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

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

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

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

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

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

WHEREAS, P.L.2011, c.34 (N.J.S.A.52:14B-26 et seq.) as originally introduced in the Legislature as Senate Bill No. 6 and Assembly Bill No. 2853 included a section that would have authorized State and local agencies responsible for issuing permits or approvals to waive strict compliance with the standards promulgated for issuing those permits or approvals, where necessary to alleviate undue hardship and where the waiver is based on common sense principles, and this section was deleted from the bill as it moved through the legislative process and is not in the final bill as enacted into law; and

WHEREAS, If the Legislature had intended for a State agency to proceed with a rulemaking such as the one put forth by the Department of Environmental Protection establishing an omnibus procedure for the waiver of existing rules and regulations, the Legislature could have authorized such a procedure when it was acting on Senate Bill No. 6 and Assembly Bill No. 2853 instead of deleting the waiver provision in that legislation in its entirety; and

WHEREAS, Based upon the statutory citations listed as the authority for the rule proposal, the Department of Environmental Protection is going far beyond establishing a procedure to waive compliance with its existing rules and regulations for permits and approvals related to economic development projects as the statutory authority citations include a number of statutes related to natural areas, parks and historic resources, such as the "Natural Areas System Act" (N.J.S.A.13:1B-15.12a et seq.), the law establishing the Historic Sites Council (N.J.S.A.13:1B-15.108 et seq.), the law establishing the New Jersey Register of Historic Places (N.J.S.A.13:1B-15.128 et seq.), the State Fish and Game Code (N.J.S.A.13:1B-30 et seq.), the “State Park and Forestry Resources Act” (N.J.S.A.13:1L-1 et seq.); the “New Jersey Trails System Act” (N.J.S.A.13:8-30 et seq.), the “New Jersey Green Acres Land Acquisition Act of 1961” (N.J.S.A.13:8A-1 et seq.), the “New Jersey Green Acres Land Acquisition Act of 1971” (N.J.S.A.13:8A-19 et seq.), the “New Jersey Green Acres Land Acquisition and Recreation Opportunities Act” (N.J.S.A.13:8A-35 et seq.), the “Garden State Preservation Trust Act” (N.J.S.A.13:8C-1 et seq.), and the “Farmland Assessment Act of 1964” (N.J.S.A.54:4-23.1 et seq.); and

WHEREAS, While the “Highlands Water Protection and Planning Act” (N.J.S.A.13:20-1 et al.) provides specific authority for the Highlands permitting review program established by the Department of Environmental Protection pursuant to the act to allow for a waiver of the provisions of a Highlands permitting
review on a case-by-case basis for three specific circumstances, the current rule proposal does not conform with the language set forth in section 35 of that act (N.J.S.A.13:20-33) by establishing new waiver criteria not authorized in the law; and

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

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

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

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

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

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

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

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

STATEMENT

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

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

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