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American Planning Association
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The Sustainability Institute
at The College of New Jersey
An Institute for Planning and Governance

Policy Briefing: NJDEP Waiver Rule

Thursday, September 13th

8 am – 10:30 am

The College of NJ

NJBA NEW JERSEY BUILDERS ASSOCIATION

“Waiver Rule” Update

As of August 1, 2012 the Waiver Rule at N.J.A.C. 7:1B became operative.

The Waiver Rule establishes limited circumstances under which the Department of Environmental Protection may waive strict compliance with certain Department rules under certain circumstances.

Last Updated: September 12, 2012

What is the issue?

- 40 years of State statutes and amendments
- 40 years of State rules and rule revisions developed under multiple administrations
- New statutes and rules every year
- Limited ability and time to evaluate all these laws/rules and Federal laws/rules to reconcile conflicts

The Waiver Rule recognizes…

- Strict compliance with rules can sometimes produce unreasonable, unfair and unintended results some of which may not be most protective or beneficial to the environment
- DEP rules cannot anticipate every possible outcome or unfair hardship that may result
- DEP rules cannot predict new issues

DEP is committed to….

- Maintaining the Department's Mission
- A transparent and public process
- Training for DEP staff to ensure consistency
- Outreach to the public
- Assistant Commissioner review of all waiver decisions
- Commissioner review of all waiver decisions during initial implementation

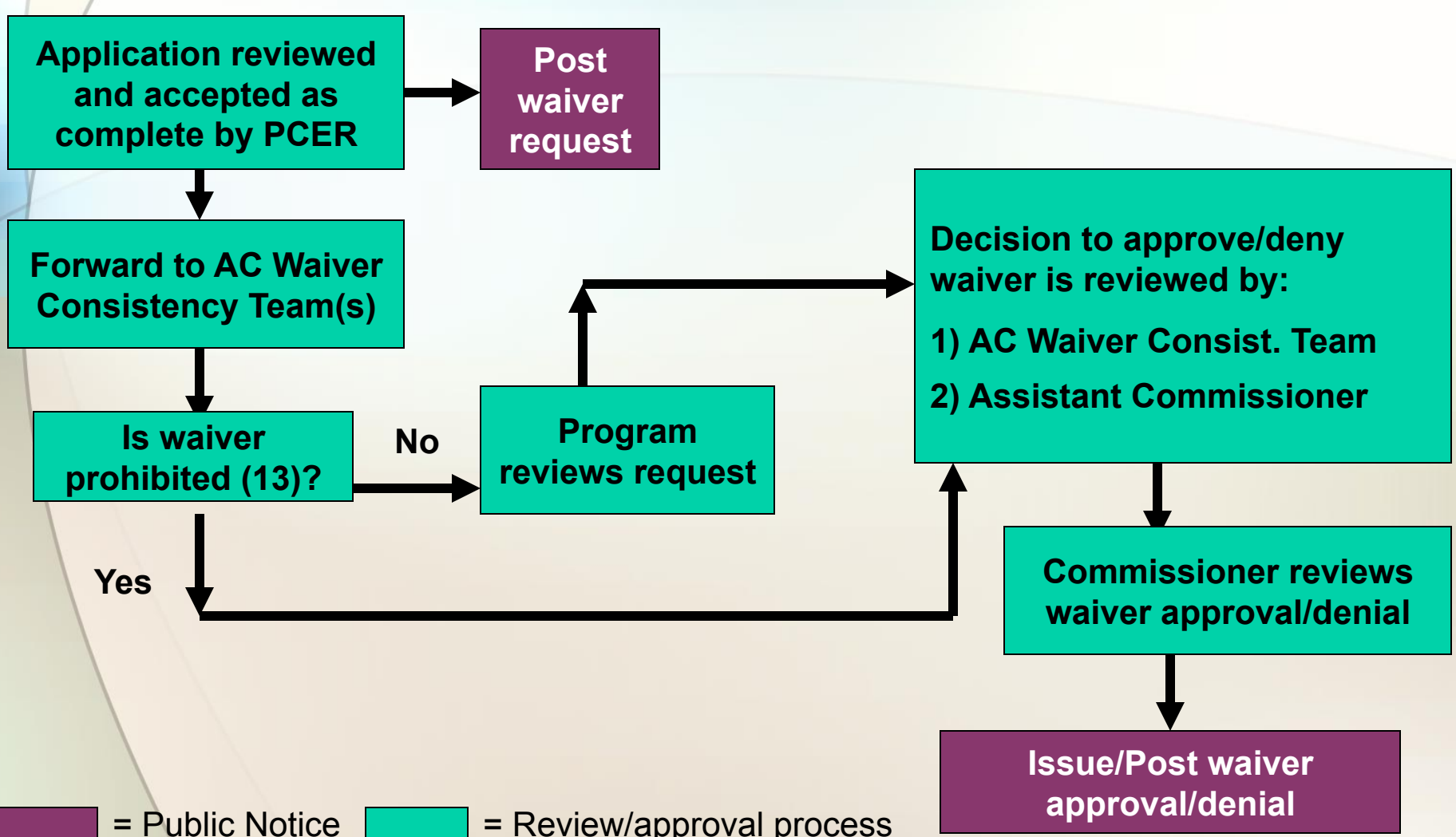
Important Reminders

- Waivers will be approved in **limited** circumstances
- Applicants should exhaust all other options first
- Waivers apply to **rule requirements**
- Waivers do not apply to **permit conditions** or **enforcement actions**

Important Information

- There is no time frame for the Department to act on a waiver request
- Waiver requests **will not** be processed on a first-come, first-served basis – waivers will be prioritized
- Prioritization and timeframe may be linked with the number of requests received by the program
- No “Do-Loops” between applicants and DEP

DEP's Waiver Process



Waiver Application Steps

1. Basis for a Waiver
2. Restrictions
3. Evaluation Criteria

Step 1 - Basis for a Waiver:
(Must Meet at Least 1 of 4)

1. Conflict with another DEP, State or Federal agency rule
2. Be unduly burdensome
3. Net environmental benefit
4. Declared public emergency

See **Guidance Manual**

Available online: www.nj.gov/dep/waiverrule

Step 2 – Restrictions on Waiver Applications

The Department **cannot grant** a waiver for…

1. Requirements or duties imposed by State or Federal statute or Federal rule
2. Rule provisions that are directly tied to specific Federal requirements for Federally delegated, authorized or assumed programs
3. A rule that implements a Federally enforceable program pursuant to a State Implementation Plan (SIP)

Step 2 – Restrictions on Waiver Applications

The Department **cannot grant** a waiver for…

4. The waiver would not be consistent with New Jersey's participation in a multi-state or multi-jurisdiction program
5. The air emissions trading program
6. A numeric or narrative standard protective of human health
7. The designation of rare, threatened, or endangered status of any species or habitat

Step 2 – Restrictions on Waiver Applications

The Department **cannot grant** a waiver for…

8. A rule for a remediation funding source, claim, grant, loan or financial assistance
9. A rule for 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

Step 2 – Restrictions on Waiver Applications

The Department **cannot grant** a waiver for…

11. A rule providing for public participation, or for notice to interested parties or the public
12. A rule providing for a fee, oversight cost, and/or other Department cost
13. Any provision of this waiver rule

Step 3 - Evaluation Criteria

The DEP considers:

1. The public has sufficient notice in accordance with applicable rules
2. The DEP has been provided with sufficient information and data to support a waiver
3. There are circumstances that support the need for a waiver

Step 3 - Evaluation Criteria

The DEP considers:

4. There is a net environmental benefit on the remediation and redevelopment of a contaminated site
5. The person seeking the waiver may have directly caused or contributed to the circumstances resulting in the rule being unduly burdensome
6. The waiver would be consistent with DEP's core missions
7. The waiver would result in a reasonable and effective response to a public emergency

DEP Process to Accept and Evaluate Waiver Requests

- Implementation Team with wide Department representation
- Website: http://www.nj.gov/dep/waiverrule/
  - Electronic submittal of requests
  - Post waiver requests and DEP decisions
  - Other materials to help applicants and the public understand the rules and process
  - Keep checking for updates!

Since August 1st

- 10 requests received
  - 4 forwarded to appropriate WCT
  - 3 rejected as incomplete
    - lack of public notice (2)
    - lack of justification (1)
  - 3 requests pending at PCER
- Sites or circumstances historically known to the Department
- All Land Use and Site Remediation Program matters
- Unduly Burdensome – most common basis

Last updated: Sept. 12, 2012

Application General Remarks

- Public Notice
  - Need proof of pubic notice consistent with rules which applicant is requesting a waiver
- Narrative Description
  - Accurate and concise narrative description
  - No “see attached”

Application General Remarks

- Justification for the basis
  - **Submit robust supporting data, info, details**
  - **Walk DEP through the decision process of the request**
  - **Tie it all together**

Governor Chris Christie • Lt.Governor Kim Guadagno

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In commemoration of the Green Acres Program's photo contest, New Jerseyans captured 50 years of open space preservation. The

1-877-WARN-DEP Hotline

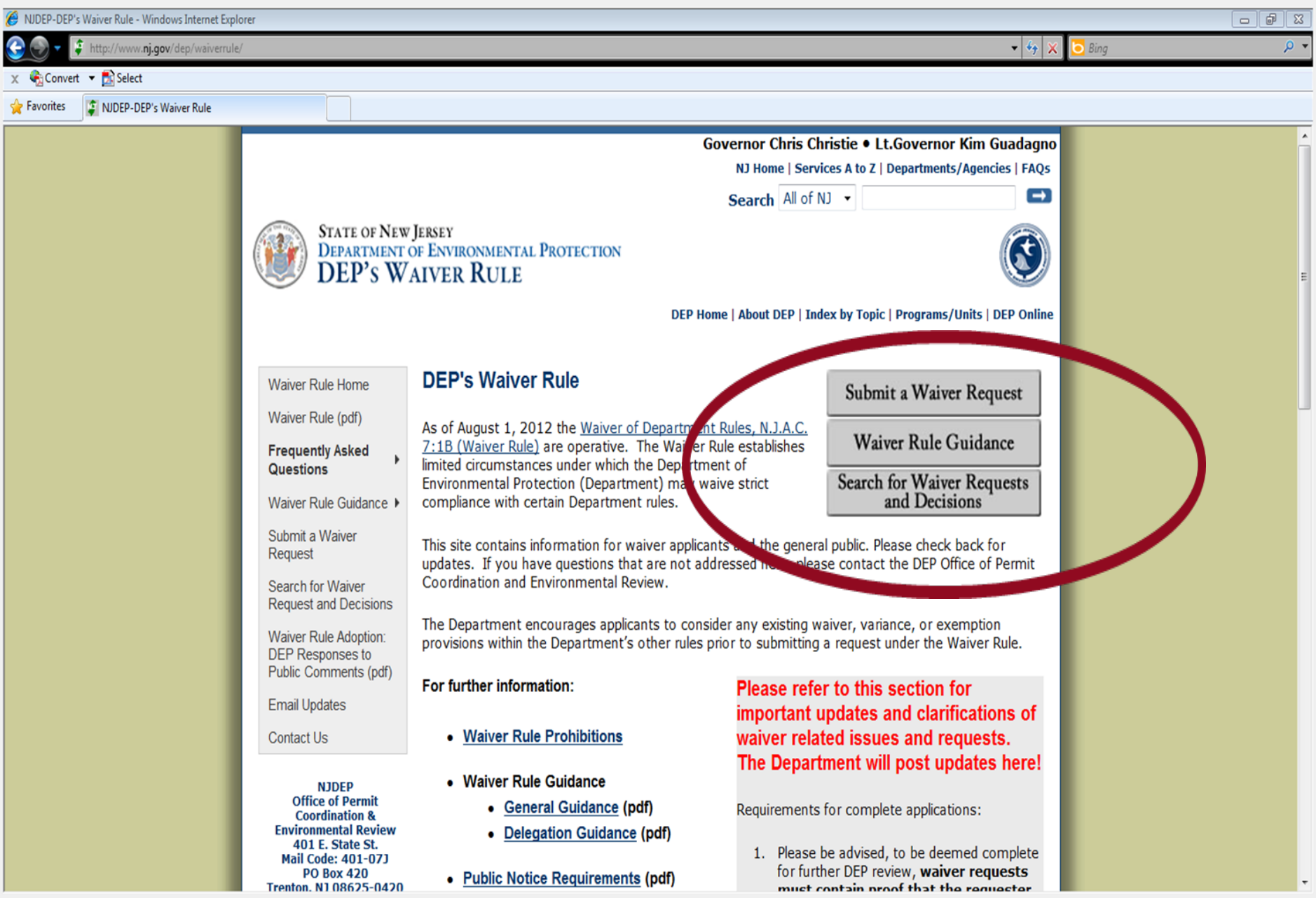
New Waiver Rule Info
NO REQUESTS FOR WAIVERS WILL BE ACCEPTED BEFORE AUGUST 1, 2012

NJ State Parks & Forests Guide — State Parks Mobile App

Today's Air Quality

Transformation & Stakeholder Involvement

Meetings & Events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NJDEP
Office of Permit Coordination & Environmental Review
401 E. State St.
Mail Code: 401-07J
PO Box 420
Trenton, NJ 08625-0420
DEP's Waiver Rule
As of August 1, 2012 the Waiver of Department Rules, N.J.A.C. 7:1B (Waiver Rule) are operative. The Waiver Rule establishes limited circumstances under which the Department of Environmental Protection (Department) may waive strict compliance with certain Department rules.
Submit a Waiver Request
Waiver Rule Guidance
Search for Waiver Requests and Decisions
This site contains information for waiver applicants and the general public. Please check back for updates. If you have questions that are not addressed here, please contact the DEP Office of Permit Coordination and Environmental Review.
The Department encourages applicants to consider any existing waiver, variance, or exemption provisions within the Department's other rules prior to submitting a request under the Waiver Rule.
For further information:
Waiver Rule Prohibitions
Waiver Rule Guidance
General Guidance (pdf)
Delegation Guidance (pdf)
Public Notice Requirements (pdf)
Please refer to this section for important updates and clarifications of waiver related issues and requests. The Department will post updates here!
Requirements for complete applications:
1. Please be advised, to be deemed complete for further DEP review, waiver requests must contain proof that the requester

Litigation

- Rule challenged by 28 environmental and labor organizations (*In re Adoption of N.J.A.C. 7:1B, Docket No. A-3514-11T2*)
- Appellants argue:
  1) No Legislative authority
  2) No standards, criteria or safeguards to confine discretion
  3) DEP guidance on website amounts to rule-making that must be adopted through APA process

Litigation

- The Attorney General's response:
  1) DEP is entitled to substantial deference because the rule derives from the Legislature's broad grant of power to DEP
  2) Rule falls within DEP's expressed and implied authority
  3) Rule has adequate standards and properly guides DEP discretion
  4) Additional Internal procedures ensure consistency and encourages complete waiver submissions

Questions?

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