

Observer-Tribune

Groups sue to block new rules to waive environmental restrictions

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By BOB THOMAS, Staff Writer

A broad coalition of environmental groups and advocates of open public government have sued the state Department of Environmental Protection (DEP) from offering waiver considerations on a case by case basis, irregardless of the statutes involved.

The suit was filed on July 25 by the Columbia Environmental Law Clinic, on behalf of groups such as the Sierra Club, the New Jersey Highlands Coalition, the Teamsters, United Steelworkers and Rutgers Administrators Union.

It asks the Appellate Division of Superior Court to block DEP's implementation of the so-called "waiver rule" and to prevent any applications under the rule to be processed while the court decides its validity.

The DEP adopted the waiver rule, effective Wednesday, Aug. 1. It will allow strict compliance with DEP rules to be waived on an individual case basis.

Ed Lloyd, director of the Columbia Environmental Law Clinic, said adoption of the new, streamlined process would give the DEP "carte blanche to rewrite the environmental regulatory structure."

Jeff Tittel, executive director of New Jersey Sierra Club, called the rule a threat to the environment and to due process.

"It is too vague and will be subject to abuse and "pay to play,"" Tittel said in a statement. "This rule is a giveaway to special interests at the expense of New Jersey's environment, public health and safety."

Under the waiver rule, one basis for a waiver is that the regulations in question are unduly burdensome. Specifically, the guidance offered by DEP lists excessive costs as a legitimate reason to request a waiver. It also suggests comparison to less costly measures which would provide a comparable or greater benefit.

The waiver rule requires public notice of each waiver application and posting of a narrative summary describing the case and alternative measures.

Julia Somers, executive director of the N.J. Highlands Coalition, said the individual consideration of waivers would involve every facet of state government, not just areas of environmental concern.

"We think this approach will lead to corruption and pay to play," Somers said. "It will be a real problem and is a real reason for all state residents to be concerned. Under this policy, there is the strong possibility of people paying to get the decision they want."

Somers said the DEP is still considering how the waiver rule impacts the state Highlands Act.

"What they have opined in their guidance as far as the Highlands is concerned is still unclear," she said. "If they do include the Highlands (in the waiver rule), we will challenge it."

Somers said the overall waiver rule invites endless legal action.

"Refusals will be challenged by the applicants or, if granted, by groups such as ours. They're going to be in court over and over again wasting the public's money," Somers said.

The coalition lawsuit challenges the authority of the DEP to waive regulations established by the Legislature.

Lloyd said there are more than 2,300 citations by the DEP involving 91 specific cases that the department feels justify its authority to enact the waiver rule.

He said that even if the authority of DEP to use a waiver rule is upheld, the rules for obtaining the waivers are unclear.

"They've thrown in everything including the kitchen sink," said Lloyd. "Every DEP regulation in the last 40 years could be avoided under this rule. The standards are so vague that they do not meet the requirement of due process."

Among the waiver allowances are any case where greater environmental protection is provided by the alternative proposed by the applicant than by the regulation for which the waiver is asked.

Lloyd said the waiver rule doesn't provide any specific way to measure such an impact. He also

said the provision is unlikely to be used.

"The only two cases already posted by DEP involve economic hardship to the applicant," Lloyd said.

Another basis for a waiver application is any case in which differing regulations appear to conflict with each other.

The guidance posted by the DEP asks waiver applicants to provide a statement of facts detailing the expected costs of strict compliance versus costs of any proposed alternatives.

It also asks applicants to address the specific intentions of the regulation they propose to circumvent.

Under expedited consideration of the case, Lloyd said a decision on the requested injunction against the law could be issued before the end of August. He said the broader consideration of the challenge to the waiver rule could be decided by the end of the year.

The DEP is only the second state agency to respond to Gov. Chris Christie's request for waiver provisions for all regulations. Christie proposed the sweeping use of waivers in the first months of his administration.

The DEP process included open public hearings over a more-than one year period.

Lloyd said the Division of Consumer Protection is the only other branch of state government to have adopted broad waivers.

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