

New Jersey Court Bars Department of Environmental Protection's (DEP) Reliance On "Guidance" For Stormwater Management Plans

Article By:

Paul H. Schneider

In upholding DEP's "waiver rules" earlier this year, the Appellate Division of New Jersey Superior Court called into question the agency's reliance on "guidance documents" in lieu of formal rulemaking. In that case, the court upheld the waiver rules despite DEP's use of guidance documents in implementing the rule, finding that there are sufficient substantive standards in the rules themselves for applicants to submit, and DEP to evaluate, waiver applications.

The Appellate Division returned to the "guidance in lieu of rulemaking" issue in a September 9, 2013 decision involving freshwater wetlands permits for the expansion of an assisted living facility in Hamilton Township, Mercer County. The wetlands permit applications triggered a review of the applicant's stormwater management plan. DEP's stormwater management rules require an applicant to demonstrate that to the "maximum extent practicable" its stormwater management plan gives nonstructural stormwater strategies, such as swales or bioretention basins, priority over structural stormwater strategies, such as storm sewers, pipes, and manufactured treatment devices. The court held that DEP's "use of and reliance on" the Nonstructural Strategies Points System (NSPS) to assess compliance with this provision in the stormwater management rules is impermissible because the NSPS procedure was not adopted in accordance with the rulemaking provisions of the Administrative Procedure Act.

It remains to be seen how this latest decision may affect DEP's review of stormwater management plans and its broader use of guidance documents.

© 2025 Giordano, Halleran & Ciesla, P.C. All Rights Reserved

National Law Review, Volume III, Number 253

Source URL: <https://natlawreview.com/article/new-jersey-court-bars-department-environmental-protection-s-dep-reliance-guidance-st>