

[First Reprint]

**ASSEMBLY CONCURRENT
RESOLUTION No. 37**

**STATE OF NEW JERSEY
215th LEGISLATURE**

PRE-FILED FOR INTRODUCTION IN THE 2012 SESSION

Sponsored by:

Assemblyman PETER J. BARNES, III

District 18 (Middlesex)

Assemblyman JOHN F. MCKEON

District 27 (Essex and Morris)

Assemblyman REED GUSCIORA

District 15 (Hunterdon and Mercer)

Assemblywoman L. GRACE SPENCER

District 29 (Essex)

Assemblyman THOMAS P. GIBLIN

District 34 (Essex and Passaic)

Co-Sponsored by:

Assemblymen Chivukula, Caputo and Assemblywoman Jasey

SYNOPSIS

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

CURRENT VERSION OF TEXT

As reported by the Assembly Environment and Solid Waste Committee on May 21, 2012, with amendments.



(Sponsorship Updated As Of: 5/25/2012)

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

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

Matter enclosed in superscript numerals has been adopted as follows:

¹Assembly AEN committee amendments adopted May 21, 2012.

1 imposed by public utilities; N.J.S.A.50:1-1 et seq. and
2 N.J.S.A.58:4A-4 are repealed; and N.J.S.A.58:1B-1 et seq. and
3 58:1B-7 deal specifically with the authority of the New Jersey
4 Water Supply Authority ¹; and the notice of adoption published in
5 the New Jersey Register on April 2, 2012 retains these citations as
6 the authority for the new rules with the exception of deleting the
7 two citations to the repealed sections of law and replacing the
8 reference to N.J.S.A.39:3-33.1 with N.J.S.A.39:3-33.10 to 33.11
9 concerning Conserve Wildlife license plates¹ ; and
10 **WHEREAS,** ¹[According to the rule proposal, the] The¹ new rules
11 ¹[would “establish the conditions and procedures for] establish a
12 procedure whereby¹ the department ¹[to] may¹ approve
13 ¹[waivers] a request for a waiver¹ from strict compliance with its
14 rules ¹[where appropriate to address situations where rules conflict,
15 or a rule is unduly burdensome in specific application, or a net
16 environmental benefit would be realized, or a public emergency
17 exists”] when the department determines that at least one of the
18 following conditions exists: there are “conflicting rules”; strict
19 compliance with the rule would be “unduly burdensome”; a “net
20 environmental benefit” would be realized; or a public emergency
21 has been declared¹ ; and
22 **WHEREAS,** P.L.2011, c.34 (N.J.S.A.52:14B-26 et seq.) as originally
23 introduced in the Legislature as Senate Bill No. 6 and Assembly
24 Bill No. 2853 included a section that would have authorized State
25 and local agencies responsible for issuing permits or approvals to
26 waive strict compliance with the standards promulgated for issuing
27 those permits or approvals, where necessary to alleviate undue
28 hardship and where the waiver is based on common sense
29 principles, and this section was deleted from the bill as it moved
30 through the legislative process and is not in the final bill as enacted
31 into law; and
32 **WHEREAS,** If the Legislature had intended for a State agency to
33 proceed with a rulemaking such as the one put forth by the
34 Department of Environmental Protection establishing an omnibus
35 procedure for the waiver of existing rules and regulations, the
36 Legislature could have authorized such a procedure when it was
37 acting on Senate Bill No. 6 and Assembly Bill No. 2853 instead of
38 deleting the waiver provision in that legislation in its entirety; and
39 **WHEREAS,** Based upon the statutory citations listed as the authority
40 for the rule proposal ¹and the notice of adoption published in the
41 New Jersey Register on April 2, 2012¹ , the Department of
42 Environmental Protection is going far beyond establishing a
43 procedure to waive compliance with its existing rules and
44 regulations for permits and approvals related to economic
45 development projects as the statutory authority citations include a
46 number of statutes related to natural areas, parks and historic

1 resources, such as the “Natural Areas System Act” (N.J.S.A.13:1B-
2 15.12a et seq.), the law establishing the Historic Sites Council
3 (N.J.S.A.13:1B-15.108 et seq.), the law establishing the New Jersey
4 Register of Historic Places (N.J.S.A.13:1B-15.128 et seq.), the
5 State Fish and Game Code (N.J.S.A.13:1B-30 et seq.), the “State
6 Park and Forestry Resources Act” (N.J.S.A.13:1L-1 et seq.); the
7 “New Jersey Trails System Act” (N.J.S.A.13:8-30 et seq.), the
8 “New Jersey Green Acres Land Acquisition Act of 1961”
9 (N.J.S.A.13:8A-1 et seq.), the “New Jersey Green Acres Land
10 Acquisition Act of 1971” (N.J.S.A.13:8A-19 et seq.), the “New
11 Jersey Green Acres Land Acquisition and Recreation Opportunities
12 Act” (N.J.S.A.13:8A-35 et seq.), the “Garden State Preservation
13 Trust Act” (N.J.S.A.13:8C-1 et seq.), and the “Farmland
14 Assessment Act of 1964” (N.J.S.A.54:4-23.1 et seq.); and

15 **WHEREAS**, While the “Highlands Water Protection and Planning Act”
16 (N.J.S.A.13:20-1 et al.) provides specific authority for the
17 Highlands permitting review program established by the
18 Department of Environmental Protection pursuant to the act to
19 allow for a waiver of the provisions of a Highlands permitting
20 review on a case-by-case basis for three specific circumstances, the
21 **‘[current rule proposal does] provisions of these new rules set**
22 **forth at N.J.A.C.7:1B-1.1 et seq. do**¹ not conform with the language
23 set forth in section 35 of that act (N.J.S.A.13:20-33) by establishing
24 new waiver criteria not authorized in the law; and

25 **WHEREAS**, The rule proposal **‘and the notice of adoption published in**
26 **the New Jersey Register on April 2, 2012**¹ also **‘[cites] cite**¹ the
27 “Site Remediation Reform Act” (N.J.S.A.58:10C-1 et seq.) as
28 providing authority for this rule; however, this law, enacted in
29 2009, is quite specific in the authority granted to the Department of
30 Environmental Protection, and while it provides the department
31 with numerous responsibilities and discretion in a number of areas,
32 it only authorizes a deviation “from the strict adherence to the
33 regulations” in one specific instance found at N.J.S.A.58:10B-2,
34 and the language in the **‘[proposed]’**¹ new rules is contrary to this
35 provision; and

36 **WHEREAS**, A number of the statutory citations identified in the
37 proposal **‘and the notice of adoption published in the New Jersey**
38 **Register on April 2, 2012**¹ , such as N.J.S.A.58:10B-4 (the
39 Hazardous Discharge Site Remediation Fund), N.J.S.A.58:10B-20
40 (the Remediation Guarantee Fund), N.J.S.A.58:12A-22 through
41 N.J.S.A.58:12A-25 (the “Water Supply Replacement Trust Fund”),
42 are to laws establishing specific funds for enumerated purposes or
43 to appropriations of funds for certain specified purposes and there is
44 no law that authorizes a State agency to waive requirements for
45 complying with designated uses of State funds; and

46 **WHEREAS**, At **‘[proposed new]’**¹ N.J.A.C.7:1B-2.1(b), the
47 **‘[proposal] new rule**¹ states that the department will not waive any

1 rule in '[12] 13' specific enumerated areas; however, a number of
2 statutes listed as the authority for the rule '[proposal]' clearly fall
3 within those '[12]' specific areas, leading to confusion and a lack
4 of clarity as to how this rule '[proposal would] will' be
5 implemented and to what it exactly applies; and
6 **WHEREAS**, For all of the above reasons, the '[proposed] adopted'
7 rules and regulations '[to establish] establishing' a procedure for
8 the waiver of department rules are inconsistent with the statutory
9 authority provided to the Department of Environmental Protection
10 and '[would]' undermine the specific rules and regulations
11 adopted pursuant to the authority granted to the department by the
12 Legislature in specific laws; now, therefore,

13
14 **BE IT RESOLVED** by the General Assembly of the State of New
15 Jersey (the Senate concurring):

16
17 1. The Legislature declares that the rules and regulations
18 proposed in the New Jersey Register on March 7, 2011 by the
19 Department of Environmental Protection '[to establish] , adopted
20 by the Commissioner of Environmental Protection on March 6,
21 2012, and published in the New Jersey Register on April 2, 2012
22 establishing' a procedure for the waiver of department rules are not
23 consistent with the intent of the Legislature.

24
25 2. The Clerk of the General Assembly and the Secretary of the
26 Senate shall transmit a duly authenticated copy of this concurrent
27 resolution to the Governor and the Commissioner of Environmental
28 Protection.

29
30 3. Pursuant to Article V, Section IV, paragraph 6 of the
31 Constitution of the State of New Jersey, the Commissioner of
32 Environmental Protection shall have 30 days following transmittal
33 of this resolution to amend or withdraw the '[proposed] adopted'
34 rules and regulations or the Legislature may, by passage of another
35 concurrent resolution, exercise its authority under the Constitution
36 to invalidate the rules and regulations in whole or in part.