Ed. 581 (1941). The proposed Waiver of Department Rules at N.J.A.C. 7:1B, “Conflicting Rules” regulation should be withdrawn or revised in accordance with the test for conflict under Florida Lime & Avocado Growers Inc. v. Paul, and Hines v. Davidowitz, when State regulation conflicts with Federal law or regulation or when State and/or Department regulations conflict with each other. (51)

**RESPONSE:** Contrary to this commenter’s statement, the waiver rules do, in fact, define “conflicting rules” as a situation where two or more rules conflict “so as to make compliance with both rules is impossible or impracticable.” N.J.A.C. 7:1B-1.2.

**60. COMMENT:** In accordance with the Supremacy Clause of the U.S. Constitution, a State statute or local regulation is invalid when it conflicts with Federal statute or with an administrative regulation enacted pursuant to powers properly exercised by Congress. The proposed "Conflicting Rules" regulation is unconstitutional because it conflicts with powers properly exercised by Congress or the New Jersey State Legislature. (51)

**RESPONSE:** The commenter does not explain in what way the waiver rules conflict with powers properly exercised by Congress or the New Jersey Legislature and thus the Department is unable to further evaluate this comment. The Department promulgated the waiver rules pursuant to broad regulatory authority that the New Jersey Legislature has delegated to the Department. Please see the Department’s response to Comments 11-15, 24-25, 26, 27-28, 29 and 31-32 for a detailed discussion of the Department’s authority for the waiver rules.

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## **Interstate commerce**

**61. COMMENT:** When Congress has not acted to address a particular issue or activity, the Commerce Clause is said be “dormant” in the context of that issue. In 1849, The Supreme Court held for the first time that, even in the absence of congressional action, states may be barred from impeding interstate or foreign commerce, Smith v. Turner, 48 U.S. 283, 7 How. 283, 12 L. Ed. 702 (1849). Since that date the Courts have enforced the dormant Commerce Clause in order to protect a free market within the United States.

The concept of free market suggests that states should not act for the sole purpose of protecting local commerce from interstate competition. In voiding an attempt by a state to promote its own economic advantage by curtailing the movement of articles in interstate commerce, the U.S. Supreme Court wrote, “the ultimate principle is the proposition that one state in its dealings with another may not place itself in a position of economic isolation,” H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 539, 69 S. Ct. 657, 93 L. Ed. 865 (1949).

In more recent years, the U.S. Supreme Court has continued to cite the same rationale for enforcing the dormant Commerce Clause. In 1978, the Court noted that “where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected,” City of Philadelphia v. New Jersey, 437 U.S. 617, 624, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978). In 1994, the Court again explained its aim “to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent,” C & A Carbone, Inc. v. Town of Clarkson, N. Y., 511 U.S. 383, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994).

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The proposed Waiver of Department Rules, N.J.A.C. 7:1B, objective is to remove State of New Jersey Department of Environmental Protection (NJDEP) regulations that are an impediment to economic growth which amounts to “economic protectionism” in violation of the Commerce Clause, Philadelphia v. New Jersey and C & A Carbone, Inc. v. Town of Clarkson, N. Y., and is per se invalid.

The proposed rules discriminate between in-State and out-of-State parties, such as but not limited to developers who receive waivers and developers who do not receive waivers thereby creating an uneven playing field placing an excessive burden on developers who do not receive waivers. The propose rule's effect reaches beyond State borders because it will cause developers from out-of-State who receive a waiver to do business in New Jersey rather than another state.

(51)

**62. COMMENT:** The Waiver of Department Rules, N.J.A.C. 7:1B, was proposed for protectionist reasons because the prime proponents of the proposed regulations are the developers, contractors, land owners, etc. who stand to benefit from the competitive advantages that are to be gained, Hunt v. Washington State Apple, Advertising Commission, 432 U.S. 333, 353, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). The proposed Waiver of Department Rules, N.J.A.C. 7:1B, is protectionist and the proposed rules are void and must not be adopted. (51)

**63. COMMENT:** The Commerce Clause protects against potentially inconsistent legislation arising from the regulatory regimes of other states, Healy v. Beer Institute, Inc., 491 U.S.

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324, 336-37. The Waiver of Department Rules at N.J.A.C. 7:1B will result in inconsistent results which are repugnant to the Commerce Clause and therefore, void and the proposed rule must be withdrawn. (51)

**64. COMMENT:** The Proposed Waiver of Department Rules at N.J.A.C. 7:1B is not legitimately concerned with conserving natural resources, but aims rather at preferring local industry or domestic users of natural resources. In situations like this the courts will be apt to intervene. Thus in invalidating Oklahoma's attempt to advantage domestic users of natural gas produced there the Court ruled that "[n]o state can ... unreasonably burden interstate commerce or the right to carry it on," West v. Kansas Natural Gas Co., 221 U.S. 229, 262, 31 S. Ct. 564, 55 L. Ed. 716 (1911). The Waiver of Department Rules at N.J.A.C. 7:1B, is in violation of interstate commerce and the right to carry it on and is void. (51)

**65. COMMENT:** In 1982 the U.S. Supreme Court ruled that ground water was an article of commerce, Sporhase v. Nebraska, ex rel. Douglas, 458 U.S. 941, 957-58, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982). Since ground water is an article of commerce it is a violation of interstate commerce to waive ground water regulations that affect the groundwater rights of neighboring states. (51)

**66. COMMENT:** The Commerce Clause gives Congress power to regulate, air, water and land in order to protect the health and welfare and to prevent competitive exploitation. The concern for environmental protection raises many of the same underlying concerns addressed

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by the U. S. Supreme Court in the context of protecting the health and safety of workers. As noted by the Court in United States v. Darby, 312 U.S. 100 (1941), Congress must have the power to prohibit that destructive competition which “is injurious to the commerce and to the states from and to which the commerce flows.” United States v. Darby, at 115. No state should face the need to lower its standards of environmental protection in order to lure industry, and this concern applies whether or not the effects of environmental degradation extend beyond state borders. The proposed Waiver of Department Rules at N.J.A.C. 7:1B lowers environmental protection standards in order to lure industry and in accordance United States v. Darby, supra violates interstate commerce even if the effects of environmental degradation do not extend beyond state borders. The proposed Waiver of Department Rules at N.J.A.C. 7:1B is void and should be withdrawn. (51)

**67. COMMENT:** Because the power of Congress over interstate commerce is plenary, Congress can authorize states to pass laws which interfere with commerce. However, Congressional authorization is not necessarily the last word on the matter. Even when Congress grants authority to the state to regulate in a manner that may burden interstate commerce, the Equal Protection Clause of the Fourteenth Amendment still requires that states have a legitimate purpose which supports their actions. Distinguishing between Commerce Clause and equal protection rationales, the Supreme Court ruled in 1985 the “promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose.” Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 882, 105 S. Ct. 1676, 84 L. Ed. 2d 751 (1985). The intent of the proposed Waiver of Department Rules at

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N.J.A.C. 7:1B is the promotion of domestic business over nonresident competitors that violate the Equal Protection Clause of the Fourteenth Amendment and, therefore, the proposed rule should be withdrawn. (51)

**RESPONSE TO COMMENTS 61 THROUGH 67:** The waiver rules authorize the Department in its discretion, and in accordance with the substantive standards and procedural safeguards in the rules, to consider waiving a regulated entity's strict compliance with an existing rule in four limited circumstances defined in the waiver rules. The waiver rules apply equally to all applicants subject to the Department's rules without regard to whether they are residents of New Jersey or residents of another state. No substantive or procedural provisions of the waiver rules discriminate against non-resident industry. The waiver rules are not designed to protect local commerce from interstate competition and they do not violate the Commerce Clause or unlawfully burden interstate commerce. That the United States Supreme Court in one case may have ruled that ground water was an article of commerce does not render all state regulation of ground water a violation of the Commerce Clause. For these same reasons, the waiver rules do not violate the Fourteenth Amendment.

The Department is confident that these waiver rules, which apply only in the limited circumstances set forth in the rules, will ensure adequate protection of public health, safety and the environment. Please see the Department's responses to Comments 24-25, 31-32, 54 and 79-80 describing the substantive standards, decision-making criteria and limitations of the waiver rules guiding and controlling the Department's future waiver decisions consistent with the Department's core missions and its statutory responsibilities.

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### Supremacy clause

**68. COMMENT:** U. S. Const. art. VI, § 2 provides: “This constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the Contrary notwithstanding.” Attitudes towards the preemption doctrine have changed over time, from historical presumptions that subject matters regulated by the Federal government could not also be regulated by the states, Missouri Pac. R. Co. v. Porter, 273 U.S. 341, 47 S. Ct. 383, 711. Ed. 672 (1927), to a more contemporary presumption that concurrent regulation by state and Federal government is the norm rather than the exception, People of State of Cal. v. Zook, 336 U.S. 725, 730, 69 S. Ct. 841, 93 L. Ed. 1005 (1949). The general rule that in *cases* of conflict courts should presume that Congress did not intend to preempt, was built upon the same principle of Federalism, and to reinforce accountability, the Court generally expects Congress to express a clear intent to preempt; when Congress fails to do so, is should be with the understanding that state law or regulation will generally remain in effect. In accordance with People of State of Cal. v. Zook, in the proposed Waiver of Department Rules, N.J.A.C. 7:1B, “Conflicting Rule” regulation, the reference to "Federal agency rule" should be eliminated or be revised to read that no State regulation will be waived if it conflicts with Federal regulation, unless such regulation is preempted. (51)



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**RESPONSE:** The commenter appears to be suggesting that the Department should state in the waiver rules that it may not waive a Department rule that is preempted by Federal law. If a Department rule is preempted by Federal law, the Department rule is invalid as a matter of law. There is no need for the Department to state this legal truism in the waiver rules.

### **Due process**

**69. COMMENT:** The Fifth Amendment limits the commerce power of Congress. In 1935 the Supreme Court noted “that this power must be exercised in subjection to guaranty of due process of law found in the Fifth Amendment.” Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 347, 55 S. Ct. 758, 79 L. Ed. 1468 5 (1935). It also added in 1950, “[N]ot even resort to the Commerce Clause can defy the standards of due process.” Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604, 616, 70 S Ct. 403, 94 L. Ed. 381 (1950). The Due Process Clause applies to the government in three ways. First, controls are invalidated when they are arbitrary or wholly lacking in objective standards for application. Second, enforcement actions must be accompanied by adequate procedural safeguards. Third, when private property is taken under commerce power, just compensation must be made to the owner. All three of these constraints were considered by the Court to regulate the surface mining of coal. Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc., 452 U.S. 264 (1981). The environmental regulations adopted by the Department are designed to establish a State wide program to protect human health, safety and the environment from the adverse effects of pollution, sprawl, etc. Various positions of the proposed regulations effect an uncompensated taking (regulatory taking and/or physical taking) of public and/or private

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property in violation of the “Just Compensation Clause” of the 5th Amendment. In addition, the proposed Waiver of Department rules N.J.A.C. 7:1B violates procedural due process requirements and therefore the proposed rules are unconstitutional. (51)

**RESPONSE:** In vague and conclusory terms, the commenter asserts that “various positions of the proposed regulations effect an uncompensated taking.” Inasmuch as the commenter has provided no facts or specific information to explain this assertion, the Department is unable to evaluate and respond to this aspect of the comment. The commenter’s reference to the Commerce Clause of the United States Constitution in support of this vague claim is confusing; the Commerce Clause ordinarily has no application to state property law or New Jersey’s sovereign right to regulate property within its borders. Whether there has been a regulatory taking of property requiring just compensation by a state requires an analysis of the Fifth and Fourteenth Amendments to the United States Constitution, Article I, Paragraph 20 of the New Jersey Constitution; and the legal principles articulated in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), as well as Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). See Mansoldo v. State of New Jersey, 187 N.J. 50 (2005); Bernardsville Quarry, Inc. v. Borough of Bernardsville, 129 N.J. 221 (1992); Gardner v. New Jersey Pinelands Commission, 125 N.J. 193 (1991).

Similarly, the commenter is not specific as to procedural due process concerns. The waiver rules do not violate constitutional guarantees of procedural due process. The proposed rules were proposed, subject to public review and comment, and adopted in accordance with all

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of the requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. The waiver rules contain detailed substantive standards, criteria and limitations and procedural safeguards controlling and guiding the Department's potential future waiver decisions. By circumscribing the waiver decision-making of the Department in this fashion, and by requiring notice to the public in accordance with the public notice requirements of the rules from which a waiver is requested, as well as public notice of the Department's determination to consider a waiver and its decision on each waiver, the Department has properly addressed due process concerns. Please see the Department's responses to comments on N.J.A.C. 7:1B-2.3 for a more detailed discussion of the public notice requirements and procedural due process provided by the waiver rules. Please see the Department's response to Comments 11-15, 24-25, 26, 27-28, 29 and 31-32 for a detailed discussion of the Department's authority for the waiver rule.

**Executive Order No. 2 -- Directive to adopt waiver rules**

**70. COMMENT:** The adoption of this rule, based solely on executive fiat, usurps the role of the state legislature, contradicting years of legislative deliberations and agency rulemaking that have resulted in current environmental law and regulation, replacing them with vague general principles that give both the environment and the regulated public minimal protection from inconsistent, arbitrary official behavior. (239)

**71. COMMENT:** The proposed waiver of Department rules is an abuse of the Governor's Executive Order powers and therefore the proposed rules are void. (51)

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**RESPONSE TO COMMENTS 70 AND 71:** The Department does not draw its authority to promulgate the waiver rules from Executive Order No. 2, but from its comprehensive legislation. Please see the Department's response to Comments 11-15, 24-25, 26, 27-28, 29 and 31-32 for a detailed discussion of the Department's authority for the waiver rules.

The waiver rules are, however, consistent with Executive Order No. 2 (2010), which orders and directs State agencies to implement and adhere to a number of Common Sense Principles set forth in the Order. Among these Common Sense Principles, Executive Order No. 2 provides that all State agencies shall, in recognition that existing regulations can be conflicting or unduly burdensome, adopt rules allowing for waivers from strict compliance with agency regulations, which are not inconsistent with the core missions of the agencies. In addition, Executive Order No. 2 provides that all State agencies shall ensure that their regulations are efficient, consistent across State agencies, accessible and transparent to interested parties.

**72. COMMENT:** The Governor can issue Executive Orders directing the State agencies to behave in certain ways. He does not need the Legislature to do that. However, if a Governor's Executive Order encroaches upon the substance of a statute, a standard or procedure, then the Governor needs legislative authorization to do that. Similarly, the DEP Commissioner can issue administrative orders that tell his Department employees how to behave. It is troubling that the Commissioner has done so in a way that colors the effect of this rule, because the Commissioner issued a vision and mission statement that says that the Department's role is to promote economic development, and that is tied to the core mission of the Department. So given that Executive Order 2 is brought into the rule proposal, and given

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that the Red Tape review recommendations are brought into the rule proposal as the factual basis for it, there is a serious problem with respect to how the proposal would change the standards and the existing law in the absence of legislative authorization. (517)

**RESPONSE:** The waiver rules change neither legislative standards nor existing statutory law. Instead, the waiver rules further the Department's core missions to maintain, protect and enhance New Jersey's natural resources, and to protect the public health, safety, and welfare, and the environment, and more specifically, to effectuate the purposes of its enabling statutes. Please see the Department's response to Comments 11-15, 24-25, 26, 27-28, 29, and 31-32 for a detailed discussion of the Department's authority for the waiver rules.

### **Administrative Procedure Act**

**73. COMMENT:** Regulations are interpretations of statutes. A primary role of regulations is to provide the amplifications necessary to allow public officials to make decisions. Such executive branch interpretations of statutes may only be made in accordance with the Administrative Procedure Act. (326)

**74. COMMENT:** The proposed waiver rules are a violation of the New Jersey Administrative Procedure Act, N.J.S.A. 52-14B-1 et seq., since the Act does not authorize waivers. (51)

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**RESPONSE TO COMMENTS 73 AND 74:** The Department agrees that rules and regulations ordinarily must be promulgated in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., which establishes certain procedures and requirements for administrative agency rulemaking. The waiver rules were proposed, subject to public review and comment, and adopted by the Department in accordance with the procedural and substantive requirements of the Administrative Procedure Act. The Department does not draw its authority for these waiver rules from the Administrative Procedure Act but rather from its comprehensive legislation.

### **Regulatory Flexibility Act**

**75. COMMENT:** The proposed waiver of Department rules violates the New Jersey Regulatory Flexibility Act N.J.S.A. 52:14B-16 through 21 because it does not differentiate between large businesses and small businesses. The New Jersey Regulatory Flexibility Act is designed to benefit small businesses and not multi-billion dollar, international corporations. The proposed waiver of Department rules should be withdrawn or re-written to clearly only benefit small business. (51)

**RESPONSE:** The New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., does not require that State agencies differentiate between large and small businesses, as the commenter asserts. N.J.S.A. 52:14B-18 directs State agencies to accomplish their objectives in a way that minimizes unnecessary adverse economic impacts of proposed rules on small businesses. The Act directs State agencies to consider approaches such as differing compliance or reporting requirements or timetables, the use of performance rather than design standards, and exemptions

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for small businesses. Ibid. The Act also requires, at N.J.S.A. 52:14B-19, that the Department publish a regulatory flexibility analysis with each proposed rule, which requirement the Department fulfilled with the proposal of these waiver rules (see 43 N.J.R. 473(a)). As explained in the Regulatory Flexibility Analysis, the waiver rules do not impose any new standards for small or large businesses, but provide a mechanism for the Department to consider a waiver from strict compliance with an existing rule in appropriate circumstances. The economic costs of applying for a waiver will vary depending on the type and size of project involved and the specific requirement for which a waiver is sought, rather than the size of the business seeking the waiver. Since the economic impact of the rules on businesses, including small businesses, is anticipated to be positive, the Department determined it would not be appropriate to establish any differing standard for approval of a waiver for small businesses.

### **Other legal issues**

**76. COMMENT:** There is no justification for the rule arising out of concerns about rule conflict or undue burden. Such a claim is merely an excuse to avoid the trouble of drafting properly targeted rules based upon specific factual findings, as the law of this State requires.  
(239)

**RESPONSE:** The commenter overlooks the findings of the Department in the Summary of the proposal and the ample record developed during the public comment period on the proposed rules. As it did during development of these waiver rules, the Department generally takes pains to work with members of the regulated industries and other stakeholders to draft and explain the

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basis for proposed rules. Additionally, in accordance with the Administrative Procedure Act, the Department provided a public comment period affording an opportunity for input on its proposed rules by all interested parties. With decades of rulemaking experience and implementing its regulatory programs, it is clear to the Department that no administrative rule, however carefully crafted it may be, can possibly anticipate each and every factual circumstance that might fall within the purview of the waiver rules. While the Department attempts to craft its rules to address the factual scenarios that might be reasonably anticipated, unanticipated situations do arise that may warrant relief from strict compliance with an existing rule. Therefore the Department designed the waiver rules to provide a possible mode of relief for regulated entities in four limited circumstances as set forth in the rules.

**77. COMMENT:** The Department should consider expanding proposed N.J.A.C. 7:1B-2.1 to provide that notwithstanding N.J.A.C. 7:1B-1.1(a) and 2.1(b), the Department **shall** waive compliance with **any** of the Department's rules when the Department determines that such a waiver is necessary to prevent the Department from applying that rule in such a way as to violate a person's constitutional rights in a particular circumstance (a rule unconstitutional "as applied"). The theory of such expansion is that constitutional rights trump all other considerations, including Federal statutes and regulations (if there is conflict with the United States Constitution); Federal, multi-state, or multi-jurisdiction programs; laws enacted by the Legislature; orders made by the Governor (including Governor Christie's Executive Order No. 2); the Department's "core missions"; and policy preferences and judgments embodied in proposed N.J.A.C. 7:1B-2.1(b). For example, notwithstanding proposed N.J.A.C. 7:1B-



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2.1(b)1 and (b)2, waivers may be necessary to prevent the Department from applying a Federal or State statute or Federal regulation in such a way as to violate a person's constitutional rights in a particular circumstance (a statute or regulation unconstitutional "as applied"). The Department may in such instances (and, possibly, only with the agreement of the Office of the New Jersey Attorney General) want to consider the Federal or State statute or Federal regulation unenforceable because of the conflict with the United States Constitution or the New Jersey Constitution. (317)

**RESPONSE:** The Department agrees with the commenter's view concerning the paramount importance of constitutional rights. The Department does not have any authority, however, to implement an otherwise constitutional rule in a manner that would infringe upon a person's constitutional rights. There is no need, therefore, for the Department to provide for the waiver of a rule in such a circumstance.

**78. COMMENT:** The Department may not apply the proposed waiver of Department rules, retroactively (ex post facto), unless the New Jersey Legislature has given in the statute clear indication that the statute should be given retroactive effect. Department of Transp. v. PSC Resources, Inc. 175 N.J. Super. 447, Atlantic City Mun. Authority v. Hunt, 210 N.J. Super. 76. (51)

**RESPONSE:** The Department agrees. This concern is addressed in N.J.A.C. 7:1B-2.1(a), which provides for the prospective application of the waiver rules.

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**79. COMMENT:** The Waiver Rule Proposal allows the Department to waive protections it is bound by the Legislature to enforce, in favor of economic and other prerogatives it has little capacity to assess and no legal authority to pursue. (239)

**80. COMMENT:** For DEP to consider promoting other objectives over those of environmental protection is both blatantly contrary to its mission and an outright violation of the limits of its authority. (239)

**RESPONSE TO COMMENTS 79 AND 80:** The waiver rules do not support the commenters' assertion that the rules allow the Department to render decisions in which environmental protections it is bound to enforce may be waived in favor of economic and other objectives. While in some circumstances, economic considerations come into play, these circumstances are limited and all other considerations and requirements in the rules must be applied. As stated in the proposal summary at 43 N.J.R. 473, the new waiver rules 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. To clarify and emphasize that all of the criteria and standards in the rules must be met in order for the Department to approve a waiver under these rules, the Department is modifying N.J.A.C. 7:1B-2.1(a) to expressly require that, in addition to at least one of the four bases, all other requirements of the chapter must be met.

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To the extent that the commenters are focused on the “unduly burdensome” basis in the rules for approving a waiver at N.J.A.C. 7:1B-2.1(a)2, the Department is modifying the definition of “unduly burdensome” at N.J.A.C. 7:1B-1.2 on adoption to clarify that the "comparable or greater benefits" of an alternative measure of compliance under a waiver against which excessive costs of strict compliance with an existing rule would be gauged are "benefits to public health and safety or the environment." The definition at N.J.A.C. 7:1B-1.2 of the term “unduly burdensome” now provides that any alternative measures of compliance offered by the applicant must achieve comparable or greater benefits to public health and safety or the environment. This is consistent with the Department’s core missions as expressed at N.J.A.C. 7:1B-1.1(a).

The purpose of the waiver rules is to set forth the limited circumstances in which the Department may waive strict compliance with its rules in a manner consistent with its core missions to maintain, protect, and enhance New Jersey's natural resources and to protect the public health, safety, welfare and the environment. N.J.A.C. 7:1B-1.1(a). When evaluating a waiver application that presents one of the four requisite bases for considering a waiver under N.J.A.C. 7:1B-2.1(a), the Department must apply the criteria set forth in N.J.A.C. 7:1B-2.2(a). These criteria include whether 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; and whether 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. Further, among other limitations imposed on the Department’s waiver discretion, N.J.A.C. 7:1B-

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2.1(b)1 (as modified on adoption; see response to comment 23) expressly provides that the Department shall not waive 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. Moreover, other types of rules listed at N.J.A.C. 7:1B-2.1(b) that the Department cannot waive include, for example, a rule providing a numeric or narrative standard protective of human health; the designation of rare, threatened, or endangered status of any species of flora or fauna, or habitat for such species; and a rule providing for public participation, or for notice to interested parties or the public.

Collectively, the Department's statement of purpose in the waiver rules to abide by its core missions to maintain, preserve, and enhance New Jersey's natural resources and to protect the public health, safety, welfare and the environment; the four requisite bases for considering waivers, at least one of which an applicant for a waiver must satisfy; the numerous and carefully drawn additional criteria that the Department must apply to its review and evaluation of a waiver request; and the strict limitations placed upon the Department's ability to approve waivers, provide ample safeguards and assurance that the Department's waiver decisions pursuant to these rules will be consistent with its core missions, and its environmental protection responsibilities under its enabling statutes.

While not necessary to establish the validity of the waiver rules, it may also be noted that a number of the Department's enabling statutes contain provisions expressly authorizing or mandating that the Department consider economic concerns in its implementation of environmental protection statutes, including the consideration of costs of compliance, administering financial incentives, providing financial solutions, and promoting legislative goals

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of economic viability and growth. In N.J.S.A. 13:1D-1 and -2, existing functions, powers and duties of the Department of Conservation and Economic Department were transferred to and continued in the Department of Environmental Protection. Among the many powers delegated to the Department in its general enabling statute, the Legislature in N.J.S.A. 13:1D-9v empowered the Department to:

Encourage and aid in coordinating State, regional and local plans, efforts and programs concerning the remediation and reuse of former industrial or commercial properties that are currently underutilized or abandoned and at which there has been, or is perceived to have been, a discharge, or threat of a discharge, of a contaminant. For the purposes of this subsection, "underutilized property" shall not include properties undergoing a reasonably timely remediation or redevelopment process.

In N.J.S.A. 13:1D-119 et seq., establishing a system for paying Department permitting application fees in installments, the Legislature declared and found in N.J.S.A. 13:1D--120:

- a. It is within the public interest to promote economic growth, to encourage and foster the development and establishment of new industries and businesses, to champion and expedite the expansion, modernization and diversification of existing businesses, corporations and establishments, and to attract and facilitate the siting and relocation of employers who will provide highly skilled and high-paying employment opportunities for the citizens of this State;
- b. While the quality of New Jersey's environment is paramount to the health and well-being of the residents of this State, it is essential to counter forcefully those who

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preach the erroneous dogma that our citizens must choose between the environment and economic prosperity and growth;

c. The Department of Environmental Protection must play a central role in educating the public that a clean environment and economic prosperity and growth are not only compatible, but interdependent; [other paragraphs omitted].

For a sampling of other statutes of the Department evidencing a legislative intent that the Department play a meaningful role in promoting economic growth and prosperity in the State while discharging its environmental protection duties, see the Solid Waste Management Act, the Coastal Area Facility Review Act, the Highlands Water Protection and Planning Act, the Industrial Recovery Act and the Brownfield and Contaminated Site Remediation Act.

As to the Department's capacity to analyze financial information submitted by an applicant, the Department does not anticipate that many waiver applications will require complicated financial analyses. If they should, however, the Department will draw on the expertise of its internal economic staff and that of other State agencies, as necessary.

**81. COMMENT:** There is a statutory legal issue with potential conflicts with Federal laws, despite the fact that Federal law and regulations are specifically exempted. This goes to the way Federal oversight is conducted and the way Federal programs are delegated. Hypothetically, when the EPA delegates the authority to implement a clean air or water standard of 10, the EPA looks at the underlying programmatic and regulatory requirements that result in the standard of 10. A standard in itself is not self-implementing; there are other aspects of rules that implement a standard, and those rules would all be subject to waivers,

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and, therefore, the standard is effectively jeopardized. The Federal government is not going to stand by and allow that to occur. Has the Department sought Federal review of these waiver rules pre-proposal, because they could be highly vulnerable from a Federal standpoint. (517).

**RESPONSE:** As observed by the commenter, the waiver of Federal law and regulations by the Department is specifically prohibited by the waiver rules. N.J.A.C. 7:1B-2.1(b)1, (b)2 and (b)3. As adopted, the waiver rules preclude waivers of “[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.” N.J.A.C. 7:1B-2.1(b)1. The rules also preclude waivers of “[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.” N.J.A.C. 7:1B-2.1(b)2). Finally, the rules preclude waivers of any “rule that implements a Federally enforceable program pursuant to a State Implementation Plan (SIP), as defined in N.J.A.C. 7:27-18.1.” N.J.A.C. 7:1B-2.1(b)3). The Department, therefore, disagrees that the waiver rules present the problem the commenter describes.

While the Department did not seek Federal review of the waiver rules prior to proposal, the Department acknowledges the commenter’s concern that the complexity of the requirements by which the Department administers Federally delegated programs may prevent a clear delineation of which Department rules serve to implement Federal statutes and regulations. However, in reviewing all waiver applications, the Department must evaluate potentially applicable Federal requirements to assure compliance with Federal law, rules, and delegation

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requirements. The Department is experienced in this regard. Should there be a question whether a Federal program or rule is implicated in the context of any particular waiver review, the Department will consult as necessary with EPA or the appropriate Federal entity.

**82. COMMENT:** The Legislature has already provided NJDEP with authority to compromise on specific penalties in at least 27 of the environmental statutes listed as authority for the waiver rule, thereby reducing the financial burden for those entities showing a willingness to comply with the laws and rules. Numerous other statutes allow for clearly defined and limited exceptions and exemptions. These existing remedies eliminate the need for more drastic options permitted under the proposed waiver rules. Additionally, blanket powers regarding enforcement, or lack thereof, can be found in N.J.S.A. 13:1D-125, in which NJDEP is urged to increase compliance with environmental laws by use of grace periods for minor infractions, and environmental audits. N.J.S.A. 13:1D-134 et seq. authorizes the Department to adopt rules necessary to expedite the commercial use of energy or environmental technologies verified by the New Jersey Corporation for Advanced Technology as having significant net beneficial environmental effect in their overall performance; however, this statute is specific with regard to verification of the technology and in no way provides the power for the vague case-by-case waivers proposed in N.J.A.C. 7:1B. Finally, “smart growth” statutes authorize NJDEP to develop rules providing for expedited permit and permit-by-rule procedures, again relieving entities of the time-consuming burden of process while ensuring adherence to New Jersey environmental law.

(491)



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**RESPONSE:** The Department acknowledges that some statutes authorize the Department to provide various forms of relief from strict compliance with existing statutory or regulatory requirements. To implement certain statutes, as several commenters have discussed, the Department has in place existing rules authorizing certain waivers. In addition, the Department is empowered to provide relief in the form of its enforcement discretion, as this commenter notes. However, the various statutes mentioned do not address the Department's need for a remedy in certain limited circumstances where a regulated entity's strict compliance with an existing Department rule may be unduly burdensome, as defined in these waiver rules. The Department has adopted the waiver rules to fill this need.

**83. COMMENT:** In the definition of net environmental benefit, the determination of a "qualitative" benefit presents a value judgment on the part of NJDEP that may be at odds with local and municipal land use laws and objectives, and therefore may violate the provisions of Home Rule. Failure to "quantify" benefits leads to unpredictability and the perception of arbitrary and capricious application of the rules. Statutes are clear in their consideration of permissible environmental offsets -- those regarding exchange of lands, transfers of development rights, freshwater wetlands restoration, coastal permit approvals, emission allowance energy trading, water allocation credits, and so on. These same statutes do not authorize NJDEP endorsement of other actions which are detrimental to natural resources or the environment, regardless of an unquantified offset. (491)

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**RESPONSE:** Please see the Department's response to Comments 11-15, 24-25, 26, 27-28, 29 and 31-32 for a detailed discussion of the Department's statutory authority for the waiver rules. In considering permit applications under existing land use rules and in administering other regulatory programs, it can be difficult to quantify the detrimental environmental impacts of regulated activities and also to quantify off-setting mitigation measures or environmental benefits. In fact, one of the Department's great challenges in environmental regulation has been to adequately describe, in numerical, narrative or other terms, the many benefits of New Jersey's environmental resources in order to explain the need to maintain, protect and enhance these resources. In many cases, environmental benefits and detriments have both qualitative and quantitative components. The extent to which environmental benefits or detriments are amenable to quantification often depends on the circumstances, resources and activities involved in a particular case. The Department has determined that it is crucial to have the flexibility to evaluate both the quantitative and the qualitative aspects of environmental benefits and detriments when reviewing applications under the waiver rules. It is not clear to the Department why the commenter believes that the waiver rules "may be at odds with local and municipal land use laws and objectives and violate the provisions of Home Rule," so the Department is not able to respond to this aspect of the comment.

**84. COMMENT:** In the spring of 2011 when the Department's budget was being considered in the Senate Budget Committee, Senator Buono raised some very serious and focused concerns with respect to this rule proposal. She mentioned that this proposal would establish unequal protection, between permittees, between geography and places, and between natural

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resources. She specifically raised a concern with respect to the situation where one company might get a waiver and therefore secure a competitive economic advantage over a firm that did not get a waiver, which could open the door to litigation. (517)

**RESPONSE:** As applied, the waiver rules will not result in unequal protection or unfair economic advantage to particular applicants. As noted in response to Comment 33, the Department is developing an internal review process to ensure consistency in the Department's future review and disposition of waiver applications pursuant to these rules. The Department believes that this process, coupled with the substantive standards, decision-making criteria, and limitations in the rules and the posting of notice of waiver decisions and information pursuant to these rules, will result in coherent, principled and consistent consideration and disposition of waiver applications. Please see the Department's responses to Comments 24-25, 31-32, 54 and 79-80 describing the substantive standards and procedures in the waiver rules to ensure adherence to the Department's core missions and statutory responsibilities, as well as consistency, predictability and transparency in the Department's decision-making under the rules.

### **Contesting a waiver decision**

**85. COMMENT:** The Waiver Rule Proposal does not define any administrative procedure by which applicants or other interested parties can challenge the grant or denial of a waiver. (239, 509)

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**86. COMMENT:** The rule contains no provision to allow impacted communities or other parties to contest a waiver application. Where is the community's right to be protected from spurious claims by polluters of "unduly burdensome" and "excessive costs"? Our communities have been unduly burdened for decades at a very high cost to health, well-being, and quality of life, with little relief from DEP. (310)

**87. COMMENT:** If certain determinations by the Department under N.J.A.C. 7:1B would constitute a "contested case" under the Administrative Procedure Act, then N.J.A.C. 7:1B-2.4 should set forth the procedures for making, evaluating, and processing requests for adjudicatory hearings to contest such determinations. Part of those procedures could stipulate that if applicable, the procedural rules applicable to adjudicatory hearings to contest the decision to issue or deny a permit authorization (or modification thereof) apply to adjudicatory hearings to contest the decision to issue or deny a waiver request (or not to consider a waiver) concerning that permit authorization. (317)

**88. COMMENT:** N.J.A.C. 7:1B-2.4 should set forth adjudicatory hearing procedures that apply to waiver requests that are not directly associated with a decision to issue or deny a permit authorization. (317)

**RESPONSE TO COMMENTS 85 THROUGH 88:** The rules do not include a new uniform administrative procedure to challenge the approval or denial of a waiver. A person will have a right to an administrative hearing if such a right is created by the constitution, a statute or an

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existing rule. The statutes and rules governing the particular regulatory program of the Department for which the waiver is requested ordinarily will determine the applicable administrative hearing request process.

**89. COMMENT:** The Department should consider adding to N.J.A.C. 7:1B-2.4 language providing that within 180 days (or some other reasonable period) of receiving a waiver request that is not directly associated with a decision to issue or deny a permit authorization, the Department shall approve, deny, or determine not to consider that waiver request. Such a deadline would help to prevent such waiver requests from accumulating in limbo indefinitely, and give the person who requested the waiver some legal recourse in the event of prolonged Department inaction. If the Department did not meet the 180 day deadline, the waiver request would not be automatically approved or denied, but the person who requested the waiver could bring an action in court to compel the Department to take action either approving, denying, or determining not to consider the waiver request. Cf. Toll Bros. v. Dept. of Envir. Pro., 242 N.J. Super. 519, 529-531 (App. Div. 1990). (317)

**RESPONSE:** The Department anticipates that the majority of waivers it considers will be related to a permit or some other Department approval. Further, even when this is not the case, the rule for which waiver is requested may itself contain a decision deadline, which will then apply to the decision on the waiver. In those rare cases where a waiver is not related to a permit, and where there is no decision deadline that applies to the rule for which waiver is requested, a deadline will not have been established. As it would for any other requests for Department

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action, the Department will take into consideration its workload, priorities and resources when addressing waiver requests.

### **Regulatory flexibility and efficiency**

**90. COMMENT:** As New Jersey grows its economy and looks to attract new business and jobs, the waiver rule sends the right message that the DEP is willing to work with business while still respecting the environment. The proposed rule allows for flexibility and a mechanism for the consideration of a waiver in appropriate circumstances. Additionally, it allows for new technology and innovative approaches to dealing with environmental problems while still providing the public with the required transparency associated with regulatory activity. The proposed rule sends the right message to businesses that New Jersey is willing to help ameliorate a regulatory climate which for years has strangled economic development. (26, 43, 44, 121, 151, 234, 270, 419, 528)

**91. COMMENT:** Often the strict application of the technical details of a rule defies common sense even from an environmental protection perspective. In other circumstances, despite the known debate and DEP's position on application of a rule, because of a lack of clarity in the rule or conditions not contemplated at the time of the adoption of the rule, or the advent of new techniques and technology, on a project specific basis the rule would prohibit development for no good or sufficient reason and for little or no environmental gain. (151)

**92. COMMENT:** The waiver rule is supported because there have been too many times

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when the commenter would want to do something that is better than what a rule would allow and is not allowed to do it, and there are far too many times where there are contradictions in rules that just slow down the process. (114)

**93. COMMENT:** This is a very dynamic time right now with addressing stormwater issues, for instance, low impact designs, trying to do something unique using the natural topography and natural vegetation of a site, but the DEP regulations may not allow such approaches. There are areas where three or four acres of woodlands are being cleared to put in a stormwater basin because that is what the regulations say. Regarding mitigation, sometimes it would be useful to put resources into addressing a more important problem, but the mitigation requirements are different and nobody at the Department can make that call under the current rules. There are circumstances that a waiver provision is very appropriate. (301)

**94. COMMENT:** Any waiver process needs to be transparent, and it also should be very rare when a waiver is approved. With that being said, this waiver provision is necessary. There are times when environmental regulations conflict. There are times when someone is trying to achieve a net environmental benefit. One example is Mordecai Island off of Beach Haven in Little Egg Harbor Bay. That is a natural marsh island that was disappearing from erosion and wave action. Residents put up their own money, a substantial part of the money towards coming up with a solution. The Army Corps of Engineers and several divisions of DEP were involved, and there were conflicting regulations as to what could be done to save this island. There were issues with submerging live vegetation, bird habitat, and other issues. That went

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on for years and years and years as that island slowly disappeared. That is a good example of where there just needed to be a decision made for the greater good of protecting a natural resource that was disappearing. There are other examples. Regulations can be changed, but it does not happen quickly. (301)

**95. COMMENT:** Due to lack of flexibility regulatory programs are inefficient and burdensome. Each site and project represents a unique situation and the regulations could never have predicted all the scenarios that arise. NJDEP's efforts to create the new waiver and make the department better suited to handle the complicated situations which come up for each of the individual development projects in the New Jersey are commended. A waiver program will give the Commissioner the flexibility to resolve issues that can delay and potentially ruin a project. (27, 508)

**96. COMMENT:** The core premise of these proposed rules, namely that there exist certain circumstances under which strict compliance with a Department rule or provision of a rule can lead to unreasonable, unfair or unintended results with attendant adverse impacts, is supported. What has been lacking is a comprehensive mechanism within the rules to provide the Department with the flexibility to prevent or minimize these adverse impacts in a reasoned and rigorous fashion, without sacrificing the environmental and public health protections to which all citizens of New Jersey are entitled. (99)

**97. COMMENT:** As a responsible developer working primarily in the redevelopment and



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urban areas, the commenter has witnessed firsthand how the strict enforcement of the technicalities of some DEP rules can prevent an otherwise worthwhile project from moving forward. In some cases, if the project does not move forward, the net effect on the environment from the existing situation would be demonstrably much worse than the proposed new development. (151)

**98. COMMENT:** This initiative is supported as it makes common sense to recognize there may be particular circumstances warranting some leeway from strict compliance with departmental rules, while still protecting the environment. (400-404, 490)

**99. COMMENT:** Conflict arising from major legislative initiatives such as The Coastal Area Facility Review Act, the Pinelands Protection Act, State Planning Act, Casino Gaming and Affordable Housing Legislation, to name a few, is not uncommon. Coupled with other environmental legislation and the resulting new administrative agencies and the hundreds of subsequent administrative codes that were implemented to advance these important and worthwhile initiatives, there are high costs and extreme delays to important public safety improvements on a regular basis. When these legislative initiatives were passed, the assumption then was that they would not cause conflict, but rather each one was a comprehensive approach to diverse needs. Unfortunately, the ensuing decades saw the individual administrative agencies promulgate layer upon layer of regulation meant to advance their particular directive, but with little or no consideration of other environmental agency jurisdictions or their ongoing parallel or even conflicting actions. Unfortunately, in

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hindsight, we see unnecessary costs and delays of important public safety projects for no purpose other than one of process. Where duplication and overlapping regulations collide, there is a loss to public safety, a high cost passed to taxpayers, and a loss to environmental protection and good management. Where codes conflict, or add so many administrative layers to public projects that render them unattainable or extremely costly, it is warranted and prudent to allow flexibility within the conflicting or duplicative codes, in order to add common sense in a rigid system. The protections provided within this proposal are ample to assure that neither environmental stewardship nor responsibility to the safety of the public would be compromised. (271)

**100. COMMENT:** While NJDEP regulations are important in preserving New Jersey's natural resources, the Department is applauded for recognizing that not every project can fit neatly within the parameters of the various, and often conflicting, NJDEP regulations. The Waiver Rule proposal recognizes the dilemma that developers and builders routinely face, and offers an avenue for appropriate relief or alternative solutions in certain extenuating circumstances. The situations outlined to qualify for consideration under the Waiver Rule, including unduly burdensome, net environmental benefit, and public emergency, are appropriate and necessary. Many argue that the proposed Waiver Rule is a means to weaken environmental protections. However, the Waiver Rule, if implemented in a meaningful manner, will help achieve a balance between the environment, public safety, and economic circumstances without diminishing environmental protections. Most importantly, the Waiver Rule will provide the Department with the necessary leeway to implement a common sense

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approach to finding meaningful solutions for proposed projects and conflicts. (74, 305, 331, 396)

**101. COMMENT:** There are many areas where the Department's existing regulations do allow some level of waiver, but there are many more areas where the waivers do not go where they need to go. A good idea can be on the table, a positive way of doing something, perhaps a new way of doing something, but the rules do not allow it. There are myriad circumstances where environmental protection is stymied by conflicting rules. Perhaps a classic example is a site remediation area where there is contaminated soil as dark fill adjacent to a waterway in a flood plain. The rules conflict. An area must be remediated, but it cannot be capped. If it is impracticable or impossible to remove the contamination, then a remedy must be provided that is suitable for the area, and the law includes a requirement that the property cannot be left undevelopable. There are many other examples where the environment is better protected by allowing a remediation to go through with some flexibility in the floodplain rules. There are three approaches the Department has to address the situation. One, status quo, keep the rules exactly the way they are, let these improvements go by the wayside, let positive things not happen, let business go to other places. Two, dramatically change the rules to make sure that those conflicts do not take place, reduce the protections so that there are no overlaps or conflicts. Three, come back with a rule like this one, which may not be perfect, but accomplishes a wide range of goals, still remaining protective, that allows for a site-specific analysis for the extraordinary circumstances, for the unusual intersection of rules, for the situations where protection and economy can go

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together, but the rules do not allow them at this point, where new innovative approaches or creative approaches can be done so the Department has flexibility within the programs without going back and redoing an entire set of rules or multiple sets of rules. There are many from certain segments of our society that will say, follow the first course, get rid of this rule, do not change anything, keep the status quo. There are many others who will advocate the Department's rules go way too far, you have to cut back. There's a medium approach, a common sense approach, and the Department is to be commended for attempting to follow that common sense approach. (395)

**102. COMMENT:** The concept of "waiver" -- as contemplated by the proposed rule to describe the means by which compliance with a particular regulatory requirement may be excused or modified for a specific project or activity -- arises in several similar, but distinct contexts. For example, waiver may be appropriate when the application of a particular regulatory requirement to a specific project or activity:

- (1) would undermine, frustrate or inhibit compliance with another regulatory requirement of the NJDEP or another State agency;
- (2) would undermine, frustrate or inhibit the achievement of the statutory purpose of the statute or the regulation as a whole, which the requirement exists to serve;
- (3) would impose a financial/economic cost on a permit applicant and/or region of the State that is excessive in relation to the environmental benefit secured by the regulatory requirement; and

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(4) would impose a financial/economic cost on a permit applicant and/or region of the State that is excessive in relation to an alternative measure that achieves comparable environmental benefits.

The common thread running through each of these is the unintended effect the application of a particular regulatory requirement has when applied to a specific project or activity. However, drafters of regulations are not usually able to foresee every possible application of a requirement, much less carefully evaluate the effect each requirement may have in its innumerable potential applications. For example, regulatory requirements are not written to intentionally undermine, frustrate, or inhibit the achievement of the statutory purposes, though sometimes they do. Similarly, regulatory requirements are not conceived to intentionally impose costs that are excessive in relation to the benefits they secure, though sometimes they do. Further, rule drafters are not typically able to foresee every possible method, strategy or technology available to achieve the statutory objective. Many regulations identify specific regulatory measures that must be taken to protect public health or natural resources, and, intentionally or unintentionally, do not include every potential method, strategy or technology available -- in other words, regulations are often not performance-based. At times, regulatory requirements impose financial/economic costs that are unnecessary or excessive compared to alternatives that achieve a comparable result at less cost.

The NJDEP should have the authority provided in the proposed rules to waive or modify a regulatory requirement in order to achieve a common sense result that is consistent with the statutory purpose the regulatory requirement is intended to advance. If the NJDEP does not have the authority to do this, statutory purpose or legislative intent can become improperly

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subordinate to an anomalous regulatory requirement, and the tail thus wags the dog. In the absence of a straightforward way to acknowledge and address such anomalies, NJDEP staff have, for the most part, done their best to accommodate circumstances by applying common sense interpretations of requirements where a strict or literal application would frustrate the statutory purpose or otherwise offend common sense. This approach, however, has limited application, and has proven to be very labor intensive, lacks transparency, and has been criticized by courts.

On the whole, the inability to effectively and efficiently address regulatory anomalies has the potential to stall economic growth by preventing environmentally responsible and economically important projects from proceeding. In addition, the waiver or modification of a particular regulatory requirement where its application does not make sense often results in benefits to a range of interests that extend well beyond the economic interest of the permit applicant seeking the waiver. For example, when removing anomalous requirements in appropriate circumstances allows economic investment, the economic consequences often include increased tax revenue to the State and local government, increased business opportunities and increased employment. Conversely, a regulatory requirement that does not make sense imposes hardships and burdens shared by the applicant, the State, local governments, workers, taxpayers and businesses.

Providing an efficient way to address anomalies and avoid unintended regulatory results will improve the permitting system by: (1) reducing the time spent by NJDEP staff trying to work around regulatory requirements that do not make sense as applied to a specific project or activity, (2) reduce the number of permitting decisions perceived as arbitrary and increase

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confidence in the fairness of permitting decisions, and (3) reduce administrative appeals of permitting decisions believed to be arbitrary. In addition, in many circumstances, the waiver or modification of a regulatory requirement will result in an overall improvement to environmental conditions, including the protection of public health and natural resources, and in this respect does not represent a tradeoff between economic interests and resource protections. Accordingly, to avoid further unnecessary impediments to sound environmental stewardship and economic growth, NJDEP needs a legitimate and efficient procedure, grounded in objective standards, to consider waivers to regulatory requirements on a case-by-case basis when their application to a specific project or activity does not make any sense. The proposed waiver rule serves these important interests and is likely to yield the important environmental and economic benefits noted above. (463)

**103. COMMENT:** There is concern about the potential abuse of this rule by politically connected developers, but DEP staff will continue to raise the bar on environmental protection and hold it high. It has been the experience of permittees that higher standards and improved treatment are required with each five year permit renewal. This rule will not be changing this regulatory approach. It is hoped that this rule will move meaningful discussion of the best overall environmental solution to the forefront more expeditiously. (184)

**104. COMMENT:** The proposed Waiver Rule will assist in the approval of environmentally beneficial projects that otherwise would have been prevented from receiving approval due to

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conflicting rules, and/or rules not specifically designed to accommodate sensible marina/waterfront development. (97)

**105. COMMENT:** In my experience, there have been several projects that have been negatively impacted by the rules concerning wetlands and flood hazard areas at little or no benefit to the environmental features involved. In many cases, it is impractical to comply with the hard line of the rules. Often there are alternative means that could be implemented to benefit the environment and habitat -- if only there were an avenue to waive portions of the rules for good reason. The proposed rule provides that avenue. One advantage to the rule is that the burden of proof is on the applicant, similar to a variance request from zoning rules, or when a road engineer requests a design exception from the NJDOT. The proofs and criteria are weighed by the Department, and since the public is provided notice, the public too can provide facts regarding a waiver request. This ensures that all aspects of environmental protection will continue to be considered in a serious manner. (130)

**106. COMMENT:** Many times an application is pending for a permit and DEP staff, after carefully evaluating the application say that what the applicant is proposing makes sense and there is no substantial detriment to the environment, but it cannot be approved because of the requirements of the rules. These waiver rules will take the handcuffs off in appropriate circumstances. The parade of horrors that some have described is not going to happen because DEP staff are people of knowledge and integrity and good faith and they will not be granting waivers willy-nilly for everybody who comes in and asks for one. These rules are



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going to be administered in a sound, reasoned, common sense manner, just as the DEP usually acts. (200, 501)

**107. COMMENT:** There is concern that the standards are vague, they will be subject to abuse and they are subjective. However, none of those is the case. One size fits all never works in a permit context, because you can never anticipate every possible situation; there will be exceptions to the rule. The key is to find those and to administer them in a common sense manner. By way of example, for about 60 years now, in each of the 566 municipalities in this State, in addition to zoning and setbacks, there is a variance procedure, and in particular cases, and for special reasons, one can get a variance if no substantial detriment to the public good and no substantial detriment to the zone plan and zoning ordinance are demonstrated. When that language was challenged as vague and unconstitutional, the New Jersey Supreme Court, in the case of Ward versus Scott, upheld that language and said it was sufficiently definitive to provide a standard for local zoning and planning boards to act. The standards in the waiver rules are far more definitive and specific. The Supreme Court said in 1952 that the exigencies of modern government have increasingly dictated the use of general, rather than minutely detailed, standards in regulatory enactments under the police power. And they point out that courts have routinely approved standards, such as the BPU operates under a standard of public convenience and necessity, and other administrative agencies operate under a standard of what's "just and reasonable." All of those have been upheld. As a result, there is a body of case law interpreting these standards, and every zoning board and planning board knows what the rules are. The same thing will happen with the waiver rules, and the

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standards are even more specific than the ones that have been upheld by the courts. The unduly burdensome standard -- everyone recognizes a hardship when one presents itself. When two rules are in conflict with one another, that is easily understandable. Environmental benefit, is clearly spelled out in the rules. An emergency is clear when one happens. The Appellate Division of the Superior Court, in 1988, in a case called SMB Associates, called upon the DEP to adopt precisely this kind of waiver rule to provide this needed flexibility and to do so under the Administrative Procedure Act. It has taken awhile, but the Department is commended for doing it now. Note that the Pinelands Commission, since the enactment of that act in 1979, has had a waiver of strict compliance provision in the Comprehensive Management Plan. One can get a waiver in the Pinelands if one can show extraordinary hardship, which is not much different than the unduly burdensome or hardship test that is in this proposal. One can also get a waiver from the Pinelands for compelling public need. It gives the agency flexibility and discretion, which will be properly exercised. It has not been a problem with the Pinelands, and should not be a problem with the DEP. Also, these regulations provide adequate notice for people who are concerned to submit comments. They provide transparency, in that the DEP has to issue a written decision explaining why, under a particular fact situation, it is waiving a rule. And if somebody does not like the decision, the constitution provides for the courts to review under what is called prerogative jurisdiction, so there is due process. The waiver rules are not subjective or vague. They are long overdue. (200)

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**RESPONSE TO COMMENTS 90 THROUGH 107:** The Department acknowledges the commenters' support of the rules. In this group of comments, the commenters have included a number of case-specific scenarios that provide additional evidence supporting the need for rules giving the Department more regulatory flexibility. It would be inappropriate, however, for the Department to speculate here on the applicability of these waiver rules to the individual scenarios or situations described by commenters, absent a specific waiver application before the Department setting forth all relevant facts and circumstances. Moreover, the commenters should keep in mind that the Department's discretion to approve waivers under the rules is limited to where it is demonstrated that one of the four requisite bases for approving a waiver exists and that all other requirements of the waiver rules are satisfied, and only where the Department determines that the approval of such waivers would be consistent with the Department's core missions and statutory requirements.

**108. COMMENT:** There has long been a need to review system wide permits in all media to ensure the best overall environmental protection. There is also a need to better coordinate reviews among competing and or complimentary divisions, commissions or programs. The proposed rule offers an approach to do this. (184)

**RESPONSE:** The intent of these waiver rules is not to enable the Department to consider system-wide permits, as these affect entire classes and groups of regulated entities and should be pursued through other means. Rather, the waiver rules are intended to apply to strict compliance with specific rule provisions in limited individual cases where it is shown that at least one of the

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four bases in the rules for requesting a waiver is satisfied and that all other requirements of the rules are met.

### **Need for waiver rules**

**109. COMMENT:** Existing regulations already provide the authority to issue waivers.

Furthermore, stakeholder groups are meeting regularly to discuss revisions to the Department's rules. Waiver provisions within existing rules were adopted in accordance with the Administrative Procedure Act, were open to public comment and include waiver standards. Broadening the Department's authority to provide waivers, without criteria for such determination, is a recipe for further environmental degradation. If the intent of this rule is better policy decisions that benefit the greater public good, there should be an inter-agency approach. (87)

**110. COMMENT:** If a project needs a waiver from a specific rule, let the applicant use the opportunities for waiver and/or variance already in place. There is no need for something more. (2, 3, 8, 15, 23, 42, 49, 52, 70, 82, 91, 93, 95, 100-102, 106, 132, 140, 142, 150, 155, 161, 162, 167, 180, 187, 188, 210, 214, 222, 228, 233, 236, 240, 246, 249, 250, 253, 262, 264, 269, 283, 287, 291, 295, 304, 312, 315, 323, 348, 364, 370, 371, 372, 374, 377, 406, 412, 413, 421, 429, 430, 445-447, 454, 470, 477, 492, 494, 497, 502, 514, 516, 525)

**RESPONSE TO COMMENTS 109 AND 110:** Not all Department rules provide for exceptions or waivers, and in some cases existing waiver provisions may not be adequate to cope

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with limited situations of the kind addressed by these waiver rules. These rules provide regulatory flexibility by enabling the Department, in its discretion, to resolve problems caused by the strict application of existing rules in individual cases where it is shown that at least one of the four requisite bases in the rules for requesting a waiver is satisfied and that all other requirements of the rules are met. The waiver rules do not lack decision-making criteria as suggested in one comment. Please see the Department's responses to Comments 24- 25, 31 32, 79- 80, 149-159, and 160-170, for a detailed discussion of the standards, decision-making criteria and limitations in the rules guiding and controlling the Department's future waiver decisions. The Department will continue to engage in inter-agency dialogue and reach out to stakeholders as proven methods of solving problems which from time to time may arise in connection with implementation of rules.

### **Impact on local government**

**111. COMMENT:** A process for waivers allows towns to make a case for relief in the face of problematic rules. This will save time and money for municipalities. (125)

**112. COMMENT:** Letters and resolutions of support were transmitted to the Department from the Mayor and Council of Port Republic, the Borough of Stone Harbor and the County of Sussex. (169, 465, 524)

**113. COMMENT:** The Waiver Rule as proposed is supported, but legislation should be enacted so that a separate waiver rule would not be required. (325)

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**RESPONSE TO COMMENTS 111 THROUGH 113:** The Department acknowledges the commenters' support of the rules. Please see the Department's response to Comments 11-15, 23, 24-25, 27-29, 31-32, and 39 for a detailed discussion of the Department's authority for the waiver rules under its existing and comprehensive legislation.

#### **Use of waiver in specific situations**

**114. COMMENT:** The commenter described a site for which conflicts in rules and limitations on development create burdens without any benefit to the environment. (Detailed narrative of site history, site conditions and permitting history omitted.) A common sense approach should include an evaluation of the unique nature of this site. If the rule under the Flood Hazard Area Control Act that requires a buffer were waived, neither the environment nor public health would be negatively impacted. However, development would have a positive economic impact, including increased job opportunities related to the development of the site, including construction, professional services, such as engineering, surveying, buildings and supplies and so on. In addition, the improvements would bring increased ratables to the community and the State. Without a waiver, strict application of DEP rules is unduly burdensome, because it imposes actual, exceptional hardship, without any benefit to the environment or public health. The unique nature of this property cries out for a common sense solution. As applied to the site, the rules lead to unreasonable, unfair and unintended results, tantamount to a taking through regulation. (194)

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**115. COMMENT:** A challenge facing the water and wastewater industries today is that purveyors are required to use anticorrosion chemicals which adds metals and phosphorus to water. Wastewater regulations require that metals and phosphorus be treated and removed. In Category 1 waterways, the amount of metal in the water is measured with a sample taken at the end of the wastewater discharge pipe which provides no dilution. This means the reading will be high and cause a permit exceedance. It then becomes important to do a true evaluation of environmental harm to aquatic life before automatically imposing a costly treatment upgrade. Adding reverse osmosis treatment on a wastewater facility will cost billions of dollars and triple the amount of sludge produced as well as create a need to dispose of a hazardous brine. This means added air pollution and increased sludge management costs for trucking these wastes. There is also a conflict occurring with regard to court ordered affordable housing units and the prohibition on expanding existing sewerage capacity. It is less expensive to a community to expand an existing facility than to build an entire new one. Economic pressures of the day mean that cost effective solutions must be entertained along with environmental protection. (184)

**116. COMMENT:** The commenter explained a situation in which approval was denied to clean up and develop a brownfield because not encroaching on the outer 150 feet of buffer was prioritized over the need to clean up the brownfield property. (Detailed narrative of site history, site conditions and permitting history omitted.) The project would provide many benefits to the environment and the town. The Supreme Court of New Jersey ruled that the property is developable as zoned for 140 units. The Waiver Rule should be implemented --

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this site is a perfect example of conflicting and impractical application of the regulations governing different divisions within the Department. The intent of the Waiver Rule is to correct these intractable regulations to meet the needs and goals of DEP when applying conflicting rules. The Waiver Rule is appropriate and long overdue. It will aid in resolving conflicting agendas and goals within the DEP. (225)

**117. COMMENT:** The commenter states it is a small business that since 1978 has been an environmentally responsible steward of its property. (Detailed narrative of site history, site conditions and permitting history omitted.) The commenter states its business has suffered financially due to physical disruption of the premises caused by a DEP-ordered cleanup. The requirements and standards today are far more severe than any in existence when the property was purchased. Why is there no avenue of relief through a "grandfather" provision or State financial assistance to deal with a situation that was unknown to the owner and was not knowingly caused by or aggravated by the owner? (387, 388)

**118. COMMENT:** The DEP should be more lenient on small family-owned businesses that have or will have ground water issues. (Detailed narrative of site history, site conditions and permitting history omitted.) The commenter states that it is only a matter of time before its business will have to close. (521)

**119. COMMENT:** The commenter seeks advice on how the waiver rules may apply to the commenter's situation. (Detailed narrative of site history, site conditions and permitting



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history omitted.) (507)

**RESPONSE TO COMMENTS 114 THROUGH 119:** These commenters have outlined specific projects, permitting scenarios and enforcement-related actions of the Department as justification for a rule providing for a waiver of strict compliance. However, the Department cannot determine whether any of the specific situations described above would meet the requirements for a waiver under these rules, because the rules require a careful, case-by-case analysis of all relevant facts, evaluated against each of the standards, decision-making criteria and limitations in the rules. The person submitting an application for a waiver of strict compliance would need to show that the application was 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. See N.J.A.C. 7:1B-1.1(a) and N.J.A.C. 7:1B-2.2(a)6 (as recodified from (a)7 on adoption; see response to Comment 23). The applicant would need to prove that the activity in question fell under one or more of the four specific situations under which a waiver may be authorized at N.J.A.C. 7:1B-2.1(a). The applicant would need to demonstrate to the satisfaction of the Department that the waiver of strict compliance did not inappropriately seek to waive any of the Department rules enumerated in N.J.A.C. 7:1B-2.1(b). The application would have to be evaluated in consideration of all of the criteria and limits at N.J.A.C. 7:1B-2.2 and 2.4. Regarding a commenter's request for a provision addressing issues that arose prior to the adoption of these rules, the Department has determined that prospective application of the waiver rules is appropriate. See N.J.A.C. 7:1B-2.1(a), and the Department's responses to Comments 411-414. The Department cannot address the

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commenters' general concern about the need for more leniency in DEP rules for small businesses as that is beyond the scope of this rulemaking. However, a waiver under these rules is available to businesses of all sizes, including small businesses, and, if all criteria and standards of the rules are met, may afford some relief to small business applicants. Regarding one of the commenters' request for State financial assistance, this issue is also beyond the scope of this rulemaking.

### **Specificity of the waiver rules**

**120. COMMENT:** The rules are so vague that the door will be left wide open for abuse by special interests. The rules are inappropriate and support special interests over the preservation of New Jersey's critical natural resources. (5, 7, 10, 11, 28-32, 35, 53-57, 62, 63, 66, 67, 71, 107, 109, 119, 122, 126, 133, 156, 160, 165, 171, 176, 182, 186, 189-192, 204-206, 216-218, 232, 237, 238, 245, 247, 251-253, 259, 260, 267, 272, 281, 286, 289, 292, 299, 302, 303, 307, 309, 316, 318, 332, 343, 344, 360, 362, 365, 368, 379, 381-384, 415, 416, 423, 433, 434, 444, 448, 455, 458, 461, 466, 468, 473, 482, 483, 485, 493, 499, 503, 505, 512, 518, 520, 522, 523)

**121. COMMENT:** People throughout the State recognize that our country was established under the rule of law. Regardless of the good intentions of this administration, substituting the arbitrary decisions of individuals inevitably leads to favoritism and corruption. Far better that the DEP should focus on streamlining the bureaucracy to speed the resolution of applications for everyone. (19, 37, 38, 50, 65, 69, 72, 73, 80, 105, 110, 141, 158, 173, 175, 195, 207, 209, 211, 220, 227, 258, 261, 284, 296, 319, 324, 333, 341, 349, 390, 398, 410,

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436, 450, 467, 469, 479, 480, 488, 510, 513, 526)

**122. COMMENT:** The rule fails to provide limitations and protections to prevent its overuse and abuse. (2, 3, 8, 15, 23, 42, 49, 52, 70, 82, 91, 93, 95, 100-102, 106, 132, 140, 142, 150, 155, 161, 162, 167, 180, 187, 188, 210, 214, 222, 228, 233, 236, 240, 246, 249, 250, 262, 264, 269, 283, 287, 291, 295, 312, 323, 348, 370, 371, 374, 377, 406, 412, 413, 421, 429, 430, 447, 454, 470, 477, 492, 494, 497, 502, 514, 516, 525)

**123. COMMENT:** N.J.A.C. 7:1B-2.1(a) states that DEP “may” waive any rule based on the factors listed here, but need not. The vagueness of the waiver criteria, and lack of standards, creates a significant danger of selective waiver by regulators, as do most of the provisions of the Waiver Rule. (239, 285)

**124. COMMENT:** The rule ensures that powerful, well-connected applicants would be given special treatment at the expense of our water, air and forests and to the detriment of the public. Experience teaches that conferring permitting agencies with this kind of highly discretionary, easily manipulated power results in arbitrary, politically driven decisions that are bad for the environment and unfair to the public. The rules will allow for abuse and political pressure from developers and polluters that will allow for “pay-to-play” to push through projects to the detriment of the environment. (6, 16, 24, 61, 96, 159, 208, 268, 308, 309, 310, 353, 354, 355, 358, 416)

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**125. COMMENT:** Power corrupts, and the NJDEP is no exception to this rule. Where would the checks and balances be? Money and politics will corrupt the process more than it is now. Someone who is owed a favor, someone who gives money to a particular politician, someone who has strong political influence, or someone who promises that many jobs will be created could receive the waivers. The net result would be an undemocratic process with no transparency that invites corruption. (20, 86, 157, 172, 243, 321, 511)

**126. COMMENT:** A blunt instrument response such as the Waiver Rule Proposal is overly broad and unreasonable. DEP promises that waivers will be granted judiciously; the proposed rules offer nothing in the way of guarantee. The public should not be expected to rely for all time on the good faith of DEP regulators. Should such trust be justified today, nothing in the Waiver Rule Proposal's vague standards prevents the abuse of agency discretion later. (239)

**127. COMMENT:** Hard fought protections that are currently in place would be waived to any developer who has the right connections or spent enough money to have his interests, rather than the interest of the citizens of New Jersey, represented by State representatives. Any important decision could be made by regulators with minimum substantive or procedural safeguards against arbitrary or biased behavior, or corruption. (358, 437)

**128. COMMENT:** Waivers will increase the role of politics and decrease the role of science in DEP decision-making. (372)

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**129. COMMENT:** Giving permitting agencies this kind of highly discretionary, easily manipulated power results in politically-driven, arbitrary decisions that are bad for the environment and unfair to the public. Whether it is undue political influence or not the concern is that this rule is too broad and vague. This creates an atmosphere ripe for abuse by consultants and developers, as does the case-by-case basis of determining who gets a waiver and who does not. (81, 193, 471, 472, 486)

**130. COMMENT:** This rule will open the door to political pressure and abuse by special interests, pushing for their pet projects, to the detriment of the environment and small business. (486, 493)

**131. COMMENT:** The fear of many people is that waiver of “unduly burdensome” regulations will occur mainly to the benefit of politically well-connected developers, who can imply support from the Governor’s office (whether the Governor of the moment is Republican or Democrat). It is not far-fetched to imagine a quiet message from the Governor’s office to award or deny a waiver depending upon whether the requestor had contributed to the Governor’s campaign or that of his opponent. At the very least there could be the appearance of favoritism. (75)

**132. COMMENT:** DEP is running the risk of using what will be viewed as a judgment-based system, including possible allegations of favoritism, cronyism and “let’s make a deal”

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permitting. (361, 329, 366)

**RESPONSE TO COMMENTS 120 THROUGH 132:** The Department acknowledges that there is an inherent tension between the need to ensure predictability in State agency decision-making, and the need for an agency to have sufficient flexibility to address unforeseen and unusual situations. There is concern that unfettered administrative discretion can lead to pressure on government officials to show favoritism and to treat applicants in an inequitable fashion. On the other hand, overly rigid and prescriptive, one-size-fits-all or “cookie-cutter” approaches to regulation, can lead to labor-intensive bureaucratic procedures, as well as causing “red tape” that slows agency functions and often frustrates fulfillment of sound policy decisions. The Department’s intent in promulgating rules is to provide clear direction to the regulated community, and yet also provide sufficient flexibility to deal with the wide array of complex situations and interconnected environmental resources that fall under the Department’s jurisdiction. The Department believes that the waiver rules achieve a necessary and appropriate balance between these considerations.

The Department does not agree that the waiver rules lack sufficient standards or safeguards that will lead to arbitrary decisions or abuses of discretion. There are ample substantive standards in the waiver rules on the basis of which the Department will evaluate waiver applications. The rules carefully circumscribe the Department's discretion by setting forth a statement of purpose emphasizing that waivers shall be consistent with its core missions to maintain, protect and enhance New Jersey’s natural resources and to protect the public health, safety, welfare and the environment and that it is not the purpose of the rules to allow for routine

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circumvention of any Department rules (N.J.A.C. 7:1B-1.1(a)); by establishing only four limited situations, or bases, in which waivers will be considered by the Department under the rules (N.J.A.C. 7:1B-2.1(a)); by providing additional, detailed criteria that must be applied by the Department in its review and evaluation of waiver applications (N.J.A.C. 7:1B-2.2(a)); and by imposing limitations significantly curbing the scope of the Department's waiver authority (N.J.A.C. 7:1B-2.1(b) and 7:1B-2.4). The Department's statement of purpose, the four alternative bases for considering a waiver, the detailed criteria for the Department's evaluation of waiver requests and the limitations on the Department's waiver discretion in the rules provide appropriate safeguards against the potential for arbitrary or uneven exercises of waiver authority. Please see the Department's responses to Comments 24-25, 31-32, 79-80, 120-132, 149-160, and 161-171, discussing the standards, criteria and limitations in the waiver rules informing the public and guiding and controlling the Department's future waiver decisions.

The Department is developing an internal review process to ensure consistency in the Department's future review and disposition of waiver applications pursuant to these rules. The Department believes that this process, coupled with the substantive standards, decision-making criteria, and limitations in the rules and the posting of notice of waiver decisions and information pursuant to these rules, will result in coherent, principled and consistent consideration and disposition of waiver applications.

**133. COMMENT:** There is not the potential for abuse cited by the proposal's critics. The proposal expressly states that waivers will be approved in limited circumstances and the criteria for granting a waiver set a high burden on the party seeking the waiver to

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demonstrate that it is appropriate and that environmental protection will not suffer. Other criteria further limit the Department's discretion, e.g., waivers cannot be granted for a specific statutory requirement unless the statute specifically authorizes a waiver; waivers cannot be granted under Federally delegated or authorized programs if the waiver is inconsistent with the delegation; waiver of numeric or narrative standards is strictly prohibited; and waivers cannot be used to excuse prior violations. Nine other categories of rules cannot be waived. These limitations, together with the procedural safeguards noted above, carefully circumscribe the Department's authority in acting on any waiver and assure that waivers will only be granted in limited and appropriate circumstances. (99)

**RESPONSE:** The Department acknowledges this comment in support of the rules.

### **Small businesses**

**134. COMMENT:** The rule is so open ended and vague on the metrics for assessing burdensome and conflicting rules that it will certainly create an opportunity for large companies to plead their cases and disadvantage small businesses that cannot bring the same case, or communities that will not be able to counteract these petitions for waivers. (291, 310)

**135. COMMENT:** This proposed rule would endanger workers, weaken important environmental and workplace safeguards and create unpredictability and unfair competition for small businesses. Overall, the rule unfairly benefits large corporations that can afford to



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do the research and hire the legal teams needed to apply for waivers. Any company that can afford to apply for a waiver will, and the cost of applying will be unduly burdensome to small businesses that try to compete. Governor Christie's Executive Order calls for predictability in the regulatory process. The only predictability that will be created is that small businesses will not be able to compete. (352)

**136. COMMENT:** Contrary to the proposal's economic impact statement, the rule would hurt New Jersey's small businesses. Small businesses will be particularly disadvantaged as they will lack the financial and personnel resources needed to pursue the waiver option; while bigger business operations with greater financial and personnel resources will be able to more easily compile the necessary information and application materials, to engage in the meetings and lobbying needed to successfully escort their waiver materials to a successful conclusion securing the requested waiver. (136, 239, 409, 416, 408)

**137. COMMENT:** Due to the lack of predictability of outcome, the proposed rule may also be considered discriminatory to smaller entities lacking the resources for a legal battle. (21, 46, 48, 64, 92, 94, 104, 124, 138, 139, 146, 148, 152, 174, 212, 213, 223, 224, 226, 298, 311, 392, 441, 442, 452, 460, 474, 475, 491, 495)

**RESPONSE TO COMMENTS 134 THROUGH 137:** It is not clear why the commenters believe that requesting a waiver will frequently require great financial and personnel resources or professional assistance. As explained in the Regulatory Flexibility Analysis in the proposal, the

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expense of a waiver and the necessity of hiring experts to pursue a waiver will vary depending on the activities that would be authorized by the waiver and the rule for which a waiver is requested. Depending on the circumstances, requesting a waiver of a rule may or may not require substantially more assistance or add appreciably to the cost of complying, or demonstrating compliance with, the rule sought to be waived in a particular case. It should be noted that requesting a waiver under these rules is not mandatory. Ordinarily the determination whether or not to apply for a waiver will be a business decision to be weighed in light of all relevant factors, including, but not limited to, assessing the potential costs involved in the obtaining the waiver and the potential benefits that would result from the waiver. Please see the response to Comments 16, 33, 85-89, 120-132, and 360-393 for further discussion of the process by which the Department plans to review applications for waivers and implement the rules.

### **Environmental justice**

**138. COMMENT:** A waiver should never be granted solely in areas where economically depressed people live. (20)

**139. COMMENT:** This rule would endanger communities throughout the State, and it will most certainly increase the vulnerability of those communities where minority and low income people cannot defend themselves from the powerful industries and developers that have every incentive, along with the resources, to bring their petitions before the agency, case by case, to seek waivers on rules that should apply equally to all. Environmental Justice communities like the Ironbound in Newark already suffer from disproportionate, cumulative

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burdens that current rules have not helped to alleviate. This rule would further degrade rules that are already weak and leave communities with increased exposure to pollution. (310, 407)

**140. COMMENT:** The New Jersey Department of Environmental Protection's (NJDEP) own cumulative impacts screening method demonstrates that communities of color and low-income communities in New Jersey suffer from a disproportionate amount of pollution and higher health risks than other communities. This proposed rule has the potential to exacerbate and perpetuate this environmental injustice since a disproportionate number of environmental hazards are sited in these communities and therefore it stands to reason that a disproportionate number of waiver applications may come from facilities located in these communities. The proposed waiver rule has no protections for overburdened environmental justice communities. (408)

**141. COMMENT:** The rule contains no provision to allow impacted communities, cities, or other parties to contest a waiver application. Where is the community's right to be protected from spurious claims by polluters of "unduly burdensome" and "excessive costs"? Our communities have been unduly burdened for decades at a very high cost to our health, well-being, and quality of life, with little relief from the DEP. (310)

**142. COMMENT:** The environmental justice community and the environmental community have good faith differences with DEP but do respect the staff who are trying to do the right thing. We all have agreed on a basic set of playing rules, and it seems these waiver rules go

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outside of those bounds. (438)

**143. COMMENT:** This waiver rule allows for the whim or political sway of one person to ultimately put overburdened communities in further danger. (181)

**RESPONSE TO COMMENTS 138 THROUGH 143:** The Department understands the concerns regarding the potential impact these rules may have on communities, particularly those that are most vulnerable to environmental and human health impacts. The Department has long recognized the unique challenges within overburdened communities and continues to work directly with these communities through the Department's Office of Environmental Justice to ensure meaningful participation and fair treatment of all residents. The waiver rules do enable the Department to evaluate and address impacts on overburdened communities. For example, N.J.A.C. 7:1B-2.2(a)3 and 6 (as recodified from (a)7 on adoption; see response to Comment 23) require the Department to consider whether the circumstances support the need for a waiver and whether a waiver would comport with the Department's core missions, which include protection of not only the environment, but also public health, safety and welfare.

**144. COMMENT:** The waiver rule proposal fails to integrate the environmental justice concerns of minority and low income communities in the Social Impact statement. The minority and low income communities, such as but not limited to Camden, Newark, Paterson, etc. and civil rights leaders were not solicited for their views regarding the impact of waivers on their communities in advance of the proposed rule making. The Department

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has not complied with procedures of the Administrative Procedure Act for proposed rules and therefore the proposed rules are void. (51)

**RESPONSE:** With respect to stakeholder input, the Department provided for both formal and informal public input prior to proposing the rules, described in more detail in the response to Comment 204. The Department also held a public hearing on the proposal. The Social Impact statement in the proposal addresses the overall anticipated social impact of the waiver rules and in fact highlights that the limits in the rules, including the prohibition on waivers of standards protective of human health, will ensure public health continues to be protected and any adverse impact of any waivers will be minimized. The Department has fully complied with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., with respect to the adoption of these rules. In this regard, please see the Department's response to the comments included in the section of this document entitled Administrative Procedure Act.

**145. COMMENT:** The Department must include an Environmental Justice component to the rule. While it is nice to think that achieving a net environmental benefit can be realized, it is also possible that environmental benefits will come at the cost of those in poor areas of the State. Any net environmental benefit should be realized in areas that benefit those in the same area first, or in the alternative, a similar socio-economic area that the projects should have occurred could be offered as a second choice. For illustrative purposes only, while it might benefit the State as a whole to improve a State Park in Morris County, it does little for the residents of Camden for projects that cannot meet promulgated environmental regulations

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and waivers are granted in consideration of improvements in those Morris County parks.

(314)

**RESPONSE:** The Department acknowledges the commenter's concern and notes that any offset to an environmental impact must meet the requirement in the definition of "net environmental benefit" at N.J.A.C. 7:1B-1.2, which specifies that "[T]here 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." (Emphasis added.) The Department believes that this provision adequately addresses the commenter's concerns.

#### **Department's core mission**

**146. COMMENT:** Please identify all of the Department's core missions (referenced in the summary), indicate where these core missions are defined, and identify who defined these core missions. (509)

**147. COMMENT:** The reliance on core mission is unsupportable. No statute gives DEP the general 'core' regulatory mandate cited in the Waiver Rule Proposal. DEP was established in 1970, when environmental and public health departments from several New Jersey agencies were reorganized under the umbrella of a single agency. Successive subsequent reorganization finally gave rise to the current DEP in 1994. See, e.g., N.J.S.A. 13: ID-1. However, none of the statutes reorganizing DEP purports to state its "mission". (239)

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**148. COMMENT:** The term “core mission” appears to be an artifact from the Mission Statement of 2010. The Department has had a long history, starting in 1970, and its core mission has changed over time. In 10 years or 20 years, what will be the core mission of the Department? (361)

**RESPONSE TO COMMENTS 146 THROUGH 148:** Adopted on August 24, 2010, N.J.A.C. 7:1-1 provides that the Department's core mission “is and will continue to be the protection of the air, waters, land, and natural and historic resources of the State to ensure continued public benefit.” N.J.A.C. 7:1-1 further provides that this mission is advanced through effective and balanced implementation and enforcement of environmental laws to protect these resources and the health and safety of New Jersey’s residents. It also states that “it is crucial to understand how actions of the Department can impact the State’s economic growth, to recognize the interconnection of the health of New Jersey’s environment and its economy, and to appreciate that environmental stewardship and positive economic growth are not mutually exclusive goals: the Department will continue to protect the environment while playing a key role in positively impacting the economic growth of the State.” N.J.A.C. 7:1-1(a). The commenter’s mention of “the Mission Statement of 2010” apparently refers to the Department's Vision Statement, which builds on the principles set forth in Executive Order Nos. 1 through 4 (2010), and which is consistent with the Department's core mission. This statement is available at [www.nj.gov/dep/about.html](http://www.nj.gov/dep/about.html).

In the waiver rules, the Department describes “the core missions of the Department to maintain, protect and enhance New Jersey’s natural resources and to protect the public health,

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safety, and welfare, and the environment.” N.J.A.C. 7:1B-1.1(a). The core missions of the Department as set forth in N.J.A.C. 7:1-1 and in N.J.A.C. 7:1B-1.1(a) of the waiver rules are consistent with the Department’s comprehensive enabling legislation, including legislation transferring to the Department powers of its predecessor agency, the Department of Conservation and Economic Development, N.J.S.A. 13:1D-1 and 2, the Department’s general enabling statute at N.J.S.A. 13:1D-1 et seq., and an array of statutes creating numerous environmental programs and policies implemented by the Department. Please see the Department’s response to Comments 11-15, 23, 24-25, 27-29, 31-32, and 39 for a detailed discussion of the Department’s authority for the waiver rules.

**149. COMMENT:** Environmental Protection must remain the paramount goal of the DEP, and this rule does not achieve that end. (5, 7, 10, 11, 28-30, 35, 57, 62, 63, 66, 67, 71, 107, 109, 119, 122, 126, 133, 156, 160, 165, 171, 176, 182, 186, 189, 190, 191, 192, 204-206, 216-218, 232, 237, 238, 245, 247, 251, 252, 259, 260, 267, 272, 281, 286, 289, 292, 299, 302, 303, 307, 316, 318, 332, 343, 344, 360, 362, 365, 368, 379, 381-384, 415, 423, 427, 433, 434, 444, 448, 455, 458, 461, 466, 468, 473, 482, 483, 485, 499, 503, 505, 512, 518, 520, 522, 523)

**150. COMMENT:** It is the DEP’s responsibility to protect the environment and the public interest and this proposal does not do this. In the proposal itself, on page 12, “The rules would allow some activities to proceed that would otherwise not be allowed, with corresponding negative environmental impacts.” Also a direct quote from the rule,



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“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.”

And from page 3, DEP’s core missions of protecting the air, waters, lands, and natural and historic resources of the State to ensure continued benefit 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. The very thing that DEP is charged with doing by DEP’s own acknowledgment, the opposite is done with this proposal. (47, 372)

**151. COMMENT:** The waiver rule is in direct conflict with DEP’s core mission. (5, 6, 59 - 61, 68, 111, 181, 407, 409, 438)

**152. COMMENT:** The NJDEP has a core mission: to protect the air, waters, land, and natural and historic resources of the State for the public good. This proposal in no way advances this core mission. (33, 86, 113, 215, 241, 369, 424, 511, 527)

**153. COMMENT:** New Jersey residents rely on the DEP to protect them from polluting activities, and if complying with those protections is “unduly burdensome” to some entity, that entity should find another activity to pursue rather than putting public health at risk. (89)

**154. COMMENT:** We cannot identify any aspect of the proposed rule that fosters the mission of the NJDEP to protect the environment. It appears that the proposed rule is a hurried and

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overbroad effort that undermines the mission of the NJDEP and violates applicable law.

(123)

**155. COMMENT:** In order to have any level of credibility and to ensure that it fulfills DEP's mission of protecting the environment and public health, the proposed rule would need to be drastically rewritten. It would have to have much more limited goals and objectives. It would have to have specific standards to provide safeguards, and it would require much greater transparency, public notice and an opportunity for public comment regarding all the proposed waivers. (159, 407, 438)

**156. COMMENT:** Under this rule, DEP would consider whether a proposed waiver is consistent with the Department's core mission, which is hardly reassuring since the DEP Commissioner is twisting the DEP's core mission to include economic growth. (263)

**157. COMMENT:** The Waiver Rule asserts that DEP's mission is to be advanced through effective and balanced implementation, but really the DEP's mission should be advanced by recognizing that priority protection of the environment provides economic, health, safety, and quality of life benefits to the entire State; whereas a focus on balance introduces subjective prioritization that inevitably benefits one community to the detriment of another. True balance in implementation of environmental laws comes in the uniform benefits provided by environmental protection. (416)

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**158. COMMENT:** The DEP Commissioner has issued a vision and mission statement that say that the Department's role is to promote economic development, and he ties that to the core mission of the Department. Given that Executive Order 2 and the Red Tape review recommendations are brought into the rule proposal as the factual basis for the proposal, there is a serious problem with how the proposal would change the standards and the existing law in the absence of legislative authorization. (517)

**159. COMMENT:** The present proposal threatens to undermine the Department's entire regulatory structure, and erode the environmental protections afforded thereunder. (113, 527)

**RESPONSE TO COMMENTS 149 THROUGH 159:** These waiver rules do not change statutory law. The waiver rules apply to rules promulgated by the Department pursuant to existing enabling legislation delegating to the Department broad rulemaking authority. This enabling legislation includes powers of its predecessor agency, the Department of Conservation and Economic Development, continued in the Department pursuant to N.J.S.A. 13:1D-1 and -2; the Department's general enabling statute at N.J.S.A. 13:1D-1 et seq., granting the Department broad authority to formulate comprehensive policies and programs for the conservation of natural resources, the promotion of environmental protection and the prevention of pollution of the environment of the State; and an array of statutes creating various environmental programs and policies implemented by the Department. The Department's statutory authority to promulgate rules articulating when and how it will regulate a particular activity includes, within that authority, the authority not to promulgate rules regulating a particular activity, provided that

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the decision not to regulate the activity does not violate a statutory requirement or purpose. The Department's adoption of the waiver rules is an exercise of its discretionary authority to decide when and how to regulate or not to regulate. Please see the Department's response to Comments 11-15, 23, 24-25, 26, 27-29, 31-32, and 39 for a detailed discussion of the Department's authority for the waiver rules, and the Department's responses to Comments 24-25, 31-32, 79-80, 120-132, 149-159, and 160-170, describing the substantive standards, decision-making criteria and limitations of the waiver rules guiding and controlling the Department's future decision-making, which ensure adherence to the Department's core missions and its statutory responsibilities.

Within the existing statutory framework, the Department may adopt rules allowing it to take into account economic or financial considerations in reviewing permit applications and discharging other duties under the law, provided that its rules are not contrary to statutory requirements or purposes. In fact, the Department's enabling statutes contain a number of provisions expressly recognizing financial or economic concerns that may be considered in the Department's implementation of environmental protection statutes. Please see the Department's response to Comments 79 and 80 further discussing the Department's authority to take into account economic and financial factors in reviewing permit applications and discharging other duties. The Department is confident that adoption of these rules will not result in the diminution or abdication of its roles in the protection of health, safety and the environment.

### **Impacts to the environment, public health and safety**

**160. COMMENT:** The proposed rule jeopardizes healthy environments and communities

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needed to sustain them, as well as public health and safety, by letting developers and polluters off the hook. Projects that are a detriment to the environment must not be pushed through by granting waivers. The environment will come second to economic considerations and complaints from developers and polluters. The rule threatens communities with increased flooding and pollution, and it threatens jobs. (2, 3, 5-7, 8, 10, 11, 15, 20, 23, 28-30, 35, 42, 49, 52, 57, 61-63, 66, 67, 68, 70, 71, 76, 78, 79, 82, 86, 87, 89, 91, 93, 95, 96, 100-102, 106, 107, 109, 119, 122, 126, 132-134, 140, 142, 150, 155, 156, 157, 160, 161, 162, 165, 167, 171, 176, 180, 182, 183, 186-193, 204-206, 210, 214-218, 222, 228, 229, 232, 233, 236-238, 240, 245-247, 249-252, 259, 260, 262, 264, 269, 266, 267, 272, 281, 283, 286, 287, 289, 291, 292, 295, 299, 302-304, 307-309, 312, 315, 316, 318, 323, 329, 332, 343, 344, 348, 358, 360, 362, 365, 368, 370, 371, 374, 375, 377, 379, 381-384, 406, 412, 413, 415, 421, 423, 427, 429, 430, 433, 434, 444, 447, 448, 454, 455, 458, 461, 466, 468, 470, 473, 477, 482, 483, 485, 492, 494, 497, 499, 502, 503, 505, 512, 514, 516, 525)

**161. COMMENT:** This rule will allow more sprawl, overdevelopment, flooding and pollution. (31, 32, 53-56, 239, 426, 486)

**162. COMMENT:** Some conditions will be cutting the heart out of many key provisions, even where there are supposedly built-in protections. Category one streams have a 300-foot buffer, and that is based on science. That is not in statute. That is in a rule, and it is based on a standard that was developed by the Department. Things like that could be waived very easily under the waiver rule criteria. (486)

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**163. COMMENT:** Given years of work by hundreds of government officials, professionals and involved citizens, this waiver proposal would have the potential to undo much of this progress. In a state third from smallest, yet more densely populated than India, strong environmental regulations are a necessity. Clean air, pure water, and unspoiled open space are precious commodities belonging to all present and future New Jerseyans. New Jersey environmental protections are not always enforced as it is, so any reduction to them would allow damage to the environment. (33, 38, 40, 41, 68, 76, 268, 322, 424, 481, 511, 519)

**164. COMMENT:** If these waivers become practice, much of the watershed restoration and protection work communities have accomplished is likely to be reversed. Future generations will likely criticize us all for failure to protect the environment for them to enjoy. The many years of work by dedicated DEP staff, in partnership with the many environmental groups in New Jersey, should not be arbitrarily discarded in this manner. (38, 86, 96, 172, 308)

**165. COMMENT:** New Jersey waterways are so polluted the DEP advises us not to swim in or fish from them. Newark, Raritan and Barnegat Bays are so polluted that harvesting of shellfish is prohibited. The air quality fails to meet minimum Federal standards. The State has more than its share of Superfund sites, and about 50 percent of the land is so impermeable that rain water runs off, flushing pollutants into streams, eroding stream banks, and destroying marine habitat, instead of seeping down to recharge underground water supplies. DEP officials predict the State's rate of development is beginning to outstrip the

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State's water supplies. The Department should not weaken health and environmental standards in order to stimulate economic growth. (263, 380)

**166. COMMENT:** DEP must be diligent in preventing yard-by-yard destruction of environmentally sensitive land. Despite the efforts of the Department and the environmental community, New Jersey's environment remains threatened by development. The commenters cite a study which they state concludes that "urban development in the nation's most densely populated state has continued unabated and in fact gained momentum up through 2007." Since 1986, 324,256 acres of land (507 square miles) have been urbanized in the State. From 2002 through 2007, urbanization in New Jersey increased by seven percent from the immediately preceding six years. New Jersey's total urban footprint now accounts for more than 30 percent of the State's five million acres. These facts strongly suggest that the development community does not require a waiver rule to facilitate development in the State. Among other impacts, new development results in impervious land cover, which increases runoff and pollution. The Department recently released a draft report on water quality. Of the waters assessed by the Department: 32 percent of waters designated for drinking water supply do not support this use; 72 percent of waters designated for recreational use do not support this use; 71 percent of waters designated for aquatic life do not support this use; due to a six percent (6 percent) decline since 2008, 42 percent of waters designated for shellfish harvest for consumption do not support this use; none of the waters designated for fish consumption support this use. The recent trend in losses of environmentally sensitive land is no less bleak. Wetlands are a vital ecological resource for

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water quality and habitat, and due to their regulation, are not being lost as quickly as forest or farmland. Nevertheless, from 1986 to 2007, New Jersey experienced a net loss of 52,285 acres of wetlands (more than 80 square miles). These statistics are a call for DEP to be vigilant in its regulatory activities, not to become more lax. (113, 123, 527)

**167. COMMENT:** Rules and regulations should be made less burdensome, as long as public health and safety are religiously protected. (220)

**168. COMMENT:** While recognizing that such waivers may be desirable under some circumstances and may yield economic and environmental benefit, some of the conditions under which waivers may be granted are too broad and could result in unjustified negative environmental impacts. (244, 456)

**169. COMMENT:** The social, emotional and economic ramifications of this Waiver Rule and its effect on realities like increased flooding are given woefully short shrift. Providing waivers from stormwater, floodplain and development protections will subject New Jersey communities, families, and taxpayers to increasing costs of flooding. Individual waivers will, in some cases, have an effect; over time the cumulative effect of multiple waivers will set in; and in both cases New Jersey residents, citizens and taxpayers will pay the price for DEP and the Governor letting developers, industry and business off the hook. (416)

**170. COMMENT:** DEP has acknowledged to the public that this proposal will weaken



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environmental protections. (372)

**RESPONSE TO COMMENTS 160 THROUGH 170:** The Department does not agree that the rules will undermine the Department's regulatory structure or lead to widespread, indiscriminate harm to the public health, safety or the environment. As stated in the Department's response to Comments 11-15, the Department's fundamental duties include maintaining, protecting and enhancing New Jersey's natural resources, protecting the public health, safety, welfare and the environment, and effectuating the purposes of its enabling statutes. The rules constitute a carefully circumscribed, case-specific mechanism whereby the Department may, in certain limited situations described in the rules, waive the strict application of an existing rule provision to a particular project or case. As stated in N.J.A.C. 7:1B-1.1, the limited purpose of the waiver rules is to provide for certain limited circumstances in which the Department may waive strict compliance with existing regulations 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, welfare, and the environment. Pursuant to N.J.A.C. 7:1B-2.1(a), a waiver may not be approved unless the applicant demonstrates to the Department's satisfaction that it meets one of the four requisites bases in the rules for granting a waiver and that all other requirements of the rules are met. N.J.A.C. 7:1B-2.2(a), which establishes waiver criteria to be considered by the Department on reviewing a waiver application, specifically provides that the Department must evaluate whether the activity authorized by 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. Moreover,

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N.J.A.C. 7:1B-2.1(b)1 (as modified on adoption; see response to Comment 23) provides that the Department shall not under these rules waive a requirement of, or duty imposed by, a Federal or State statute or regulation, unless that statute or regulation provides for such a waiver. Further, N.J.A.C. 7:1B-2.1(b)6 provides that the Department shall not waive any numeric or narrative standard that is protective of human health. The Department believes these provisions, as well as other requirements of the rules, collectively provide ample safeguards and assurance that the Department's waiver decisions will be consistent with its core missions and its environmental protection responsibilities under its enabling statutes. Please see the Department's responses to Comments 24-25, 31-32, 79-80, 120-132, 149-159, and 160-170, further discussing the standards, decision-making criteria and limitations of the waiver rules guiding and controlling the Department's future decision-making, which ensure adherence to the Department's core missions and its statutory responsibilities.

The Department acknowledges that, as stated in the Environmental Impact analysis accompanying the proposal, there may be some individual cases in which a waiver will allow an activity to proceed that would not otherwise be allowed, with some corresponding negative environmental impacts, such as in the case of a public emergency. However, as the analysis also explains, the waiver rules may only be applied in limited circumstances and the rules contain decision-making criteria and limitations designed to ensure that unacceptable environmental and public health impacts in any individual case will not occur. For the reasons stated above, the Department fully expects that its overall implementation of the rules will enable it, consistent with its core missions, to better effectuate the purposes of its enabling statutes.

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Suggestions that Department enforcement activities will be compromised fail to note N.J.A.C. 7:1B-2.4(b)1, 3, 6 and 7, which state, respectively, that a waiver of strict compliance shall waive only specific rule provision(s), shall not apply to activities unrelated to the waiver, shall not constitute a defense to a judicial or administrative enforcement action for a violation that predates a waiver, and shall not justify or otherwise excuse prior violations of environmental laws or rules. Additional provisions protecting health and safety are found at N.J.A.C. 7:1B-1.1(a), N.J.A.C. 7:1B-2.2(a)8 and 2.4(a)6. The Department is confident that these provisions, coupled with the other standards, criteria, limitations and conditions in the rules, will ensure adequate protection of health, safety and welfare and the environment.

**171. COMMENT:** The proposal says the Department was guided by Executive Order 2, as well as the Red Tape Task Force Report, but it does not say that the origin of all of that was the Department's Transition Report, which recommended that waivers be developed. That colors the entire intent here as to what undue burden is, what promotion of economic development is, a whole set of troubling policy objectives. They all seek relaxation of regulatory burden, promotion of economic development, cutting of regulatory compliance costs. It needs to be made very clear what the intent of this rule is and how it is going to be interpreted and implemented by the Department under this administration. (517)

**RESPONSE:** It is not clear why the commenter believes that the Department's promulgation of these rules is based on the Transition Report or why the commenter believes reliance on the Transition Report "colors the entire intent" of the rules. As set forth in the Department's

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response to Comments 20, 21-22, 23, 24-25, 31-32, and 54, the waiver rules serve an important regulatory function by enabling the Department to address four limited situations defined in the rules which are not addressed in the existing regulatory scheme. For more discussion of the intent of the waiver rules and how they will be implemented, please see the Department's response to Comments 11-15, 23, 24-25, 26, 27-29, 31-32, and 39 regarding the Department's authority for the waiver rules, and the Department's response to Comments 24-25, 31-32, 79-80, 120-132, 149-159, and 160-170, for a discussion of the purpose, standards, criteria and limitations of the waiver rules guiding and controlling the Department's future decision-making.

**172. COMMENT:** It will become customary for applicants to seek waiver of rules and this will inappropriately shift the burden to the Department to justify why it is not waiving a rule. The proposed rule will make waiver a condition upon which applicants design and prepare their applications or projects, instead of developing a project to adhere to the rules currently in force. (253)

**RESPONSE:** Although there may be an initial wave of applications under the new waiver rules, the Department does not expect that it will become "customary" for applicants to seek waivers of existing rules. The discretion of the Department under rules to approve waivers is circumscribed: the Department may only approve a waiver of strict compliance with a rule where it is demonstrated that at least one of four limited circumstances set forth in the rules exists and where all of the other requirements of the waiver rules are met. N.J.A.C. 7:1B-2.1(a). Those who routinely request waivers without regard to the existence of such limited situations or other

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requirements of the rules will run the risk of fruitlessly expending money and resources only to have their waiver requests repeatedly denied. The rules will not shift the burden to the Department to justify not issuing a waiver. N.J.A.C. 7:1B-1.1(d) provides that the waiver rules do not create in any person a right to obtain a waiver of strict compliance. N.J.A.C. 7:1B-2.2(a)2 states that the Department must consider whether it “has been provided with information and data sufficient to support a waiver.” N.J.A.C. 7:1B-2.2(a)3 states that the Department must consider whether the “circumstances support the need for a waiver.” Accordingly, the Department does not anticipate that applications under the waiver rules will become routine. Please see the Department’s response to Comments 11-15, 23, 24-25, 27-29, 31-32, and 39 for a detailed discussion of the Department’s authority for the waiver rules, and the Department’s responses Comments 24-25, 31-32, 79-80, 120-132, 149-159, and 160-170, for a discussion of the substantive standards, criteria and limitations of the waiver rules guiding and controlling the Department’s future decision-making.

**173. COMMENT:** As Nancy Willing writes in her Delaware Blog spot, the Delaware River Basin Commission could approve the use of hydrofracking and standards for wastewater discharge in the Delaware River Basin and, under this rule provision, the State could waive wastewater discharge requirements for suspended solids which would allow fracking waste into our waterways. New Jersey needs to maintain all environmental protections that are already written into law. (40, 41, 357, 359)

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**RESPONSE:** The Department believes it is inappropriate to speculate at this time on how it would decide hypothetical future requests for a waiver under the rules without having an application before it laying out all of relevant facts and circumstances. The commenter expresses concern about a possible future scenario involving hydrofracking and a hypothetical request to waive Department rules governing wastewater discharges. It is conceivable that the Department could receive a future application for a waiver of strict compliance of a Department rule that relates in some way to hydrofracking -- the Department could not prevent the submittal of such an application, but it does not follow that such an application would necessarily be approved. The hypothetical applicant would be required to satisfy the carefully crafted standards, criteria and limitations in the rules. Among other things, the applicant would need to demonstrate to the satisfaction of the Department that the waiver of strict compliance did not seek to waive requirements of a Federal rule or statute, or a State statute, N.J.A.C. 7:1B-2.1(b)1, or any of the Department rules enumerated in N.J.A.C. 7:1B-2.1(b), including, but not limited to, rules that impose a numeric or narrative standard that is protective of human health. The applicant would be bound by all of the limitations placed on the waiver under N.J.A.C. 7:1B-2.4(b). The Department believes that the standards, criteria, limitations and conditions in the waiver rules, together with the public accountability provided by the notice requirements, will ensure that only appropriately justified waivers are approved.

**174. COMMENT:** This rule would endanger workers, weaken important environmental and workplace safeguards and create unpredictability and unfair competition for small businesses. Not only do DEP rules protect communities and the environment, but they also

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help create safer and healthier working conditions for employees in hazardous industries. Every day these regulations, such as those issued under the Worker and Community Right to Know Act, the Toxic Catastrophe Prevention Act, and the Spill Act, protect the lives and well-being of workers in chemical plants, oil refineries, and many other industries that use hazardous substances. For example, the Toxic Catastrophe Prevention Act requires facility management to evaluate worst-case chemical accidents and review options for adopting safer technologies. Before the TCPA, there were over 100 water treatment facilities using chlorine gas to treat water. Now, there are less than a dozen, and they are looking at safer options for the community and workers. Will DEP now waive the requirement for management to consider safer processing methods because they are unduly burdensome, when they have been shown to be effective? The rule could impact laws that protect public health and safety, including the Solid Waste Management Act, Pesticide Control Act, Noise Control Act, Toxic Catastrophe Prevention Act, Pollution Prevention Act, Air Pollution Control Act, Radiation Protection Act, Worker and Community Right to Know, Construction of dams and reservoirs, sealing of abandoned wells, Water Pollution Control Act, Hazardous Discharge Site remediation, and Greenhouse Gas Initiative. (136, 159, 310, 352)

**RESPONSE:** The Department does not agree that these rules will endanger workers or weaken human health or workplace safeguards. The waiver rules will not, and cannot, alter existing statutes for the protection of workers or for the protection of public health and safety. While these rules do not preclude the submission and the Department's consideration of waiver requests such as those described by the commenter, concerns expressed by the commenters are

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not justified. Nor will the waiver rules undermine the Department's fundamental powers to protect public health, safety and the environment. The commenters overlook important legal principles and specific provisions of the waiver rules directly addressing protection of public health, safety and the environment, which strictly limit and control the exercise of the Department's discretion to approve waivers under the waiver rules. As stated in the Department's response to Comments 11-15, the Department's fundamental duties include maintaining, protecting and enhancing New Jersey's natural resources, protecting the public health, safety, welfare and the environment, and effectuating the purposes of its enabling statutes. As explained in response to Comment 174, the substantive standards, decision-making criteria, and limitations in the waiver rules, together with the notice requirements of the rules and the procedural requirements of the underlying rules for which a waiver is requested, will ensure that only appropriately justified waivers are approved. Please see the Department's response to Comments 24-25, 31-32, 79-80, 120-132, 149-159, and 160-170, for further discussion of the substantive standards, criteria and limitations of the waiver rules guiding and controlling the Department's future decision-making under the waiver rules.

The Department believes it is inappropriate to speculate at this time on how it would decide hypothetical future requests for a waiver under the rules without having an application before it laying out all relevant facts and circumstances.

The Department is developing an internal review process to ensure consistency in the Department's future review and disposition of waiver applications pursuant to these rules. The Department believes that this process, coupled with the substantive standards, decision-making criteria, and limitations in the rules and the posting of notice of waiver decisions and information



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pursuant to these rules, will result in coherent, principled and consistent consideration and disposition of waiver applications. Please see the Department's response to Comments 33 and 120-132 for further discussion of regulatory consistency and predictability.

**175. COMMENT:** N.J.S.A. 26:2D-1 et seq., should be removed from the list of rules that could be potentially waived, in order that the Radiation Accident Response Act (N.J.S.A. 26:2D et seq.) can have the option to be changed from the Federal mandate, which limits the requirement for planning and preparedness activities to nuclear facilities. (CFR 44 Section 350.3(a)) Including this rule on the waiver list would not be appropriate if this became an impediment to potentially expanding the mandated planning area for nuclear facilities beyond the current 10-mile Emergency Planning Zone, or being able to add a mandate for emergency preparedness activities related to terrorism. (449)

**RESPONSE:** The purpose of the list of statutes in the caption of the proposal is not to identify the rules that could potentially be waived under these waiver rules but to identify the statutory authorities for the rulemaking. As to the commenter's concern that the waiver rules would prohibit the Department from adopting rules concerning nuclear plants that are more stringent than Federal standards, the Department notes that its ability to promulgate, in the appropriate circumstances, rules that differ from or are potentially more strict than Federal standards is not affected by these waiver rules. The Department notes that N.J.A.C. 7:1B-2.1(b)1 (as amended on adoption; see response to Comment 23) prohibits the Department from waiving a requirement of, or duty imposed by, a Federal or State statute or Federal regulation, unless that statute or

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regulation provides for such a waiver. Accordingly, the Department could not issue a waiver of strict compliance with a requirement of, or duty imposed by the Radiation Accident Response Act, N.J.S.A. 26:2D-37 et seq.

**176. COMMENT:** New Jersey has twice as many homes and people and cars per square mile as any other state. Thus, there is twice as much human vulnerability as in any other state. The EPA guidelines are an average for an average state, but New Jersey is not average. New Jersey is an extensively congested state, with many times as many Superfund sites as any other state in the United States, and congested states have far more threats to the environment. So in New Jersey, EPA rules are totally inadequate. New Jersey rightly has more stringent rules and more stringent environmental guidelines are necessary. New Jersey has limited monitoring of the environment. The City of Elizabeth is only a few yards downwind of one of the largest refineries in the U.S. When that refinery loses any of its controls on any valve it opens by mistake, the toxic emissions flow directly into the air of a school for gifted and talented students. In the past, there have been several mishaps at the refinery. On one occasion, 21 children were sickened and hospitalized following a mishap at the refinery. Three of these children had to be put on respirators. DEP showed up 30 minutes after the mishap, and could not detect the sickening chemicals because the ambient airflow had dispersed the chemicals. Chemicals were not and are not being monitored by the DEP. Further emissions also occurred without having DEP direct measurement. Such toxic air emissions happen daily in New Jersey, but because there are inadequate monitors throughout the State, the emissions are hidden. Waivers of environmental laws are not needed in New

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Jersey; instead more extensive monitoring of the air, water and land is needed. (359)

**RESPONSE:** The Department's air pollution permitting program requires state-of-the-art, 24-hour a day electronic monitoring for all large facilities like the one described by the commenter, to ensure that these facilities comply with the Department's stringent air pollution standards. These monitors are generally mounted directly on smokestacks at the point of emissions, and therefore are not visible to the general public. This may lead to the erroneous assumption that air emissions are not being monitored. It should also be noted that N.J.A.C. 7:1B-2.1(b)6 provides that the Department shall not issue a waiver of strict compliance for any rule dealing with numeric or narrative standards that are protective of human health. Regarding the commenter's statement that waivers of environmental laws in New Jersey are not needed, please see the Department's responses to Comments 24-25, 54, 79-80,149-159, 160-170, and 174 for further discussion of concerns expressed by commenters regarding potential environmental impacts of these waiver rules. The commenter's suggestion that the Department should provide for more extensive monitoring of the air, water and land is beyond the scope of this rulemaking.

### **Waivers vs. amending rules**

**177. COMMENT:** If particular rules or laws seem burdensome or conflicting, then the agency should single out those rules for amendment. The Legislature has already allowed for waivers in those laws where it seems appropriate, after due consideration as to whether a waiver provision is necessary for those specific laws. If DEP desires greater flexibility, it should propose specific regulatory changes for each program within the framework of

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legislative intent. This would allow all stakeholders an opportunity to weigh-in on the advantages or disadvantages of these rule changes, and for the scientific community to provide recent and more accurate data to protect public health and natural resources. The DEP, like virtually any regulatory agency, already has wide latitude to resolve conflicting rules, avoid truly inappropriate results, and adjust policies in the short term while rules are officially modified, with notice and opportunity to be heard, as required by the Administrative Procedure Act. To do otherwise is to place the DEP in the untenable position of having to choose one environmental resource over another. (47, 58, 120, 123, 136, 235, 239, 310, 329, 352, 366, 385, 386, 416, 493)

**178. COMMENT:** Conflicts arising from the stringency of the rules and regulations of local, State or Federal authorities have traditionally been resolved in legislative statute and therefore should not be available for waiver. Conflicts arising through authority shared with other State departments should be resolved, as statutes require, through the rule-making process. Should the underlying statutes conflict, NJDEP should recommend amendments to the Legislature. NJDEP continues to exhibit a lack of cohesion within its various departments and in its relationship with the State Legislature in resolving important conflicts through existing channels. This proposal should be withdrawn, with NJDEP instructed to work with its counterparts through existing channels to meet its objectives. (81, 491)

**179. COMMENT:** The Department should do what is possible administratively to try to resolve conflicting regulations internally, rather than set up a waiver situation, because that is

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a slippery slope. (243)

**180. COMMENT:** A much better way to improve the effectiveness of NJDEP and other State agencies such as the NJDOT would be to follow the practice the NJDEP employed related to Raritan River dam removal when it brought together stakeholders and representatives from various divisions of the NJDEP to discuss the issues and to propose solutions. Methods like that are much more likely to bring satisfactory, speedy and fair resolutions to necessary changes. This Waiver Rule approach is not the way to tackle the problem. Putting decision-making in the hands of one person, no matter how well intended, is not the answer. Improving the operation and efficiency of government by approved, transparent, democratic methods is the way to go and the public and all stakeholders need to be involved. (172)

**181. COMMENT:** In cases where there are agency conflicts, those problems should be addressed directly. DEP, DOT and other agencies are working together to see where conflicts exist between the rules, and they need to work together in a process that identifies where those net environmental benefits can be gained. It is in that process that you work out these decisions, not by giving a generic waiver when those conflicts exist. (391)

**RESPONSE TO COMMENTS 177 THROUGH 181:** The commenters suggest there may be better ways to provide solutions for deficiencies in existing rules, such as formal amendments of the individual rules involved, recommended legislative changes, inter-agency dialogue and discussions with stakeholders. As an initial matter, it may be noted that the Department has the

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authority to adopt a single rule that applies to different environmental programs and rules under various statutes. Please see the Department's response to Comments 20, 26 and 32 in this regard. There are any number of existing rules of the Department that apply generally to multiple Department programs under different statutes. The Department determined that it would be a more efficient use of its resources to propose, obtain public comment and adopt a single waiver rule of general application pursuant to the Administrative Procedure Act than to separately propose, obtain public comment and adopt individual waiver rules for each individual program administered by the Department. The Department found this approach particularly appropriate and useful for a rule that, by its very nature, is concerned with four limited circumstances of the kind described in the rules, which may not have been anticipated or foreseen when the Department's existing rules were adopted.

The Department acknowledges that it would be preferable for the current regulatory system to foresee and address every situation that could possibly arise from the implementation of its various rules. However, as discussed elsewhere in response to comments, this is not feasible or practicable. The waiver rules serve an important regulatory purpose by providing the Department with a flexible and reasonable mechanism for resolving four limited circumstances that are not addressed by the Department's existing rules. At this time, the Department sees no need to request legislative changes for this purpose, or to undertake individual amendments of existing rules, as suggested by some commenters. The Department engages in a continuous process of reviewing its existing rules and will consider individual amendments to them or other regulatory reform where that appears necessary or appropriate. The Department will continue to

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engage in inter-agency dialogue and reach out to stakeholders as other proven methods of solving problems which from time to time may arise in connection with existing rules.

The Department is developing an internal review process to ensure consistency in the Department's future review and disposition of waiver applications pursuant to these rules. The Department believes that this process, coupled with the substantive standards, decision-making criteria, and limitations in the rules and the posting of notice of waiver decisions and information pursuant to these rules, will result in coherent, principled and consistent consideration and disposition of waiver applications. With regard to comments concerning conflicts, it should be noted that the waiver rules do not address conflicts with Federal or State statutes. N.J.A.C. 7:1B-2.1(b)1, 2 and 3. They address conflicting rules, defined as "where 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." N.J.A.C. 7:1B-1.2.

In the Department's view, the waiver rules play an important regulatory function that is long overdue. The Department believes that the waiver rules are necessary and appropriate to enable it to address the four limited circumstances set forth in the rules, which are not addressed by the existing regulatory scheme. In this regard, see the Department's responses to Comments 21, 21-22, 23, 24-25, 31-32, 42, and 54. However, adoption of the waiver rules does not mean that the Department will stop working, both internally and with other agencies, to identify other appropriate remedies for conflicts or problems as they arise. Nor does it mean that the Department will not consider amendments of existing Department rules as a remedy for conflicts or any other regulatory problems that may arise. The waiver rules do not preclude the

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availability of waivers in other existing rules. N.J.A.C. 7:1B-1.1(c). By no means do they preclude consideration of regulatory reform.

**Executive Order No. 2 - “Common sense principles”**

**182. COMMENT:** This proposal will make the application process more cumbersome and create more red tape rather than eliminate it as Governor Christie intends. (40, 41, 159, 329, 366)

**RESPONSE:** It is not clear in what way the commenters believe the waiver rules will create more red tape. To the extent that a waiver request accompanies a permit application, the applicant may in some cases be required to devote somewhat more time and resources to preparing the permit application than would have been required if a waiver were not requested. On the other hand, if the Department determines to issue a waiver, the effect of the waiver may be to reduce the time and resources the applicant would otherwise devote to applying for and carrying out the regulated activity within the requirements of the rule being waived. Whether the first or the second proposition is true will depend on the particular rule provision implicated by the waiver request and the unique circumstances of each case. Please see the response to comments 186-189 regarding the allocation of Department resources to implement the waiver rules.

**183. COMMENT:** Executive Order No. 2 calls for regulations that focus on compliance and performance-based outcomes. However this waiver rule is a deterrent to strict compliance



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with Department regulations by offering polluters and developers the opportunity to argue that regulations they feel are too costly or vexing to come into compliance with are burdensome. (486)

**RESPONSE:** While the commenter is correct that Executive Order No. 2 (2010) directs all State departments to adopt rules that focus on compliance and performance-based outcomes, the order also directs all departments to adopt rules providing for a waiver of strict compliance as part of the “Common Sense Principles” for State agency rulemaking. The Department believes that the adoption of these waiver rules complies with both mandates in the order. In some cases, the unintended result of strict application of a Department rule has been to deter performance of activities that further the Department's core missions.

#### **Department resources and administration of the waiver rules**

**184. COMMENT:** Waivers will open the door for third party comments. Lawsuits would result from disgruntled applicants complaining that others received waivers but they did not, and from communities, organizations, and individuals who counted on the NJDEP to enforce its rules to protect the environment, only to find that protection waived. (21, 46, 48, 64, 92, 94, 104, 124, 138, 139, 146, 148, 152, 174, 213, 212, 223, 224, 226, 298, 311, 329, 366, 392, 441, 442, 452, 460, 474-476, 495)

**RESPONSE:** As explained in response to Comments 373-382, interested persons may submit comments on any posted waiver for the Department's consideration. The Department

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acknowledges the possibility that the waiver rules may, to some extent, generate new litigation by those who disagree with the Department's waiver decisions. However, the Department believes the waiver rules are necessary and appropriate to fulfill an important regulatory need.

**185. COMMENT:** The ambiguity in the waiver rule, and the lack of clarity as to when the waiver rule would be applied "appropriately" will lead to problems for DEP staff in interpreting and applying the proposed waiver rule. It will be impossible to objectively apply such a subjective rule. This will place DEP staff in impossible conflicts with all stakeholders: the regulated community, concerned citizens, environmental advocates, and others. (253)

**RESPONSE:** The Department does not agree that ambiguity in the waiver rules will create the problems described by the commenter. The waiver rules have been carefully crafted to include substantive standards and criteria for the Department's future interpretation and application of the waiver rules. Please see the Department's responses to Comments 24-25, 31-32, 79-80, 120-132, 149-160, and 161-171, discussing the standards, criteria and limitations in the waiver rules guiding and controlling the Department's future waiver decisions. The Department is developing an internal review process to ensure consistency in the Department's future review and disposition of waiver applications pursuant to these rules. The Department believes that this process, coupled with the substantive standards, decision-making criteria, and limitations in the rules and the posting of notice of waiver decisions and information pursuant to these rules, will result in coherent, principled and consistent consideration and disposition of waiver applications. As is the practice now with other regulatory matters, should significant conflicts with

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stakeholders arise in connection with a waiver application, the issue(s) will be elevated and addressed by higher-level Department managers.

**186. COMMENT:** Waiver requests will not be properly scrutinized by a shrinking DEP staff that is already overburdened with permit reviews and transformation planning. The DEP is being denied the resources to thoroughly review waiver requests and pursue enforcement actions when compliance with waiver conditions or a “net environmental benefit,” as defined in the proposed rule, is not achieved. (486)

**187. COMMENT:** Given the limitations of the Department’s core staff of qualified compliance personnel, it may be difficult for the Department to determine if the waiver has actually succeeded in meeting the following conditions: 1. yields an environmental benefit; 2. promotes transparency, and 3. meets the regulatory objective. (456)

**188. COMMENT:** Given the low cost of a waiver application for regulated entities and the lack of any clear standard for the grant or denial of waivers, it is in the best interest of every business and individual to apply to waive compliance with all applicable DEP rules. The Waiver Rule Proposal opens the floodgates to a deluge of waiver declarations, each simple waiver request leading to a lengthy factual investigation, an uninformed, arbitrary decision, or both. Due to the standardless and arbitrary nature of DEP’s decisions on waiver requests under the Waiver Rule Proposal, these waiver decisions may lead to petitions to State courts for judicial review. All of these will impose severe burdens on DEP, which has undergone

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significant funding cuts over the past ten years and perhaps faces future reductions in appropriations. (40, 41, 239, 329, 366, 476, 486)

**189. COMMENT:** The Jobs Impact Analysis does not address the fact that the proposed rule will generate an increased workload for DEP staff to evaluate the anticipated large number of waiver requests that will be submitted. Given the broad program scope of waivers, and the associated additional DEP workload, please provide specific details of the analyses the DEP conducted to determine what is the anticipated FTE number will be to process the waiver requests and how these FTEs will be funded. (509)

**RESPONSE TO COMMENTS 186 THROUGH 189:** The Department does not expect to receive an unmanageable number of waiver requests. As with any new program, there will be a "learning curve" when the rules first take effect. However, the rules state at N.J.A.C. 7:1B-1.1(b) that they are not to be used to routinely circumvent any Department rule. The Department will reject frivolous, unsupported or inappropriate waiver requests. Because this is a new chapter that will apply to a wide variety of cases, it is impossible to accurately estimate the probable cost of implementing the rules. As described in the response to Comment 33 and elsewhere in response to comments, the Department is developing an internal review process to ensure consistency in the Department's future review and disposition of waiver applications pursuant to these rules. The Department will allocate resources as necessary to implement this waiver program, both for evaluating applications and for enforcement purposes.

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**190. COMMENT:** With limited resources and cutbacks across government by Governor Christie, it is not reasonable to establish a new rule without a means of funding the program that will review waiver requests. It is also not reasonable for taxpayers to provide funding for waivers from which individuals will benefit. A process for the Department to recover all costs associated with processing waiver requests is necessary to ensure the Department is not increasing the burden to the taxpayers or existing understaffed programs, or passing waiver costs along to fee-supported programs that are funded by fees from those permittees that comply with Department rules (not waivers). (314)

**191. COMMENT:** The clear difficulty of administering the Waiver Rule Proposal will increase DEP costs. The host of issues that will arise from the rule include impractical broadness, procedural unsoundness, and unnecessary administrative burden on DEP. As a practical matter, implementation of the waiver rule will place such a large demand on staff resources at the DEP, that it will jeopardize the ability of any developer with a complex project, regardless of worthiness, to get through the permit process. The DEP is being denied the resources to thoroughly review waiver requests and pursue enforcement actions when compliance with waiver conditions or a “net environmental benefit,” as defined in the proposed rule, is not achieved. (486, 239, 476)

**RESPONSE TO COMMENTS 190 AND 191:** The Department believes that the rules, which implement the “Common Sense Principles” for rulemaking set forth in Executive Order No. 2 (2010), will result in the more efficient administration of regulatory programs. In some cases,

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waivers may enable staff to more readily issue authorizations for activities that provide greater environmental benefit than would result from strict compliance with the rules. By employing the flexibility afforded by these waiver rules, the Department may be able to more quickly arrive at solutions to problems that arise when rules conflict or are unduly burdensome than can be accomplished under the existing regulatory process.

The Department believes that these rules will support current efforts to make the Department a more effective organization. A critical component of an effective Department decision making process is flexibility in implementing regulations. In addition, Department initiatives include the simplification of business practices and the systematic review of rules to provide flexibility and taking a results-oriented rather than prescriptive approach to environmental protection and regulation. The waiver rules are one of several means to implementing these efforts.

DEP staff handle numerous tasks in the course of their day-to-day regulatory activities that are not specifically tied to or funded by fees. As with those activities, any costs associated with review of waiver applications that is not offset by efficiencies gained or savings realized in conducting other reviews, such as with associated permits, will be absorbed into existing program budgets.

Consistent with the standard operation of the Department's enforcement program, the Department will exercise managerial discretion and resource allocation planning to assure that an appropriate enforcement role in monitoring compliance with waivers and waiver conditions is maintained.

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**192. COMMENT:** Once this rule is adopted, it would be difficult to demand compliance from the regulated community. The likely result of enforcing the rules some of the time, with some people, under some circumstances, will be chaos and anarchy, with regulators hard pressed to maintain enforcement. (329, 366)

**RESPONSE:** The Department does not agree that enforcement activities will be compromised as a result of the adoption of the rules. Any waiver issued under these rules will be limited and specific, as required under N.J.A.C. 7:1B-2.4, and will be enforceable just as any other Department approval is enforceable. Furthermore, N.J.A.C. 7:1B-2.4(b)6 provides that the Department's waiver of strict compliance with one of its rules shall not constitute a defense to a judicial or administrative enforcement action that predates the waiver, and N.J.A.C. 7:1B-2.4(b)7 provides that a waiver of strict compliance shall not justify or otherwise excuse prior violations.

#### **Department review of waiver applications**

**193. COMMENT:** The Waiver Rule is silent on the waiver application process in general. It gives applicants and DEP no guidance as to what information applicants should submit in support of an application. It also gives no guidance on what kind of showing is necessary for the grant of a waiver. The lack of any information concerning the appropriate content of a waiver application further indicates that the Waiver Rule Proposal contemplates no meaningful standards. (239, 317)

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**RESPONSE:** While the waiver rules do not contain specific procedural requirements for waiver applications, the standards, criteria and limitations in the rules, in particular the waiver evaluation criteria at N.J.A.C. 7:1B-2.2, do provide guidance as to what applicants for waivers must demonstrate in order to obtain a waiver. Please see the Department's responses to Comments 24-25, 31- 32, 79-80, 120-132, 149-160, and 161-171, discussing the standards, criteria and limitations in the waiver rules.

There are two primary reasons the Department did not include detailed procedural requirements for waiver applications in the rules. First, most waiver applicants will also require other Department approvals and so must follow the application procedures to obtain those approvals under the applicable program rules. A waiver application in the context of applying for another approval would most likely need to contain information comparable to that necessary for the application for the particular approval. Second, these rules will apply to a wide variety of situations. In each case, reviewing the four requisite bases at N.J.A.C. 7:1B-2.1(a) for consideration of a waiver and the waiver evaluation criteria in the rules, the applicant will know what types of documentation will serve to demonstrate how waiver of a particular rule provision applicable to a particular activity in the applicant's case will meet the requirements for a waiver under the rules. If the Department does not receive sufficient information and data to support a waiver under these waiver rules, or if it does not receive such information in a timely manner, the waiver request will be denied.

**194. COMMENT:** Proposed N.J.A.C. 7:1B specifies no deadline for the Department to decide whether to approve or deny waiver requests. It is important to expedite waivers in a



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timely manner. N.J.A.C. 7:1B should require that the procedural rules applicable to the decision to issue or deny a permit authorization (or modification thereof) apply to the decision to issue or deny a waiver request concerning that permit authorization. This applies the concept of proposed N.J.A.C. 7:1B-2.4(a)7 to the period before the Department approves a waiver request and before the permit authorization is issued. (285, 317, 414, 419)

**RESPONSE:** While the Department agrees that waiver decisions should be timely, the Department does not believe that adding deadlines to the rules is necessary or beneficial. These waiver rules will apply to a wide variety of situations, which cannot be accurately predicted. There is too great a likelihood that situations will arise in which the timing of a waiver decision should not be linked to the timing of a related permit decision. For example, if the Department is considering a waiver for a project that also requires a flood hazard permit, the flood hazard permit application will be subject to both a public notice requirement and a 90-day deadline for a Department decision because its review is governed by the timeframes in the 90-day Construction Permit law, N.J.S.A. 1D-29 et seq. If a related waiver request is submitted late in the 90-day review period, public notice will have to be repeated (as required under the flood hazard rules), and if the waiver request is complex, the Department may need more than the balance of the 90 days to review it. In such a case, the applicant would have to withdraw the application and resubmit it, as the request for a waiver cannot extend the statutorily mandated 90-day deadline. The public notice of the waiver would then be included in the notice of the new, resubmitted application, in accordance with N.J.A.C. 7:1B-2.3(a).

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**195. COMMENT:** The rule proposal lacks detail on how waivers will be issued and whether multiple individuals, positions or NJDEP sections are given this authority. Will they be issued by each program? Will it be centralized? (285, 414, 419, 486)

**196. COMMENT:** What is needed is an independent board to hear all requests for waivers, similar to Boards of Zoning Adjustment which hear requests for waivers from local zoning regulations. Such a board would operate in public, and the public would be able to ask questions of applicants and make statements concerning the proposed waiver. The board would have to be politically and economically independent, i.e., not filled with appointees from the development community or the environmental community. It would need to have a small staff, charged with verifying the economic assertions of applicants as well as environmental assertions such as "net environmental benefit". This would be transparency. (75)

**197. COMMENT:** An equal number of representatives from academia, government, DEP, private sector, public, and the environmental community need to be present for individual waiver reviews and the implementation of this new waiver rule proposal. (481)

**198. COMMENT:** It is recommended that an autonomous or semi-autonomous board, commission or other authority be created to be the sole body responsible for granting waivers. This body would function in a manner similar to a local board of adjustment, which may grant certain variances from ordinances adopted by local governments. As the intent of

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this rule is to issue waivers only in “specific and infrequent cases”, this body would not be overly burdened. Creation of a single body would result in consistency in decision making. If, alternatively, the NJDEP is to assume this responsibility directly, it is recommended that a designated authority be set up internally, made up of representatives from the different NJDEP sections so that one section is not unduly favored when there is an internal rule conflict. The goal of granting waivers sparingly and consistently becomes less likely if multiple individuals or DEP sections are given this authority. (285)

**RESPONSE TO COMMENTS 195 THROUGH 198:** The Department does not have the statutory authority to establish the type of independent decision-making board suggested by the commenter, or to delegate its decision-making authority under these rules to such a board. As detailed in the Department’s response to Comment 33 and other comments, the Department is developing an internal review process to ensure consistency in the Department’s future review and disposition of waiver applications pursuant to these rules. The Department believes that this process, coupled with the substantive standards, decision-making criteria, and limitations in the rules and the posting of notice of waiver decisions and information pursuant to these rules, will result in coherent, principled and consistent consideration and disposition of waiver applications.

### **Relationship of waiver to permit programs**

**199. COMMENT:** Will a waiver decision be issued prior to and independent of a companion permit decision? If a waiver decision is issued prior to a decision on a companion permit application, the DEP will not be able to consider the potential impacts of all regulated

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activities in making a waiver decision and this piecemeal review would result in permit decisions that will compromise environmental protection. (509)

**200. COMMENT:** Too often an applicant is told the Department feels the project is not in compliance with the regulations. This determination is often made late in the permit application review process and leaves little time for waiver preparation and submission. The Department should consider clarifying in the proposed rule that the person seeking a waiver can submit the waiver request at the same time as submission of the permit application, or when the Department informs the applicant that the project is not in compliance with existing rules. (74)

**201. COMMENT:** It is unclear and of great concern how the Department's decision on a waiver request relates to certain key procedural rules applicable to Department permit programs, especially before a waiver request is approved and a permit authorization is issued. Proposed N.J.A.C. 7:1B-2.4(a)7 requires a decision that approves a waiver request to include "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." These procedural rules do not apply to (i) the permit program procedures followed before the permit authorization is issued; and (ii) processing of an initial waiver request before the Department approves that request. The commenter provided several scenarios using the NJPDES permit program as examples to pose questions about applicability of the rules to DEP consideration of waiver applications: submitted in advance of a permit application;

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submitted at the same time as a permit application; submitted during the public comment period on a draft permit; and submitted after a permit is issued. (317)

**RESPONSE TO COMMENTS 199 THROUGH 201:** The person seeking a waiver may and, more often than not, likely will submit the waiver application with a companion permit application. One of the reasons these waiver rules do not include specific procedures for waiver applications, application review, public notice, and other similar actions is because the Department anticipates that in most cases a waiver will be related to a permit application. Rather than create separate procedures for waivers, the Department instead will rely on the procedures in the related permit rules. Therefore, the timing of waiver consideration and decision would normally be the same as the timing of the procedural steps in the process of application review and decision on the permit application. Similarly, submittal of a waiver request after a permit is issued would normally be subject to the applicable permitting rules, in the same way that submittal of a request to modify the permitted activity would be handled, including any notice requirements or other procedural requirements.

One of the commenters has raised a number of hypothetical situations relating to the process and timing for waiver and permit applications. Several of the questions relate to whether the waiver rules could be implemented in ways that violate certain statutory provisions. The Department is prohibited from implementing the waiver rules in violation of a statute, as the Department's rulemaking authority itself is derived from its enabling statutes. N.J.A.C. 7:1B-2.1(b)1 specifically prohibits waiver of any requirement of, or duty imposed by, State statutes or Federal statutes or regulations. The commenter also points out problems that might arise if a

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waiver were issued prior to a related permit for the same activity or project. The Department anticipates that in most cases a waiver application will be related to a permit application and this approach would be the most efficient and sensible process for an applicant to follow. However, the commenter is correct that some waiver applications may be submitted at various other times not directly linked to a permit application. Submittal of a waiver request after a permit is issued would normally be subject to the applicable permitting rules, in the same way that submittal of a request to modify the permitted activity would be handled, including any notice requirements or other procedural requirements. The commenter asks whether the Department is obligated to respond to comments on the public notice of a waiver. The answer to this would lie in the same regulatory scheme discussed above in this response. That is, in a case where the Department is required to respond to comments received as a result of public notice of the permit application (or of related actions), then the Department would be required to respond to any comments resulting from public notice concerning the waiver request, in the same way and to the same extent.

### **Miscellaneous comments**

**202. COMMENT:** The Department has largely relied upon Governor Christie's Executive Order No. 2 as a basis for the adoption of the rule; however it appears that the Department has been selective in its application of that Executive Order. It seems to put little effort into the very first Common Sense principle (1.a.) that requires State agencies to, "Engage in the 'advance notice of rules' by soliciting the advice and views of knowledgeable persons from outside of New Jersey State government, including the private sector and academia, in

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advance of any rulemaking to provide valuable insights on the proposed rules, and to prevent unworkable, overly-proscriptive or ill-advised rules from being adopted.” Yet the summary does not discuss which knowledgeable persons outside of the government agency were consulted in advance of the rulemaking, when these consultations were made and the position of each person. Further, the Department’s July 16, 2010 press release states, “The DEP’s communications on issues must be constant and transparent, so that decisions are fully and clearly understood, Commissioner Martin said. The DEP will encourage stakeholders to be fully involved in considering issues, providing balance and information that will ensure fully transparent establishment of DEP policies and regulations.” Clearly the Department has failed on these directives. This proposal should be rescinded or otherwise determined invalid unless the Department can provide transparency by documenting that both environmental groups and legal academia were consulted and provide the public with those group’s views on this rulemaking in the summary document of any reproposal. (314)

**RESPONSE:** It should be noted that, while Executive Order No. 2 was one of the reasons the Department is promulgating these waiver rules, the order does not provide the authority for the rules. The authority for these rules is discussed in detail in the response to Comments 11-15, 23, 24-25, 27-29, 31-32, and 39. Further, the Department did, in fact, carry out a thorough stakeholder process in preparing the proposal. The Department conducted both formal and informal stakeholder outreach in an effort to obtain input from a thorough cross-section of the Department's regulated community. On June 2, 2010, the Department held an outreach meeting to solicit stakeholder input, which included participants representing a variety of interests,

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including the New Jersey Chapter of the Sierra Club, the NY/NJ Baykeeper, the Eastern Environmental Law Center, the New Jersey Builders' Association, the Pinelands Commission, and private practice attorneys who deal with the Department's regulatory process frequently. On December 3, 2010, the Department held an additional meeting with numerous stakeholders. Input was sought from staff throughout the Department, and suggestions for the rules were accepted from various stakeholders thereafter, until the proposal was finalized. A broad range of issues were discussed, including the scope of the waiver rules, potential procedures for review of waiver requests, transparency of the process, and the likely economic and environmental impacts of the rules. The Department considered information resulting from these informal stakeholder meetings in the development of these rules. The Department does not believe the rules are invalid because the Department did not document all input from these meetings.

**203. COMMENT:** Please provide the anticipated schedule and costs related to DEP plans to outsource or privatize waiver and/or permit application review functions currently performed by DEP staff. (509)

**RESPONSE:** The Department will review waiver applications under the rules. There is no plan to privatize or outsource the consideration of waivers of strict compliance. It is not clear why the commenter believes that the Department plans to do so.

**204. COMMENT:** Given that the proposed waiver provision would apply to 98 statutes and implementing rules, please provide specific data that DEP generated to estimate the number



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and scope of anticipated waivers. (509)

**RESPONSE:** The waiver rules provide a carefully circumscribed criteria-based mechanism enabling the Department in its discretion to approve waivers in certain limited cases that satisfy the requisite grounds for a waiver, the substantive standards and the procedures in the rules. Under the rules, the Department's waiver discretion is limited to cases where it is shown that at least one of the following requisite bases in the rules for obtaining a waiver is satisfied and that all other requirements of the rules are met: (1) existing rules conflict so as to make compliance impossible, as defined in the rules, or (2) the strict application of existing rules to the particular case would be unduly burdensome, as defined in the rules, or (3) a net environmental benefit as defined in the rules can be achieved by the waiver, or (4) a public emergency exists. While these waiver rules stem from the Department's experience that such situations arise from time to time, it is impossible to estimate with any accuracy the number or scope of waivers that will be issued under the waiver rules.

**205. COMMENT:** DEP seems once again to be favoring industry over the environment. DEP should stop giving waivers at the expense of the Pinelands. (208)

**206. COMMENT:** This proposal could authorize DEP to provide waivers to environmental regulations already in place that govern the Pinelands for possible industrial development or housing. (424)

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**207. COMMENT:** The waiver rule would result in serious erosion of environmental protections. Developers should not get exemptions from DEP rules because waivers could be approved for projects in areas that have been protected for the benefit of all New Jerseyans including the Highlands and Pinelands. (334, 335)

**RESPONSE TO COMMENTS 205 THROUGH 207:** The Department is confident that the waiver rules, which apply only in the limited circumstances set forth in the rules and which set forth ample standards guiding and controlling the Department's future waiver decisions, will not result in the erosion of environmental protections. Please see the Department's responses to Comments 24- 25, 31- 32, 54, 79, 80, 149-159, 160-170, and 174 for a detailed discussion of the standards, criteria and limitations in the waiver rules, and addressing concerns about environmental degradation.

It should be noted that the waiver rules do not authorize the Department to approve waivers of the rules promulgated by the Pinelands Commission at N.J.A.C. 7:50. These waiver rules enable the Department to waive only its own rules in the appropriate case. See N.J.A.C. 7:1B-1.1(a). With regard to the Highlands, many specific requirements and duties of the Department with respect to permitting are set forth in the Highlands Water Protection and Planning Act at N.J.S.A. 13:20-33 and 34, and therefore could not be waived under N.J.A.C. 7:1B-2.1(b)1, which prohibits the waiver of statutory requirements. If a provision in the Department's Highlands Water Protection and Planning Act rules, N.J.A.C. 7:38, is not excluded from waiver under N.J.A.C. 7:1B-2.1(b), the provision could potentially be the subject of a waiver, if all other limits and conditions in the waiver rules are met.

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**208. COMMENT:** Any applicant for a permit should be able to request a waiver, if they can make the required demonstrations, whether or not the applicable State rule contains a waiver provision. (414)

**RESPONSE:** The Department agrees that the option to request a waiver under the waiver rules should be available to all, regardless of other available waiver options. As provided at N.J.A.C. 7:1B-1.1(c), these waiver rules do not preclude the availability of exceptions, variances, waivers, or emergency authorizations pursuant to any other chapter of the Department's rules. The converse is also true – the availability of exceptions, variances, waivers, or emergency authorizations in other chapters of Department rules does not preclude an application for a waiver under these rules. Any person or entity who believes that that he, she or the entity meets the criteria for a waiver under these rules may apply for an N.J.A.C. 7:1B waiver.

**209. COMMENT:** The rules are vague and do not describe what is meant by “when appropriate” in the following statement “The rules will provide an additional means of relief from strict compliance with Department rules when appropriate.” The rule states that in certain limited circumstances, strict compliance with a rule or provision of a rule can lead to an unreasonable, unfair, or unintended result. No examples were cited. (20)

**RESPONSE:** The Department does not agree that the waiver rules are vague. The language to which the commenter refers is not in the text of the rules but in the proposal summary, which

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describes the waiver rules in general terms. As used in the opening statement of the summary (43 N.J.R. 473), “where appropriate” refers to the four requisite grounds, at least one of which must be the basis for any request for a waiver under the rules. The requisite grounds for requesting a waiver are listed N.J.A.C. 7:1B-1B-2.1(a) (Basis for a waiver) and defined in N.J.A.C. 7:1B-1.2. As provided at N.J.A.C. 7:1B-2.1(a), the Department may approve a waiver only when it determines that one of the four requisite grounds for a waiver exists and all other requirements of the rules are met. Please see the Department’s responses to Comments 24-25, 31-32, 79-80, 120-132, 149-159, and 160-170, regarding examples of the limited circumstances in which the Department might consider waivers under these rules, and discussing the standards, criteria and limitations in the waiver rules informing the public and guiding and controlling the Department’s future waiver decisions.

**210. COMMENT:** The fact that even the definitions of key terms are themselves waivable when DEP decides that “the context clearly indicates otherwise” further illustrates the generality and vagueness of the Waiver Rule Proposal. (239)

**RESPONSE:** The phrase quoted by the commenter, "unless the context clearly indicates otherwise," is a standard phrase included in most definitions sections in the Department’s various rules. This phrase ensures that terms in rules are interpreted consistently with the rules' intent, and are not taken out of context. Regarding the suggestion that a definition in these waiver rules could itself be subject to waiver, the Department agrees that allowing a waiver of any provision of these waiver rules would create confusion and undermine the purpose of the rules, which is to

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establish through rulemaking the requirements, standards, and criteria that will govern the Department's waiver decision-making. Accordingly, for clarification, the Department on adoption is modifying the list of rules in N.J.A.C. 7:1B-2.1(b) that may not be waived to include any provision of these waiver rules. Please see the Department's responses to Comments 24-25, 31-32, 79-80, 120-132, 149-160, and 161-171, discussing the standards, decision-making criteria and limitations in the waiver rules informing the public and guiding and controlling the Department's future waiver decisions.

**211. COMMENT:** N.J.A.C. 7:1B-1.1 states that this is a rule applied at the agency's discretion -- therefore, its application is subjective and at the whim of the individual applying it. The issue of subjectivity is compounded by the failure of the rule to provide needed objective, quantitative, criteria and guidance as to how and when the rule should be applied; and the minimal guidance on application given is either subjective or limited. Considering the broad expanse of the rules to which this Waiver Rule applies -- over 97 at last count -- objective criteria and clear guidance on its application is not just warranted but crucial. (416)

**RESPONSE:** The commenter cites a portion of N.J.A.C. 7:1B-1.1 out of context. The complete provision in which the term "in its discretion" appears reads as follows: "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.*" (Emphasis added) It is also noted

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that this provision is the statement of purpose introducing the rules. The Department does not agree that the waiver rules lack objective standards and criteria or that they provide “minimal guidance” on how and when a waiver application may be applied. Please see the Department’s responses to Comments 24-25, 31-32, 79-80, 120-132, 149-160, and 161-171, discussing the standards, criteria and limitations in the waiver rules informing the public and guiding and controlling the Department’s future waiver decisions.

**212. COMMENT:** Why is it so hard to get the entire proposal itself? The DEP issues press releases which are not the entire rule. It would be helpful to include in the press release a link to the proposal. (422)

**RESPONSE:** The press release concerning the proposal of these waiver rules did include a link to the “rules and regulations” portion of the Department web site, which provides an easy-to-find link to the entire text of the proposal at <http://www.nj.gov/dep/rules/proposals/030711b.pdf>. However, the Department cannot control whether such links are printed by each newspaper or other publication. It should also be noted that the Department's home page contains a link to the "rules and regulations" page under "information tools." The rules and regulations page contains links to all of the Department's existing rules, rule proposals, rule adoptions, and notices of administrative changes to rules, as well as information on how to submit comments and participate in public hearings.

**213. COMMENT:** Any effort to abolish or make ineffective the D & R Canal Commission is

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opposed. (413)

**214. COMMENT:** With several critical environmental regulations scheduled to expire and needing to be extended, Assembly bill A-4186 could force dramatic rollbacks in existing protections and should be opposed. (425)

**215. COMMENT:** When Commissioner Martin took office at the NJDEP, the statement was made that the NJDEP was like a ship without a rudder. Should this rule become effective, the NJDEP will truly be a ship without a rudder that is destined to sink. (453)

**216. COMMENT:** The gas companies are fueled by greed, anger and ignorance. The DEP should value all life and take care of it. (167, 233)

**217. COMMENT:** If the staff of the DEP think the Department is too burdensome to the State, then they should find new jobs so more responsible people will replace them. (380)

**218. COMMENT:** By making it easy for corporations to ignore previous DEP restrictions on development with these rules, you are fostering their prosperity at the cost of more open space, recreation, and clean water. (459)

**RESPONSE TO COMMENTS 213 THROUGH 218:** These comments are beyond the scope of this rulemaking.

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### **7:1B-1.1 Purpose and applicability**

**219. COMMENT:** Please identify all provisions, controls and limitations in the proposed rule that would ensure that DEP does not use this chapter to waive strict compliance such that the waiver would become a way to routinely avoid compliance with that rule. (509)

**220. COMMENT:** Under proposed N.J.A.C. 7:1B-1.1, “it is not the purpose of this chapter to allow for the routine circumvention of any Department rule.” There is nothing in the rules that would limit the applicability of this rule to limited circumstances. Reliance on this statement as a deterrent to this undesirable practice is insufficient. (239, 361, 363)

**RESPONSE TO COMMENTS 219 AND 220:** The Department does not agree that the waiver rules will induce applicants to routinely seek waivers or to circumvent rules. As noted, N.J.A.C. 7:1B-1.1 states that it is not the purpose of the waiver rules to allow for the routine waiver of any Department rule. The Department’s discretionary authority to approve waivers under the waiver rules is highly circumscribed. The Department may not approve a waiver of a strict compliance with a rule unless it is demonstrated that at least one of four bases identified in the rules exist for approving the waiver and, furthermore, that all of the other requirements of the waiver rules are met. N.J.A.C. 7:1B-2.1(a). Please see the Department’s response to Comments 24-25, 31-32, 79-80, 120-132, 149-160, and 161-171, discussing the limited purpose, the objective standards, the decision-making criteria, the procedural safeguards and the significant limitations in the rules informing the public and guiding and controlling the Department’s future waiver decisions. If



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applicants request waivers without regard to their merit and the requirements of the waiver rules, such applications will be denied.

**221. COMMENT:** We appreciate the explicit statement at subsection (c) that these proposed waiver rules do not preclude the applicability of waiver rules in other Title 7 chapter rules. (490)

**RESPONSE:** The Department acknowledges the commenter's support for the rules.

**222. COMMENT:** Proposed N.J.A.C. 7:1B-1.1(e) states that “this chapter does not authorize any other entity to approve a waiver.” If the State of New Jersey were to hire private contractors to provide services related to Department rules, would proposed N.J.A.C. 7:1B-1.1(e) in all circumstances prohibit such contractors from approving a waiver under N.J.A.C. 7:1B, or could such a contractor in some circumstances be considered part of the Department, with authority to approve a waiver request under N.J.A.C. 7:1B? Why or why not? (317)

**223. COMMENT:** The commenters state that they read the licensed site remediation professional law to say that an LSRP has the discretion to apply best professional judgment in certifying compliance with regulations. So this rule would mean that the LSRPs would be interpreting and certifying the provisions of this rule. Can an agent of the DEP request a waiver? Specifically, can an LSRP request a waiver? Can the agent or LSRP request a waiver for whomever they are working for? (235, 486, 517)

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**RESPONSE TO COMMENTS 222 AND 223:** N.J.A.C. 7:1B-1.1(e) provides that the rule “does not authorize *any other entity* to approve a waiver.” (Emphasis added) Accordingly, neither licensed site remediation professionals (LSRPs), which are regulated by the Site Remediation Professional Licensing Board pursuant to the Site Remediation Reform Act, N.J.S.A. 58:10C-1 et seq., nor private contractors hired by the Department have the authority to issue waivers of strict compliance under the waiver rules. While the Department may have the authority to hire contractors to review waiver applications or perform other duties, N.J.A.C. 7:1B-1.1(e) prohibits the issuance of waivers by such contractors, or by any entity other than the Department. If an LSRP is authorized to request a waiver on behalf of a client, the Department will evaluate the waiver request on its merits, in accordance with the standards, criteria, and limitations in the rules, as it would evaluate any other waiver request by or on behalf of a client.

### **7:1B-1.2 Definitions**

**224. COMMENT:** The proposed definition for “waiver” should be amended to reference an “applicant” instead of a “person” as person is too narrow. The same change should be made throughout the rules. (490)

**225. COMMENT:** Add the following definition of “Person”: “Person” means any natural person, company, firm, association, corporation, or other entity. “Person” is an important term in proposed N.J.A.C. 7:1B (see, e.g., proposed N.J.A.C. 7:1B-1.1(d) and the proposed N.J.A.C. 7:1B-1.2 definition of “waiver”). The above definition is copied from the N.J.A.C.

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7:1D-2.1 definition of “person,” and makes it clear that the term is not limited to a natural person. (317)

**RESPONSE TO COMMENTS 224 AND 225:** The Department has not included a definition of "person" in the rules because Department rules generally include their own definitions of "person." Thus, in evaluating an application for a waiver of a rule, the Department will normally use the definition of "person" in the rules for which a waiver is requested. The Department's definitions of "person" in its various rules are generally broad, including not only individuals, but typically associations, partnerships, corporations, public bodies, and other entities.

**226. COMMENT:** In the definition of “waiver,” consider changing “person or property” to “person, property, or activity.” Because the proposed definition of “waiver” identifies “the particular circumstances of that person” as a basis for waiver, it seems illogical to limit the hardship clause of the definition of “unduly burdensome” to “hardship for a particular project or property.” Hardship may arise not from an inherent characteristic of a “project or property,” but from the particular circumstances of a person. In addition, because proposed N.J.A.C. 7:1B-2.4(a)6i and ii refer to “the activity approved as part of the waiver,” it seems illogical to exclude the term “activity” from the definitions of “unduly burdensome” and “waiver.” The term “activity” seems broader than the term “project.” Applying pesticide around an existing building, for example, is clearly an “activity,” but might not qualify as a “project.” In addition, some persons perform much of their specific activity (e.g., construction, testing or inspection, cleaning, pesticide application, various kinds of site

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remediation) wherever their customers or clients are located. It may in some instances be impractical for such businesses (and the Department) to specify in advance each “particular project or property,” yet a waiver might still be warranted for that specific activity on the basis of the particular circumstances of that person or activity. This same change in phraseology should also be made at N.J.A.C. 7:1B-2.4(a)2 and 2.4(b)4. (317)

**227. COMMENT:** We suggest that the Department be consistent with terms such as person, property, project, development and applicant in the proposed regulations. These terms are defined in different ways in various NJDEP programs, and can impact how the Department views permit applications and rule compliance. (74)

**228. COMMENT:** The “waiver” definition should be amended to state “and/or property.” (490)

**229. COMMENT:** The definitions of “unduly burdensome,” and “waiver” should be made consistent. Consider changing “a particular project or property” to “a particular person, project, property, or activity.” In the definition of “waiver,” consider changing (in two places) “person or property” to “person, property, or activity.” Hardship may arise from the particular circumstances of a person. In addition, because N.J.A.C. 7:1B-2.4(a)6i and ii refer to “the activity approved as part of the waiver,” it seems illogical to exclude the term “activity” from the definitions of “unduly burdensome” and “waiver.” The term “activity” seems broader than the term “project.” Applying pesticide around an existing building, for

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example, is clearly an “activity,” but might not qualify as a “project.” In addition, some persons perform much of their specific activity (e.g., construction, testing or inspection, cleaning, pesticide application, various kinds of site remediation) wherever their customers or clients are located. It may be impractical for such businesses (and the Department) to specify in advance each “particular project or property,” yet a waiver might still be warranted for that activity on the basis of the particular circumstances of that person or activity. (317, 490)

**RESPONSE TO COMMENTS 226 THROUGH 229:** The Department does not see a material distinction between the terms "project" and "activity" as used in these rules and to avoid confusion, the Department has modified the rules on adoption to include the term "project or activity" in each provision in which either "project" or "activity" was used in the rules as proposed. The Department has not added the term "person" to the definition of "unduly burdensome" because, while a waiver is issued to a specific person, the mere assertion of financial difficulty or difficult individual circumstances experienced by the applicant not tied to a particular project or activity, or property, is insufficient to qualify for a waiver of a rule applicable to the project or activity, or property.

**7:1B-1.2 and 2.1(a)1: Conflicting rules**

**230. COMMENT:** We are pleased that the Department recognizes that conflicts occur within regulatory programs -- not only within the Department, but also between other State and/or Federal agencies. The regulated community has long voiced concerns over the maze of

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regulations and the difficulties and missteps that may occur unintentionally by those seeking to comply with the various programs. (490)

**RESPONSE:** The Department acknowledges the commenter's support for the rules.

**231. COMMENT:** We appreciate the inclusion of the word “impracticable” in the definition of “conflicting rules.” (490)

**RESPONSE:** The Department acknowledges this comment in support of the rules.

**232. COMMENT:** We have witnessed the exasperation of dealing with environmental rules affecting a property that can be both conflicting and redundant. At times these rules provide little to no tangible environmental benefit and merely act as a hindrance to needed economic growth. The proposed waiver rule will help address this inequality. (77, 300, 346)

**RESPONSE:** The Department acknowledges the commenter's support for the rules, but observes that the waiver rules address conflicting rules as defined therein, not rules that are redundant.

**233. COMMENT:** In case of conflict, which conflicting rule should be waived? (239)

**234. COMMENT:** The definition of "conflicting rules" is circular. It is not clear when two

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rules will conflict such that following both is “impracticable.” Nor is it clear whether “conflict” means a facial conflict or a conflict as applied. What is and what is not a “conflict,” and what is and is not ‘impracticable’ -- and therefore whether a waiver is permitted under proposed rule N.J.A.C. 7:1B-2.1(a)1 -- is to be decided by DEP through the exercise of standardless discretion. (239)

**RESPONSE TO COMMENTS 233 AND 234:** In the waiver rules, “waiver” is defined at N.J.A.C. 7:1B-1.2 as a decision by the Department pursuant to this chapter that relaxes compliance with a specific Department rule, in whole or in part, *as applied* to a specific person, project or activity, or property, on the basis of the particular circumstances of that person, project or activity, or property (as amended on adoption; see response to Comments 228-231). (Emphasis added). Accordingly, whether or not the conflict between rules is “facial” or based upon their express language, the waiver applicant must demonstrate “conflicting rules” as applied to a specific person, project or property. The Department’s waiver discretion under the rules is not standardless. Please see the Department’s response to Comments 24-25, 31-32, 79-80, 120-132, 149-160, and 161-171, discussing the substantive standards, decision-making criteria and significant limitations in the rules guiding and controlling the Department’s waiver discretion.

**235. COMMENT:** We see no need for such a far-reaching rule to resolve conflicting rule problems. One approach is to require the application of the most environmentally-protective rule in an established conflict situation. The other, a more normal approach, is to engage in

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conventional rule-making with full public participation to remove the conflict. (361)

**236. COMMENT:** N.J.A.C. 7:1B-2.1(a)1 should be expanded to provide a hierarchy or objective standard by which the department will determine which of the conflicting rules will prevail. As an example, a higher environmental benefit and public health, safety and welfare are two examples of standards that could be used in keeping with the Department's core mission. (389, 509)

**RESPONSE TO COMMENTS 235 AND 236:** The commenters request that the Department establish a hierarchical system for determining which rule will take precedence in the event of conflicting rules. However, the Department believes that specificity of this nature would create an undesirable rigidity in its decision-making that would rob the rules of the very flexibility they are intended to provide. The Department believes the better course is to exercise its discretion to decide how best to resolve conflicting rules when it has all the facts and circumstances before it in the form of an actual waiver application.

**237. COMMENT:** The DEP's own one stop-shop permitting group of air, water and soil departments is already facilitating coordination between the permitting groups, and those groups have flexibility within existing rules to minimize conflicts. (87)

**RESPONSE:** While the Department's Office of Permit Coordination works to facilitate multiple permit reviews in order to increase efficiency for both the applicant and the Department, it does



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not engage in resolving conflicting substantive requirements of the various rules applicable to a specific person, project or activity, or property. The waiver rules are necessary and appropriate to provide a potential administrative remedy for the four limited circumstances described in the rules, including conflicting rules that make strict compliance with both rules impossible or impracticable. Please see the Department's response to Comments 20, 21-22, 23, 24-25, 31-32, 42, and 54 discussing the salutary regulatory purpose of these waiver rules.

**238. COMMENT:** Waiving environmental regulations that conflict with Department of Transportation (DOT), Department of Community Affairs (DCA), or other State and Federal regulations will allow inappropriate development that will destroy our resources, violating the core mission of the DEP. For example, the Delaware River Basin Commission could approve the use of hydraulic fracturing in the Basin and, under this rule provision, the DEP could waive State wastewater discharge requirements for suspended solids for treatment plants which would allow fracking waste in New Jersey's waterways. The definition of conflicting rules is too broad to protect the resources and can easily be abused by developers, polluters, and other State agencies. (159, 321, 363, 486)

**239. COMMENT:** Since DEP maintains that the proposed rule will not reduce environmental protection, why did this proposal not include a provision that environmental protection standards of DEP rules would trump other, non-environmental rules in cases of conflict? These rules can only result in the environment drawing the short end of the stick every time. (87, 509)

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**240. COMMENT:** Since the definition of “waiver” refers to DEP relaxing strict compliance with a specific “Department” rule, does this mean that all waivers will be limited to DEP rules only, and that other agencies (NJDOT, NJDCA) would not be required to waive compliance with their rules to address conflicts? The process by the NJDEP and another State agency resolve which State agency rule is to be waived, if any, should be identified. (159, 285, 486, 509)

**241. COMMENT:** This proposal will make it easier to avoid environmental regulations if a regulation conflicts with another department, State or Federal Agency’s rule. Instead, current procedures should be followed to resolve conflicts. (472)

**242. COMMENT:** In the past, agency heads would meet and resolve regulatory differences between agencies, and then propose specific regulatory amendments. Due to the absence of standards in this proposal, waiver decisions will require repetitive deliberation between agencies, creating more bureaucracy and red tape, in contradiction to Executive Order #No. 3. (509)

**RESPONSE TO COMMENTS 238 THROUGH 242:** The Department’s authority to waive rules is limited to its own promulgated rules other than those expressly exempted at N.J.A.C. 7:1B-2.1(b). As a result, the Department cannot waive rules of another State agency that conflict with a Department rule. Rather the Department will evaluate whether a Department rule conflicts

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with a rule of another agency within the meaning of these waiver rules and will only exercise its discretion to approve such a waiver if all other requirements of these waiver rules are met. The waiver rules do not contain a requirement that environmental protection standards must always trump non-environmental standards of a conflicting rule, whether a Department rule or that of another agency. However, N.J.A.C. 7:1B-2.2(a)6 (as recodified from (a)7 on adoption; see response to comment 23), specifically provides that the Department must evaluate whether the activity authorized by 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. Consequently, environmental protection concerns will be factored into all waiver decisions. Moreover, N.J.A.C. 7:1B-2.1(b) provides that the Department will not under these rules waive a requirement of, or duty imposed by, a Federal or State statute or regulation, unless that statute or regulation provides for such a waiver.

It is not clear why one commenter believes that the rules will establish a time-consuming or resource intensive process requiring repetitive deliberation between agencies. First, the Department anticipates that in most cases the rules will apply to a conflict between two different Department rules. Second, when rules of two State agencies conflict, there is no reason to believe that the resolution of the conflict will require deliberations any lengthier or more repetitive than those currently held when this type of conflict occurs.

The Department disagrees that the waiver rules lack standards. Please see responses to comments 24-25, 31-32, 79-80, 120-132, 149-159, and 160-170, for a detailed discussion of the limited purpose and objective standards of the rules.

Regarding the specific issue of hydrofracking, please see the response to Comment 174.

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**243. COMMENT:** Our concern is that you could waive the criteria below the State standards to much weaker Federal standards. (159)

**244. COMMENT:** Although Federally delegated programs are exempt from waivers, this rule proposal will be used to roll back New Jersey's standards to the minimally required Federal regulations. In light of the Governor's Executive Order No. 2 calling for no State rule stricter than Federal standards, this rule proposal could allow the Department to use less restrictive Federal standards in permitting, such as the Army Corps of Engineers standards in wetlands or Federal levels for chemicals in drinking water. New Jersey is the most densely populated state in the country and has the most toxic sites regulated under the Federal Superfund program. The Legislature has adopted stricter standards for this state because we face more environmental and pollution problems and require more regulation to prevent those issues from being exacerbated. Environmental quality and public health will suffer tremendous negative impacts if this rule is used to waive standards down to Federal levels (486)

**245. COMMENT:** The fact that a New Jersey law or a rule conflicts with Federal laws does not give the Executive Branch authority to radically change interpretation. If that New Jersey law is clear in what it says and it is conflicting with a Federal law, it is not up to the Executive Branch, it is up to the Legislature to either change that law or the courts to reverse it. If our standards are higher than a Federal law, is that considered a conflict? It should not be, but we wonder. (326)

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**246. COMMENT:** Federally delegated programs are exempt, but in light of the Governor's Executive Order No. 2 calling for no State rule stricter than Federal standards, this rule could allow the Department to use less restrictive Federal standards in permitting, such as Army Corps of Engineer standards in wetlands or Federal levels for chemicals in drinking water. The lax Army Corps of Engineers standards will be used in permitting wetlands instead of New Jersey's. Air emissions, fishing licenses, and criteria to protect human health are also exempt, but again, can be waived to the weaker Federal standards. On toxics in drinking water, the Federal standard is cancer rates at one in 10,000 people and the New Jersey standard is one in 1 million people. The Legislature has adopted stricter standards for this state because we face more environmental pollution problems and require more regulation to prevent those issues from being exacerbated. The proposed rule has the potential to pose significant threats to New Jersey's people and environs. (385, 386, 486, 493)

**247. COMMENT:** This raises the issue of how would you interpret the category one buffers, because the rule was designed as an anti-degradation implementation procedure under the surface water quality standards, which is Federally mandated. New Jersey chose to use the category one buffer as a procedure to protect category one streams, under the anti-degradation policies. That clearly is Federally-approved, and therefore an exempt program. However, the buffer proposals got codified in the stormwater management rule, which is used for compliance with the Federal stormwater permit program. So there is another level of Federal implementation or Federal regulatory protection, and therefore an exemption of

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this rule. Please clarify that. (517)

**248. COMMENT:** The waiver concept is okay, and waivers are already included in various regulations. However, there is a technical regulation which is a conflict in your own proposal. New Jersey has a drinking water standard for the element arsenic in drinking water. The Federal government lowered the standard from 50 parts per billion to 10 ppb. The State of New Jersey lowered it even further to five. According to the waiver proposal, numeric standards will not be waived. However, it is also noted that State standards shall not be more stringent than Federal standards. Our laboratories do a great deal of private well water testing under the Private Well Testing Act. Arsenic is one of the elements that is tested for, and it is quite frequent to find arsenic levels that exceed the State standard of five ppb. It is a naturally-occurring element. That does not fall under these waivers. However, what if a major water system in New Jersey has arsenic levels at, say, seven ppb and it would cost, to take a rough figure, \$100 million to treat that water to lower it, could the water system apply for a waiver? Even though it is a numeric standard, it is a numeric standard at conflict with the Federal standard. (235)

**RESPONSE TO COMMENTS 243 THROUGH 248:** Nothing in Executive Order No. 2 (2010) reduces any Department standard to those set by the Federal government, nor does the Order prohibit the adoption of regulatory standards that are more restrictive than those required by the Federal government. Executive Order No. 2 directs that State agencies “detail and justify every instance where a proposed rule exceeds the requirements of federal law or regulation.”

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The Order directs that State agencies, when promulgating rules, “not exceed the requirements of federal law except when required by State statute or in such circumstances where exceeding the requirements of federal law or regulation is necessary in order to achieve a New Jersey specific public policy goal.” Thus, State agencies may adopt standards that exceed the requirements of Federal law or regulations; provided the agency provides a detailed justification for doing so, and provided the standards either implement a State statutory requirement or fulfill a New Jersey specific public policy goal. Waiver decisions under these rules will be based not on provisions in Executive Order No. 2, but on the standards and decision-making criteria set forth in the rules. While these waiver rules provide the Department with the flexibility, in appropriate cases, to waive strict compliance with a Department rule that is more stringent than a Federal standard, the standards, the requisite bases for a waiver, the decision-making criteria, and the limitations in the rules ensure that waivers will be appropriately approved and not routinely used to circumvent Department standards that are stricter than Federal standards.

The fact that a State regulation is more stringent than a Federal regulation would not itself render the State regulation a “conflicting” rule, as defined in the waiver rules at N.J.A.C. 7:1B-1.2, as that fact alone would not establish impossibility or impracticality of complying with both rules. Should a state rule conflict with a federal rule such that compliance with both is impossible or impracticable, then a waiver might be appropriate depending on the particular rule provision and the specific circumstances. Such a waiver would have to meet all standards and requirements of the waiver rules, and would apply only to the particular rule provision identified in the Department’s waiver decision, and to the person, particular project or activity, or location that would be the subject of the waiver.

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N.J.A.C. 7:1B-2.1(b)5, 6 and 10 prohibit waiver of a rule concerning the air emissions trading program; numeric or narrative standards protective of human health; and a license or approval for hunting, fishing, or trapping, respectively. These prohibitions do not allow the Department to issue any waiver of these rules, regardless of whether the Department rule is more stringent than the corresponding Federal regulation.

A commenter asks how the Department would interpret the applicability of the waiver rules to “buffers” established for Category One Waters in light of N.J.A.C. 7:1B-2.1(b)2 of the waiver rules, which prohibits waiver of a rule for a Federally delegated, authorized or assumed program where such a waiver would be inconsistent with New Jersey’s delegation, authorization, or assumption of authority pursuant to the Federal program. The commenter appears to be referring to N.J.A.C. 7:8-5.5(h) of the Stormwater Management Rules (N.J.A.C. 7:8), which establishes a 300 foot special water resource protection area (SWRPA) for Category One Waters. The Department administers the Surface Water Quality Standards, N.J.A.C. 7:9B (SWQS), pursuant to the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., and in conformance with requirements of the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq., commonly known as the Clean Water Act (CWA), and the Federal regulatory program established by EPA pursuant to the CWA at 40 CFR 131. The SWQS include general requirements, use designations, classifications, antidegradation categories and water quality criteria applicable to the surface water bodies of the State. New Jersey’s anti-degradation policy for Category One Waters is set forth in N.J.A.C. 7:9B-1.5(d)(2)(iii) of the SWQS, which provides that such waters are to be “protected from any measurable changes (including calculable or predicted changes) to the existing water quality.”



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The 300 foot SWRPA requirement in the Stormwater Management Rules is a best management practice for addressing nonpoint source pollution, which helps implement the SWQS antidegradation policies. A waiver of the 300 foot SWRPA requirement in the Stormwater Management Rules under the waiver rules is not categorically prohibited by N.J.A.C. 7:9B or by federal law. Federal antidegradation policy allows for flexibility in State implementation. The antidegradation policy standard is “no measurable change,” which an applicant might be able to demonstrate in different ways. It is conceivable that the Department would consider approving a waiver from strict compliance with N.J.A.C. 7:8-5.5(h) of the Stormwater Management Rules in an appropriate case depending upon on the particular facts and circumstances established by an applicant. Of course, any applicant would be required to submit an application demonstrating that it satisfies at least one of the four requisite bases for seeking a waiver under the rules and that all other requirements of the waiver rules are met, including all other requirements of N.J.A.C. 7:9B, in order for the Department to consider a waiver.

The commenter also seeks clarification regarding whether the 300 foot SWRPA is mandated under the Federal stormwater permitting program. The SWRPA is not mandated under the Federal stormwater permitting program.

**249. COMMENT:** Please provide specific data and findings on the required cost-benefit analysis that DEP conducted to evaluate the full costs of the waiver review process, including cases where DEP has to resolve interagency conflicts? (509)

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**RESPONSE:** Executive Order No. 2 (2010) directs agencies to adopt rules for waivers.

Executive Order No. 2 also directs State agencies to employ cost-benefit analyses, as well as other forms of economic and scientific research, when promulgating rules. As the Department explained in the Economic Impact Analysis in the proposal, it was not possible to quantify the economic results of future waiver applications and potential approvals of waivers of strict compliance because the amount of costs involved would depend upon the type and size of any prospective project, activity or property, as well as the specific rule from which the waiver is being sought. (See 47 N.J.R. 475) As to issues of interagency conflicts, the Department anticipates that these will arise infrequently, and that the waiver option will be considered in the context of the Department's existing methods of communicating and coordinating with other agencies.

**7:1B-1.2 and 2.1(a)2: Unduly burdensome**

**250. COMMENT:** Environmental regulations impose excessive and undue burdens on the public, with little environmental benefit. This waiver rule proposal is an important step by the Department to alleviate some of the (unintended) tensions that result from its regulations, while ensuring that environmental protections are not lost, but in fact advanced. (490)

**RESPONSE:** The Department acknowledges this comment in support of the rules.

**251. COMMENT:** This rule proposes that the Department will consider a waiver when a prospective applicant "asserts" that strict compliance with a rule would be unduly

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burdensome. As a regulatory mechanism, a simple "assertion" represents a weak standard, and certainly does not comport to the predictability and transparency that Executive Order #2 requires, as opposed to requiring that a prospective applicant "demonstrate" that strict compliance with a rule is unduly burdensome. Such a "demonstration" should be codified in the rule to include the requirement that a prospective applicant provide sound scientific data, accurate cost estimates and expenditures, and a full summary of development costs to provide opportunity for a relative cost comparisons in determining whether strict compliance is "unduly burdensome." (509)

**RESPONSE:** The language to which the commenter refers appears not in the rules, but in the explanatory Summary in the proposal. The mere assertion of undue burden would not be sufficient to justify Department issuance of a waiver under the rules, which establish many requirements that must be met prior to issuance of a waiver. Among other requirements, see for example, N.J.A.C. 7:1B-2.2(a)2 requiring that the Department determine whether it has been provided with sufficient data to support a waiver. "Sufficient data" will vary depending on the specific rule for which waiver is requested, the basis of the waiver request, and the circumstances of each particular case. As these waiver rules will apply to a wide range of existing rules and situations, the Department has not proposed specific waiver application requirements. The applicant must provide a sufficient level of detailed information to give the Department a basis to approve the waiver applying the standards and decision-making criteria of the waiver rules. If the Department does not receive sufficient information and data to support a waiver under these

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waiver rules, or if it does not receive such information in a timely manner, the waiver request will be denied.

**252. COMMENT:** We suggest changing the definition of “unduly burdensome,” as follows:

“unduly burdensome means a situation in which the strict compliance with a specific rule could result in excessive cost in relation to alternative measure of compliance, including mitigation, that achieves comparable or greater benefits.” Since certain types of mitigation could fall under this definition, it would make sense to specifically include it within the definition. (414)

**RESPONSE:** The Department believes the commenter's suggested addition to the definition is unnecessary. There are many possible types of alternative measures of compliance, some of which may not be identified until the facts of a specific case are known. Therefore, singling out a particular alternative measure might create confusion by mistakenly implying a preference for that particular alternative measure of compliance.

**253. COMMENT:** New Jersey's strong environmental programs are under attack. The Department has proposed a new rule that would allow developers and polluters to secure waivers from every environmental regulation if the agency determines that the rule is “unduly burdensome.” (425)

**254. COMMENT:** The consideration of undue burden allows the “yard-by-yard destruction”

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disapproved in the East Cape May case. (123)

**RESPONSE TO COMMENTS 253 AND 254:** The waiver rules will not allow the “yard-by-yard destruction of environmentally sensitive land” disapproved in the East Cape May decision, as one commenter contends. In the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-22b affords the Department the option of modifying its actions in order to minimize the detrimental effect of an approval, modification or denial of a permit and avoid a regulatory taking. In East Cape May Assocs. v. New Jersey Dep’t of Env’tl. Protection, 343 N.J.Super. 110 (App. Div. 2001), certif. den. and appeal dismissed, 170 N.J. 211 (2001), the Appellate Division held that, before the Department could avail itself of this statutory option, the Department must adopt rules in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, establishing standards for doing so. The Court remanded the case to allow the Department to draft appropriate rules for this purpose. In this case, the waiver rules have been proposed and adopted in accordance with the Administrative Procedure Act.

The commenters’ concerns about environmental degradation under the waiver rules are unwarranted. They overlook guiding legal principles and specific provisions of the waiver rules directly addressing environmental concerns, which strictly limit and control the exercise of the Department’s discretion to approve waivers under the rules. As stated in the Department’s response to Comments 11-15, the Department’s duties include maintaining, protecting and enhancing New Jersey’s natural resources, protecting the public health, safety, welfare and the environment, and effectuating the purposes of its enabling statutes. As stated in N.J.A.C. 7:1B-1.1(a), the purpose of the waiver rules is to provide for certain limited circumstances in which

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the Department may waive strict compliance with existing regulations “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, welfare, and the environment.” Pursuant to N.J.A.C. 7:1B-2.1(a), a waiver may not be approved unless the applicant demonstrates to the Department’s satisfaction that it meets one of the four requisite bases for approving a waiver and that all other requirements of the rules are met. N.J.A.C. 7:1B-2.2(a), which establishes waiver criteria to be considered by the Department on reviewing a waiver application, provides that the Department must evaluate whether the activity authorized by 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. Moreover, N.J.A.C. 7:1B-2.1(b)1(as modified on adoption; see response to Comment 23) provides that the Department shall not waive a requirement of, or duty imposed by, a Federal or State statute or regulation, unless that statute or regulation provides for such a waiver.

In summary, the statement of purpose, the four requisite bases for approving a waiver, the decision-making criteria and the limitations in the waiver rules all guide and limit the Department's exercise of waiver discretion. These provisions articulate the Department’s environmental concerns and provide ample safeguards and assurance that the Department’s waiver decisions will be consistent with its core missions and its environmental protection responsibilities under its enabling statutes. Please see the Department’s responses to Comments 24-25, 31-32, 54, 79-80, 149-159, 160-170, and 174 further addressing concerns about environmental degradation and discussing the substantive standards, decision-making criteria and limitations of the waiver rules guiding and limiting the Department’s future decision-

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making, which ensure adherence to the Department's core missions and its statutory responsibilities.

**255. COMMENT:** "Unduly burdensome" is ill defined, including subjective criteria. The terms need clear and quantitative definition; and they need to ensure consideration of the burdensome ramifications to others in the community of granting a waiver. While a stormwater best management practice may increase the cost (i.e., burden) of a particular development project, there are also very real and more significant costs and burdens to taxpayers, neighbors and downstream residents that come from failing to use a stormwater BMP. What is the lost value of ecotourism and lost days at work by flood victims that result from standard detention basins as compared to beautiful and beneficial infiltration systems, lost market value of affected homes, loss of quality of life in the community, and increased taxpayer obligations to pay for emergency services, rebuilding eroded infrastructure, repairing washed out riverbanks that cause pollution, the loss of public and private lands (through erosion) and more? (75, 89, 416)

**256. COMMENT:** What does "an actual exceptional hardship for a particular project or property" mean? Just because something is hard for an applicant, does not mean that the public should suffer degradation of wetlands, streams, drinking water resources, the air we breathe, or any other negative environmental impact. The definition will also allow waivers when environmental regulations pose "excessive cost in relation to an alternative measure of compliance that achieves comparable or greater benefits." The unduly burdensome language

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in the proposed rule waiver provides ample opportunity for environmental degradation, with little hope of tangible environmental benefits. (87)

**257. COMMENT:** The definition of "unduly burdensome," and waiver based on undue burden, are too broad and vague. What makes a hardship "exceptional"? Is "exceptional" anything greater than the average cost of compliance, the top quartile of cost of compliance, or something else? What is the universe of applicants or applications against which a given application will be compared to determine what is "exceptional"? DEP has neither the data nor the time to apply a rigorous definition of exceptionality even if the rule included one. (321)

**258. COMMENT:** The proposal does not define "burdensome" or say what constitutes a hardship other than "result in excessive cost." Who exactly is feeling the hardship? Do we need someone to build something up in West Milford that may eventually flood someone down in Wayne? Look at the flooding this week in Passaic County. Do we need fewer rules that keep people from building where they should not build? The NY/NJ Baykeeper said the "unduly burdensome" waiver proposal is "so vague, it's unworkable." (375)

**RESPONSE TO COMMENTS 255 THROUGH 258:** In stating that excessive cost itself would constitute a hardship, the commenter misinterprets the "unduly burdensome" basis in the rules for seeking a waiver. The definition of "unduly burdensome" at N.J.A.C. 7:1B-1.2 provides two alternative criteria for a finding of undue burden: actual, exceptional hardship for a



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particular project or activity, or property; or excessive cost in relation to alternative measures with equal or greater benefit to the public health and safety or the environment.

In order to meet the first criterion, an applicant must demonstrate that compliance with the rule from which a waiver is sought will cause exceptional hardship. As to the second criterion, the definition of “unduly burdensome” has been clarified upon adoption by adding, after “comparable or greater benefits,” the language “to public health and safety and the environment,” consistent with the purposes set forth at N.J.A.C. 7:1B-1.1(a). Meeting either of these two criteria in the definition of “unduly burdensome” would justify the Department’s consideration of a waiver. However, that in itself would not be sufficient for the issuance of a waiver. The Department will evaluate all waiver applications under the rules in light of its statement of purpose in NJAC 7:1B-1.1(a), and all of the decision-making criteria of N.J.A.C. 7:1B-2.2(a) and all other requirements of the waiver rules must be met.

Commenter concerns that the undue hardship basis for a waiver under the waiver rules will foster environmental degradation are unwarranted. Please see the Department’s responses to Comments 24-25, 54, 79-80, 149-160, 161-171, 175, and 253-254 addressing concerns about environmental degradation.

The waiver rules provide opportunities for the Department to evaluate and address impacts on communities. For example, N.J.A.C. 7:1B-2.2(a)3 and 6 (as recodified from (a)7 on adoption; see response to Comment 23) require the Department to consider whether the circumstances support the need for a waiver and whether a waiver would comport with the Department's core missions, which include protection of not only the environment, but also public health, safety and welfare.

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**259. COMMENT:** Under the definition of “unduly burdensome” the term "exceptional hardship" is vague. If this term includes financial hardships, the definition is unreasonable since any person denied approval under the regulations can claim an “exceptional hardship.” For example an individual could purchase a property that had previously been denied a permit due to environmental regulations, then apply for a waiver due to the financial hardship of owning a property that cannot be developed for maximum profitability. The Department should require at a minimum that the hardship be exceptional, unusual, and peculiar to the project involved and that mere economic or financial hardship alone is not exceptional. A developer should not be able to buy a property cheaply because it is all wetland and then make a large profit by pleading that regulations preventing him from filling it are “unduly burdensome.” (75, 239, 314)

**RESPONSE:** The commenter misinterprets the “unduly burdensome” basis in the waiver rules for seeking a waiver. Mere financial hardship is not a basis in the waiver rules for approving a waiver. Please see the Department’s response to comments 255-258 discussing the “unduly burdensome” basis in the rules for considering waivers. An assertion that a waiver was necessary to assure maximum profitability would not meet the requirements for a waiver under the rules. If a person bought property that was ineligible for a permit and then claimed hardship because development of the property was unprofitable, the person’s application for a waiver would implicate N.J.A.C. 7:1B-2.2(a)4, under which the Department considers whether the applicant created, or played a role in creating, the claimed hardship.

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**260. COMMENT:** The rules allow any developer to seek a waiver where compliance would create “exceptional hardship” or “excessive costs.” This broad exception opens the door to waiver applications by virtually any applicant in the same manner the Municipal Land Use Law opens the door to variances. Given the strong public interests associated with environmental regulations, it is inappropriate for the Department to offer relief comparable to a land use variance. Given the breadth of this exception, the Department will be inundated with such requests in the same manner as land use boards across the State experience, and environmentally sensitive lands will be lost. (113, 159, 527)

**RESPONSE:** The Department disagrees that the “unduly burdensome” basis for seeking a waiver under the rules will result in an unmanageable number of waiver requests based on “exceptional hardship” or “excessive costs.” As with any new program, there will be a "learning curve" when the rules first take effect. However, the rules state at N.J.A.C. 7:1B-1.1(b) that they are not to be used to routinely circumvent any Department rule. The Department will reject frivolous, unsupported or inappropriate waiver requests. Because this is a new chapter that will apply to a wide variety of cases, it is impossible to accurately estimate the probable cost of implementing the rules. As described in the response to Comment 33 and elsewhere in response to comments, the Department is developing an internal review process to ensure consistency in the Department’s future review and disposition of waiver applications. The Department will allocate resources as necessary to implement this waiver program. As explained in the response to comments 160-170 and elsewhere in response to comments, the waiver rules may only be

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applied in limited circumstances and the rules contain limitations designed to ensure that unacceptable environmental and public health impacts in any individual case will not occur.

Overall, the Department is confident that its waiver decisions will be consistent with its core missions and its environmental responsibilities under its statutes.

**261. COMMENT:** The definition of excessive cost is not clearly outlined. Under this waiver developers and polluters will essentially be regulating themselves and not using the best available technology that protects public health and safety and our natural resources. Instead cheap, less protective mechanisms will be utilized. Environmental regulations must not be waived because this administration views environmental protection as too costly. What benchmark will DEP apply to evaluate costs in making waiver decisions? Does this simply mean “a greater cost than the alternative”? If so, what costs are to be considered and how are these costs to be measured? Since waiver requests are proposed to be prospective, how will DEP verify cost estimates provided in support of a waiver request, as opposed to actual costs expended? If a property is already developed, you’ve got to pay more to tear down the existing buildings, is that an excessive cost? Unfortunately, most of our environmental laws don’t enjoy these constitutional protections, our open space does. These costs are not excessive, because the state is nearly at build-out and we have little open space left. (239, 326, 486, 509)

**262. COMMENT:** Any sound regulations may be deemed to pose a "hardship" for someone who wishes to shirk responsibilities for the long-term consequences of his actions. There is

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no guidance regarding the degree of exceptional hardship or excessive cost that qualifies for a waiver. Several statements in the summary give the strong impression that economic interests outweigh environmental benefits. Formal rules should be as specific as possible and not subject to interpretation. If some interpretation is occasionally required, it should be minimal. (20, 38, 81, 310)

**263. COMMENT:** It is unclear what the rule means by “excessive cost.” The language might be read to mean a financial cost is excessive any time the applicant argues to DEP’s satisfaction that non-compliance plus mitigation would be less expensive than compliance. This reading would simply read a mitigation mechanism into every DEP permitting program, which has no statutory authority, conflicts with existing statutes, and is bad policy. But if not this kind of broad cost/benefit option for all permits, what could “excessive cost” mean in the rule as written? DEP has neither the capacity nor the expertise to conduct such financial analyses in a rigorous, reliable fashion. (321)

**RESPONSE TO COMMENTS 261 THROUGH 263:** As set forth in the rules, the assertion of excessive costs or financial hardship alone will not suffice to establish the “unduly burdensome” basis in the rules for seeking a waiver. Please see the Department’s response to Comments 255-258 discussing the “unduly burdensome” basis in N.J.A.C. 7:1B-2.1(a)2. As stated in the definition of “unduly burdensome,” the benchmark for determining excessive cost will be how the cost of complying with the rule sought to be waived compares to the cost of achieving an alternative measure of compliance that provides comparable or greater benefit to public health

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and safety or the environment. If the applicant demonstrates a basis under N.J.A.C. 7:1B-2.1(a)2, the Department will evaluate the application in light of the statement of purpose in N.J.A.C. 7:1B-1.1(a), the decision-making criteria of N.J.A.C. 7:1B-2.2(a), and all other requirements of the waiver rules. Whether a waiver is sought relying on the “unduly burdensome” basis or another requisite basis in the rules for this purpose, economic considerations will not undermine the Department’s adherence to its core missions and responsibilities for effectuating the purposes of its statutes, as one commenter suggests. Please see the Department’s response to Comments 79-80 and 149-160 regarding economic considerations and environmental protection.

**264. COMMENT:** Under this rule, the DEP can grant developers and polluters waivers if a rule is considered unduly burdensome, conflicts with other rules, or the Department believes some net environmental benefit can be achieved. This means developers could build on wetlands if avoiding them would cost too much and polluters can clean up a polluted site in exchange for the ability to avoid other DEP regulations. (16, 24, 353, 354, 355, 472)

**265. COMMENT:** All regulation may be considered burdensome on some level. Just because a party wishes to pursue a project on a particular piece of property does not mean that the project is suitable for the property. For example, placing a spent uranium storage facility in the middle of a residential neighborhood is not appropriate but it would be an extreme hardship for the applicant to find another site for their project. There is nothing in this rule that would prohibit the application of a waiver for the project; nor is there anything in the

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rule that would dictate that this request for a waiver should be rejected. Considering the discretionary potential inherent in the application of these criteria by present and future DEP representatives, further clarity and definition of the terms “exceptional hardship” and “excessive cost” should be provided to reduce the amount of subjectivity associated with these phrases. (235, 253, 285, 356, 361, 363, 372, 389, 472, 481, 519)

**RESPONSE TO COMMENTS 264 AND 265:** The commenters misinterpret or oversimplify the waiver rules. Please see the Department’s response to Comments 255-258 and 259 discussing the “unduly burdensome” basis in the rules, and the responses to Comments 24-25, 31-32, 79-80, 120-132, 149-160, and 161-171, and 175 discussing the numerous standards, criteria and limitations of the waiver rules guiding and controlling the Department’s future decision-making under the rules. The Department has endeavored to supply reasonable direction and specificity in the rules, while retaining a reasonable degree of regulatory flexibility consistent with their purpose. The Department does not believe the definitions of “unduly burdensome” or “excessive costs” require further definition. The fact that the Department may consider a waiver based on conflicting rules, undue burden or public emergency does not mean that the Department may issue a waiver without careful and due consideration of environmental impacts. Under N.J.A.C. 7:1B-2.2(a)5 and 6 (as recodified from (a)7 on adoption; see response to comment 23), the Department must consider whether there will be a net environmental benefit and whether 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. Finally, N.J.A.C. 7:1B-2.3(a)6 requires the Department to impose conditions on

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the waiver as necessary to maintain, protect, and enhance New Jersey's natural resources and to protect public health, safety, and welfare, and the environment. The Department declines to evaluate the hypothetical siting of a spent uranium storage facility without a specific application for a waiver before it setting forth all relevant facts and circumstances.

**266. COMMENT:** Inconvenience, aesthetic considerations, physical handicaps, personal preferences, or the proximity of one's neighbors must not, as a rule, qualify as an exceptional hardship for the purposes of obtaining a waiver. All of these problems can be resolved through other means, even if the alternative is more expensive, or requires the applicant to relocate the project at the applicant's expense or change the project. (314)

**RESPONSE:** The Department declines to speculate on whether the hypothetical circumstances posed by the commenter might qualify for a waiver under the rules in the absence of a specific waiver application setting forth all relevant facts and circumstances. Please see the Department's responses to Comments 24-25, 31-32, 79-80, 120-132, 149-160, and 161-171, and 175 discussing the standards, criteria and limitations of the waiver rules informing the public and guiding and controlling the Department's future decision-making under the rules. The Department has endeavored to supply reasonable direction and specificity in the rules, while retaining a reasonable degree of regulatory flexibility consistent with their purpose and spirit. Just as the Department has not included a list of specific situations in which waivers will always be issued (please see the response to Comments 300-304), the Department has also refrained from including a specific list of conditions or considerations which would never support a



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determination of "exceptional hardship." In both cases, such automatic waiver approvals or waiver denials would run counter to the flexibility which is the goal of these rules.

**267. COMMENT:** In the definition of "unduly burdensome," the phrase "alternative measure of compliance" seems inappropriate since the waiver is for a measure of non-compliance. It should be made clear that the alternative is a minor non-compliance and that the "comparable or greater benefits" are environmental and not financial or economic. (244)

**RESPONSE:** The Department believes the phrase "alternative measure of compliance" is appropriate. A claim of excessive cost of strict compliance with the rule sought to be waived will be weighed against the cost of implementing an alternative measure of compliance that achieves comparable or greater benefits. As to the concern that the comparable benefits should be environmental rather than financial or economic, please see the response to Comments 79 and 80 regarding the change on adoption to the definition of "unduly burdensome." As modified on adoption, any alternative measure of compliance offered by the applicant must achieve comparable or greater benefits to public health and safety or the environment, which is consistent with the Department's core missions as expressed at N.J.A.C. 7:1B-1.1(a).

**268. COMMENT:** In discussing costs related to alternate environmental benefits to offset any impacts from the waiver, will there be any provision, funding and personnel available to conduct follow-up inspections to determine if any offsets were conducted such as planting trees elsewhere when an area is disturbed for development and to inspect general compliance

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with offset conditions put on these waivers? Follow-up inspections by the Department shall be conducted to determine such compliance. (20)

**RESPONSE:** As with any Department approval, monitoring of a waiver recipient's compliance with waiver conditions will become part of the Department enforcement program's normal responsibilities.

**269. COMMENT:** Alternative measures of compliance shall not include extensions. Although the Department does issue extensions, extensions are not alternative cleanup measures. (20)

**RESPONSE:** The commenter appears to object to the extension of existing approvals as a method of waiving cleanup deadlines set forth in Department rules. Should an applicant request a waiver of a deadline set in a Department rule, the Department is confident that the standards, criteria, limitations and conditions in the waiver rules would provide adequate protection against an inappropriate extension. In addition, N.J.A.C. 7:1B-1.1(b) should prevent routine use of extensions to circumvent rule deadlines.

**270. COMMENT:** The definition of "unduly burdensome," and the use of the term in N.J.A.C. 7:1B-2.1(a)2, allow DEP to waive a regulation when the waiver would result in no net environmental benefit -- that is, if it causes environmental harm -- as long as DEP believes the waived regulations impose an "undue" non-environmental burden. For DEP to

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consider promoting other objectives over those of environmental protection is both blatantly contrary to its mission and an outright violation of the limits of its authority. The rules must include a nexus between the objective of the rule targeted by the waiver applicant and the “benefit” of the waiver. It is neither the DEP’s appropriate role in the State government, nor its area of expertise, to assess non-environmental benefits in the course of its decision making. The balancing of environmental and other priorities is the province of the State legislature, operating through and accountable to the political process. (239)

**RESPONSE:** The commenter expresses the view that it is the role of the Legislature, not the Department, to balance environmental and other public objectives and priorities. This comment appears to overlook that the waiver rules apply to rules of the Department which have been promulgated pursuant to statutory authority. The Department’s statutory authority to promulgate rules articulating when and how it will regulate a particular activity includes, within that authority, the authority not to promulgate rules regulating a particular activity, provided that the decision not to regulate the activity does not violate a statutory requirement or purpose. The Department's adoption of the waiver rules is an exercise of its discretionary authority to decide when and how to regulate or not to regulate. The waiver rules are simply one exercise of the Department’s existing statutory authority to adopt reasonable rules and regulations for implementing the policies of its enabling statutes and its various environmental programs. Please see the Department’s response to Comments 11-15, 23, 24-25, 27-29, 31-32, and 39 for a detailed discussion of its authority for the waiver rules. The commenter argues that a waiver under the rules may justify a purely economic or other non-environmental benefit which is not

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the Department's appropriate role or within its area of expertise. Neither of these arguments is justified. Please see the Department's response to Comments 79-80, 149-160, and 250-265 discussing the waiver rules and economic and financial considerations, as well as its response to Comments 24-25, 31-32, 79-80, 120-132, 149-159, and 160-170, discussing the standards, criteria and limitations of the waiver rules informing the public and guiding and controlling the Department's future decision-making under the rules.

**7:1B-1.2, 2.1(a)3 and 2.2(a)5: Net environmental benefit**

**271. COMMENT:** The rule provides in its narrative that any negative impacts from granting of the waivers will be partially offset from positive environmental impacts from other waivers so any adverse environmental impacts are minimized. We believe that all adverse environmental impacts are to be avoided. Aside from potentially irreparable harm to the environment and to ecosystems, the overall positive economic impact foreseen by the Department could be more than offset by the future costs of addressing negative environmental impacts. The Department does not provide any basis that the granting of these waivers will have any positive impacts on the environment. (239, 356, 361, 363, 416)

**272. COMMENT:** Allowing regulations to be waived for a "net environmental benefit" cannot guarantee a net loss of resources will not occur. DEP has compared this waiver rule to a municipal zoning variance. Net environmental benefit is not defined in variance statute. Instead variances are based on the standard of "public good without public detriment." The project cannot result in an increase in pollution, flooding, traffic or other negative impacts to

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the public quality of life or the community. To achieve a public good the project must overall further the goals of the master plan and municipal zoning and promote public health and safety. (486)

**273. COMMENT:** While the rule provides ambiguous criteria that “there is a net environmental benefit,” there is no requirement that the granting of the waiver will result in a net environmental benefit. It is merely one factor to consider. What data does the Department rely on to support this provision? (239, 361, 363)

**274. COMMENT:** When translated into plain English, net environmental benefit inevitably still means that harm is being done. The criteria for making this call are subjective and easily manipulated. This will promote the sacrifice of existing healthy habitats, ecosystems, and resources in the speculative hope that mitigation will bring future benefits to other ecosystems and habitats. (38, 193, 321)

**275. COMMENT:** How are you going to measure net environmental benefit? Are you going to factor in the additional public health cost? The Government is committed to doing so, but a year into the administration, we are still waiting to see that new better cost benefit analysis. (363, 372)

**276. COMMENT:** Because DEP’s regulations cover a broad range of subjects, the definition of a “net environmental benefit” cannot possibly address the issues specific to solid waste,

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flood hazards, wetlands protection, or any other area of regulation. Waiver of a rule preventing encroachment on protected wetlands necessarily causes environmental harm to the affected wetlands, not a benefit. To allow any other environmental benefit to offset this harm means there cannot be an adequate nexus between benefit and harm. The absence of any requirement for proximity in time between benefit and harm further suggests that the Waiver Rule will be applied with just such an attitude. (239, 244)

**277. COMMENT:** The net environmental benefit clause potentially pits natural resources against one another. One scenario the Department has referred to is that the net environmental provision would enable remediation of contaminated wetlands. If the Department is asking New Jersey to accept cleanup of contaminated wetlands by filling with soil and impervious cover, without regard to the flood management, filtration and habitat quality of those wetlands, then the Department is asking us to rank development as more environmentally beneficial for wetlands mitigation, and that's unacceptable. We cannot support, for example, any regulation that ranks clean soil as more important than clean water, or vice-versa. The people of New Jersey deserve to have clean water to drink, clean air to breath and healthy soils in which to grow our food. (87)

**278. COMMENT:** In the definition of "Net environmental benefit" the terms "adequate geographic and resource nexus" should be further defined to reduce the amount of subjectivity associated with this waiver condition. For example, must the area receiving the waiver be contiguous to the natural resource area receiving the mitigating benefit? Must the

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resource that is the subject of the waiver be exactly the same type of resource receiving the net benefit? What are the standards or the timelines over which net environmental benefits must be realized? Do they have a nexus in time, as well as space and ecosystem? (120, 285, 321, 486)

**RESPONSE TO COMMENTS 271 THROUGH 278:** The commenters ask specific questions about how the term "net environmental benefit" will be applied in implementing the waiver rules. The answer to each of these questions will vary depending on the resources, site conditions, region, and other attributes of the case or project for which the Department is considering a waiver. For example, in a case where a riparian zone on a stream is impacted by an activity authorized under a waiver, the Department might require mitigation in a contiguous area, so as to ensure that the offset measures provide a qualitative and/or quantitative benefit to the same stream. However, in a case in which a waiver would impact a small wetland that is already degraded and hydrologically isolated, the Department might require mitigation that enlarges a larger, higher quality wetland elsewhere in the watershed, so as to increase the total acreage of valuable, non-fragmented wetlands in the area. The "adequate geographic and resource nexus" limitation in the definition of "net environmental benefit" applies when the Department determines that an application relying on the "net environmental benefit" basis will require environmental offsets. Again, because the Department expects that waiver applications under these rules will present a wide variety of situations that cannot now be predicted, the Department declines any attempt to predict how it will interpret and apply "adequate geographic and resources nexus" to a particular case in the absence of a concrete waiver application before it

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setting forth all relevant facts and circumstances. The Department acknowledges that there may be occasions when a basis for a waiver is presented that will not result in a net environmental benefit as, for example, where a public emergency exists within the meaning of the rules. However, the decision-making criteria in the rules require that the Department consider in every case whether there will be a net environmental benefit from the waiver. N.J.A.C. 7:1B-2.2(a)5. They require further that the Department consider in every case whether 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. N.J.A.C. 7:1B-2.2(a)6.

**279. COMMENT:** The rules do not describe how a responsible party will prove there is an environmental benefit to the waiver. Detailed proof shall be submitted in the application process. (20)

**RESPONSE:** The Department anticipates that a demonstration of environmental benefit will vary greatly based on the particular situation. The burden will be on each applicant for a waiver to submit information and documentation sufficient to demonstrate that all of the waiver rules' requirements are met and that the Department should exercise its discretion to approve a waiver. The Department will not issue a waiver if an applicant fails to provide sufficient documentation demonstrating that all applicable requirements of the waiver rules have been met and that the Department should exercise its discretion to approve a waiver. See N.J.A.C. 7:1B-2.2(a)2.



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**280. COMMENT:** “Net environmental benefit” as defined in the new rule does not include consistency with the State Plan Areas or restrict waivers to redevelopment sites or sites that are currently densely developed. (486)

**RESPONSE:** The Department does not believe that the availability of waivers should be limited to the specific areas suggested by the commenter. The waiver rules are intended to provide regulatory flexibility in the Department’s review and disposition of waiver requests so the Department may better achieve its many environmental goals. Please see the Department’s responses to Comments 20, 21-22, 23, 24-25, 31-32, 42, and 54 regarding the important and salutary function of the waiver rules to allow the Department to address the four limited circumstances identified in the rules which are generally not addressed in its existing rules. It may be noted here, however, that one of the criteria the Department must consider when reviewing a waiver request is whether “[t]here 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 an the expansion of an existing development.” N.J.A.C. 7:1B-2.2(a)5.

**281. COMMENT:** These rules would undermine the State’s ability to implement a cohesive “State strategic plan.” As envisioned by the administration, the forthcoming State strategic plan is intended to provide an overarching framework for land use regulations, but this rule provides no connection to it. The rule may allow any project to advance, regardless of whether it supports or contradicts the plan. It also raises fears about whether “bad” projects

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will be approved that undermine the quality of our communities as places to live and work.

This is critical in New Jersey, the nation's most developed state, as it works to retain and attract employers. (476)

**RESPONSE:** The Department believes the waiver rules will complement efforts to implement a Strategic Plan for the State. Waivers of strict compliance authorized by the waiver rules may support any number of goals and strategies articulated in the State Strategic Plan. In eligible and appropriate cases, waivers of strict compliance might be employed, for example, to facilitate public infrastructure projects that promote sustainable economic growth as guided by the State Strategic Plan. The State Strategic Plan also promotes the goal of effective planning for "vibrant regions" such as "priority growth investment areas" and "regional innovation clusters." Included within this goal is a set of 10 physical and economic values known as "Garden State Values" -- a framework of best practices that promote redevelopment, the protection of critical natural resources, and healthy lifestyles, all of which the commenter's remarks support. In eligible and appropriate cases, the Department believes that these waiver rules may further these best practices where the strict compliance with Department rules may sometimes work against these goals.

**282. COMMENT:** The proposed waiver rule is not consistent with the smart growth policies and the goals of the State Plan as the issuance of waivers will result in the loss of critical natural resources, the creation of more pollution and promote little beneficial economic growth. Allowing increased, more intense, and higher density development through the

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issuance of waivers is not consistent with State Planning Goal 2: Conserve the State's Natural Resources and Systems. Under the waiver rule, development could be permitted in critically sensitive areas such as stream buffers, flood plains, and wetlands, with devastating impacts to local ecosystems and hydrology. The resulting economic growth will not be consistent with State Planning Goal 3. This growth will not be beneficial as ecological resources and communities will suffer from more pollution, traffic, and degraded resources as a result of exempting polluters and developers from the State's environmental regulations. The waiver rule is not consistent with State Planning Goal 4: Protect the Environment, Prevent and Clean Up Pollution, as this waiver rule will roll back ninety-eight Department regulations, preventing the protection of natural resources and allowing the creation of more pollution. Environmental protection and regulations for the State's largest polluters can be simply waived away under this provision, making the proposal completely contradictory to the goals of the State Plan outlined above. (486)

**RESPONSE:** The commenter's concern that environmental protection regulations may be "simply waived away," rendering the waiver of strict compliance with existing rules incompatible with State planning goals, is not warranted. Nor will the waiver rules "roll back" Department regulations. Please see the Department's response to Comments 24-25, 54, 79-80, 149-160, 161-171, 175, and 261-262, as well as its responses to Comments 24-25, 31-32, 79-80, 120-132, 149-159, and 160-170, discussing the standards, criteria and limitations of the waiver rules informing the public and guiding and controlling the Department's future decision-making under the rules.

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The State Planning Commission has recently taken action to propose a new State Strategic Plan as the Draft State Plan and to close the cross-acceptance process related to the 2001 State Development and Redevelopment Plan. Although the State Strategic Plan and the 2001 State Development and Redevelopment plan contain major differences, the “smart growth goals” of the 2001 plan continue to be represented in the State Strategic Plan’s goal of promoting effective planning for “vibrant regions.” Therefore, irrespective of the repeal of Executive Order No. 4 (2002) provided for in Executive Order No. 78 (2011), and for the reasons set forth in the Smart Growth Impact Statement included in the rule proposal, the Department believes that the rule comports with the goals of smart growth and implementation of the State Plan process. The commenter assumes that waivers will be issued for "higher density development" and states that waivers could permit development in sensitive areas, concluding that these waiver rules are inconsistent with "smart growth" and three specific goals of the State Plan. However, the commenter takes these goals of the State Plan out of context. One of the basic tenets of smart growth is the desirability of concentrating development in centers so as to prevent the type of sprawl development that is so destructive of the environment. Therefore, issuance of a waiver allowing higher density development in eligible and appropriate cases could, under the right circumstances, be beneficial to smart growth goals.

**283. COMMENT:** The proposed rule does not adequately protect open space from diversion to other purposes, as required by Green Acres Bond Acts and the Garden State Preservation Trust Fund Act. At a minimum, the proposed rule must specify that it does not apply to the diversion of protected open space to purposes other than public outdoor recreation and/or

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conservation. The use of “or” in “quantitative or qualitative” will be fatal to the protection of open space. Constitutional requirements prohibit the net loss in the quantity as well as the quality of protected open space. (328)

**RESPONSE:** N.J.A.C. 7:1B-2.1(b)1 prohibits the Department from waiving any requirement of a Federal or State statute or a Federal regulation. To the extent that the procedural requirements for diversion of land acquired by the State or by a local government unit using Green Acres Bond funds or Garden State Preservation Trust funds are set by statute (see N.J.S.A 13:1D-51 et seq., N.J.S.A. 13:8A-20 et seq., and N.J.S.A. 13:8C-1 et seq.), those requirements could not be waived under these rules. To the extent that other requirements applicable to diversion of open space lands are established in Department regulations but not prescribed by the enabling statute, it is possible that a waiver of such requirements could be approved. However, applications for waivers will have to meet all requisite bases and criteria of the waiver rules in order to be approved. Accordingly, these waiver rules may not contravene the State Constitution and the Department will not approve a waiver that is inconsistent with constitutional requirements. However, to the Department's knowledge there are no detailed specifications about the use of Green Acres encumbered parkland or requirements for the diversion application process in the State Constitution.

**284. COMMENT:** There are innovative engineering solutions available in the marketplace that would prove to be more beneficial for the environment. Unfortunately, the current regulatory approach by the Department does not permit their use. The proposed rules

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recognize the importance of evaluating what would provide an overall net environmental benefit to natural resources or environmental good. (490)

**RESPONSE:** The Department acknowledges the commenter's support for the rules.

**285. COMMENT:** We have no confidence in the scientific validity, efficacy, or enforceability of mitigation plans to off-set destruction or degradation of existing resources. There is a lack of sound scientific footing for the use of mitigation to provide equivalent environmental benefits. Moreover, neither DEP nor any other State or regional agency has shown it is structured and dedicated to ensuring mitigation projects are successfully completed, and once a development is complete, it is, practically speaking, impossible to undo the permit if the mitigation does not work as promised. (321)

**286. COMMENT:** DEP's definition of "net environmental benefit" to include mitigation reflects an unacceptably utilitarian view of DEP's statutorily designed purpose, regardless of the requirement that mitigation exceed the requirement of the waived rule. Allowing undefined "mitigation" to weigh in favor of allowing circumvention of environmental regulation runs counter to the idea that the State should protect the environment as an end in itself. (239)

**287. COMMENT:** "Net environmental benefit" is highly objectionable. The rules are too vague in failing to provide any criteria or scientific requirements for evaluating elements

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such as “other related environmental good.” The term "substantially outweigh" is not defined. Any project could qualify for this exception as long as “suitable” mitigation was offered. On a case-by-case basis, the Department would speculate as to some amount of onsite and/or off site mitigation necessary to overcome assured environment destruction from the proposed activity. We find this to be dangerous and indefensible, particularly given the high failure rate (in terms of both quantity and quality) of mitigation projects. (6, 61, 87, 113, 239, 309, 321, 358, 380, 472, 486, 509, 527)

**288. COMMENT:** Why did the DEP propose that mitigation may be a consideration in waiver decisions, rather than requiring mitigation as a condition of waiver approval when other standards have been satisfied, as is the case with other existing DEP rules? (509)

**289. COMMENT:** The mitigation allowed for in the definition of “net environmental benefit” does not mandate that the effect, value or quantity of the mitigation exceed the environmental damage allowed by the waiver, it merely requires that the mitigation be beyond what the waived rule would have required -- so “net environmental benefit” can be achieved by an insignificant level of activity for the environment. In a case where the rule being waived requires protection of a resource, and waiver allows its destruction, what would be defined as a net environmental benefit? Protection of healthy ecosystems is always more cost beneficial than damage with later restoration. So to the extent the Waiver Rule is accepting mitigation in lieu of protection it is failing to be environmentally and economically wise. Further, mitigated environments are nowhere near as functional ecologically or in terms of addressing

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stormwater runoff or pollution issues as mature habitats, and therefore cannot be considered on par in performance with mature habitats proposed for destruction. (416)

**RESPONSE TO COMMENTS 285 THROUGH 289:** The Department has over 20 years of experience with mitigation and continues to be a national leader in mitigation research and implementation. In its freshwater wetlands program, for example, the Department employs dedicated staff to work specifically on the review, approval and successful completion of wetland mitigation projects. The Department has supported the efforts of its mitigation staff through the development of comprehensive mitigation rules at N.J.A.C. 7:7A-15. In addition, the Department has developed a state of the art "Water Budget Model" which ensures that sites chosen for mitigation will function hydraulically to facilitate successful mitigation. This model is available online at [http://www.nj.gov/dep/landuse/o2\\_budgetmanual\\_final\\_7\\_22\\_08.pdf](http://www.nj.gov/dep/landuse/o2_budgetmanual_final_7_22_08.pdf).

Regarding mitigation failures, the Department has experienced successes using its enforcement powers to bring failed mitigation sites into compliance with rules and permit conditions. The Department agrees that in many cases it is preferable to protect existing resources rather than to allow damage and require later restoration as mitigation. However, in some cases the resource affected by a waiver may already be partially degraded, such that it may be environmentally better to enhance or restore less degraded resources nearby, resulting in a net gain in resource value, habitat and other benefits. In addition, if a demonstration of net environmental benefit includes a mitigation component, the definition of net environmental benefit requires that the mitigation, combined with any other waiver conditions, must ensure that environmental benefits "substantially outweigh" environmental detriments. N.J.A.C. 7:1B-1.2.



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This does not comport with the commenter's claim that net environmental benefit can be achieved with an "insignificant level of activity for the environment." One commenter suggests that the Department require mitigation as a condition of every waiver. However, in some cases it may be more appropriate or more environmentally beneficial to achieve net environmental benefit through means other than mitigation. Therefore, the rules provide the Department the flexibility to allow, but not mandate, the use of mitigation as a component of ensuring net environmental benefit. The commenter is incorrect in stating that "[A]ny project could qualify for this exception as long as 'suitable' mitigation was offered." Performance of mitigation does not, by itself, meet the requirement that a waiver must result in a net environmental benefit.

The Department does not believe the waiver rules are vague, and one commenter's characterization of the waiver rules as "allowing circumvention of environmental regulation" is not justified. Please see the Department's responses to Comments 24-25, 31-32, 79-80, 120-132, 149-160, and 161-171, discussing the standards, criteria and limitations of the waiver rules informing the public and guiding and controlling the Department's future decision-making under the rules.

**290. COMMENT:** There is a science-based methodology to determine net environmental benefit. It goes by the acronym of NEBA, net environmental benefit analysis. It has been developed and continues to be under development at the Oak Ridge National Laboratory, but it does not appear to be a very good fit with this waiver rule. It is long, time-consuming, data intensive, and it can yield valuable results, but it is a bad fit with the whole concept of waivers, particularly if waiver requests are generated on an ad hoc basis. The Oak Ridge

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Laboratory says, "Primary information gaps related to NEBA include: non-monetary valuation methods, exposure-response models for all stressors, the temporal dynamics of ecological recovery, and optimal strategies for ecological restoration." Those are the things that are missing. So when the Department is thinking about doing this quickly and effectively to the benefit of all concerned, if it is going to invoke science, it had better think twice. (361)

**RESPONSE:** The Department agrees that the methodology the commenter describes would be inappropriate in the context of these waiver rules, and the Department does not intend to apply this method. Instead, the Department will apply the definition of "net environmental benefit" at N.J.A.C. 7:1B-1.2 in considering waivers under these rules. Concern that the waiver rules may result in favoritism, cronyism or other inappropriate, arbitrary or unreasonable approving of waivers is unwarranted. Please see the Department's responses to Comments 24-25, 31-32, 79-80, 120-132, 149-160, and 161-171, discussing the standards, criteria and limitations of the waiver rules informing the public and guiding and controlling the Department's future decision-making under the rules.

**291. COMMENT:** This rule proposes that a waiver of strict compliance "might" be appropriate where the waiver "could" result in a net environmental benefit. The proposed provision that a waiver "could" result in net environmental benefit is ludicrous in that it does not mandate a net environmental benefit as a requirement of issuing the waiver. This provision should be modified to limit issuance of a waiver only to cases where a prospective

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applicant has clearly demonstrated through submission of verifiable data that a net environmental benefit "will" result from the waiver. (509)

**RESPONSE:** Based on its experience with rulemaking and implementing its regulatory programs, the Department determined that net environmental benefit should not be the only basis for a waiver. There are four bases for waivers, as set forth at N.J.A.C. 7:1B-2.1(a). Assuming all other limitations and requirements in the waiver rules are met, the Department does not believe it should not deny a waiver that satisfies one of the other three bases (conflicting rules, strict compliance would be unduly burdensome, and public emergency) only because the waiver does not result in a net environmental benefit. However, net environmental benefit is one of the waiver evaluation criteria at N.J.A.C. 7:1B-2.2(a) that the Department will consider when reviewing every waiver request. Please see the Department's responses to Comments 24-25, 79-80, 149 - 160, 161 - 171, 175, and 260 - 261, addressing concerns about potential environmental degradation.

The language cited by the commenter does not appear in the substantive text of the waiver rules. It appears only in the rule proposal summary, which summarizes and explains the proposed rules but will not be part of the rules when they are promulgated.

**7:1B-1.2, 2.1(a)4 and 2.2(a)8: Public emergency**

**292. COMMENT:** Allowing waiver of ecological protections in the face of a claimed emergency is often, in both the short term and the long term, not wise and ends up being more costly in terms of ramifications and future repair costs. For example, after flood events

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communities often use a claim of emergency need to support their request to scour out stream corridors, stream banks and floodplains. The result is increased future flooding and erosion that requires near term and long-term restoration and taxpayer dollars for emergency and rebuilding response. The proposed Waiver Rule allows for waiver without any guidance, which is reckless and opens tremendous opportunity for abuse and misapplication. (416)

**293. COMMENT:** The proposed rule includes a "public emergency" provision as a basis for issuing a waiver from strict compliance. Given the fact that existing DEP rules already include provisions to allow permit authorizations to respond to emergencies, why did the DEP propose a duplicative provision that only adds to agency bureaucracy and red tape? Please cite specific examples of previous DEP permit cases where the existing emergency authorization provisions did not adequately respond to emergency circumstances. (509)

**294. COMMENT:** Exceptions for public emergencies are already embedded in the DEP's existing regulations. Many other waiver mechanisms are incorporated into other regulatory schemes, thus making the proposed waiver rule unnecessary. Further, an agency has inherent power to waive de minimis violations of objective standards. SMB Associates at 59. (108)

**295. COMMENT:** The rule mandates that rules be waived in public emergencies, and that is all it says on the matter. What types of emergencies? All emergencies? Should all rules be waived during emergencies that are requested? Do rules that are being waived need to be related to the emergency? These are clarifications that need to be incorporated into the rule.

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(120)

**296. COMMENT:** N.J.A.C. 7:1B-2.1(a)4 is redundant, as a declared public emergency already adequately suspends the rules. In addition, there is no attempt by DEP to justify including a “waiver under emergency” category in the Waiver Rule Proposal based on the Common Sense Principles stated in Governor Christie’s Executive Order Number 2 (2010). This proposed “public emergency” provision would allow DEP to unnecessarily waive required compliance with environmental protection standards. (20, 87, 123, 239, 509)

**297. COMMENT:** Regarding proposed N.J.A.C. 7:1B-2.1(b)4 and 2.2(a)8, and the proposed N.J.A.C. 7:1B-1.2 definition of “public emergency”: Could a declaration by the Governor of a state of fiscal emergency be a basis for waivers under N.J.A.C. 7:1B? Why or why not? An argument for an affirmative answer would be that such waivers would result in a reasonable and effective response to the declared public fiscal emergency because positive economic impacts of such waivers (see 43 N.J.R. 475) would result in increased revenue collections and decreased spending by the State. (317)

**RESPONSE TO COMMENTS 292 THROUGH 297:** As stated in the definition of the term, a public emergency exists when a State or Federal official with the authority to do so declares a public emergency. It is impossible for the Department to foresee what types of emergencies will be declared in the future and when and whether waivers will be appropriate. Contrary to one commenter's assertion, these rules do not "mandate" that rules be waived in public emergencies.

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N.J.A.C. 7:1B-2.1(a)4 merely authorizes the Department to consider waivers in the case of a public emergency as defined in the rules. Once the Department has determined that a waiver may be considered on this basis, all other requirements of the waiver rules must also be met. Among other decision-making criteria in the rules, the Department, pursuant to N.J.A.C. 7:1B-2.2(a)7, will consider whether the waiver would result in a reasonable and effective response to the public emergency. The Department believes that rather than increase "red tape," these rules will enable the Department to reduce red tape, by providing the Department with regulatory flexibility to address the limited situations addressed by the rules. Not all DEP rules provide exceptions for emergencies, and in some cases the existing emergency provisions may not be adequate to cope with a particular emergency. Further, a project may be subject to more than one Department rule, with differing and possibly conflicting approaches to responding to emergencies. The Department agrees that all emergency responses should be carefully evaluated for effectiveness in both the short and the long term. That is the basis of N.J.A.C. 7:1B-2.2(a)7, requiring the Department to consider whether a waiver would result in a reasonable and effective response to the public emergency. These rules are not, as one commenter asserts, simply redundant with existing rules that already have waiver provisions. Unlike those rules, the regulatory waiver discretion under these rules enables the Department, in eligible and appropriate cases, to fashion possible remedies that may not be available under other rules.

The Department is confident that the waiver rules provide ample guidance and will not result arbitrary decisions or regulatory abuse. Please see the Department's responses to Comments 24-25, 31-32, 79-80, 120-132, 149-160, and 161-171, discussing the standards,

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criteria and limitations of the waiver rules informing the public and guiding and controlling the Department's future decision-making under the rules.

### **7:1B-2.1 Basis for waiver**

**298. COMMENT:** The Department outlines the four limited situations where a waiver may be issued: conflicting rules; strict rule compliance would be unduly burdensome; net environmental benefit and public emergency. These instances are appropriate and we also note that waivers would be issued only for future regulated activities. (490)

**RESPONSE:** The Department acknowledges the commenter's support for the rules. As provided in N.J.A.C. 7:1B-2.1(a), waivers issued under the rules will have prospective application to regulated activities. Please see the response to Comments 411-414 for further discussion of the prospective application of the rules.

**299. COMMENT:** The Waiver Rule Proposal allows DEP to waive a provision based on only one of the listed conditions, disregarding the others. It is inappropriate to allow DEP to waive environmental protections either if such a waiver alleviates no undue burden, or if such a waiver results in environmental harm. To allow either of these, especially the former, makes clear that the Waiver Rule Proposal constitutes a broad rollback of the environmental law, no matter how well-justified the costs of existing environmental regulation to the regulated community. (239)

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**RESPONSE:** Based on its experience with rulemaking and implementing its regulatory programs, the Department determined that a waiver could be appropriate on any one of the bases identified at N.J.A.C. 7:1B-2.1(a), assuming all other limitations and requirements in the waiver rules are met. Accordingly, the Department would not deny an otherwise beneficial waiver only because the waiver would not alleviate an undue burden. Similarly, if a waiver would allow for a more appropriate response to a public emergency, or for a better resolution of conflicting rules, the Department would not deny such a waiver only because the waiver would not alleviate an undue burden. As to the commenter's assertion that the rules indicate a "rollback" of environmental law, please see the Department's responses to Comments 24-25, 54, 79-80, 149 - 160, 161 - 171, 175, and 260 - 261, addressing concerns about potential environmental degradation.

**300. COMMENT:** Particular to New Jersey marinas and marine businesses, we suggest the following as general examples of waivers to specific rules that should be considered by the Department when an environmentally beneficial project would have otherwise been prevented from receiving approval:

- 7:7E-3.2 Shellfish habitat: Waiver provisions should be considered where all marinas in shellfish habitat, regardless of size, should be able to perform both new and maintenance dredging in order to maintain existing facilities.
- 7:7E-3.6 Submerged vegetation habitat: Waiver provisions should be considered where all marinas in submerged vegetation habitat, regardless of size, should be able to perform both new and maintenance dredging in order to maintain existing facilities.



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- 7:7E-3.15 Intertidal and subtidal shallows: Waiver provisions should be considered where new dredging is required within an existing facility in order to maintain the economic viability of the facility. Mitigation should not be required for this activity within existing facilities.
- 7:7E-3.23 Filled water's edge: Waiver provisions should be considered where the expansion into the "waterfront portion" of a marina site is required for activities that are clearly vital to marina operation, such as repair and maintenance services, boat sales, parking for the marina, and dry storage.
- 7:7E-4.5 Recreational docks and piers: Waiver provisions should be considered where certain recreational docking facilities, such as youth sailing programs, handicap boat access, etc. require docks in excess of 8 feet in width; and Waiver provisions should be considered where minor increases in dock or pier coverage, within marinas which have existing dock or pier structures exceeding eight feet in width, do not result in the need to reduce the size of these structures to eight feet.
- 7:7E-4.6 Maintenance dredging: Waiver provisions should be considered where maintenance dredging has been conducted on a site, not just within the last 10 years; and Waiver provisions should be considered where previously authorized depths need to be exceeded in order to meet current economic demands of the facility. Where explicit evidence is not available, the burden of proof for determining that prior dredging has occurred should be based upon consideration of available historical evidence indicating the presence of marina activities.

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- 7:7E-4.8 Dredged material disposal: Waiver provisions should be considered where an ultimate disposal location for uncontaminated dredge sediments is unknown (i.e. landscape mulch blending projects and general stockpile sale).
- 7:7E-4.19 Breakwaters: Waiver provisions should be considered where breakwaters that deviate from the current spacing requirement are required in order to maintain safety at an existing facility. Non-vertical breakwaters, composed of stone or other materials, should also be considered.
- 7:7E-7.3 Resort/Recreational Use: Waiver provisions should be considered where marinas cannot meet the design standards of 7:7E-7.3A.
- 7:7E-7.3A Marina Development: Waiver provisions should be considered where marinas cannot meet the design standards of 7:7E-7.3A.
- 7:7E-7.11 Coastal engineering: Waiver provisions should be considered where structural shore protection is required to protect all marina development, not just the "water dependent" portions.
- 7:7E-7.12 Dredged material placement on land: Waiver provisions should be considered where an ultimate disposal location for uncontaminated dredge sediments is unknown (i.e. landscape mulch lending projects and general stockpile sale). (97)

**301. COMMENT:** We request that the Department include, as a basis for a waiver, provisions that the waiver would result in the protection of property owner rights vested prior to the adoption of regulations in question. As part of the social and economic impact applicability of the Waiver Rules, it is imperative that the waiver standards acknowledge and provide a

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mechanism to facilitate the resolution of regulatory conflicts prior to a denial decision thereby reducing State liability for “regulatory takings.” The case load volume and backlog of procedural matters resulting from overly burdensome rules, some of which clearly extend beyond the intent of the enabling legislation, strain the resources of both the State's regulatory and legal staff and delay the resolution of matters beneficial to the State. Further, the absence of waiver provisions has resulted in property owners having to pursue exhaustive litigation because no other recourse is available. The Waiver Rules propose safeguard measures for the implementation of standards to determine waiver applicability, but should specifically cite that the granting of a waiver would advance a net economic benefit to the State and its taxpayers. (256, 515)

**302. COMMENT:** The section should include a provision for Public Safety, and Public Safety should be defined as follows: "Public Safety" means a situation where the local governing body has adopted a resolution, ordinance or other official action to establish that the proposed work is in the interest of the safety, health and welfare of the general public. This is a necessary addition as public safety issues do not always qualify as public emergencies. (389)

**303. COMMENT:** We request that the Department consider the proposal to include, as a basis for a waiver, renewable energy projects or other similar projects as having a beneficial "net environmental benefit" and be subject to waiver applicability. Renewable energy resources provide many immediate positive environmental impacts by avoiding or reducing

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risks associated with fossil fuel resources. It is recognized that renewable energy sources, such as wind and solar, are important resources with the potential to provide for sustainable energy development, and that the development of such facilities should be encouraged by the Department. The specific inclusion of renewable energy projects as having a net environmental benefit will encourage the people and businesses of New Jersey that the Department is an advocate for renewable energy projects. (256, 515)

**304. COMMENT:** We request that the Department consider the proposal to include, as a basis for a waiver under N.J.A.C. 7:1B-2.1(a), projects recognized by the Governor to be in the best interest of the people of New Jersey. The Governor may at times recognize the importance of a project to the State's economy or critical to the well-being of the State of New Jersey. Through the input from all of the State's agencies, the Governor can identify appropriate projects or programs that warrant a waiver. With input from the diverse State departments, an appropriate balance can be struck between the need to sustain viable economic and environmental conditions in the State. The Waiver Rule could provide a mechanism for the Governor to provide exceptions to projects which can result in a net benefit to the people of New Jersey. (256, 515)

**RESPONSE TO COMMENTS 300 THROUGH 304:** The commenters suggest that the rules be amended to provide that waivers will be considered in certain categories of cases or issued in certain specified situations. However, any attempt to categorize the situations or rules that would be eligible for a waiver would rob the rules of the very flexibility they are designed to provide.

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Based on years of experience with rulemaking and implementing its regulatory programs, the Department has found that strict compliance with rules can sometimes produce unreasonable, unfair or unintended results that may actually frustrate, rather than advance, the general legislative purposes of its enabling statutes or rules. The waiver rules will afford the Department the ability and regulatory flexibility to consider waiving strict compliance with rules in the four defined and limited situations set forth in the rules. The waiver rules do not prevent the Department from evaluating any of the various situations described by the commenters and issuing a waiver if the Department determines that the particular situation meets all of the requirements in the rules and a waiver is justified.

**305. COMMENT:** N.J.A.C. 7:1B-2.1 states that the rules will enable the Department to evaluate which requirements might be waived in order to best preserve public health, safety, and welfare, and the environment. However, this provision seems to contradict another proposed provision that would allow waivers in cases where the rules are "unduly burdensome." (509)

**RESPONSE:** It appears that the commenter is referring to N.J.A.C. 7:1B-1.1(a), not N.J.A.C. 7:1B-2.1. N.J.A.C. 7:1B-1.1(a) does not "enable the Department to evaluate which requirements might be waived in order to best preserve public health, safety, and welfare, and the environment." Instead, this provision is the statement of the purpose of the rules. The statement of purpose is not inconsistent with the "unduly burdensome" basis in the rules for requesting a waiver. Every applicant for a waiver on that basis must satisfy all other requirements of the

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waiver rules. Among other requirements, the Department must apply the decision-making criteria set forth in N.J.A.C. 7:1B-2.2(a), including, for example, whether the waiver would be consistent with its core missions. Please see the Department's responses to Comments 24-25, 31-32, 79-80, 120-132, 149-159, and 160-170, describing the substantive standards, decision-making criteria and limitations of the waiver rules informing the public and guiding and controlling the Department's future decision-making under the rules.

**306. COMMENT:** N.J.A.C. 7:1B-2.1(b) will obviously cause confusion and has already resulted in troublesome statements by NJDEP representatives. For example, in an article published in the Star Ledger on March 9, 2011, entitled "N.J. Proposes Single Waiver Allowing DEP to Bypass rules to approve development projects," an NJDEP spokesman admitted that the waiver provisions are subjective and that it would be up to the NJDEP to decide what would work best in complex situations. He provided an example of allowing a home to be built within a protected stream corridor near endangered species habitat if a detention basin is constructed for water quality purposes. If the NJDEP spokesperson can provide such wide ranging opportunities for a waiver, one must question what limitations to the exercise of discretion are contained in this proposed rule. (123)

**RESPONSE:** The waiver rules provide standards and limitations that will guide the exercise of the Department's discretion. Each waiver application will be judged on its own merits and will only be approved if all standards and requirements in the rules are met. Please see the Department's response to Comments 24 and 25 regarding the purpose of the waiver rules to give

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it regulatory flexibility to consider approving waivers from strict compliance with rules in the four limited situations set forth in the rules, its responses to Comments 10, 21-22, 23, 24-25, 31-32, 42, and 54 regarding the salutary function of the waiver rules to provide the Department with a reasonable decision-making mechanism enabling it to potentially resolve certain limited situations not addressed by existing rules, and its responses to Comments 24-25, 31-32, 79-80, 120-132, 149-159, and 160-170, describing the substantive standards, decision-making criteria and limitations of the waiver rules informing the public and guiding and controlling the Department's future decision-making under the rules.

**7:1B-2.1(b): Rules excluded from waiver**

**307. COMMENT:** Proposed N.J.A.C. 7:1B-2.1(b) should be expanded to provide also that the Department shall not waive any requirement in N.J.A.C. 7:1B. If any such requirement can be waived, then N.J.A.C. 7:1B fails to fulfill its stated purpose of setting forth the circumstances in which the Department may waive strict compliance with Department rules. (317)

**308. COMMENT:** The scope of the Waiver Rule Proposal is extreme to the point of absurdity: the proposed waiver rules allow waiver of the rules that limit waiver. That the Waiver Rule Proposal can be invoked to waive itself renders meaningless even the weak limits proposed therein. (239)

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**RESPONSE TO COMMENTS 307 AND 308:** The Department agrees that allowing a waiver of any provision of these waiver rules would create confusion and undermine the purpose of the rules, which is to establish through rulemaking the requirements, standards, and criteria that will govern the Department's waiver decision-making. As explained in response to Comment 210, the Department on adoption is modifying the list of rules in N.J.A.C. 7:1B-2.1(b) that may not be waived to include any provision of these waiver rules.

**309. COMMENT:** A waiver shall never be granted when receptors are at risk such as vapor intrusion receptors, potable well receptors, water bodies, etc. (20)

**310. COMMENT:** N.J.A.C. 7:1B-2.1(b) contains a list of situations in which the Department shall not waive any rule. According to the summary for N.J.A.C. 7:1B-2.1, the list of rules for which the Department will not grant a waiver "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 sufficiently burdensome to justify Department consideration of waiver requests (for example, boat, hunting, fishing and trapping licenses). The NJDEP should include in this rule a specific list of DEP regulations and/or rules for which waivers under this rule will not be granted, particularly as relates to N.J.A.C. 7:1B-1(b)1, 2 and 6. This would provide greater clarity as to application of this rule. As an alternative, a formal waiver applicability determination process is needed. (285)

**311. COMMENT:** N.J.A.C. 7:1B-2.1 is vague and open to multiple interpretations. While



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the rules say there are certain statutes that it cannot apply to, it does not delineate those, it is very unclear. (363, 385, 386, 493)

**312. COMMENT:** The vagueness of N.J.A.C. 7:1B-2.1(b) fatally undermines the fairness and transparency of the rulemaking process. The public has no ability to comment knowledgeably or effectively on this rule because it is totally unclear which regulations the current DEP proposed rule purports to amend by allowing waivers. The DEP should at least include the list of rules it believes can and cannot be waived under this provision. That it has not done so further suggests that the Waiver Rule Proposal not only includes no clear standards for its application, but contemplates no clear standards for its application. (239)

**313. COMMENT:** In the absence of any specific guidelines as to the scope of regulation that cannot be waived, it is not clear that regulators will agree on the interpretation of N.J.A.C. 7:1B-2.1(b), and therefore on which rules can and cannot be waived. This illustrates once again that DEP should establish separate waiver standards for individual regulations pursuant to individual statutes, rather than a single poorly delineated blanket rule. (239, 509)

**314. COMMENT:** Please identify each specific requirement, rule, standard, program and designation referred to at proposed N.J.A.C. 7:1B-2.1(b)1-7 where the Department will not approve any waiver, so that the public can understand accurately and plainly the expected consequences of the rule. (509)

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**315. COMMENT:** Historical data and technical reports prepared by DEP, DEP Contractors, NJ State Police Office of Emergency Management and FEMA over the past 30 years have clearly documented that strict regulatory compliance with the Department's Flood Hazard Area and Coastal Zone Management rules protects people and property from storm and flood damages, and significantly reduces taxpayer expenditures on storm and flood damage recovery. Please provide details and citations for the specific studies, technical data and cost/benefit analyses that DEP conducted to support the current proposal to allow waivers to these existing rules. (509)

**316. COMMENT:** While we support shielding as many regulations as possible from waiver, N.J.A.C. 7:1B-2.1(b) does not communicate to us or to the public which substantive regulations cannot be waived under the proposed rule. For example, with respect to the first exemption, it is not possible for us to determine where the Department will draw the line between regulations “authorized by statute” and “established by statute.” After all, every regulation must be authorized by statute, and consequently, can be said to have been established in accordance with that statute. (113, 527)

**317. COMMENT:** This proposed waiver rule would apply to all environmental regulations, although with some ill defined exceptions. It is impossible to know which rules DEP thinks fall into these exceptions and which do not. Presumably, DEP believes most rules do not fall into the exceptions and DEP should explain itself in this regard. (6, 61, 309, 358)

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**RESPONSE TO COMMENTS 309 THROUGH 317:** The commenters request more specificity regarding what rules are not eligible for a waiver. The rules do not provide such details because such specificity would deprive the rules of the very regulatory flexibility they are intended to provide to the Department. Over the years, in implementing a wide variety of rules and applying them in thousands of different situations, the Department has found that no rule, no matter how well-crafted and well thought out, will anticipate and perfectly fit every possible situation to which it may apply. It has found that strict compliance with existing rules can sometimes produce unreasonable, unfair or unintended results that may actually frustrate, rather than advance, the purposes of its enabling statutes or existing rules. The waiver rules will afford the Department the ability and regulatory flexibility to consider waiving strict compliance with existing rules where it is shown that the four requisite grounds, or bases, in the rules for a waiver are satisfied and that all other requirements of the rules are met. It is not clear to what one commenter refers regarding the distinction between rules “authorized by statute” versus those “established by statute.” The waiver rules, as proposed and adopted, do not use either of these terms.

In response to one commenter, the Department has modified the waiver rules on adoption to expressly preclude waiver of the waiver rules, as discussed in its response to Comment 210.

In response to the claim of vagueness, please see the Department’s responses to Comments 24-25, 31-32, 79-80, 120-132, 149-160, and 161-171, discussing the substantive standards, decision-making criteria and limitations of the waiver rules informing the public and guiding and controlling the Department’s future decision-making under the rules.

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**318. COMMENT:** Proposed N.J.A.C. 7:1B-2.1(b) does not allow waivers for Federally delegated programs, but those programs are not identified. DEP must believe the exceptions do not exclude all environmental rules that are connected with any Federal statute or program, since that reading would essentially negate the proposed waiver rule. But if not that, then how is one to know where the exceptions apply? Further, New Jersey has historically opted to enact stricter legislation and the delegation exception does not address this fact. (6, 61, 123, 309, 321, 358)

**RESPONSE:** The Department is experienced with reviewing Federal delegation requirements, fashioning its own rules to meet those requirements, and documenting to the Federal agencies involved that the Department's rules are properly implementing Federally-delegated programs. It will continue to do so. The commenter is correct that in some cases the New Jersey Legislature has enacted legislation imposing requirements that are stricter than Federal law requires. In regard to Federal statutes and programs, the Department believes that the rules excluded from waiver under N.J.A.C. 7:1B-2.1(b)1, 2 and 3 provide sufficient guidance. It may be that some rules tangentially related to Federal statutes or programs would be eligible for waiver under the rules. The Department declines to speculate on this in the absence of a concrete application for a waiver setting forth all relevant facts and circumstances. It is unclear why the commenter believes that any such waivers would negate the waiver rules.

**319. COMMENT:** The Highlands Rules at N.J.A.C. 7:38 permit waivers in accordance with N.J.A.C. 7:38-6.4, pursuant to the Highlands Water Protection and Planning Act. Will the

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proposed waiver rule allow waivers from the Highlands Rules, or expand the basis for which such waivers can be granted to include the four proposed criteria identified in N.J.A.C. 7:1B-2.1? (285)

**RESPONSE:** The Highlands Water Protection and Planning Act Rules at N.J.A.C. 7:38 are rules of the Department and therefore an application to waive strict compliance with a rule at N.J.A.C. 7:38 would be considered if it satisfies at least one of the four requisite bases for seeking a waiver under the rules and all other requirements of the waiver rules are met. As provided at N.J.A.C. 7:1B-1.1(c), these waiver rules do not preclude the availability of other waivers, exceptions, variances, or emergency authorizations under existing Department rules. A waiver under N.J.A.C. 7:38-6.4 would be an alternative available to an applicant.

**7:1B-2.1(b)1, 2 and 3: Conflict with State and Federal rules and programs**

**320. COMMENT:** The Department would not issue a waiver regarding "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." As it is unclear what the specific, Federally or State imposed requirements or duties would be, the Department should provide a better explanation for what these would entail. The proposal includes the statement that a waiver would not be issued "where the waiver would not be consistent with New Jersey's delegation, authorization, or assumption of authority pursuant to that Federal program". The language can be clarified by rewording the text as follows: "where the waiver would be inconsistent with..." (168, 239, 490)

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**321. COMMENT:** N.J.A.C. 7:1B-2.1(b)1, if read according to its plain language, should negate the proposed waiver rule, since the proposed rule is designed precisely to permit the waiving of duties imposed by State statutes, via the regulations that are adopted to implement those duties. The proposed rule seems to use the word “specific” to modify duty in order to capture some narrow range of requirements, presumably far less than the whole universe of statutory requirements. But it is impossible to know what DEP believes, or will in application assert, these “specific,” as opposed to all the other, non-specific, duties are. (321)

**RESPONSE TO COMMENTS 320 AND 321:** The requirements or duties imposed by a Federal or State statute or Federal regulation vary by Department program and the applicable statutes and regulations. As explained in response to Comment 23, the Department has modified N.J.A.C. 7:1B-2.1(b)1 on adoption to delete the qualifier “specific” in the context of a “requirement” or “duty” imposed by a Federal or State statute or a Federal regulation, as the Department does not have the authority to waive requirements or duties imposed by a Federal or State statute or a Federal regulation of any sort, whether general or specific.

As to the suggestion that N.J.A.C. 7:1B-2.1(b)1 negates the entire waiver rule, the Department disagrees. The commenter’s premise appears to be that the content of every Department rule is dictated specifically by a statutory provision and that therefore no Department rule can be waived under these rules, thus making the rules ineffective. While all Department rules are promulgated pursuant to statutory authority, many statutes establish the basic framework for a regulatory program and then direct the Department to promulgate regulations

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using the agency's expertise and exercising its discretion. Other statutes are much more detailed and prescriptive, circumscribing the Department's exercise of discretion in promulgating implementing regulations. Rules promulgated pursuant to generalized authority that establish regulatory standards set by the Department using its discretion may be waived under these rules if all requirements and criteria of the rules are met. In contrast, a Department rule that codifies a standard or other requirement expressly stated in a State or Federal statute or in a Federal regulation cannot be waived under these rules.

As to the commenter's suggestion that N.J.A.C. 7:1B-2.1(b)2 should be modified on adoption to state that the Department cannot issue a waiver "where the waiver would be inconsistent with ... delegation, authorization or assumption of authority of a Federal program," the Department does not see a material difference between that language and the language in the rule that states that a waiver cannot be approved "where the waiver would not be consistent with .... delegation, authorization or assumption of authority ...." As a result, the suggested change has not been made.

**322. COMMENT:** The scope of the exception at N.J.A.C. 7:1B-2.1(b)1, when Federal or State law allows waiver of a rule "concerning" a "specific" requirement or duty of Federal or State statute, or Federal regulation, as opposed to a non-specific requirement or duty, is unclear -- if "such a waiver" means an identical waiver standard to that imposed by statute, the Waiver Rule Proposal is redundant. If the statutory waiver imposes a different standard, DEP has no legal authority to substitute its own standard. (239)

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**RESPONSE:** Under N.J.A.C. 7:1B-2.1(b)1 (as modified on adoption; see response to Comment 23), the Department cannot waive a requirement or duty imposed by Federal or State statute or Federal regulation unless the applicable statute or Federal regulation itself authorizes waiver of the duty or requirement. If a State or Federal statute or a Federal regulation authorizes waiver of the duty or requirement it imposes, then the availability of a waiver will be determined by the terms of the State or Federal statute or Federal regulation, if different from the terms of these waiver rules. However if a Federal or State statute or Federal rule provides for waiver of the duties and requirements of the applicable authority but no process or criteria for obtaining such a waiver is set forth in the Federal or State statute or Federal rule, or in the Department rules implementing the State statute, then the Department may authorize an applicant to utilize the process and criteria in these waiver rules.

**323. COMMENT:** With respect to the second exemption, it is not clear whether New Jersey's Federally designated programs (i.e., wetlands) are completely immune to waiver or, more troubling and possibly unlawfully, only immune to the extent such regulations exceed Federal standards. In reading N.J.A.C. 7:1B-2.1(b)2, we are unable to ascertain which longstanding regulations that protect environmentally sensitive lands and resources the Department intends to honor. (113, 527)

**RESPONSE:** In many Department rules involving Federal program delegations, the requirements of the Federally delegated program are only one component of the Department's



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rules, while other provisions of the Department's rules implement State requirements. The dual nature of these rules frequently is the result of additional State requirements found in the New Jersey statutes which authorize the Department's assumption of the Federal program. For example, the Freshwater Wetlands Protection Act (FWPA), at N.J.S.A. 13:9B-27, provides for the Department to assume and administer the Federal wetlands protection program. In addition, the FWPA includes many other State-specific requirements not required by the Federal wetlands program. Therefore, N.J.A.C. 7:1B-2.1(b)2 would prohibit a waiver of a provision of the Department's freshwater wetlands rules if the waiver would be inconsistent with Federal wetlands program requirements or the terms and conditions of delegation of the Federal wetlands program to New Jersey. Of course, such a waiver would also need to meet all other requirements in these waiver rules. The commenter states that it would be possibly unlawful if New Jersey's Federally delegated programs are only immune from waiver to the extent that the rules exceed Federal standards. That is not the intent of these rules. All provisions of Department rules that are required by the terms of a Federal delegation, authorization, or assumption are exempted from waiver regardless of whether the particular rule exceeds Federal standards..

**324. COMMENT:** Would proposed N.J.A.C. 7:1B-2.1(b)1 and (b)2 prohibit waivers that are necessary to avoid absurdity or unreasonableness, inconsistent with legislative or Federal agency intent, that would result from a literal reading of a Federal or State statute or Federal regulation? The Department may in such instances want to construe the statute or Federal regulation consistent with such intent. (317)

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**RESPONSE:** Settled principles of statutory interpretation would argue in favor of construing any statute or regulation to avoid absurd or unreasonable results wherever possible. The Department will be mindful of these principles in applying N.J.A.C. 7:1B-2.1(b)1 and (b)2.

**325. COMMENT:** In regard to proposed N.J.A.C. 7:1B-2.1(b)1 and (b)2, does the term “Federal ... statute or Federal regulation” include treaties (some of which concern environmental protection), Presidential Executive Orders, Federal guidelines that have the force of law, or Federal court decisions? Is there any reason why “Federal ... statute or Federal regulation” should not be changed to “Federal law” or “Federal law (including but not limited to Federal statutes and Federal regulations)”? Executive Order No. 27 (1994) states that "Federal law includes statutes, rules, regulations, orders, directives or guidelines." See also the use of the term “Federal law” in the Administrative Procedure Act at N.J.S.A. 52:14B-24 and related OAL rules at N.J.A.C. 1:30-5.1(c)4. (317)

**RESPONSE:** The Department notes that the term “Federal law” is used in Executive Order No. 27 (1994) and the APA and OAL rule provisions cited by the commenter for the purpose of the requirement that State agencies provide as part of their rule proposals an analysis addressing whether the agency’s proposed rules contain standards or requirements that exceed standards or requirements imposed by Federal law, which analysis applies to any new, readopted or amended rule under the authority of or in order to implement, comply with or participate in any program established under Federal law or under a State statute that incorporates or refers to Federal law, standards or requirements. N.J.A.C. 7:1B-2.1(b)1 and 2 exempt from waiver Department rules

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that constitute requirements or duties imposed by Federal statute or regulation or that provide for a Federally delegated, authorized, or assumed program where the waiver would not be consistent with the State's delegation, authorization, or assumption of the Federal program. The relationship of State rules to Federal requirements under Executive Order 27 and the cited APA and OAL rule provisions is not dissimilar to the relationship of Department rules to Federal requirements under the waiver exemptions at N.J.A.C. 7:1B-2.1(b)2 and 3. Therefore the Department has not made the commenter's suggested change. Should the Department receive a request to waive strict compliance with a Department rule that in some way implicates a Presidential Executive Order, Federal guidelines, or a Federal court decision or treaty, the Department will review the specific circumstances presented to determine if an exemption from waiver at N.J.A.C. 7:1B-2.1(b)2 or 3 would apply.

**326. COMMENT:** Does the term "State statute" include appropriation bills and bond acts enacted by the New Jersey Legislature but not codified in "New Jersey Statutes Annotated"? Is there any reason why "State statute" should not be changed to "law enacted by the Legislature" (a term that might more clearly includes such enacted bills and acts)? (317)

**RESPONSE:** Any law enacted by the New Jersey Legislature is considered a State statute, whether or not it is compiled in the New Jersey Statutes Annotated. Therefore, the clarification suggested by the commenter is not necessary. The Department considers Public Laws enacted by the Legislature, as well and those laws that are codified in the New Jersey Statutes Annotated (N.J.S.A.) as "statutes" within the meaning of the waiver rules.

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**7:1B-2.1(b)4: Collaborative programs**

**327. COMMENT:** N.J.A.C. 7:1B-2.1(b)4 states that a waiver would not be issued regarding 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.” First, the proposed wording should be clarified by replacing “*would not be consistent with*” with “*would be inconsistent with.*” Second, the proposed language regarding “participation” is very vague and open-ended. The Department should amend the subsection to specify that a waiver would not be issued if it would “violate a specific commitment or program that New Jersey has undertaken.” An example of such a specific multistate program is the anti-idling campaign. (490)

**RESPONSE:** The Department does not see a material difference between the language suggested by the commenter and the language in N.J.A.C. 7:1B-2.1(b)4 as to the phrasing “would be inconsistent with” as opposed to “would not be consistent with.” Secondly, the Department does not agree that substituting “would violate a specific commitment or program that New Jersey has undertaken” for “would not be consistent with New Jersey’s participation in the multi-state or multi-jurisdiction program” would make the rule more clear. That a waiver of a rule would be impermissible because doing so would violate a “specific commitment or program” is simply another way of saying that a waiver of a rule that is part of such a program is impermissible if doing so would not be consistent with New Jersey’s participation in the program, since a rule that is part of such a program would necessarily be a specific commitment

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made to facilitate the State's participation in the program. Accordingly, the Department has not made the suggested changes.

**7:1B-2.1(b)6: Protective of human health**

**328. COMMENT:** Under the rule as proposed, the DEP would have the authority to give waivers based on conflicting rules, with some exceptions. Among the exceptions are cases where the rule in question is "protective of human health" (N.J.A.C. 7:1B-2.1(b)6). However, it is impossible to know which rules fall into these exceptions and which do not. Presumably, DEP believes most rules do not fall into the exceptions and DEP should explain itself in this regard. (6, 61, 309, 358)

**329. COMMENT:** We object to N.J.A.C. 7:1B-2.1(b)6 because it is not clear which standards DEP considers "protective of human health." While we have not been able to review every statute listed in the rule proposal, we have found that all of the following major environmental statutes reference the protection of human health as among the goals served by the statute: the Water Pollution Control Act, the Freshwater Wetlands Protection Act, the State Flood Control Facilities Act, the Coastal Area Facilities Review Act, the Wetlands Act of 1970, the Brownfield and Contaminated Site Remediation Act, the Air Pollution Control Act, and the Solid Waste Management Act. Perhaps there is an environmental program that does not aim to protect human health, but we have not found it yet. DEP obviously does not intend to exempt all these regulations. So, once again, we find the proposed rule is unlawfully, and unwisely, vague and arbitrary. (321)

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**RESPONSE TO COMMENTS 328 AND 329:** The Department notes that protection of the *public* health is generally understood to relate to safeguarding and improving the health of the community as a whole, whereas protection of *human* health is generally understood to relate to safeguarding and improving the health of individual persons. N.J.A.C. 7:1B-2.1(b)6 is very specific in that it prohibits the waiver of a *numeric or narrative standard* that is protective of *human health*. (Emphasis added) Such standards would include, for example, certain health risk-based remediation standards and safe drinking water standards.

Several of the statutes cited by the commenter as well as many of the other Department enabling statutes reference in their statements of purpose or findings the protection of public health, or they reference protecting the public safety, health, and welfare, or providing public benefit or protecting the public interest. Some of the Department's enabling statutes reference protection of human health. However, the prohibition at N.J.A.C. 7:1B-2.1(b)6 of the waiver of a numeric or narrative standard that is protective of human health does not mean that the Department will not waive the strict compliance with any of its rules promulgated pursuant to an enabling statute that has as one of its purposes the protection of public health or human health. As explained in prior responses to comments, under these waiver rules, the Department will review a request for waiver of strict compliance with one of its rules, including a rule promulgated under any of the statutes cited by the commenter, to determine if it meets at least one of the requisite bases at N.J.A.C. 7:1B-2.1(a), is not prohibited under N.J.A.C. 7:1B-2.1(b), and, applying the criteria at N.J.A.C. 7:1B-2.2, should be approved.

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**330. COMMENT:** N.J.A.C. 7:1B-2.1(b)6 does not make clear what constitutes a standard "protective of human health." A broad range of regulations may impact human health, including regulations that do not refer explicitly to human health. Few environmental standards are "protective of human health" on their face; many others protect human health indirectly, and others arguably protect human health only under some circumstances. For example, DEP's groundwater quality standards apply both to groundwater for potable water supply (N.J.A.C. 7:9C-1.5(c)1), and groundwater for maintenance of special ecological resources (N.J.A.C. 7:9C-1.5(d)1). Are all groundwater quality standards "protective of human health" *per se* as they apply to groundwater for potable supply? Are all standards enacted pursuant to water quality inherently protective of human health? If pollution of any groundwater could potentially impact potable water supply, are all groundwater quality standards nonwaivable? Are such standards waivable based on an argument that waiver will not affect human health *in this particular case*? Can they be waived based on an argument that a proposed activity exceeds them in such a minor way, or takes place in such a remote area, as not to affect human health? Or that the standards themselves are unreasonably *overprotective* of human health insofar as they overestimate the toxicity or other effect of regulated chemicals? Are groundwater quality standards *not* protective of human health as applied to groundwater for maintenance of special ecological resources, even though they might be a source of potable water? If so, there is no reason for the Waiver Rule Proposal to cite for statutory authority both the Water Pollution Control Act and the Water Quality Planning Act. Such confusion further reflects the fact that these and other environmental standards address the specific legislative concerns of their enabling statutes. They do not

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contemplate or guide the application of a general waiver because the legislature has not authorized DEP to enact a general waiver. As a result, the application of such a general waiver requires DEP to resolve all of these questions in the absence of any guidance: that is, without obligation to follow any objective standard. The vagueness of the “human health” exception thus allows DEP to place regulations inside and outside the scope of the proposed rules at will. (239)

**RESPONSE:** As explained in response to Comments 336 and 337, N.J.A.C. 7:1B-2.1(b)6 prohibits the waiver of a *numeric or narrative standard* that is protective of *human health*. (Emphasis added) Such standards would include, for instance, certain health risk-based remediation standards and other health risk-based standards and criteria such as certain drinking water standards and surface water and ground water standards.

If a waiver request involves a rule pertaining to groundwater quality, the Department will review the request to determine if it meets at least one of the requisite bases at N.J.A.C. 7:1B-2.1(a), is not prohibited under N.J.A.C. 7:1B-2.1(b), and, applying the criteria at N.J.A.C. 7:1B-2.2, should be approved. Please see the Department’s response to Comments 11-15, 24-25, 26, 27-28, 29 and 31-32 for a detailed discussion of the Department’s authority for the waiver rules, and the Department’s responses to Comments 24-25, 31-32, 79-80, 120-132, 149-159, and 160-170, describing the substantive standards, decision-making criteria and limitations of the waiver rules guiding and controlling the Department’s future decision-making, which ensure adherence to the Department’s core missions and its statutory responsibilities.



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**7:1B-2.1(b)7: Threatened and endangered species**

**331. COMMENT:** N.J.A.C. 7:1B-2.1(b)7 states that a waiver would not be issued regarding “the designation of rare, threatened, or endangered status of any species of flora or fauna, or habitat of such species.” We strongly recommend that this exemption should be limited to only endangered species. There is no legislative authority to designate *rare* species. Also, the presence of “habitat” should not be part of the criteria. Specifically, the Department has no formal designation process for threatened and endangered species habitat, but instead relies upon the Landscape Methodology. The Landscape Methodology establishes broad areas of *potentially* suitable habitat, rather than identifying areas actively inhabited or used by endangered species. Instead of habitat, the Department should evaluate whether there has been any adverse impact on endangered species. (490)

**RESPONSE:** While the commenter is correct that there is no specific reference to the term "rare species" in the Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 et seq., the Department is well within its authority in assigning this designation. The statute authorizes the Department to "conduct investigations concerning wildlife in order to develop information relating to populations, distribution, habitat needs, limiting factors and other biological and ecological data to determine management measures necessary for their continued ability to sustain themselves successfully" (see N.J.S.A. 23:2A-4a) and to "establish such programs, including acquisition of land or aquatic habitats, as are deemed necessary for the conservation and management of nongame and endangered species of wildlife" (See N.J.S.A.

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23:2A-7a). It is well established in the scientific literature that in order to protect a species, its habitat must likewise be protected.

To the extent the commenter disputes the Department's use of the Landscape Project method for delineating habitat, that assertion is beyond the scope of this rulemaking. The Department notes, however, that the Appellate Division upheld the Department's use of the Landscape Project method in In re Adopted Amendments to N.J.A.C. 7:7A-2.4, 365 NJ. Super. 255 (App. Div. 2003).

#### **7:1B-2.1(b)8: Remediation**

**332. COMMENT:** N.J.A.C. 7:1B-2.1(b)8 states that a waiver would not be issued for rules regarding "a remediation funding source, claim or other reimbursement, grant, loan, or other financial assistance." As it is unclear why it is important that the Department not waive the above related rules, an explanation is needed. (490)

**RESPONSE:** The items listed at N.J.A.C. 7:1B-2.1(b)8 regulate or implicate the distribution or use of funds for purposes such as cleanups, public works, critical infrastructure projects, and disbursements to the public to cover damages. The effect of a waiver of these would be to diminish the public purse or resources available to the Department for use in accomplishing its legislative mandates and core missions. As a matter of policy, the Department has determined not to allow the waiver of rules concerning such funds.

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**7:1B-2.1(b)9: Licenses**

**333. COMMENT:** Because of how some Department-administered statutes use the terms “certification” or “registration,” questions may arise about the scope of proposed N.J.A.C. 7:1B-2.1(b)9. The Department should emphasize that a certification or registration for an individual or business differs from a certification or registration for a facility constructed, owned, or operated by an individual or business. To illustrate this difference, the Department should confirm that N.J.A.C. 7:1B-2.1(b)9 does not prevent the Department from waiving a rule concerning “certification” of water supply and sewerage facilities under N.J.S.A. 13:1E-1 et seq., or “registration” of solid waste disposal facilities under N.J.S.A. 58:11-23 et seq., even if the waiver is requested by and applies to an individual or business that proposes to construct, own, or operate such facilities. (317)

**RESPONSE:** N.J.A.C. 7:1B-2.1(b)9 applies to a license, certification, or registration for a vehicle, boat, individual, or business, and N.J.A.C. 7:1B-2.1(b)10 applies to a license or approval for hunting, fishing, or trapping. As indicated in the proposal summary at 43 N.J.R. 474, the Department included in the list at N.J.A.C. 7:1B-2.1(b) certain requirements that are not so burdensome on the regulated community as to justify the Department’s consideration of a waiver based on the standards and requirements in these waiver rules, and noted as examples boat, hunting, fishing and trapping licenses. N.J.A.C. 7:1B-2.1(b)9 and 10 list licenses, registrations, and certifications that are held by an individual or individual business. They are not the types of registrations and certifications that, as the commenter points out, are required under various Department rules to be obtained for facilities that are constructed, owned, and/or operated by an

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individual or business. A waiver of strict compliance with a rule governing the latter type of registrations and certifications could be considered, provided at least one of the four bases for a waiver at N.J.A.C. 7:1B-2.1 is applicable and all other criteria and standards in these rules are met.

**7:1B-2.1(b)11: Public participation**

**334. COMMENT:** It is unclear whether N.J.A.C. 7:1B-2.1(b)11 refers to any “notice” or specifically to “public notice.” If the latter, DEP is free to waive any rule requiring notice or disclosure not specifically to “the public.” Thus, an applicant can be exempted from all requirements of notice to DEP or other government bodies, or individuals affected by its activities. (239)

**RESPONSE:** “Public participation” does encompass notice to the public, as notice is necessary in order to enable public participation. As to “notice,” the Department’s prohibition on waiving a rule providing for notice here covers any rule requiring notice to any entity, including the Department and other government entities, as well as the public. Accordingly, no change is made to this provision on adoption other than to adjust the syntax as explained in response to Comment 23.

**7:1B-2.1(b)12: Fees**

**335. COMMENT:** N.J.A.C. 7:1B-2.1(b)12 states that a waiver would not be issued for rules

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regarding “a fee, oversight cost, and other Department cost.” We disagree with this exemption as it should always be in the Department’s discretion to waive fees and costs. Further, in order to encourage economic growth and to provide New Jersey citizens with a range of reasonably priced housing opportunities, the waiver rule should be available for at least part of the total fees for all affordable or work force housing projects. (490)

**336. COMMENT:** There should be a process to dispute fees and oversight costs if warranted.

In many circumstances, it is the fees and costs which create a burden on industry with no realized environmental benefit. (419)

**337. COMMENT:** There are issues with the fees. Some of these groups are non-profits that are trying to do this. They are being requested to pay fees, and while there may eventually be a waiver on that, it goes for years before that can be decided. (301)

**RESPONSE TO COMMENTS 335 THROUGH 337:** The Legislature has authorized the Department to collect fees from applicants and other persons requesting Department approvals, reviews or other actions in order to cover the Department’s costs of administering its various programs. Many Department programs rely on fees and oversight costs to fund staff who carry out functions that are crucial for environmental protection, such as issuing permits and licenses, managing and maintaining State parks, and enforcing laws that prevent pollution and other threats to public health. The Department’s fee rules typically establish fees based on program costs. Allowing the waiver of these fees would have a negative impact on the budgets projected

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by the various programs to cover costs. For these reasons, the Department has determined not to provide for a waiver of fees for any sector of the regulated community.

Some Department programs do have processes independent of these waiver rules, by which fees and oversight costs can be disputed.

**338. COMMENT:** It is requested that N.J.A.C. 7:1B-2.1(b)12 be amended to read as follows:

"12. A fee, oversight cost, and other Department cost (except with regard to the Department's method used for determining the fee or cost)." There is a need to allow a waiver to be granted for a fee or cost, when it can be shown that the method used to assess the fee or cost is inconsistent with the Department's core missions. The commenter provided an example relating to the NJPDES fees. (504)

**RESPONSE:** As explained in response to comments 335-337, the Department charges fees under its enabling statutes in order to fund its implementation of those statutes. N.J.A.C. 7:1B-2.1(b)12 prohibits the waiver of a fee. Since the fee calculation methodology is intrinsic to the fee itself, a waiver of the fee methodology would defeat the prohibition on waiving the fee. Therefore the commenter's suggested change has not been made.

#### **Other suggested exclusions from waiver**

**339. COMMENT:** Green Acres diversion refers to land that's protected through either having been bought by Bond Act money or Garden State Preservation Trust money, and also with other funds. These lands are protected not only by a law with stricter language, but they are

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protected by the State Constitution, which mandates that money from Bond Acts must be used for the purpose stated in the Bond Acts, and the Bond Acts all specify that the money must be used for conservation purposes and/or public outdoor recreation. Otherwise, you could buy with one hand and sell with another, and they all come under pretty much the same regulations. The Bond Act also makes clear that conservation and public outdoor recreation are essential to the well-being of our people. And they also include the idea that, starting back in 1962, the State is developing, and we have to buy now before we get priced out of the market, so it is clear that the diversion process must be very limited. So if we keep these waiver rules at all, N.J.A.C. 7:1B-2.1(b) should include all the Green Acres diversion rules.  
(317, 326)

**RESPONSE:** The Department has determined not to include the Green Acres diversion rules among those listed at N.J.A.C. 7:1B-2.1(b) that cannot be waived. Please see the response to Comment 292 for further discussion of the diversion process.

**340. COMMENT:** We suggest adding a fifth basis for a waiver where mitigation can provide a greater environmental benefit than strict compliance. In other words, a permittee should not have to demonstrate unduly burdensome if it can simply demonstrate a greater environmental benefit by doing something different but related to a permit requirement.  
(414)

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**RESPONSE:** The commenter's suggestion is addressed in the rules at N.J.A.C. 7:1B-2.1(a)3, which provides that one of the four alternative bases for a waiver to be considered is “net environmental benefit,” as that term is defined at N.J.A.C. 7:1B-1.2. This basis for a waiver does not require a demonstration that strict compliance with the rule sought to be waived would be unduly burdensome.

**341. COMMENT:** In N.J.A.C. 7:1B-2.1, the rule exemptions are too restrictive and will undermine the intent of the rule, which is to provide relief where a site specific situation warrants a waiver. It is important to note that many rules and regulations contain provisions and conditions which do not relate to environmental protections. Examples include analytical test methods which are outdated and costly, testing species in a permit which are not reflective of current environmental conditions, etc. The NJDEP should allow for a case by case waiver for any condition if it can be demonstrated that the rule or requirement does not add any environmental benefit and creates an undue burden on the site. We fully appreciate that the concerns will be the appearance of backsliding and easing environmental standards. We believe the solution to this is to develop a strong, transparent administrative record of the decision. (419)

**RESPONSE:** N.J.A.C. 7:1B-2.1(a)2 establishes, as one alternative basis for a waiver to be considered, the situation where “strict compliance with a rule would be unduly burdensome.” This basis for a waiver does not necessarily require the demonstration of environmental benefit. The “conflicting rules” basis and “public emergency” basis for consideration of a waiver also do



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not necessarily require the demonstration of environmental benefit. However, when evaluating a waiver application that presents one of the four requisite bases for approving a waiver under N.J.A.C. 7:1B-2.1(a), the Department must apply the criteria set forth in N.J.A.C. 7:1B-2.2(a). These criteria include whether there is a net environmental benefit, and whether 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. Please see the Department's responses to Comments 24-25, 31-32, 79-80, 120-132, 149-160, and 161-171, discussing the substantive standards, decision-making criteria and limitations of the waiver rules informing the public and guiding and controlling the Department's future decision-making under the waiver rules.

**342. COMMENT:** The NJDEP may wish to reconsider whether it is necessary to establish blanket exclusions from the rule. The legal, policy or practical need for the exclusions is not clear. NJDEP should be able to evaluate an application seeking the waiver of any regulatory requirement that an applicant asserts meets the criteria established in the proposed rule. If NJDEP determines a regulatory requirement conflicts with another requirement or frustrates the achievement of a statutory purpose, it should not be prevented from waiving or modifying the requirement because it falls within a seemingly arbitrarily established category protected from scrutiny. Under any reasonable framework for a waiver rule, NJDEP would not grant or be compelled to grant a waiver for an activity that would compromise human health, violate a statute or be otherwise improvident, so there does not appear to be a need for broad categorical exclusions from the rule. (463)

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**RESPONSE:** The Department believes the waiver rules strike a reasonable and appropriate balance between requiring strict compliance with Department rules and providing a reasonable mode of relief from strict compliance in the limited circumstances set forth in these waiver rules. The Department believes that the exclusions referenced by the commenter and set forth in N.J.A.C. 7:1B-2.1(b) are an important part of that regulatory balance. Listing at N.J.A.C. 7:1B-2.1(b) the types of rules that may not be waived provides reasonable limits on the scope of the Department's waiver discretion under these rules, and provides clarity and guidance to the regulated community and the general public.

**343. COMMENT:** The Department should craft significantly tighter eligibility parameters for waivers. In thinking about how to ensure better environmental protection and economic growth outcomes, the Department would be well-informed by the permit efficiency task force's recommendations for "priorities for permit processing." Projects that demonstrate these characteristics, that is, project viability, no net environmental degradation, improvement to the environment or public health and safety, and advancing at least one State priority, would also receive prioritized, coordinated review for waivers. Such prioritizing would better focus the waiver program on advancing sustainable economic growth as envisioned by the Governor's emerging State Strategic Planning effort and reduce the workload related to implementing waivers under these rules. (476)

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**RESPONSE:** The standards and criteria in these waiver rules are intended to ensure that waivers will be issued only in limited circumstances and only 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. The Department determined not to categorically prioritize or restrict the availability of waivers under these rules to certain types of projects. However, the waiver evaluation criteria will enable the Department to consider implications of the State Strategic Plan as it is implemented.

**344. COMMENT:** DEP could best manage its risks by replacing the current rule proposal with a one-year pilot program that combines tight eligibility requirements with heightened performance standards ensuring that each project delivers demonstrable environmental and economic benefits. Such a program would allow DEP staff to build the experience needed to craft a more robust, permanent waiver program. It would also help staff to identify specific changes to other permitting rules needed to provide adequate flexibility. It will also be necessary to enhance public transparency measures to help build trust in the waiver process.

(476)

**RESPONSE:** The waiver rules stem from the Department's long experience with implementing its rules, and the difficulties that occasionally have arisen in applying those rules in a reasonable way in limited or unusual situations such as those covered by the waiver rules. While the Department appreciates the suggestion, it does not believe that a pilot program is necessary to

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move forward with such rules. In addition, Executive Order No. 2 (2010) directs each State agency to adopt rules that allow for waivers of strict compliance with regulations.

**345. COMMENT:** There are protective regulations that should not be the subject of this waiver. Any regulation that affects the health or safety of New Jersey communities should not be included. Regulations addressing stormwater, flood hazards, hazardous contaminants (their use, storage or disposal), pesticides, waste management, toxins, radiation, water supply are among these. In addition, regulations protecting important ecological resources should also be exempted such as regulations regarding wetlands, floodplains, forests. When considering whether this rule is appropriate, and/or should be applied in any particular case, there needs to be a cumulative assessment of effects in addition to considering individual impacts. To pursue a waiver, a thorough environmental, community, health, safety and economic analysis should be required -- without this neither the agency nor the public have the information necessary to assess its true ramifications. In the proposal the Department states: "it is not possible to quantify the economic results of future waiver applications and potential approvals of waiver from strict compliance." The same can easily be said for environmental, social and other impacts. As such, the proposal acknowledges the need for case specific analysis of each waiver application. (416)

**RESPONSE:** The rules or subject matter areas that the commenter suggests be excluded from waiver are so broad as to include virtually everything the Department regulates. The Department believes the waiver rules strike a reasonable and appropriate balance between requiring strict

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compliance with rules in all cases, except as may otherwise be provided in those rules, and providing a reasonable mode of relief from strict compliance in the limited circumstances set forth in the new rules. The Department will review each waiver application on a case-by-case basis to determine if it meets at least one of the requisite bases at N.J.A.C. 7:1B-2.1(a), is not prohibited under N.J.A.C. 7:1B-2.1(b), and, applying the criteria at N.J.A.C. 7:1B-2.2, should be approved. Please see the Department's responses to Comments 24-25, 31-32, 79-80, 120-132, 149-160, and 161-171, describing the substantive standards, decision-making criteria and limitations of the waiver rules guiding and controlling the Department's future waiver decisions consistent with the Department's core missions and its statutory responsibilities.

#### **7:1B-2.2 Waiver evaluation criteria**

**346. COMMENT:** The Waiver Rule's evaluation criteria are inadequate and subjective—without providing the objective assessment criteria for a waiver request this rule becomes little more than a rubber stamp for waiver requests. N.J.A.C. 7:1B-1.1 states that this is a rule applied at the agency's discretion. The issue of subjectivity is compounded by the failure of the rule to provide needed objective, quantitative, criteria and guidance as to how and when the rule should be applied; and the minimal guidance on application given is either subjective or woefully limited. Considering the broad expanse of the rules to which this Waiver Rule applies – over 97 at last count – objective criteria and clear guidance on its application is not just warranted but crucial. N.J.A.C. 7:1B-2.2 also does not provide the clear, objective criteria and guidance necessary to ensure appropriate and equitable application of the Waiver Rule. Criteria and guidance that are quantitative to the greatest

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extent possible need to be provided; qualitative guidance needs to have a level of specificity and clarity that it would be equitably applied across projects and by the variety of staffers that will be applying it. A waiver must always result in objectively clear quantitative and qualitative environmental benefits that exceed, on a 4 to 1 ratio, what a community and environment would have received through application of the requirement waived – this will better approach ensuring net environmental benefits are achieved, that a community is not harmed by a waiver decision, and that all individuals/entities pursuing a waiver are doing so out of genuine need rather than convenience. (416)

**347. COMMENT:** The waiver evaluation criteria seem relevant to the forging of environmental policies. The rule, however, purports to make them the basis for individualized decision-making in the granting or waiving of permits and other requirements. We object to this provision because: (a) These standards are highly generalized and too subjective to be applied as the basis for individual permit and compliance decisions, lacking any measurable thresholds; (b) There is no requirement that DEP actually find each of these considerations is satisfied, as the rule only requires DEP to “consider the extent to which” each criterion “support[s]” granting a waiver; and (c) There is no way to know how each consideration would be weighed in comparison with the other listed considerations in each case. (321)

**RESPONSE TO COMMENTS 346 AND 347:** The Department acknowledges that there is an inherent tension between the need to ensure predictability in State agency decision-making, and

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the need to provide agencies with sufficient flexibility to address unforeseen situations. The Department believes that these waiver rules achieve an appropriate balance between regulatory predictability and administrative flexibility, while providing a reasonable mode of potential relief from strict compliance in the limited circumstances set forth in the new rules. The Department is developing an internal review process to ensure consistency in the Department's future review and disposition of waiver applications pursuant to these rules. The Department believes that this process, coupled with the substantive standards, decision-making criteria, and limitations in the rules and the posting of notice of waiver decisions and information pursuant to these rules, will result in coherent, principled and consistent consideration and disposition of waiver applications. Please see the Department's responses to Comments 24-25, 31-32, 79-80, 120-132, 149-160, and 161-171, discussing the substantive standards, decision-making criteria and limitations of the waiver rules guiding and controlling the Department's future waiver decisions consistent with the Department's core missions and its statutory responsibilities.

**348. COMMENT:** The Department proposes eight criteria that would be applied to determine whether a waiver should be granted at N.J.A.C. 7:1B-2.2(a). The proposed criteria should be adopted as they are practical and well-balanced. The criteria include procedural elements (i.e. public notice measures), site specific information and resulting benefits, and departmental interests (i.e. Department's core missions and satisfaction of statutory mandates). (490)

**RESPONSE:** The Department acknowledges this comment in support of the rules.

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**7:1B-2.2(a)1, 2 and 3 Sufficient notice; sufficient information; circumstances supporting**

**349. COMMENT:** The criteria in proposed N.J.A.C. 7:1B-2.2(a)1, (a)2, and (a)3 are that “the public has had sufficient notice of the waiver in accordance with applicable rules,” “the Department has been provided with information and data sufficient to support a waiver,” and “there are circumstances that support the need for a waiver.” These are not criteria that the Department should merely “consider.” Proposed N.J.A.C. 7:1B should be revised to clearly prohibit the waiver if the required notice was not provided, if the Department does not have information sufficient to support the waiver, or if circumstances do not support the need for a waiver. (239, 317)

**RESPONSE:** N.J.A.C. 7:1B-2.2(a) mandates that the Department consider the extent to which the listed criteria support a waiver under these rules. The extent to which the criteria support a waiver will be determined by the Department based on the demonstrations made as to each criterion in the waiver application presented. Specific to notice, N.J.A.C. 7:1B-2.3 requires that notice of each waiver application be provided in accordance with that section. Since notice is a fundamental requirement of the waiver rule and cannot itself be waived (see N.J.A.C. 7:1B-2.1(b)13 as added on adoption and explained in response to Comment 210), failure to provide notice will be fatal to a waiver application. Similarly, a lack of sufficient information to adequately review a waiver application will result in its denial.

**350. COMMENT:** One proposed criterion is that, "The public has been provided with information and data sufficient to support a waiver." However, the proposal does not include



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clearly defined standards that identify what information and data will be required to support a waiver. Therefore, the proposal lacks clarity and predictability and does not permit the public to understand accurately and plainly the expected consequences of the rule. (509)

**RESPONSE:** The commenter has misquoted N.J.A.C. 7:1B-2.2(a)2. That criterion reads: “The *Department* has been provided with information and data sufficient to support a waiver.” (Emphasis added) This provision ensures that the Department receives all information and data necessary to support a waiver; if such information is not provided or cannot be obtained in a timely manner, the waiver request will be denied. As to public notice, N.J.A.C. 7:1B-2.3 further provides that “[a]ny 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.” In other words, the applicant must adhere to existing public notice requirements in the rules involved in the waiver request. In most cases, those rules will provide the specificity, predictability and clarity of the kind that the commenter suggests the waiver rules lack.

**351. COMMENT:** N.J.A.C. 7:1B-2.2(a) should be expanded to include: The waiver would result in an improvement for public health, safety and welfare. (389)

**RESPONSE:** The commenter's concerns are addressed at N.J.A.C. 7:1B-2.2(a)(5), which requires the Department to consider whether a net environmental benefit would be achieved, and N.J.A.C. 7:1B-2.2(a)6, which requires the Department to consider whether the waiver would be

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consistent with the Department's core missions to maintain, protect and enhance New Jersey's natural resources and to protect the public health, safety, and welfare, and the environment, when evaluating whether to issue a waiver.

**352. COMMENT:** N.J.A.C. 7:1B-2.2(a)3: "circumstances that support the need for a waiver" is extremely broad and no guidance is given as to its meaning, whether such circumstances must relate specifically to the objectives of a rule to be waived, or to environmental concerns at all. Whether any given circumstance legitimately or adequately "supports" a waiver is debatable, and DEP is given no guidance by the Waiver Rule Proposal as to how to weigh this criterion. (239)

**RESPONSE:** N.J.A.C. 7:1B-2.2(a)3 is but one of seven criteria that the Department must consider and weigh when evaluating waiver applications. "Circumstances that support the need for a waiver" will vary depending upon the particular project or activity involved and which of the four requisite bases of N.J.A.C. 7:1b-2.1(a) is identified by the applicant in requesting a waiver. Such circumstances will involve facts or events particular to the project or activity that, when weighed with all other criteria of the rules, substantiate waiver. Individualized facts may include physical site characteristics or constraints of a proposed project, costs of compliance, or a description of how two Department rules conflict as applied to a project or activity. The Department disagrees with the comment that the waiver rules provide no guidance as to what circumstances support the need for a waiver. Please see the Department's response to Comments 24-25, 31-32, 79-80, 120-132, 149-159, and 160-170, discussing the substantive standards,

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decision-making criteria and limitations of the waiver rules informing the public and guiding and controlling the Department's future decision-making under the rules.

**7:1B-2.2(a)4: Unduly burdensome circumstances caused by requester**

**353. COMMENT:** The rule states that, "(a) The Department shall consider the extent to which the following criteria support a waiver of strict compliance with a rule in accordance with this chapter: The person seeking the waiver may have directly caused or contributed to the circumstances that resulted in the rule being unduly burdensome;" That statement appears to be saying you have the power to create whatever circumstance is necessary to be able to qualify to receive a waiver. In any instance where a person or entity has contributed to their own claim of hardship, burden, or environmental inequity, application of the law should strictly prohibit them from pursuing a waiver. (20, 363, 389, 416, 486)

**354. COMMENT:** For the case of hardship, as used in the definition of "unduly burdensome," the hardship may have been generated by the applicant, for example, by an unwise investment. One possibility is that they may have purchased a lot containing wetland for a price that implied the wetland could be developed and will develop a serious debt if denied permission. We are concerned that the rules could then be interpreted to be "unduly burdensome" and that wetland filling would be permitted. It is not clear there is any form of hardship, let alone exceptional hardship, which would be generated solely by application of current environmental regulations. Certainly there could be a diminution of anticipated profit, or reduction of ability to pay off unwisely contracted loans. We do not believe

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circumstances of this kind should be used as reasons for degrading the environment. (244)

**RESPONSE TO COMMENTS 353 AND 354:** N.J.A.C. 7:1B-2.2(a)4 is not intended to benefit a person who causes or contributes to the circumstances that make strict compliance with the existing rule unduly burdensome, nor does it allow any person to "create whatever circumstance is necessary to be able to qualify to receive a waiver." This criterion requires the Department to take into account the extent to which the hardship is a self-created hardship, a factor that would work against the person's eligibility for a waiver.

**7:1B-2.2(a)5: Net environmental benefit**

**355. COMMENT:** N.J.A.C. 7:1B-2.2(a)5 provides for situations where there would be a net benefit as a result of a waiver for "expansion of existing development". This term should be defined, or at a minimum, the intent should be clarified through examples of acceptable expansions of existing development, such as a road or bridge widening that would result in improved public safety. (389)

**356. COMMENT:** One proposed criterion, at N.J.A.C. 7:1B-2.2(a)5, is that "There is a net environmental benefit, including the consideration, when appropriate, of the impact of the waiver on... the expansion of an existing development." What is the nexus between a potential net environmental benefit and the expansion of an existing development? (509)

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**RESPONSE TO COMMENTS 355 AND 356:** Where a waiver involves existing development, N.J.A.C. 7:1B-2.2(a)5 requires the Department to consider impacts of the requested waiver on an expansion of that development in determining whether to issue a waiver under the rules. New development often raises different issues from those raised by the expansion of existing development, differences which should be considered in evaluating a waiver request. A waiver authorizing an activity related to expansion of an existing development may have fewer adverse environmental impacts than a waiver authorizing an activity related to a new development. In some cases, this may be true even if the expansion would not strictly comply with a particular Department rule. For example, the expansion of an existing development may in some cases be undertaken without significant changes to existing utilities and other infrastructure, thus causing fewer environmental impacts than a new development. Further, expansion activities are more likely to be located within previously disturbed areas where environmental impacts may potentially be fewer than impacts of activities in undisturbed areas. N.J.A.C. 7:1B-2.2(a)5 ensures that the Department will consider whether and how an expansion of existing development affects the environmental impacts of an activity that is the subject of a waiver request under the rules.

**7:1B-2.2(a)6: Statutory purposes and objectives**

**357. COMMENT:** The criterion in proposed N.J.A.C. 7:1B-2.2(a)6 is that “the activity authorized by the waiver would be consistent with the purposes and objectives of all applicable statutory requirements.” Proposed N.J.A.C. 7:1B-2.2(a)6, 2.1(b)1 and (b)2, and 1.1(b) are not an adequate substitute for a provision that would prohibit waivers that are

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inconsistent with Federal law, the New Jersey Constitution, laws enacted by the Legislature, or orders made by the Governor. If waivers are granted very freely, waivers might conflict with and thus be inconsistent with such law or orders. Waivers that frustrate legislative policy (or the policy otherwise embodied in Federal law, the New Jersey Constitution, or orders made by the Governor) should be prohibited. (317)

**358. COMMENT:** N.J.A.C. 7:1B-2.2(a)6 addresses whether "the activity authorized by the waiver" would be consistent with the purposes and objectives of all applicable statutory requirements. Not all waivers permit an activity to be done. The majority will probably exempt an applicant from an otherwise required step. Therefore, the most obvious and commonsense intended meaning would appear to be, "The waiver would be consistent.. " Another defect in N.J.A.C. 7:1B-2.2(a)6 is that "consider" has at least two meanings. One is that a factor is acknowledged to have weight, but may be outweighed by other factors. That clearly cannot be the meaning here, for if a waiver is inconsistent with the statutes, it simply cannot be granted. Thus "consider the extent to which" must mean "determine whether." Accordingly, a possible change for greater clarity would be to move (a)6 to a separate section (b), which would read, "The Department shall also determine whether the proposed waiver would be consistent.... " etc. (326, 509)

**RESPONSE TO COMMENTS 357 AND 358:** N.J.A.C. 7:1B-2.2(a)6 has been deleted and N.J.A.C. 7:1B-2.1(b)1 modified upon adoption as explained in response to Comment 23. As modified, NJ.A.C. 7:1B-2.1(b)1 provides that the Department shall not waive a requirement of,

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or duty imposed by, a Federal or State statute or Federal regulation, unless that statute or regulation provides for such a waiver. The Constitution is the supreme law of the State of New Jersey. Issuing a waiver that is inconsistent with the State Constitution would be contrary to law and therefore modification of the rules to include a specific prohibition in this regard is unnecessary. Executive orders of the Governor issued pursuant to constitutional or statutory authority also have the force of law and therefore modification of the rules to include a specific prohibition in this regard is unnecessary. The Department will only consider issuing waivers in the limited circumstances set forth in the rules and only if all other requirements of the rules are met.

### **7:1B-2.3 Notice of the waiver**

**359. COMMENT:** In discussing proposed N.J.A.C. 7:1B-2.3, the Department stated in the proposal summary at 43 N.J.R. 474 that “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.” N.J.A.C. 7:1B-2.3(a) does not appear to have any force, however, unless the person requesting a waiver applies for approval (or performs some subsequent action for processing that application) under a Department rule that requires that person to provide public notice of that application for approval (or subsequent permit process action). Following are examples of circumstances in which proposed N.J.A.C. 7:1B-2.3(a) requires no public notice of the waiver request:

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- The person submits a waiver request to exempt that person from the requirement to obtain approval for some project or activity. In many instances, for example, the New Jersey Pollutant Discharge Elimination System (NJPDES) rules (N.J.A.C. 7:14A), the “public notice requirements of the rules from which the waiver is requested” are not applicable unless a person is applying for such approval. In such cases, there is no “public notice” in which “notice of the waiver request” can be “included.”
- The rules from which the waiver is requested require public notice to be performed by someone other than the person requesting the waiver, such as a requirement that the Department publish notice in the DEP Bulletin.

At a minimum, N.J.A.C. 7:1B-2.3(a) should be expanded to read as follows (revised language in bold): “Any person requesting a waiver, or the Department, as appropriate, shall include notice of the waiver request in any public notice the person or the Department provides in accordance with the public notice requirements of the rules from which the waiver is requested.” (317)

**RESPONSE:** Under N.J.A.C. 7:1B-2.3, as modified on adoption (see response to Comment 33), public notice will be provided for every waiver the Department considers. Therefore, the commenter's suggested changes are not necessary. Please also see the response to Comment 33 for further discussion of the public notice requirements of the waiver rules.

**360. COMMENT:** The Waiver Rule Proposal imposes on the waiver applicant no requirement to give public notice of its application. It requires only notice under the existing notice provisions of the waived regulation, regardless of how inappropriate those provisions



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might be as applied to a waiver application under the Rule Proposal. If the waived regulation requires the applicant to disclose no information useful to the public in evaluating a waiver; if it would not require notice upon application for a waiver; if it requires no notice upon application for a waiver because the regulation contemplates no waivers in the first place, the Waiver Rule Proposal calls for nothing more. Thus, no waiver application, no matter how baseless, is subject to public examination. (239, 416, 486)

**361. COMMENT:** It is essential that any waiver process be transparent and open to the public. (356, 476)

**362. COMMENT:** The proposed rule creates decisions behind closed doors that keep out the public. (391)

**363. COMMENT:** The materials accompanying the Waiver Rule discuss a focus on transparency and predictability and consistency in the application of regulation. But rather than help accomplish these goals, the proposed Waiver Rule actually undermines them. Neither agency personnel nor the public are promised a quality and quantity of information necessary to make a truly informed decision or to provide informed public comment -- as the rule does not obligate the creation of such materials nor ensure their release to the public at a time and in a fashion that guarantees an opportunity for public review and comment prior to decision making. (416)

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**364. COMMENT:** 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 person is otherwise required to provide. The details of public notification have not been spelled out. The public notification requirements shall require every person receiving a waiver to submit a public notice to the newspaper. The public notice shall be similar to that required for a NJPDES permit. (20, 491)

**365. COMMENT:** Under the Waiver Rule Proposal, DEP can nullify requirements of public participation and notice regardless of N.J.A.C. 7:1B-2.1(b)11: there is no need to waive any participation and notice requirements because the waiver of any other regulation under the current proposal involves virtually no such requirements. Proposed N.J.A.C. 7:1B-2.3(a) imposes only the existing notice requirements applicable to a waived rule: there may be no applicable requirement. (239)

**366. COMMENT:** I especially have concern about public notice, because even through the proper legal procedure, most members of the general public have difficulty learning of such things, and that can only be expected to carry through to a potential waiver situation. (155)

**367. COMMENT:** We do not believe the rule is transparent. These waiver meetings are not going to be open to the public, even if the notice requirement is posted in the New Jersey DEP website somewhere. The average citizen is not going to know how to find anything, what is going to happen at these meetings and how they will be able to impact whatever

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decisions are made. Someone will come in for a development permit that could directly affect a neighbor, and that neighbor may get notice of the application but will not get a written notice of any potential waiver down the road, and they are not going to be looking to find things on the website. (486)

**368. COMMENT:** The requirement of N.J.A.C. 7:1B-2.3 that the notice for request of a waiver simply be part of the public notice being pursued for the project does not go far enough. The public notice required for someone pursuing a waiver -- a rather extreme measure in any circumstance in that it is seeking to waive the requirements of existing law -- should be the subject of its own notice and public comment process; to allow the notice of a request for waiver to be buried in the context of other regulatory notice requirements does a disservice to the public and denies the agency decision makers of the full value and benefits of the public comment process by limiting the public awareness of the request and therefore the need to comment. If a separate notice is not deemed acceptable, then there must be specific notification mandates that make sure the inclusion of a waiver request is put front and center of any notice given so that the public can quickly realize and recognize that there is an effort to waive the requirements of the law, so the public is clearly alerted to the reality that the permit/notification/action in play is one they need to be much more involved in and vigilant over. (416)

**369. COMMENT:** The public notice requirement is also troublesome. As drafted, it is easy to read that to be after the fact. If this is going to be through the regular permitting process,

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then it should be clearly written in the rule that that is the case. It is not even mentioned.

(372)

**RESPONSE TO COMMENTS 359 THROUGH 369:** The Department will provide notice on the DEP webpage of all waiver applications it intends to consider. As explained in response to Comment 33, N.J.A.C. 7:1B-2.3(b) is being modified on adoption to clarify how the Department will provide such notice. In addition to this notice, the waiver applicant must provide whatever public notice is required by the underlying Department program rules implicated by the waiver application. Those public notice requirements may not themselves be waived pursuant to N.J.A.C. 7:1B-2.1(b)11. In this regard, see response to Comment 334.

**370. COMMENT:** Proposed N.J.A.C. 7:1B-2.3(b) should be revised to require that notice be published in the DEP Bulletin no more than 30 days after the event that is the subject of the notice. Moreover, the text of N.J.A.C. 7:1B-2.3(b) should make it clear that this 30 day deadline applies separately to each event. (For example, if the Department receives a waiver request, notice of such receipt must be published within 30 days of such receipt, even if the Department has not yet determined to consider the requested waiver.) The Department should also expand the existing N.J.A.C. 7:1-1.4(d) description of the DEP Bulletin to include the function of the DEP Bulletin under N.J.A.C. 7:1B. (317)

**371. COMMENT:** Even if the Department has not yet determined whether to consider a waiver request, the public deserves to know that a waiver request was received. Indeed, the

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Department's determination whether or not "to consider a waiver" may sometimes be the most important action the Department takes in regard to a waiver request. Providing DEP Bulletin notice of the Department's receipt of a waiver request will give the public opportunity to submit comments that may influence the Department's determination. Moreover, it seems likely that if there is no DEP Bulletin notice of the Department's receipt of waiver requests, the Department will receive frequent demands from persons outside and inside State government, including but not limited to demands made under the Open Public Records Act, N.J.S.A. 47:1A-1 et seq., for information about the Department's receipt of waiver requests. (317)

**RESPONSE TO COMMENTS 370 AND 371:** Under N.J.A.C. 7:1B-2.3(b)1, the Department intends to publish notice of its determination to consider a waiver, which will be either the receipt of a waiver request that asserts at least one of the bases in N.J.A.C. 7:1B-2.1(a) or when the Department initiates consideration of a waiver on its own. The Department will review each waiver request for which notice has been posted to determine if it meets all requirements of the waiver rules and should be approved, and subsequently post notice of its decision. Because waiver information will be posted, interested persons will have ready access to it and may not need to pursue an OPRA request. The Department does not believe the description of the DEP Bulletin in the Department's organizational rule at N.J.A.C. 7:1-1.4(d) needs to be expanded to address the inclusion of waiver notice because N.J.A.C. 7:1B-2.3(c)1, as added to the rules on adoption and explained in response to Comment 33, provides that notice of a waiver relating to a

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rule for which the Department publishes notice of permit decisions in the DEP Bulletin, will likewise be published in the Bulletin.

### **Providing for public comment on waivers before issuance**

**372. COMMENT:** Proposed N.J.A.C. 7:1B clearly lacks transparency in that it does not provide for duly-noticed hearings on waiver requests. (491)

**RESPONSE:** The transparency of the Department's review processes is not changed by these waiver rules. The rules governing the particular regulatory program for which the waiver is requested will ordinarily determine whether the Department will hold a public hearing on a waiver request.

**373. COMMENT:** The proposed rule provides no public comment periods. Waiver requests will be published in the DEP Bulletin but this essentially amounts to the Department announcing that a waiver issuance is being considered and then announcing what decision was reached, with no public comment period. These requirements block public participation in the waiver issuance process, turning permit applications into closed door negotiating with developers and polluters. The public will no longer be guaranteed that the environmental protections currently in place will be enforced to protect their interests. If adopted, this waiver rule would ensure that polluters and developers are no longer being held to standards that have been vetted by public review and subjected to public comment opportunity. (486)

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**374. COMMENT:** We object to this provision because it does not ensure adequate public notice of waiver applications or an opportunity for the public to provide information or comment on the application prior DEP's decision. The proposed rule states that the Department shall publish, in the DEP Bulletin, notice of: (1) Its determination to consider a waiver; and (2) Its decision on each waiver, but does not specify the timing of this publication or ensure the public has the necessary information to identify important waiver requests, research the facts, and comment on the request prior to the DEP determination. (321)

**375. COMMENT:** Especially given that it does not allow for public comment, the waiver rule is an open invitation to favoritism and corruption. There is no provision for intervention in the Department's consideration by persons or groups opposed to the granting of a waiver. The applicant can make unsupported assertions in its waiver request, and there is no provision for a "reality check," particularly of financial assertions which Department staff may be poorly positioned to check. The waiver proposal should be permanently tabled. (6, 38, 59, 60, 61, 75, 108, 309, 358, 369, 411)

**376. COMMENT:** Allowing the DEP Commissioner to waive compliance with 98 Department regulations violates the democratic principle of public oversight. (486)

**377. COMMENT:** If there is an opportunity to put something into these regulations that provide some type of a public comment or a process where you can get input from some of

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the groups that are very familiar with working in different ways with environmental issues, that is probably a good thing, but this waiver provision is not necessary. (301)

**378. COMMENT:** Some waiver requests may raise major or complex technical, policy or legal issues that deserve public discussion before the Department decides to approve or deny such requests. To promote transparency and allow public participation, the Department should consider expanding N.J.A.C. 7:1B-2.3 to require public notice and opportunity for public comment before the Department decides whether to approve any waiver request under N.J.A.C. 7:1B. The Pinelands Comprehensive Management Plan rules require such notice and opportunity (see N.J.A.C. 7:50-4.66), as does the Florida rule waiver statute (Section 120.542(6), F.S.). At a minimum, expand N.J.A.C. 7:1B-2.3(b) to require that the DEP Bulletin notice state whether, how, and when comments on the waiver request may be submitted, and whether the Department will consider those comments before deciding to consider, approve, or deny the waiver request. (317)

**379. COMMENT:** We strongly oppose the notion that the Department can waive substantive environmental regulations without any sort of uniform and meaningful public process, wherein the Department must carefully consider public comments and furnish written responses to same. The proposed rule fails to ensure any uniform or meaningful public process. (113, 527)

**380. COMMENT:** The DEP notice provision is inadequate. While the provision requires



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publication of the waiver in the DEP Bulletin and public notice in the forum in which the applicant would ordinarily need to publish, there is no opportunity for public comment, let alone a framework establishing a timeline for commenting. DEP's determination or neglect of these matters is unbounded by any clear requirements. (239, 361, 363, 372, 481)

**381. COMMENT:** One proposed criterion is that, "The public has been provided with information and data sufficient to support a waiver." However, this provision does not include standards for how public comment should be provided to the Department, what administrative time frames will apply to submission of public comments and how those comments will be considered. (509)

**382. COMMENT:** Under the proposed rules, when the DEP issues a waiver, there is no outside input. While requests and waivers must be noted, no one can have any input or comment on the waiver or understand it. Some waivers may be very, very small and will not really require outside input. Other waivers may be major and probably should have outside input. (235)

**RESPONSE TO COMMENTS 373 THROUGH 382:** As explained in other responses to comments, the rules governing the particular regulatory program of the Department for which the waiver is requested will ordinarily determine the opportunity for public input that will be provided on the waiver request, including the length of public comment period, whether a public hearing is held, and how public comments are considered for purposes of reaching a decision. In

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all cases, whether the waiver request is related to a permit application or not, notice that a waiver has been received and is under consideration will be posted on the Department's website, as explained in response to Comment 33. Interested persons may submit comments for the Department's consideration on any waiver for which notice has been posted. In determining whether a waiver can be approved, N.J.A.C. 7:1B-2.2(a)1 provides that the Department must consider whether the public has had sufficient notice of the waiver in accordance with applicable rules. If public notice required by the applicable program rules is not provided by the waiver applicant, this criterion will not have been met, which will factor negatively in the Department's consideration of the waiver application. Please see the Department's responses to Comments 11-15, 24-25, 31-32 and 58 concerning the Department's internal review process for waivers.

### **Documenting waiver decision after issuance**

**383. COMMENT:** The procedure is not transparent. It provides that public notice of determination to consider a waiver should be published, but documentation of its decision is provided only to the person applying, i.e. all the Department is required to publish is "the request for waiver applied for by X is granted." The Waiver Rule Proposal requires DEP to disclose no information about the content of a granted waiver: the basis for the decision to grant the waiver; Its duration, scope, and extent; the location to which it applies; conditions for the waiver, standards for changes to, revocation of, or extension of the waiver, and other information crucial to effective public oversight of DEP's grants of waivers. Without this information, there is no way to ensure that DEP makes such decisions consistently or fairly. The ability of the public to challenge such decisions is also hindered when regulators

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withhold this information. Oversight of DEP by the regulated community and the community at large is particularly important in the case of these proposed rules, due to their excessive vagueness and generality, and the resulting danger of inconsistent or arbitrary agency decision-making. Requiring DEP to justify its decisions to the public is an absolutely essential safeguard against abuse of power by regulators. To release to the public the most basic, essential information about the basis for granting the waiver, its duration, scope and extent, and conditions on the waiver, imposes no significant burden on DEP, which is already required under the Waiver Rule Proposal to provide this information to "the person to whom the waiver applies". (75, 120, 239)

**384. COMMENT:** We are greatly concerned about a lack of transparency. The notice in the Bulletin does not go far enough. The Department will provide its waiver decision to the person to whom the waiver will apply. Where is the opportunity to engage beyond that point? (193)

**385. COMMENT:** The Waiver Rule Proposal does not specify "to whom the waiver applies", and therefore who is entitled to receive the information listed in this section. This could refer to the applicant, local residents, all persons affected by the waiver (however "affect" is defined), or someone else. (239)

**386. COMMENT:** DEP is to provide the documentation listed in this provision upon *grant* of a waiver, but the Waiver Rule Proposal requires disclosure of none of this information

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concerning a decision to *deny* a waiver. Indeed, an unsuccessful waiver applicant is entitled to no information whatsoever, aside from that minimal information made available to the public pursuant to proposed rule N.J.A.C. 7:1B-2.3(b). Failure to disclose grounds for denial to the applicant or the public prevents either from confirming that DEP denies waivers according to any standard, or that any legally valid distinction separates successful from unsuccessful waiver applicants. This further increases the danger of arbitrary agency behavior and selective exemption of favored applicants from the environmental law. (239, 317)

**RESPONSE TO COMMENTS 383 THROUGH 386:** It was not the Department's intent to limit notice of waiver decisions only to the person or entity requesting the waiver, as demonstrated by the Department's inclusion in the rules at N.J.A.C. 7:1B-2.3 the requirement that the Department will publish notice of its determination to consider a waiver and of its decision on each waiver. As explained in response to Comment 33, N.J.A.C. 7:1B-2.3(b) is modified and new N.J.A.C. 7:1B-2.3(c) is added on adoption to make clear that the Department will post on-line notice of all waivers under consideration and all decisions on waivers. It also was not the Department's intent to limit its documentation of waiver decisions only to approvals, as indicated in the summary of the proposal regarding N.J.A.C. 7:1B-2.4 (see 43 N.J.R. 474), where the Department stated that its waiver decision would include "the basis for the approval (or denial, should the waiver not meet the standards of this proposed chapter)." To clarify the rules in this respect, the Department is modifying N.J.A.C. 7:1B-2.4(a) on adoption to state that waiver denials will also be documented. Any person interested in obtaining additional detail

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about a waiver application or waiver determination that is not otherwise available on the Department's website may request that information through the Department's established Open Public Records Act (OPRA) process.

**387. COMMENT:** This will result in waivers being issued and the local governments and the community will not be aware that State regulations no longer apply to projects impacting their municipality and natural resources. (486)

**RESPONSE:** N.J.A.C. 7:1B-2.3 provides that “[a]ny 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.” Thus, a waiver applicant must adhere to the public notice and, where applicable, public hearing requirements in the underlying rules from which a waiver is requested. If an existing rule requires notice to municipalities and counties, it follows that those entities must be notified of a request for a waiver. Local governments and the community may also obtain information regarding each waiver decision of the Department by accessing the Department's website, which will include information regarding waiver requests being considered, approved or denied. Please see the Department's response to Comments 33 for a detailed discussion of the public notice requirements under the waiver rules.

**388. COMMENT:** For all cases, the details of any waiver should be spelled out for the record and this record shall remain with the file for 30 years (timeframe for file maintenance) in

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order for the decision to be available to the public. (20)

**RESPONSE:** In accordance with the direction of the New Jersey Division of Archives and Records Management, along with specific Department statutes, the Department has longstanding policies and procedures governing recordkeeping and record retention. The retention policies vary by program and type of record, with some more transient documents maintained for short periods while others, such as Site Remediation Program records, are maintained for long periods of time after completion of a site clean-up. Records regarding waivers will be kept in accordance with the retention policies applicable to the appropriate program.

#### **Cumulative reporting: notice of waiver requests and waiver decisions**

**389. COMMENT:** Under N.J.A.C. 7:1B-2.3, the Department is required to publish waiver determinations in the DEP Bulletin, but there is no ongoing monitoring requirement that would allow for internal or external assessment of the waiver process, to ensure that the intent of the process is being followed. The rule should include a requirement for annual report, summarizing the information provided under N.J.A.C. 7:1B-2.4. This requirement would be similar to that found under N.J.S. 40:55D-70.1, which mandates that a local board of adjustment “at least once a year, review its decisions on applications and appeals for variances and prepare and adopt by resolution a report on its findings on zoning ordinance provisions which were the subject of variance requests and its recommendations for zoning ordinance amendment or revision, if any.” Similarly, the proposed Department annual report on waivers should include an analysis of actions taken during the year to determine not only

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compliance with the intent of the rule, but to help the Department determine whether rules require further examination and possible amendment. (285, 389)

**390. COMMENT:** Expand proposed N.J.A.C. 7:1B-2.3 to require that the Department post, on that portion of the Department's web site concerned with rulemaking, a list of all waiver requests received, under consideration, approved, and denied under N.J.A.C. 7:1B. The list shall identify the name and address of the person who requested the waiver and of the person to whom the waiver would apply, the specific rule provision(s) in question, and the date the Department received the request. For approved waiver requests, that list shall provide the information identified under proposed N.J.A.C. 7:1B-2.4(a)1, 2, and 3. For denied waiver requests, that list shall identify the name and address of the person who requested the waiver and of the person to whom the waiver would apply, the specific rule provision(s) in question, and the Department's decision date. It seems likely that from time to time, persons outside and inside State government will demand to know on a Department-wide, cumulative basis what waiver requests the Department has received under N.J.A.C. 7:1B, and information about the Department response to those requests. The Department can meet those demands more efficiently if the Department maintains a list on its web site. Requiring the Department to publish certain waiver information in the DEP Bulletin does not, by itself, sufficiently promote transparency and accessibility in the waiver decision process. Particularly as years pass, frequently searching multiple issues of the DEP Bulletin (a semi-monthly publication) for waiver information (and compiling such information) would be tedious without a master list of waiver requests and decisions. This is done in Florida and Iowa. (317)

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**391. COMMENT:** Greater transparency and accessibility would increase public confidence in the integrity of the Department's waiver decision process, and help persons outside and inside State government to, for example: Track how much relief is being provided through waivers; track backlogged waiver requests; evaluate whether waiver requests are being approved in accordance with N.J.A.C. 7:1B (and other law) and in a consistent manner; identify how N.J.A.C. 7:1B is being applied; and identify Department rule provisions that perhaps should be amended or eliminated. (317)

**392. COMMENT:** How does the DEP intend to monitor, audit and report on the number and type of waivers issued to ensure that waivers are granted on an 'infrequent basis' as indicated in this proposed section? (509)

**RESPONSE TO COMMENTS 389 THROUGH 392:** The Department plans to implement much of what the commenters are requesting. The Department will post to its website in a prominent location notice of all waiver applications under consideration as well as notice of its determination on each waiver. The easy availability of this information on the web will enable interested persons to determine how many waiver requests are being approved or denied and will also enable them to assess how the program is being implemented. As a result, the Department does not see the need to provide an annual report. As emphasized in other responses to comments, the Department's discretionary authority to approve waivers under the waiver rules is highly circumscribed. The standards and criteria in these waiver rules are intended to ensure the



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integrity of the process in that waivers will be issued only in limited circumstances and only 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.

#### **7:1B-2.4 Rule waiver and limitations**

**393. COMMENT:** This provision requires that the Department “document its decision in writing to the person to whom the waiver applies.” What is the proposed form of the waiver decision? This provision should also include a requirement that the Department document and cite each finding of consistency with the applicable statutes. (509)

**RESPONSE:** As the commenter notes, N.J.A.C. 7:1B-2.4(a) provides that the waiver decision to be issued to the applicant in writing, and N.J.A.C. 7:1B-2.4(a)1 through 9 describe the elements that will be included in a waiver decision. The Department will include in each waiver decision appropriate findings addressing the waiver evaluation criteria and other applicable standards and requirements of the waiver rules which constitute the basis for its decision, in accordance with N.J.A.C. 7:1B-2.4(a)4.

**394. COMMENT:** Expand proposed N.J.A.C. 7:1B-2.4(a)3 to include “the effective date of the waiver,” and to stipulate that except if necessary to respond to a public emergency, the waiver shall not be effective before notice that the waiver request was approved is published

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in the DEP Bulletin. Adding “the effective date of the waiver” eliminates any uncertainty about when the waiver first takes effect. (The “duration” required by proposed N.J.A.C. 7:1B-2.4(a)5 could be a time period, e.g., “24 months,” that does not identify when that period begins.) Notice in the DEP Bulletin loses much of its value, particularly in regard to potential legal challenges to approval of a waiver request, if such notice does not occur until after the waiver’s effective date. (317)

**RESPONSE:** As a general rule, the Department anticipates that the effective date and term of a waiver will track the requirements of the rule that is being waived if the underlying program rules determine how effective dates are set. However, it may be necessary in some cases to issue a waiver that becomes effective upon the occurrence of a certain event, rather than upon a specific date. Alternatively, a waiver may authorize completion of a specific activity, but the date the activity starts may be unknown or unimportant. In such cases, the Department will have the discretion to adjust the manner in which it specifies the duration of a waiver. In most instances, the Department intends to provide in its waiver decision the effective and expiration dates of the waiver.

**7:1B-2.4(a)5: Duration, scope, and extent**

**395. COMMENT:** The Waiver Rule Proposal includes no provision ensuring consistency of the standards DEP will use in determining the duration, scope and extent of waivers. The rule should have a limit that a waiver is granted only of a duration, scope, and extent necessary to address the conditions described in proposed rule N.J.A.C. 7:1B-2.1. Failing to include such

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a limitation gives DEP power to arbitrarily and inconsistently grant waivers. (113, 239, 527)

**RESPONSE:** The Department will not issue a waiver of greater duration, scope or extent than necessary and appropriate in the circumstances of each case. In determining to approve a waiver, the Department will be guided by the particular rule provision that is the subject of the waiver request, the basis under N.J.A.C. 7:1B-2.1(a) upon which the requested waiver is predicated, and relevant facts and circumstances of the particular case. In most cases, the Department anticipates that the duration of the waiver will correlate with the duration of an associated permit.

**7:1B-2.4(a)6: Waiver conditions: necessary to maintain, protect, and enhance**

**396. COMMENT:** What will guide the Department in imposing conditions “necessary to maintain, protect or enhance” environmental and natural resources. There are recent instances in which wetland mitigation plans have not been fulfilled, “temporary” roads through threatened or endangered species habitat have been made permanent (precluding any habitat restoration), forest preservation deed restrictions have not been filed, and upland buffers have been disturbed. Accordingly, we have no confidence that permit conditions can avoid or offset environmental impacts resulting from granted waivers. (113, 239, 527)

**RESPONSE:** In determining the conditions that should be included in a waiver, the Department will be guided by its core missions to maintain, protect, and enhance New Jersey's natural resources and to protect the public health, safety, and welfare, and the environment, as well as

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exercise of its professional judgment gained from many years of experience implementing its enabling statutes and rules. The examples the commenter provides appear to be instances of noncompliance with a permit condition. Should this occur in regard to a waiver, the Department has the authority to bring enforcement action or revoke the waiver. See N.J.A.C. 7:1B-2.4(a)8 and 9. Regarding the conditions the Department will include in a waiver, please see the response to Comments 397-399.

**397. COMMENT:** The Rule Proposal gives no guidance in N.J.A.C. 7:1B-2.4(a)6 as to what conditions DEP will impose on a waiver under what circumstances, and how DEP will determine whether such conditions are "necessary" to further the broad, ill-defined goals described in this provision. This language gives DEP regulators broad discretion to impose any condition on any waiver, or to impose no conditions at all. Thus DEP can exempt an applicant from compliance with environmental rules without imposing a corresponding duty to: monitor, report, minimize or mitigate environmental damage; disclose information to the public, DEP, or any persons affected by the applicant's proposed activity; use best practices protective of the environment; or fulfill any of the other requirements of current environmental regulation. (239)

**398. COMMENT:** Monitoring, reporting, and mitigation conditions must be required on every waiver approval that is issued. Monitoring and reporting are essential to ensure some "net environmental benefit" is achieved and to know the consequences of exempting polluters and developers from environmental regulations. Monitoring and site reports must

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be made available for public review and must be considered in future rule re-adoption if the rule moves forward to determine all negative impacts the rule has had on the State's environmental resources and public health and safety. (20, 486)

**399. COMMENT:** N.J.A.C. 7:1B-2.4(a)6 offers monitoring of actual environmental impacts of the activity and reporting of any environmental impacts as optional elements of the waiver decision. These should not be optional, they must be a mandated part of any waiver approval given. In addition, the monitoring should consider cumulative impacts in the same ecosystem or watershed with other approved and/or waived projects. The assessment should not be limited to environmental effects but should include health, safety, job and economic implications. The reporting obligation should be defined – quarterly until the project's implementation is complete and then annually every year thereafter for a period of 5 years (i.e. the term of any normal permit). (416)

**RESPONSE TO COMMENTS 397 THROUGH 399:** N.J.A.C. 7:1B-2.4(a)6ii provides for the Department to impose reporting requirements as necessary to "maintain, protect, and enhance New Jersey's natural resources and to protect the public health, safety, and welfare, and the environment." The Department has a wide variety of rules, such that the type of monitoring the commenters suggest may or may not be appropriate for any particular waiver. The Department will exercise its professional judgment in determining those conditions that are necessary and appropriate for any individual waiver just as it exercises such judgment in imposing conditions in permits. As discussed in response to Comment 33, the Department plans to make information

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regarding the implementation of the waiver rules available on its website. Therefore, the Department is not making changes to the rules in response to these comments.

**400. COMMENT:** In addition to the expense of applying for and obtaining a waiver, N.J.A.C.

7:1 B-2.4(a)6 includes a list of additional conditions that might apply to any waiver. The Department has failed to establish a mechanism under which costs to administer those requirements can be recovered to from the waiver recipient and not at the expense of taxpayers or regulated entities that comply with existing rules. For example, the summary discusses the use of waivers to promote advancements in technology that may not be supported by the rules. However, there are short and long term costs associated with the use of those types of technologies that the Department will have to oversee or otherwise review to determine if compliance with the conditions of the waiver continue to be met. If such evaluations or reviews are conducted by the Department, such costs should be borne by the beneficiary of the waiver, not the taxpayer or those permittees that have complied with the rules without waivers and pay their fees in support of those regulatory programs. Additionally, many if not all, technologies require maintenance to perform as originally intended. Regulatory controls need to be put into place to ensure that maintenance of those technologies is conducted to maintain their claimed performance levels. Further, there needs to be a means to direct the user of that technology in the event that the technology does not perform as originally intended that was claimed to yield a net environmental benefit. If such a net environmental benefit is not realized, as required by the initial granting of the waiver, there must be recourse to ensure that a net environmental benefit is actually realized. (314)

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**401. COMMENT:** If it is the Department's intent to provide for new technologies and best management practices, there should be guidance that ensure the standards in the environmental regulations are met. Any failure of new technology should be required to be addressed with more established, proven techniques. In fact, the Best Management Practice manual and technical guidance documents that accompany many of the Department's regulations were created to provide the flexibility to embrace new technologies and practices.

(87)

**RESPONSE TO COMMENTS 400 AND 401:** As explained in prior responses, the cost of the waiver program will be absorbed into existing Department program budgets in the same way that other Department regulatory activities not tied to specific fees are funded. The Department does not believe that waivers involving new technologies will entail significant extra costs as compared with other waivers. Such waivers will include conditions requiring that environmental and other requirements are met. If a technology authorized pursuant to a waiver under these rules requires maintenance, or fails in such a way that the waiver conditions will not be met, the cost of remedying these problems will be borne by the person responsible for meeting the waiver conditions. Regarding recourse to ensure that a net environmental benefit is realized in the event a technology fails to perform, the Department may pursue enforcement for noncompliance and/or revoke the waiver. See N.J.A.C. 7:1B-2.4(a)8 and 9.

**402. COMMENT:** N.J.A.C. 7:1 B-2.4(a)7 through 9 are unclear. The summary states that the

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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. However, proposed N.J.A.C. 7:1 B-2.4(a)7 states, "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." First, the terms "if applicable" and "applicable" appears redundant. Secondly, this appears only applicable to permit authorizations. Since the proposed rule does not define the term "permit authorizations," it is unclear what this condition applies to. For example, would a water main extension receiving a Treatment Works Approval be considered a "permit authorization"?

(314)

**RESPONSE:** Requirements concerning duration, modification, renewal, revocability and transfer are typically found in the Department's various permit program rules. For a waiver that is associated with a permit or similar authorization, which would include a treatment works approval, the procedural requirements of the underlying rules governing the permit or similar authorization will also apply to the waiver, as provided under N.J.A.C. 7:1B-2.4(a)7. For those waivers that are not associated with a permit or similar authorization, there will be no underlying permit procedural rules that will be applicable to the waiver. In such cases, the Department will establish the duration, scope and extent of the waiver under N.J.A.C. 7:1B-2.4(a)5. N.J.A.C. 7:1B-2.4(a)8 and 9 apply to all waivers, whether or not associated with a permit.



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**403. COMMENT:** The Department should be requiring financial assurances, such as bonding, so that goals are fully met prior to allowing for projects that need waivers. It is often much more expensive to correct problems especially when existing rules are in place, that now have the potential for waivers, rather than to allow for the disturbance to occur in the first place. It takes years to grow a fully mature oak tree, but mere moments to cut it down. Fully bonding or otherwise providing financial assurances that a project will be completed and subsequent monitoring demonstrates that those conditions have yielded their agreed upon net environmental benefit is needed. The Department must take proactive measures to ensure any financial burden is borne by the applicants and beneficiaries of these waivers so that taxpayers are not stuck with the bill, as was experienced in the case of the failed Encap project. (314)

**RESPONSE:** The waiver rules do not restrict the Department's ability to require financial assurance in those cases where the applicable program rules require financial assurance. However, requiring a bond or other performance guaranty for every waiver approved is unnecessary and far exceeds what the Department requires when it issues permits and other types of approvals. N.J.A.C. 7:1B-2.4(a)6i provides that the Department will include monitoring as a condition of a waiver where necessary to protect natural resources, public health, safety and welfare, and the environment. In addition, as with any Department approval, monitoring a waiver recipient's compliance with waiver conditions will become part of the DEP enforcement program's normal responsibilities.

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**404. COMMENT:** In regard to proposed N.J.A.C. 7:1B-2.4(a)7, do “the procedural rules applicable to a permit authorization being issued concerning duration, renewal, revocability, and transfer” include the procedural rules for requesting an adjudicatory hearing concerning these matters, and for the Department’s evaluation and processing of such requests? For example, if a final renewed NJPDES permit included a condition based on a waiver request previously approved by the Department, would the adjudicatory hearing procedures under N.J.A.C. 7:14A-17 concerning that NJPDES permit renewal apply to the waiver? (317)

**RESPONSE:** If a waiver of the strict application of a rule is approved, the procedures for requesting an adjudicatory hearing on the waiver would be those that apply to the rule that is being waived.

**405. COMMENT:** In regard to proposed N.J.A.C. 7:1B-2.4(a)7, change “renewal, revocability, ...” to “renewal, modification, revocability, ...” Modification is an important kind of permit action that is governed by procedural rules and that can occur after permit authorization is issued. See, for example, the NJPDES rules at N.J.A.C. 7:14A-15.6(a)1, 15.8(a), and 15.10(e)3. (317)

**RESPONSE:** The Department agrees that the modification of a permit or approval is the same sort of procedural permit action as the other actions listed, and therefore on adoption is adding "modification" at N.J.A.C. 7:1B-2.4(a)7.

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**7:1B-2.4(a)8: Basis for waiver revocation**

**406. COMMENT:** It appears that N.J.A.C. 7:1B does not allow the Department to revoke or modify an approved waiver request in response to comments on a draft NJPDES permit (or any other permit). N.J.A.C. 7:1B-2.4(a)8 sets forth two reasons for revoking a waiver. In addition, it appears that a waiver can be revoked under N.J.A.C. 7:1B-2.4(a)7 if the permit authorization is revoked. These provisions conflict with the New Jersey Water Pollution Control Act, which requires public notice and comment on applications at N.J.S.A. 58:10A-9.b. When the Department approves a waiver that will be binding in regard to that permit, interested persons have no effective opportunity to exercise the statutory rights of interested persons under N.J.S.A. 58:10A-9.b. Moreover, proposed N.J.A.C. 7:1B-2.1(b)11, which prohibits the Department from waiving any rule concerning “public participation or notice,” has no relevance here because in the NJPDES example, the rule to which the waiver applies is not a rule concerning “public participation or notice.” What abrogates public participation rights under N.J.S.A. 58:10A-9.b is not the waiver per se, but the exclusion of that waiver from the administrative procedure required under N.J.S.A. 58:10A-9.b. This problem occurs regardless of the timing of the waiver request in relation to the permit application. (317)

**RESPONSE:** If, as the commenter asserts, the scenario envisioned would be contrary to a requirement of, or duty imposed by the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., the Department would be prohibited from issuing a waiver under N.J.A.C. 7:1B-2.1(b)1.

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**407. COMMENT:** N.J.A.C. 7:1B-2.4(a)8 gives no guidance as to when DEP will revoke a waiver for noncompliance, what standards DEP will use in deciding whether to revoke a waiver or whether and when a waiver can be restored once revoked. Because the proposed rules are general, these standards cannot possibly address the specific factors that pertain to a decision to waive any one of DEP's numerous regulations. (239, 314)

**RESPONSE:** N.J.A.C. 7:1B-2.4(a)8 specifies that the Department may revoke a waiver for noncompliance "with any condition in the waiver, or for the submission of false or inaccurate information." As with any Department permit, authorization or regulatory requirement, the Department will use its enforcement discretion in determining when to pursue enforcement or revoke a waiver for noncompliance with the waiver conditions.

**408. COMMENT:** N.J.A.C. 7:1B-2.4(a)8 and 9 discuss revocation and enforcement issues, however it is unclear if there is a responsibility to achieve environmental enhancement goals: The summary and proposed rule fail to address the event that net environmental gains are not fully realized, or the compensation that will be required which allowed for the granting of the waiver are not achieved. (314)

**RESPONSE:** N.J.A.C. 7:1B-2.4(a)6 enables the Department to impose conditions on a waiver as necessary to "maintain, protect, and enhance New Jersey's natural resources and to protect the public health, safety and welfare." These may include conditions as necessary to complete required compensation and or to achieve the required net environmental benefit. Failure of a

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waiver recipient to meet any of the waiver conditions, including providing compensation, mitigation or other required environmental enhancements will expose the recipient to enforcement action and potential revocation of the waiver.

**7:1B-2.4(b)4: Applicable program-specific rules**

**409. COMMENT:** The Waiver Rule Proposal does not define which "program-specific rules" are "applicable" in any individual case under N.J.A.C. 7:1B-2.4(b)4. Because such "program-specific rules" are not exempted from the scope of the Waiver Rule Proposal, they too can be waived. The Waiver Rule Proposal enables the nullification of its own purported limits. (239)

**RESPONSE:** N.J.A.C. 7:1B-2.4(b)4 (as modified on adoption; see response to Comments 228-231) limits the validity of a waiver to the specific person, place, or project or activity identified in the waiver, unless the rule being waived allows for transfer of an approval to another person, place, or project or activity. Many of the Department's program rules (for example, water, air, solid waste) specify when and how a Department permit or approval can be transferred to another person, place, or project or activity. These program-specific rules will therefore apply to any waiver of strict compliance with a rule of that program. The intent of N.J.A.C. 7:1B-2.4(b)4 is to prevent someone from obtaining a waiver based on factors unique to the person, place, or project or activity, and then attempting to transfer the waiver to a person, place, or project or activity that does not share the case-specific factors upon which the waiver was based. The Department will not apply its rules in a manner that nullifies the limits therein.

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**7:1B-2.4(b)7: Use of waiver to resolve contested case**

**410. COMMENT:** We appreciate the Department's responsiveness in affirming at N.J.A.C.

7:1B-2.4(b)7 that the waiver rules may be used to "resolve contested cases or other disputes.

(490)

**RESPONSE:** The Department acknowledges the commenter's support for the rules.

**411. COMMENT:** The summary of N.J.A.C. 7:1B-2.4(b) states that "The waiver could, however, be used to resolve a contested case or other dispute." Responsible parties often dispute the requirements and actions they must comply with. It should not be the intention of this rule to allow any responsible party who has a dispute to have any requirements he or she does not agree with waived. (20)

**412. COMMENT:** An insult to diligent enforcement is contained in the last line of the proposed rule. There, the Department indicates its intention to use this rule "to resolve contested cases or other disputes." This phrase suggests to property owners:

- If a particular regulation is burdensome, apply for a waiver. We might waive it.
- If we do not waive it, dispute it with us. We might waive it then.
- If we still do not waive it, sue us. We might waive it after all.

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We find this section to be highly objectionable. It demonstrates an apparent disregard for the importance of the environmental regulatory scheme and a lack of will to diligently enforce same.

(113, 527)

**413. COMMENT:** Probably one of the most troublesome parts is that the waiver may be used to resolve contested cases or other disputes. We find this very problematic. (193)

**414. COMMENT:** To allow waivers to resolve "contested cases or other disputes" is to allow arbitrary decisions under the Waiver Rule Proposal to infect judicial and other administrative decisions. The lack of any transparent or even specifically defined procedure allows DEP to grant waivers subject to minimal public oversight, then use those waivers to rid itself of complaints made through judicial and administrative channels. DEP can thus apply its overbroad discretion under the Waiver Rule Proposal to escape accountability under the stronger existing procedures it now attempts to circumvent. (239)

**RESPONSE TO COMMENTS 411 THROUGH 414:** The use of a waiver to resolve a contested case will not affect the Department's enforcement efforts. The approval of a waiver under these rules will not affect the penalty portion of an enforcement action. Accordingly, the Department's consideration of a waiver as part of the settlement of a contested case would only apply prospectively to regulated activities. It is possible that in some cases a waiver may be appropriate as part of an application for an approval to bring an unauthorized activity or project into compliance.

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**415. COMMENT:** At the end of proposed N.J.A.C. 7:1B-2.4(a), add the following: “10. The name and signature of the Commissioner of the Department, or of a delegee (as defined at N.J.A.C. 7:1-1.2) to whom power to approve waiver requests under this chapter has been delegated in writing.” This addition promotes transparency and accountability by requiring a specific individual within the Department to take responsibility publicly for approving the waiver request. This addition also supplements proposed N.J.A.C. 7:1B-1.1(e) by preventing waiver requests under N.J.A.C. 7:1B from being approved by individuals outside the Department (e.g., by the Department’s contractors, or by other private parties or public officials or employees), and helps to ensure that the individual approving the waiver request has authority to do so. (317)

**RESPONSE:** The Department has not made the commenter's suggested changes. First, all approvals or permits issued by the Department follow appropriate delegations of authority from the Commissioner to appropriate managers. Second, the concern about waivers being approved by individuals or entities outside the Department is unfounded since N.J.A.C. 7:1B-1.1(e) expressly prohibits entities other than the Department from approving waivers under these rules.

### **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 that adopt, readopt or amend State rules that exceed any Federal standards or requirements to include in the rulemaking document a Federal standards analysis.



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The 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 new rule exceeds any Federal standards or requirements.

These 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 re adoption or amendment of each of those individual rule chapters.

The new rules specifically provide that no waiver will be approved in accordance with this 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 new rules are consistent with any Federal statute or regulation applicable to any of the affected Department program rules. Note that while the Department has modified N.J.A.C. 7:1B-2.1(b)1 on adoption (as explained in response to Comment 23) to delete "specific" as a modifier of requirement or duty, since the Department does not have the authority to waive requirements or duties imposed by a Federal or State statute or a Federal regulation, whether general or specific, this change does not affect this analysis.

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Because the new 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.

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**Full text** of the adoption follows (additions to proposal indicated in boldface **\*thus\***; deletions from proposal indicated in brackets with asterisks \*[thus]\*).

## **CHAPTER 1B**

### **WAIVER OF DEPARTMENT RULES**

#### **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.

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### **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.

"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.

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"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\*, **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;

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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 **\*[any rule concerning]\***:

1. A **\*[specific requirement of, or a specific]\*** **\*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 **\*[that]\*** **\*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. **\*[Part]\*** **\*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. **\*[The]\*** **\*A rule concerning the\*** air emissions trading program;
6. **\*[Numeric]\*** **\*A rule providing for a numeric\*** or narrative **\*[standards]\*** **\*standard\*** protective of human health;
7. **\*[The]\*** **\*A rule concerning the\*** designation of rare, threatened, or endangered status of any species of flora or fauna, or habitat for such species;

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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. **\*[Public]\* \*A rule providing for public\*** participation or notice; **\*[or]\***
12. A **\*rule providing for a\*** fee, oversight cost, **\*[and]\*\*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;

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6. \*[The activity authorized by the waiver would be consistent with the purposes and objectives of all applicable statutory requirements;

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.]\* \*7.\* The waiver would result in a reasonable and effective response to a public emergency.

#### **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 \*[, in the DEP Bulletin,]\* 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**



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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 \*[waive the]\* **\*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;
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;

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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
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

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