

**SENATE CONCURRENT  
RESOLUTION No. 239**

**STATE OF NEW JERSEY  
214th LEGISLATURE**

INTRODUCED SEPTEMBER 19, 2011

**Sponsored by:**

**Senator BARBARA BUONO**

**District 18 (Middlesex)**

**Senator ROBERT M. GORDON**

**District 38 (Bergen)**

**SYNOPSIS**

Determines that proposed DEP rules and regulations establishing procedure for waiver of DEP rules are inconsistent with legislative intent.

**CURRENT VERSION OF TEXT**

As introduced.



1 **A CONCURRENT RESOLUTION** concerning legislative review of  
2 Department of Environmental Protection regulations pursuant to  
3 Article V, Section IV, paragraph 6 of the Constitution of the  
4 State of New Jersey.

5  
6 **WHEREAS**, Article V, Section IV, paragraph 6 of the Constitution of  
7 the State of New Jersey provides that the Legislature may review  
8 any rule or regulation adopted or proposed by an administrative  
9 agency to determine if the rule or regulation is consistent with the  
10 intent of the Legislature as expressed in the language of the statute  
11 which the rule or regulation is intended to implement and, upon a  
12 finding that the rule or regulation is not consistent with legislative  
13 intent, may transmit the finding to the Governor and the head of the  
14 agency; and

15 **WHEREAS**, On March 7, 2011, the Department of Environmental  
16 Protection proposed for public comment in the New Jersey Register  
17 new rules, proposed to be codified at N.J.A.C.7:1B, to establish a  
18 procedure for the waiver of department rules; and

19 **WHEREAS**, The summary of the rule proposal focuses on a discussion  
20 of Executive Order No. 2 of 2010 issued by Governor Christie as  
21 the reasoning for the proposed new rules and does not provide any  
22 support or justification for the proposed rulemaking based on any  
23 statutory authority granted to the Department of Environmental  
24 Protection; and

25 **WHEREAS**, The notice of proposal lists over 100 statutory citations as  
26 the authority for the rule proposal; however, none of these statutes  
27 are discussed in the summary of the rule proposal, none of the  
28 statutory references provide the Department of Environmental  
29 Protection with the authority to promulgate one set of rules and  
30 regulations in order to waive other rules and regulations previously  
31 adopted pursuant to the “Administrative Procedure Act,” and none  
32 of the statutes referenced authorize the department to establish a  
33 procedure for the waiver of other department rules; and

34 **WHEREAS**, Of the over 100 statutory citations listed as the authority  
35 for the rule proposal, some are incorrect and do not provide the  
36 Department of Environmental Protection with any statutory  
37 authority for rulemaking, for example: N.J.S.A.39:3-33.1 concerns  
38 the registration of motor vehicles by veterans; N.J.S.A.40:55D-1 et  
39 seq. is the “Municipal Land Use Law”; N.J.S.A.40A:11-1 et seq. is  
40 the “Local Public Contracts Law”; N.J.S.A.45:1-9 requires  
41 contractors licensed by the State to indicate their license or  
42 certificate number on all contracts, subcontracts, bids and all forms  
43 of advertising as a contractor; N.J.S.A.48:3-1 et seq. pertains to the  
44 authority of the Board of Public Utilities regarding the rates  
45 imposed by public utilities; N.J.S.A.50:1-1 et seq. and  
46 N.J.S.A.58:4A-4 are repealed; and N.J.S.A.58:1B-1 et seq. and  
47 58:1B-7 deal specifically with the authority of the New Jersey  
48 Water Supply Authority; and

1   **WHEREAS**, According to the rule proposal, the new rules would  
2       “establish the conditions and procedures for the department to  
3       approve waivers from strict compliance with its rules where  
4       appropriate to address situations where rules conflict, or a rule is  
5       unduly burdensome in specific application, or a net environmental  
6       benefit would be realized, or a public emergency exists”; and  
7   **WHEREAS**, P.L.2011, c.34 (N.J.S.A.52:14B-26 et seq.) as originally  
8       introduced in the Legislature as Senate Bill No. 6 and Assembly  
9       Bill No. 2853 included a section that would have authorized State  
10      and local agencies responsible for issuing permits or approvals to  
11      waive strict compliance with the standards promulgated for issuing  
12      those permits or approvals, where necessary to alleviate undue  
13      hardship and where the waiver is based on common sense  
14      principles, and this section was deleted from the bill as it moved  
15      through the legislative process and is not in the final bill as enacted  
16      into law; and  
17   **WHEREAS**, If the Legislature had intended for a State agency to  
18      proceed with a rulemaking such as the one put forth by the  
19      Department of Environmental Protection establishing an omnibus  
20      procedure for the waiver of existing rules and regulations, the  
21      Legislature could have authorized such a procedure when it was  
22      acting on Senate Bill No. 6 and Assembly Bill No. 2853 instead of  
23      deleting the waiver provision in that legislation in its entirety; and  
24   **WHEREAS**, Based upon the statutory citations listed as the authority  
25      for the rule proposal, the Department of Environmental Protection  
26      is going far beyond establishing a procedure to waive compliance  
27      with its existing rules and regulations for permits and approvals  
28      related to economic development projects as the statutory authority  
29      citations include a number of statutes related to natural areas, parks  
30      and historic resources, such as the “Natural Areas System Act”  
31      (N.J.S.A.13:1B-15.12a et seq.), the law establishing the Historic  
32      Sites Council (N.J.S.A.13:1B-15.108 et seq.), the law establishing  
33      the New Jersey Register of Historic Places (N.J.S.A.13:1B-15.128  
34      et seq.), the State Fish and Game Code (N.J.S.A.13:1B-30 et seq.),  
35      the “State Park and Forestry Resources Act” (N.J.S.A.13:1L-1 et  
36      seq.); the “New Jersey Trails System Act” (N.J.S.A.13:8-30 et  
37      seq.), the “New Jersey Green Acres Land Acquisition Act of 1961”  
38      (N.J.S.A.13:8A-1 et seq.), the “New Jersey Green Acres Land  
39      Acquisition Act of 1971” (N.J.S.A.13:8A-19 et seq.), the “New  
40      Jersey Green Acres Land Acquisition and Recreation Opportunities  
41      Act” (N.J.S.A.13:8A-35 et seq.), the “Garden State Preservation  
42      Trust Act” (N.J.S.A.13:8C-1 et seq.), and the “Farmland  
43      Assessment Act of 1964” (N.J.S.A.54:4-23.1 et seq.); and  
44   **WHEREAS**, While the “Highlands Water Protection and Planning Act”  
45      (N.J.S.A.13:20-1 et al.) provides specific authority for the  
46      Highlands permitting review program established by the  
47      Department of Environmental Protection pursuant to the act to  
48      allow for a waiver of the provisions of a Highlands permitting

1 review on a case-by-case basis for three specific circumstances, the  
2 current rule proposal does not conform with the language set forth  
3 in section 35 of that act (N.J.S.A.13:20-33) by establishing new  
4 waiver criteria not authorized in the law; and

5 **WHEREAS**, The rule proposal also cites the “Site Remediation Reform  
6 Act” (N.J.S.A.58:10C-1 et seq.) as providing authority for this rule;  
7 however, this law, enacted in 2009, is quite specific in the authority  
8 granted to the Department of Environmental Protection, and while  
9 it provides the department with numerous responsibilities and  
10 discretion in a number of areas, it only authorizes a deviation “from  
11 the strict adherence to the regulations” in one specific instance  
12 found at N.J.S.A.58:10B-2, and the language in the proposed new  
13 rules is contrary to this provision; and

14 **WHEREAS**, A number of the statutory citations identified in the  
15 proposal, such as N.J.S.A.58:10B-4 (the Hazardous Discharge Site  
16 Remediation Fund), N.J.S.A.58:10B-20 (the Remediation  
17 Guarantee Fund), N.J.S.A.58:12A-22 through N.J.S.A.58:12A-25  
18 (the “Water Supply Replacement Trust Fund”), are to laws  
19 establishing specific funds for enumerated purposes or to  
20 appropriations of funds for certain specified purposes and there is  
21 no law that authorizes a State agency to waive requirements for  
22 complying with designated uses of State funds; and

23 **WHEREAS**, At proposed new N.J.A.C.7:1B-2.1(b), the proposal states  
24 that the department will not waive any rule in 12 specific  
25 enumerated areas; however, a number of statutes listed as the  
26 authority for the rule proposal clearly fall within those 12 specific  
27 areas, leading to confusion and a lack of clarity as to how this rule  
28 proposal would be implemented and to what it exactly applies; and

29 **WHEREAS**, For all of the above reasons, the proposed rules and  
30 regulations to establish a procedure for the waiver of department  
31 rules are inconsistent with the statutory authority provided to the  
32 Department of Environmental Protection and would undermine the  
33 specific rules and regulations adopted pursuant to the authority  
34 granted to the department by the Legislature in specific laws; now,  
35 therefore,

36

37 **BE IT RESOLVED** by the Senate of the State of New Jersey (the  
38 General Assembly concurring):

39

40 1. The Legislature declares that the rules and regulations  
41 proposed in the New Jersey Register on March 7, 2011 by the  
42 Department of Environmental Protection to establish a procedure  
43 for the waiver of department rules are not consistent with the intent  
44 of the Legislature.

45

46 2. The Secretary of the Senate and the Clerk of the General  
47 Assembly shall transmit a duly authenticated copy of this

1 concurrent resolution to the Governor and the Commissioner of  
2 Environmental Protection.

3  
4 3. Pursuant to Article V, Section IV, paragraph 6 of the  
5 Constitution of the State of New Jersey, the Commissioner of  
6 Environmental Protection shall have 30 days following transmittal  
7 of this resolution to amend or withdraw the proposed rules and  
8 regulations or the Legislature may, by passage of another  
9 concurrent resolution, exercise its authority under the Constitution  
10 to invalidate the rules and regulations in whole or in part.

11  
12

13 STATEMENT

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15 This concurrent resolution embodies the finding of the  
16 Legislature that the rules and regulations to establish a procedure  
17 for the waiver of department rules proposed by the Department of  
18 Environmental Protection (DEP) for public comment in the New  
19 Jersey Register on March 7, 2011 are not consistent with the intent  
20 of the Legislature.

21 The DEP does not have the statutory authority to promulgate one  
22 set of rules and regulations in order to waive other rules and  
23 regulations previously adopted pursuant to the "Administrative  
24 Procedure Act," and further, the DEP does not possess the statutory  
25 authority to establish a procedure for the waiver of department rules  
26 adopted pursuant to specific statutes.

27 The Commissioner of Environmental Protection will have 30  
28 days from the date of transmittal of this resolution to amend or  
29 withdraw the proposed rules and regulations, or the Legislature  
30 may, by passage of another concurrent resolution, exercise its  
31 authority under the Constitution to invalidate the rules and  
32 regulations in whole or in part.