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SITE REMEDIATION PROGRAM

Processing of Damage Claims Pursuant to the Sanitary Landfill Facility Closure and Contingency Fund Act

Readoption with Amendments: N.J.A.C. 7:11

Proposed: July 20, 2009 at 41 N.J.R. 2759(a) (see also 42 N.J.R. 642(a)).

Adopted: July 20, 2010 by Bob Martin, Commissioner, Department of Environmental Protection.

Filed: July 20, 2010 as R. 2010 d. 174, **without change**.

Authority: N.J.S.A. 13:1B-3, 13:1D-9, 13:1E-100 et seq. (particularly 13:1E-106), and 58:10-23.11 et seq.

DEP Docket Number: 10-09-06/703.

Effective Date: July 20, 2010, Readoption;
August 16, 2010, Amendments.

Expiration Date: July 20, 2015.

The Department of Environmental Protection hereby readopts, with amendments, the Processing of Damage Claims Pursuant to the Sanitary Landfill Facility Closure and Contingency Fund Act (Landfill Claims rules), N.J.A.C. 7:11. The Legislature established the Sanitary Landfill Facility Closure and Contingency Fund (the SLF Fund) when it enacted the Sanitary Landfill Facility Closure and Contingency Fund Act, N.J.S.A. 13:1E-100 et seq., (the SLF Act) in 1981. The purpose of the SLF Fund is to provide compensation for damages resulting from the improper operation or closure of sanitary landfill facilities. The fund is “strictly liable for all direct and indirect damages, no matter by whom sustained, proximately resulting from the operations or closure of any sanitary landfill.” N.J.S.A. 13:1E-106a.

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Historically, the SLF Fund has paid claims predominantly to individual homeowners who have suffered losses due to improperly operated and improperly closed landfill facilities after the homeowners have exhausted all other reasonably available sources for compensation. The SLF Fund is also utilized by the Department to finance priority cleanups at severely contaminated landfill sites.

The proposal was published in the New Jersey Register on July 20, 2009 at 41 N.J.R. 2759(a). No public hearing was requested or held concerning the proposal. The comment period for the proposal closed on September 18, 2009. On January 20, 2010, Governor Christie issued several executive orders. Executive Order No. 1 suspended for 90 days more than 150 then-pending proposals of various New Jersey agencies, among which was the proposal to readopt the Landfill Claims rules and 11 other proposals of the Department. Executive Order No. 1 states that one of the Governor's priorities is to establish, under the direction of a Red Tape Review Group, a "commonsense" approach to the promulgation of rules. The commonsense principles are described in Executive Order No. 2, and the Red Tape Review Group is established under Executive Order No. 3. The purpose of the suspension was to afford the Red Tape Review Group the opportunity to examine the suspended rulemakings and make recommendations as to those proposed rules it determines are "unworkable, overly-proscriptive or ill-advised."

On February 3, 2010, the Department filed for publication in the New Jersey Register a notice of the extension or reopening of the comment period on the proposal to readopt the Landfill Claims rules, and the other 11 suspended Department rulemakings, to March 15, 2010. The notice appeared in the March 1, 2010, New Jersey Register (see 42 N.J.R. 642(a)). The Department posted the notice on its website on February 4, 2010. The Department sought through the notice to focus any additional written comments submitted on the purposes of the rules review set forth in the executive orders. The Department also announced in the notice that it would be scheduling informal stakeholder meetings on the proposals and that the dates for the meetings would be posted on the Department's website. The schedule of the stakeholder meetings was subsequently posted on the website on February 22, 2010. The Department, did not, however, hold an informal stakeholder meeting on the Landfill Claims proposal because the proposed amendments were minor in scope and effect.

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This adoption document may be viewed on the Department's website at <http://www.state.nj.us/dep/rules>.

Summary of Public Comments and Agency Responses

The Department timely received written comments on the proposal from: Christopher Len, , New York/New Jersey Baykeeper and Hackensack Riverkeeper.

1. COMMENT: The Governor's Red Tape Review executive orders have raised potentially troublesome issues for the Department's rulemaking and enforcement process. Considering the economic impacts of environmental regulation is a fraught process. Even the best economists struggle to quantify environmental benefits in dollar terms; their best efforts, with the benefit of hindsight, tend to underappreciate environmental value at the time of quantification tragically and repeatedly. Economists struggle with correctly finding and valuing the external impacts of economic transactions, discount rates and contingent values for natural resources; most ecosystem services are not captured in market transactions and are thus of indeterminate value. There is simply no economically viable way for the Department to say, for example, that 15 shopping malls are of equal value to New Jersey as a self-sustaining osprey population.

Cost benefit analyses of environmental regulation, when attempted, are invariably wrong, invariably non-confirmable and invariably minimize the benefit while maximizing the cost. Including such cost benefit analyses in the regulatory process is an important decision for any statute, and legislatures are well aware of the importance of deciding on whether particular legislation will impel or forbid such a process.

Inappropriately applying cost benefit analyses is a common and fatal mistake many levels of government make; one that often puts them on the wrong end of an environmental lawsuit.

While true benefit analysis is probably not possible, only a highly trained economist can be expected to wade through analysis of contingent valuation, externalities and discount rates. Reasonable analysis, let alone accurate analysis, is not possible for a layperson to produce. The commenter's understanding is that the Department has not used any particular economic theory to generate its benefits analysis, has no methodology to quantify benefits, has not used economists to review the effects of these rules and has only one economist on staff for the entire

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department. Although it is good that the Department concludes that its rules are justified by their benefits, a qualified economist is likely to find far greater benefit than the Department has. (1)

RESPONSE: Governor Christie's Executive Order No. 2 delineates "common sense principles" for rulemaking that are intended to provide the "opportunity to energize and encourage a competitive economy to benefit business and ordinary citizens." At section 1a, the Executive Order directs all State agencies to solicit the advice and views of knowledgeable persons from outside of New Jersey State government, including the private sector and academia, in advance of any rulemaking. At section 1d, the Executive Order directs State agencies to "employ the use of cost/benefit analyses, as well as scientific and economic research from other jurisdictions, including but not limited to the federal government when conducting an economic impact analysis on a proposed rule."

The Administrative Procedure Act (APA) at N.J.S.A. 52:14B-23 and 24 (P.L. 1995, c.65, effective June 5, 1995, which codified the substance of Governor Whitman's Executive Order No. 27(1994) into the APA) requires State agencies that adopt, readopt or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a comparison with Federal law. The analysis must include a cost-benefit analysis that "supports the agency's decision to impose the standards or requirements and also supports the fact that the State standard or requirement to be imposed is achievable under current technology, notwithstanding the Federal government's determination that lesser standards or requirements are appropriate." Therefore, since 1994 in accordance with State law, the Department has included a cost-benefit analysis in all of its rulemakings where the rules or standards exceed Federal law.

The APA at N.J.S.A. 52:14B-4(a)2 requires State agencies to include in each rulemaking a "description of the expected socio-economic impact of the rule." The Office of Administrative Law's Rules for Agency Rulemaking implement the APA and require at N.J.A.C. 1:30-5.1(c)3 that a notice of proposal include "an economic impact statement which describes the expected costs, revenues, and other economic impact upon governmental bodies of the State, and particularly any segments of the public proposed to be regulated." Each of the Department's rule proposals contains such a statement.

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As required by the APA and the Rules for Agency Rulemaking, the Department's rule proposals also contain statements of social impact, jobs impact, agriculture industry impact, impact on small business (regulatory flexibility analysis); and statements addressing the proposed rules' impact on smart growth and the cost of housing. The Department in addition includes an environmental impact statement, describing the impact that its proposed rules will have on the environment.

The Department acknowledges that it has not historically provided as much detail in its impact analyses as an economist might. The Department endeavors to employ a practical approach to its determination of the costs and benefits of its rulemakings, and necessarily relies to a certain extent on information developed by other sources. For instance, the Department may adapt and tailor to the circumstances in New Jersey the economic analysis for a rule performed by another state or the Federal government. In addition, the Department conducts informal and formal outreach to regulated communities, environmental interest groups, the U.S. Environmental Protection Agency, other Federal and State agencies, agencies of other states, and the general public in the early stages of rulemaking. This is particularly the case for larger, more complex rulemakings. The Department will publish notice on its website or in the New Jersey Register, and/or use mail and electronic mail to known stakeholders, providing a description of the rules anticipated to be changed and the timeframe and means by which input will be gathered, for instance, at informal meetings or by written submissions, or both. Through outreach such as this, the Department obtains information on possible costs and benefits of rules that it is developing, as well as suggestions for the approach the Department should take in pursuing its regulatory goals.

Through the impact statements and Federal standards analyses for its rulemakings the Department attempts to identify the anticipated costs and benefits that will result from the proposed rules, including reasonably foreseeable indirect or secondary costs and benefits. The Department does attempt to identify and describe, even if it cannot always quantify in dollar terms, the proposed rules' costs and benefits in order to provide the public with as complete a picture and/or rationale as possible regarding the positive and negative economic impacts of the rulemaking.

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Going forward the Department anticipates looking to the scientific and economic research of other jurisdictions and conducting advance outreach for its rulemakings in order to obtain enhanced insight into the costs and benefits that will flow from its rules and help accomplish the regulatory balance contemplated by Governor Christie's Executive Orders.

2. COMMENT: The Governor's concern that Department standards may, in some instances, exceed Federal standards is misplaced. The Federal law in most environmental matters acts as a basement, below which states cannot fall, but above which they may build. The Congress and the EPA are aware that they are setting national minimums, just as they are aware that the states are very different. A minimum that makes sense in a relatively unpopulated state such as Montana, will not necessarily make sense in New Jersey, the most densely populated state in the country. A minimum in a relatively virgin state such as Oregon will not necessarily make sense in New Jersey, a state with legacy of toxic industrial pollution. In this context, it is not only appropriate that New Jersey's regulations would exceed Federal standards in a number of instances, it is essentially mandatory. Any state's environmental protection agency that is doing its job will find instances where the peculiarities of the particular state make Federal regulation inadequate.

New Jersey's regulations, because of the State's population density, industrial legacy and proximity to several huge metropolitan areas, should probably exceed Federal standards in many and diverse ways. The Department is uniquely positioned to use Federal standards as a starting point to create regulations that specifically address the unique problems facing New Jersey and its citizens. The Department, therefore, should not hesitate to exceed Federal standards when the health, safety, and welfare of New Jersey's citizens and its environment require it. (1)

RESPONSE: The APA at N.J.S.A. 52:14B-23 and 24 requires State agencies to include in their Federal standards analysis a discussion of the policy reasons that support the agency's decision to impose a standard that is more stringent than a comparable Federal standard. This is in addition to the cost/benefit analysis that the APA requires, as discussed in the immediately preceding response. The Legislature stated, at N.J.S.A. 52:14B-22, "[i]t is the declared policy of the State to reduce, wherever practicable, confusion and costs involved in complying with State

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regulations. Confusion and costs are increased when there are multiple regulations of various governmental entities imposing unwarranted differing standards in the same area of regulated activity. It is in the public interest that State agencies consider applicable federal standards when adopting, readopting or amending regulations with analogous federal counterparts and determine whether these federal standards sufficiently protect the health, safety and welfare of New Jersey citizens.”

Governor Christie’s Executive Order No. 2, section 1e, requires State agencies to “[d]etail and justify every instance where a proposed rule exceeds the requirements of federal law or regulation. State agencies shall, when promulgating proposed rules, not exceed the requirements of federal law except when required by State statute or in such circumstances where exceeding the requirements of federal law or regulation is necessary in order to achieve a New Jersey specific public policy goal.” This directive establishes a focus and approach to the comparison with Federal law that the APA requires all State agencies and the Department to conduct for rulemaking.

As the commenter points out, the conditions and circumstances of New Jersey and its citizens can be unique to the State. Consequently, both the APA and Executive Order No. 2 acknowledge that there will be times when it is absolutely appropriate for the Department to promulgate standards that are more stringent than Federal standards, either because New Jersey law so requires or because doing so is necessary in order to achieve important public policy goals for the State.

3. COMMENT: There are probably many instances where Department procedures could be more clear. For example, Department forms may have increased in complexity over the years, some information may be requested redundantly and some permits could, perhaps, be merged. The Department, however, should keep in mind that it is not a “Department of Environmental Permitting,” and its mission should not be to smooth the path from developmental permit applications to development. Central to the idea of protection is that one must often say “no.” The Department should not look at “process improvement” as making it easier to get to “yes.”

(1)

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RESPONSE: The Department undertakes various efforts to assist the regulated community in the permit application and review process. For example, in accordance with N.J.S.A. 13:1D-111, the Department develops and makes available technical manuals relating to its various environmental permits. The Department also provides checklists, identifying the application steps and submissions required under the respective permitting program rules. Checklists and applications are made available through the Department's website. The Department often assigns case managers to assist applicants with the permit process, and to coordinate permitting across various Department programs.

The Department convened the Permit Efficiency Review Task Force in 2008 and, in response to its recommendations (see <http://www.state.nj.us/dep/permittf/documents.html>), has undertaken various initiatives to improve outreach for rulemaking and to streamline and improve the permit application and review process. The Department is committed to upgrading its information technology infrastructure to support electronic submission and processing of permit applications and associated reports. The Department is in the process of increasing its network capacity, and is accelerating its efforts to design and develop electronic permitting and reporting services. Recent efforts include, for instance, implementation of an electronic water use and transfer reporting program by the water supply program to facilitate data management, eliminate the use of paper forms, reduce data errors, improve tracking and reporting of data, and make data available in a more timely fashion.

The Department believes process improvements that facilitate the issuance of permits that are consistent with the applicable standards and that are issued in a coordinated and timely fashion are beneficial to the regulated community, the Department, and the environment. Streamlining permitting will conserve the resources of all involved and maintain proper focus on achieving substantive environmental protections. As the Permit Efficiency Review Task Force's recommendations and Governor Christie's Executive Orders recognize, the process of obtaining a permit from the Department should not stand in the way of development that is otherwise allowable under applicable environmental protection law and standards.

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4. COMMENT: Although many of the State's environmental regulations could be improved, the Department ought not curtail any protections or delay any rules based on the Governor's Executive Orders. (1)

RESPONSE: The Department, in order to inform the reviews of pending proposed rules being conducted by the Department and the Red Tape Review Group established under Executive Order No. 3 issued by Governor Christie on January 20, 2010, extended or reopened the public comment period for certain pending proposals. (See Notice of extension or reopening of comment periods and informal stakeholder meetings for pending Department of Environmental Protection proposals suspended under Executive Order No. 1 (2010), <http://www.nj.gov/dep/rules/notices.html>, 42 N.J.R. 642(a).) In accordance with Executive Order Nos. 1 and 3, the Red Tape Review Group's task is, among other things, to examine various proposed administrative rules and regulations by a number of State agencies prior to their adoption and make detailed recommendations to the Governor to rescind, repeal or amend those rules. Based on those recommendations, the Commissioner of the Department will determine whether or not to proceed with adoption or amendment of the Department's affected proposals.

The Executive Orders and the Red Tape Review process expressly recognize that some rules must be adopted in order to prevent an adverse impact to public safety or security or public health; prevent prejudice to the State with regard to receipt of funding or certifications from the Federal government; allow State agencies to exercise their essential powers, duties and functions; and comply with any judicial deadline. Rule proposals that would result in such adverse impacts if adoption were delayed therefore were not suspended. Executive Order No. 2 also directs State agencies to implement the "common sense principles" in all rulemaking while keeping in mind the core missions of the agency; public health, safety, welfare and the environment; and the agency's underlying regulatory objectives. In determining whether to proceed with its rule proposals and for all future rulemaking, the Department will necessarily take all of these factors into consideration.

Federal Standards Statement

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Executive Order 27 (1994), and N.J.S.A. 52:14B-1 et seq. require State agencies that adopt, readopt or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal Standards Analysis. N.J.A.C. 7:1I is not promulgated under the authority of, or in order to implement, comply with or participate in any program established under Federal law or under a State statute that incorporates or refers to Federal law, standards or requirements. Accordingly, no further analysis is required.

Full text of the readoption with amendments follows:

(No change from proposal.)

Based on consultation with staff, I hereby certify that the above statements, including the Federal Standards Analysis addressing the requirements of Executive Order 27 (1994), permit the public to understand accurately and plainly the purpose and expected consequences of this readoption. I hereby authorize this readoption.

Date: _____

Bob Martin, Commissioner
Department of Environmental Protection