



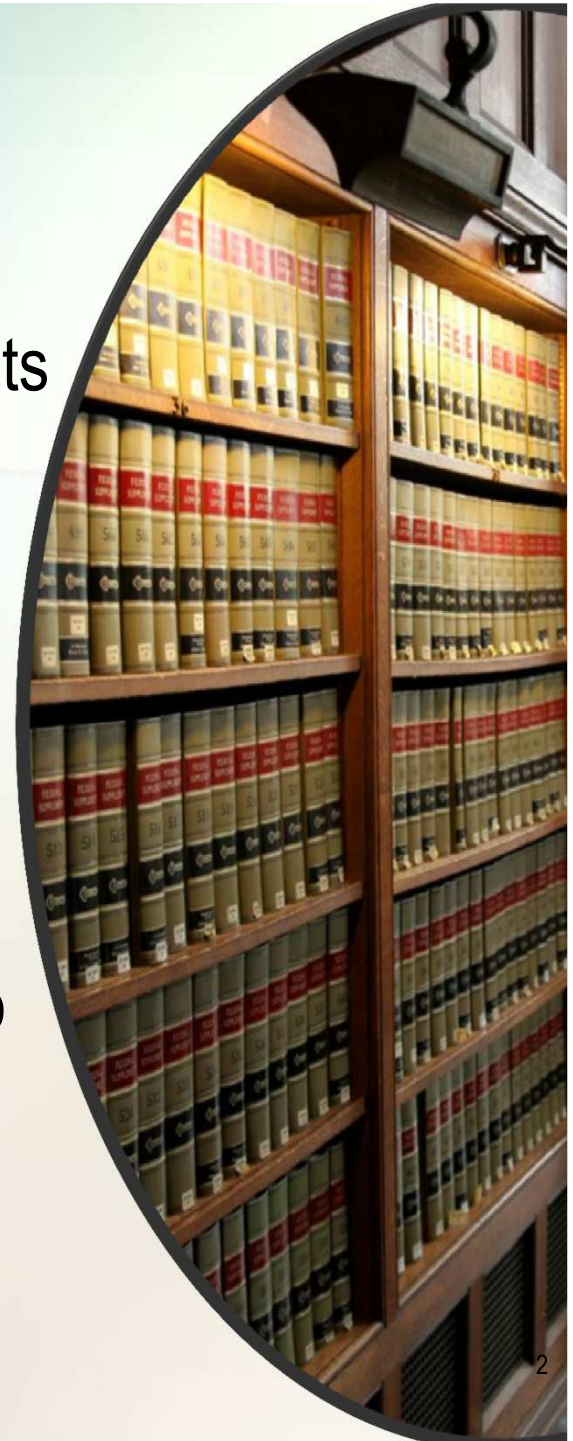
“Waiver Rule” Update

N.J.A.C. 7:1B

Last Updated: September 11, 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
- 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 process
- Training for DEP staff to ensure consistency
- Extensive outreach to the public
- Assistant Commissioner review of all waivers
- Commissioner review of all waiver decisions during initial implementation

One more tool in our tool box...

- Many DEP rules already have variance/waiver provisions and they remain useable
- DEP still maintains settlement authority
- Office of Dispute Resolution
- DEP, as always, will apply enforcement discretion



Important Reminders

- Waivers will be approved in **limited** circumstances
- Applicants should exhaust all other options first
- Waivers apply to **rule requirements**;
- **Not** to distinct **permit conditions** or **enforcement action** requirements

Key Points



Consistency



Transparency

How do we get consistency?

Waiver Rule Implementation Team

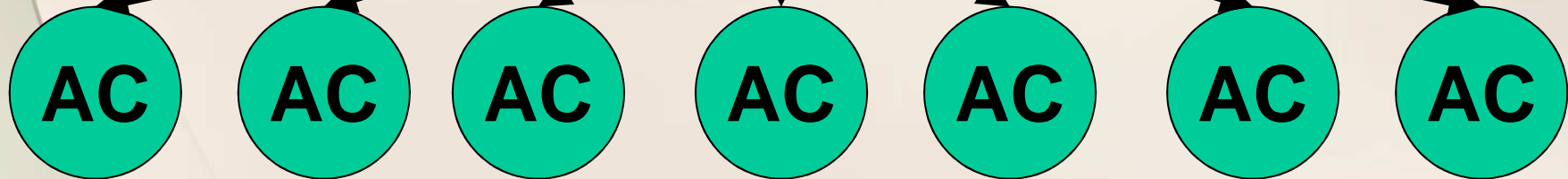
Wide Department Representation



Clearing House for Waiver Requests

Office of Permit Coordination

Scott Brubaker



How do we get consistency?

- In-depth training
- Form submissions:
<http://www.nj.gov/dep/waiverrule/submit.html>
- Templates for DEP documents
- Working with Attorney General's Office to write legally defensible decisions

How do we get consistency? (cont.)

- General guidance: <http://www.nj.gov/dep/waiverrule/docs/waiver-guidance-document.pdf>
- Delegation guidance: <http://www.nj.gov/dep/waiverrule/docs/waiver-delegation-guidance.pdf>
- Public notice requirements: <http://www.nj.gov/dep/waiverrule/docs/waiver-public-notice-rules-chart.pdf>
- FAQs: <http://www.nj.gov/dep/waiverrule/faq.html> & <http://www.nj.gov/dep/waiverrule/progfaq.html>

How do we get transparency?

- Post all applications
- Post all decisions
- Use underlying rule's public notification requirements

How do we get transparency? (cont.)

- Underlying rule's public notice requirements
 - Remember: Waivers apply to rule requirements, NOT directly to permit conditions
 - **BUT**, some waiver decisions of a rule may impact a permit condition
 - The waiver decision is effective only if the applicable permit reflects the waiver decision
- The underlying rule's public notice requirements are critical

Waiver Rule and the Underlying Rule's Public Notice Requirements

Underlying Rule	Waiver Review	Public Notice	Effective Date of Waiver
No Permit Required	<ul style="list-style-type: none"> DEP reviews pursuant to N.J.A.C. 7:1B-2.2 	<ul style="list-style-type: none"> Posted on DEP website No public comment period No public hearing 	<ul style="list-style-type: none"> Upon issuance of waiver decision
No public notice requirement	<ul style="list-style-type: none"> DEP reviews pursuant to N.J.A.C. 7:1B-2.2 	<ul style="list-style-type: none"> Posted on DEP website No public comment period No public hearing 	<ul style="list-style-type: none"> Upon issuance of waiver decision
Waiver Application arrives <u>with</u> permit request to make waiver effective	<ul style="list-style-type: none"> DEP reviews pursuant to N.J.A.C. 7:1B-2.2 Decision must respond to public comments 	<ul style="list-style-type: none"> Posted on DEP website Use underlying rule public notice requirements Waiver and permit action are noticed together and are open to comment together 	<ul style="list-style-type: none"> Upon issuance of permit action
Waiver Application arrives <u>without</u> a necessary permit request to make the waiver effective	<ul style="list-style-type: none"> DEP reviews pursuant to N.J.A.C. 7:1B-2.2 DEP may issue interim conditional approval Final decision may be impacted by future public comment 	<ul style="list-style-type: none"> Posted on DEP website Use underlying rule public notice requirements at time of required permit's comment period Preliminary waiver decision open to public comment 	<ul style="list-style-type: none"> Upon accomplishing waiver conditions Upon issuance of permit action

Potential Waiver Requests

- Any DEP rule
- With a new permit application
- For an existing permit condition
- For rules associated with an ACO
- For permits under appeal or in litigation
- Before a property owner markets a property for development
- After a property owner illegally discharges a pollutant

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

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

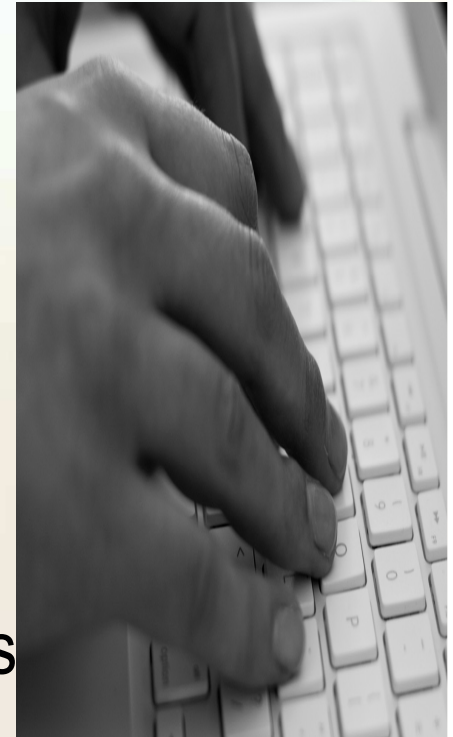
Step 3 - Evaluation Criteria

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





STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION



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Historic Preservation



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



State Parks Mobile App



Today's Air Quality



**Transformation &
Stakeholder Involvement**



Meetings & Events

NJDEP-DEP's Waiver Rule - Windows Internet Explorer

http://www.nj.gov/dep/waiverrule/

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DEPARTMENT OF ENVIRONMENTAL PROTECTION
DEP'S WAIVER RULE

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Waiver Rule Home

Waiver Rule (pdf)

Frequently Asked Questions

Waiver Rule Guidance

Submit a Waiver Request

Search for Waiver Request and Decisions

Waiver Rule Adoption: DEP Responses to Public Comments (pdf)

Email Updates

Contact Us

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Office of Permit Coordination & Environmental Review
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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.

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**

Submit a Waiver Request

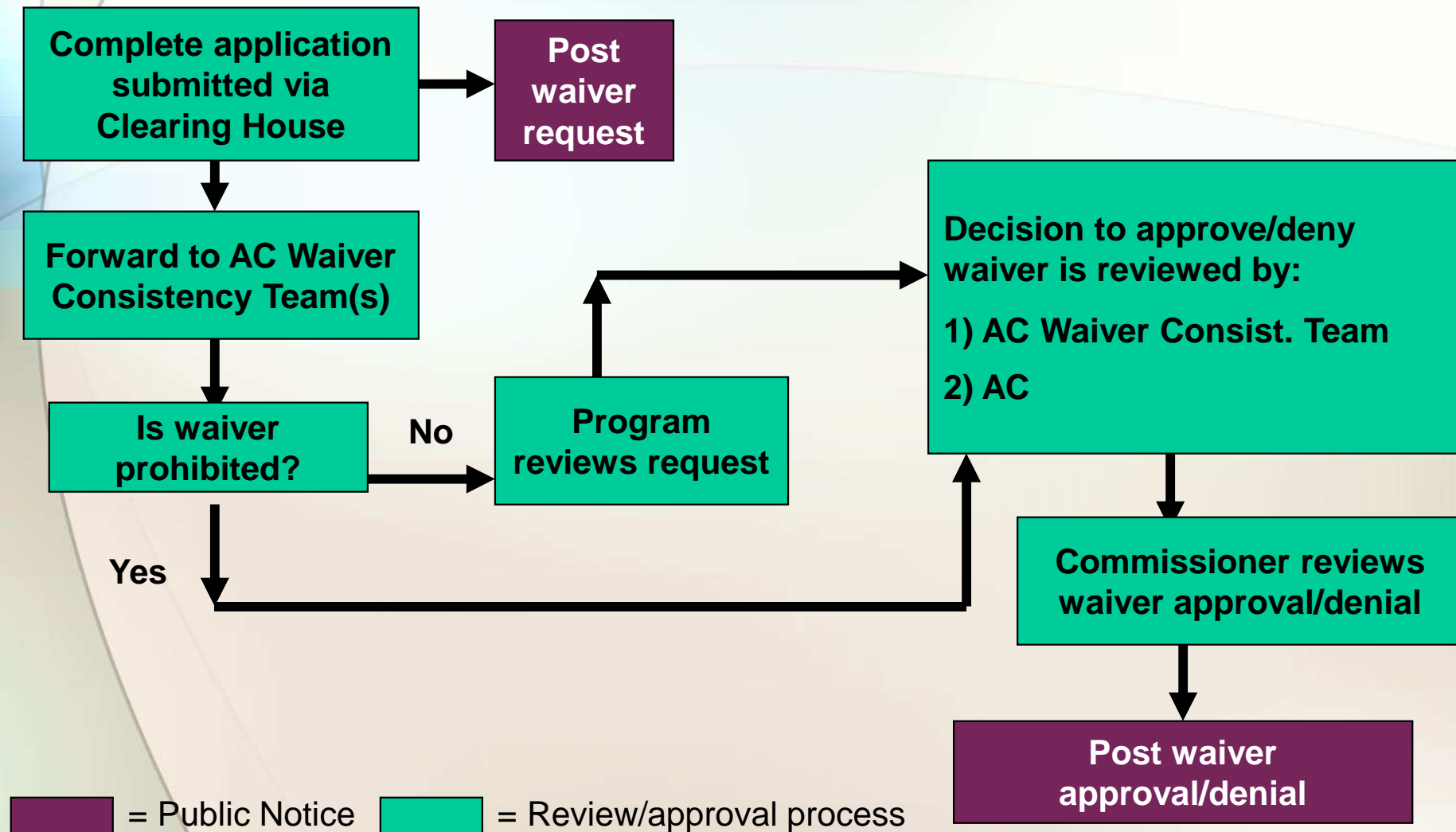
Waiver Rule Guidance

Search for Waiver Requests and Decisions

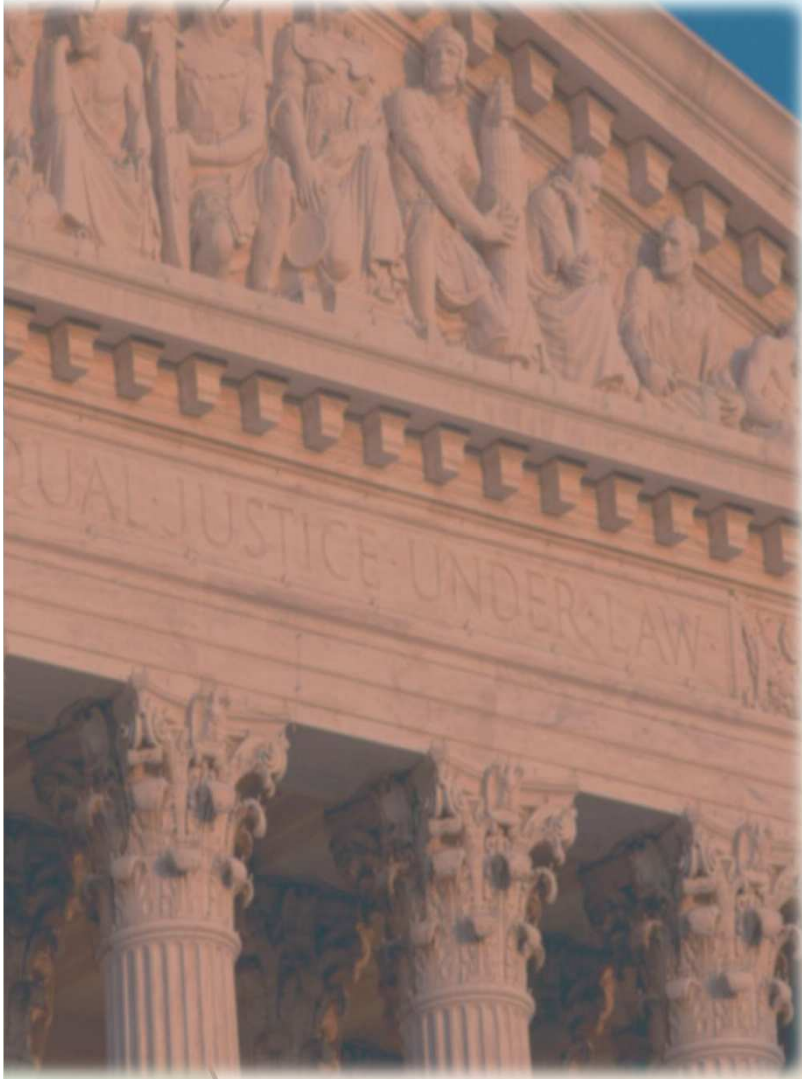
Important Information

- 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 may be linked with the number of requests received by the program
- **No “Do-Loops”** between applicants and DEP

DEP's Review Process

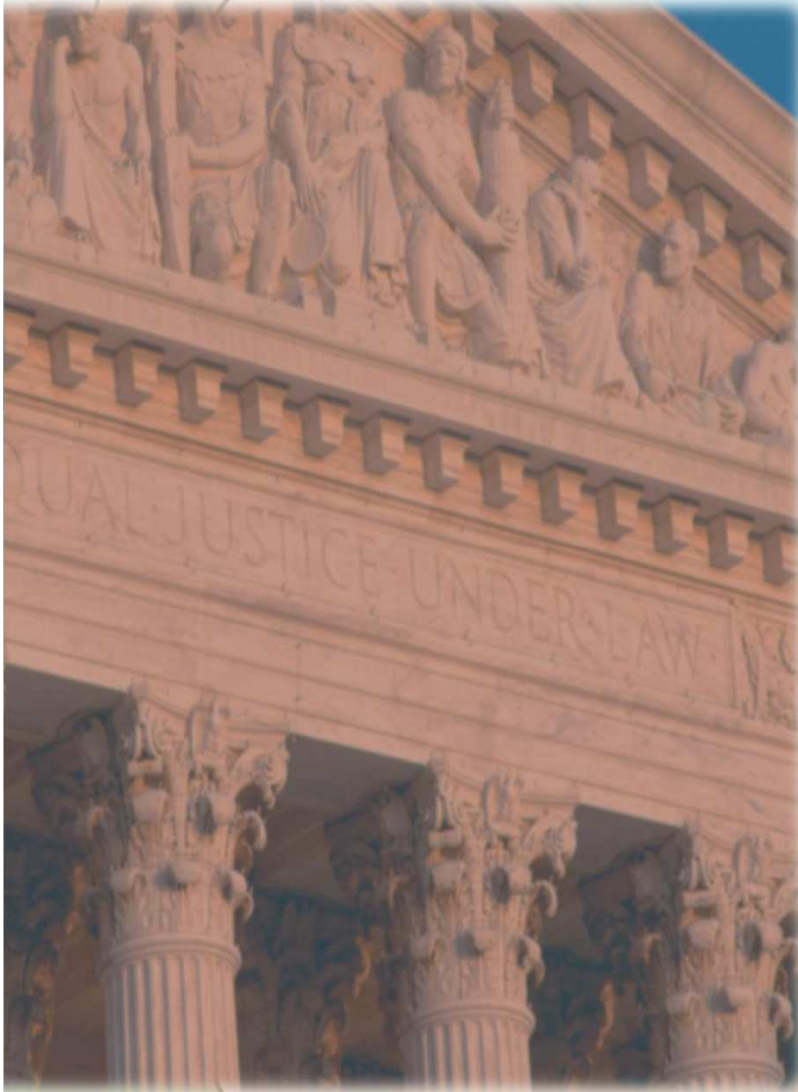


Litigation



- Rule challenged by 28 environmental and labor organizations (*In re Adoption of N.J.A.C. 7:1B*)
- They argue 3 points:
 - 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 (cont.)



- 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 department
 - 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?

