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ENVIRONMENTAL PROTECTION

OFFICE OF THE COMMISSIONER

General Practice and Procedure

Proposed Readoption with Amendments: N.J.A.C. 7:1D and Appendix A

Authorized by: Bob Martin, Commissioner, Department of Environmental Protection.

Authority: N.J.S.A. 13:1D-1 et seq., 53:14B-1 et seq., and Executive Order No. 34 (1976)

Calendar Reference: See Summary below for explanation of exception to calendar requirement

DEP Docket Number: 17-10-12

Proposal Number: PRN-2010-

Submit written comments by (60 days after publication) to:

Alice A. Previte, Esq.

Attention: DEP Docket Number 17-10-12

Office of Legal Affairs

New Jersey Department of Environmental Protection

401 East State Street, 4th floor

PO Box 402

Trenton, NJ 08625-0402

The Department of Environmental Protection (Department) requests that commenters submit comments on disk or CD as well as on paper. Submittal of a disk or CD is not a requirement. Submittals on disk or CD must not be access-restricted (locked or read-only) in order to facilitate use by the Department of the electronically submitted comments. The Department prefers Microsoft Word 6.0 or above. Macintosh™ formats should not be used. Each comment should be identified by the applicable N.J.A.C. citation with the commenter's name and affiliation following the comment.

This rule proposal can be viewed or downloaded from the Department's web page at www.state.nj.us/dep/rules.

The agency proposal follows:

Summary

Since the Department has provided a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

Pursuant to the requirements of Executive Order No. 66 (1978), the Department's General Practice and Procedure rules, N.J.A.C. 7:1D, were scheduled to expire on December 22, 2010. The filing of this proposal with the Office of Administrative Law on or before that date automatically extended the expiration date 180 days, until June 20, 2011, in accordance with the Administrative Procedure Act. (See N.J.S.A. 52:14B-5.1(c).) The Department has reviewed these rules and has determined them to be necessary, reasonable and proper for the purpose for which they were originally promulgated. Therefore, the Department proposes to readopt this chapter with the amendments set forth below.

N.J.A.C. 7:1D-1 establishes the procedure for the public to petition the Department for rulemaking. The rules are required by and are consistent with the Administrative Procedure Act (APA) concerning rule petitions. (See N.J.S.A. 58:14B-4(f).) The Department proposes new N.J.A.C. 7:1D-1.1(h) to allow the Department and a person submitting a petition for rulemaking to agree to a period of more than the mandatory 90 days after the grant of a petition for further deliberations before taking action on a petition and/or to initiate rulemaking. This is consistent with the Office of Administrative Law Rules for Agency Rulemaking at N.J.A.C. 1:30-4.2(b).

N.J.A.C. 7:1D-2 governs the debarment, suspension, or disqualification of persons from contracting with the Department, including the procedure and scope of such action. The subchapter is consistent with Executive Order No. 34 (1976), which requires all persons contracting with the State to compete fairly and perform honestly in their dealings with the State. The Department proposes to readopt the subchapter with an amendment to update contact information for the Office of Legal Affairs.

N.J.A.C. 7:1D-3 and 4 are reserved.

N.J.A.C. 7:1D-5 establishes the circumstances under which the Department will extend the public comment period on a rule proposal and hold a public hearing on a rule proposal, and the means by which it will provide notice of rulemaking to the public. The APA at N.J.S.A. 52:14B-4(a)(3) requires the Department to extend the comment period if “sufficient public interest” is demonstrated, and requires each State agency to promulgate rules establishing what constitutes “sufficient public interest.” N.J.A.C. 7:1D-5.1, Extension of comment period on a proposed rule, fulfills that requirement and provides that sufficient public interest is demonstrated if there are written requests for an extension. The requests must be from a broad range of interests, or the proposed rule must be complex or involve significant amendments. In

addition, the Department must determine that the extension is likely to result in relevant comments, and the delay in rulemaking as a result of the extension is not likely to have an adverse impact on public health, safety or the environment. N.J.A.C. 7:1D-5.2, Public hearing on a proposed rule, identifies the circumstances under which the Department will hold a public hearing on a proposal. The rule includes the circumstances enumerated in the APA (request of a committee of the Legislature or a governmental agency or subdivision or sufficient public interest is shown). “Sufficient public interest” for purposes of holding a public hearing is the same as under N.J.A.C. 7:1D-5.1 to extend the public comment period.

The APA at N.J.S.A. 52:14B-4(a)(1) mandates four methods of providing the public with notice of a proposed rulemaking: publication of the proposal in the New Jersey Register, posting of a notice or statement of the substance of the proposed rule on the agency website, distribution of a notice or statement of the substance of the proposed rule to the news media maintaining a press office in the State House Complex, and distribution of a notice or statement of the substance of the proposed rule to persons who made timely request to the Department for notice of its rulemakings. The APA then mandates a fifth method, i.e., each agency “shall additionally publicize” its rulemaking and “shall adopt rules to prescribe the manner in which it will” publicize its rulemaking and must “prescribe the circumstances under which each additional method shall be employed.” The Department’s existing rule at N.J.A.C. 7:1D-5.3, Notice of proposed rule, mandates that the fifth method for the Department’s rulemaking is publication of notice in at least one newspaper of general circulation having a distribution area sufficient to inform those persons most likely to be affected by or interested in the proposed rule. Additional and optional methods at N.J.A.C. 7:1D-5.3(c) are mailing to a distribution list; posting in a central location on State land (e.g., at marinas); publication in trade, industry, government, or

professional newsletters; or distribution at meetings of advisory groups. The Department proposes to amend N.J.A.C. 7:1D-5.3(b) to require that the Department will provide email notification of each of its proposals to a distribution list that the Department maintains for the purposes of communicating regarding rulemaking. The list includes stakeholders, environmental organizations, permittees, trade organizations and other interest groups and individuals. Electronic notice is less costly to the Department than newspaper notice (by saving both the cost of the publication, as well as the administrative cost of arranging for the notice and payment of invoices). Moreover, it is consistent with the Department's transformation initiative, which encourages further use of electronic communication with the public. Newspaper notice would become one of the additional and optional forms of notice under N.J.A.C. 7:1D-5.3(c).

Existing Appendix A to the chapter contains the Department's "Mapping and Digital Data Standards," which set forth the technical standards for the development of digital maps that are submitted to the Department. The Department proposes to readopt the Appendix without change at this time. The Department anticipates commencing the stakeholder process in the near future to lay the groundwork for a proposal to revise and update Appendix A.

There is pending a proposal of new N.J.A.C. 7:1D-3, Non-Public Records (42 N.J.R. 2880(a)). In the event the new rules are adopted prior to the adoption of the within rules proposed for readoption with amendments, the Department intends that the new rules shall become part of the readopted chapter.

Social Impact

The rules proposed for readoption with amendments will have a positive social impact. By continuing the procedure for petitions for rulemaking, they will ensure that all citizens have a

means of participating in the rulemaking process. The rules will also help to ensure that all persons contracting with the Department meet a standard of responsibility for fair competition and honest performance in their dealings with the Department. The procedure for notice of proposed rules, comments on proposed rules and public hearings will ensure that the public continues to receive notice of and is able to participate in the rulemaking process. The Mapping and Digital Data Standards in Appendix A will continue to be a valuable planning tool that can be used not only by the Department, but by any person to better identify environmental trends.

Economic Impact

In most cases, the rules governing petitions for rulemaking (N.J.A.C. 7:1D-1) have no economic impact upon anyone who desires to submit such a petition. A petition for rulemaking, which is usually a simple letter of request, can be prepared at nominal cost.

N.J.A.C. 7:1D-2 may have a negative economic impact on persons who are debarred, suspended or disqualified from contracting with the Department. However, as debarment or suspension results from non-compliance with or violation of contract terms or other State rules through the voluntary actions of the person or persons, the rule itself does not create a negative impact. The rules will not affect the total number of contracts that the Department enters into. The subchapter will continue to have a positive economic impact for the Department and the public, in that it will help to ensure that the Department deals only with those contractors who maintain standards of performance and integrity.

N.J.A.C. 7:1D-5 governs extensions of comment period, public hearings on proposed rules, notices of proposal, and the quarterly rulemaking calendar. The proposed readoption of

the subchapter with amendments will provide cost savings, insofar as the Department will no longer incur the cost of publishing notice in newspapers for all of its rulemakings.

The Department may incur costs associated with transcribing public hearings and providing staff for those hearings. As the rule allows for an extended public comment period, the Department may expend additional resources to respond to additional comments received. It is not possible to estimate the likelihood or amount of additional costs, as they will depend on the number of proposals the Department prepares, and the number of proposals for which the Department decides to extend the comment period or to conduct a public hearing.

The requirement that mapping information be submitted to the Department in a digital format is implemented only through the requirements of each particular regulatory program; thus, there is no direct economic impact from the readoption of Appendix A. In general, the Department believes that the use of cartographic data through the Geographic Information System (GIS) is a valuable planning tool that can be used not only by the Department, but by any person to better identify environmental and demographic trends. Additionally, the information available through GIS in graphic form can be sorted and presented more easily and inexpensively, compared to the time and work that would have been necessary were this information not available in digital form. The Department provides significant economic value to private companies and the public through its digital data and mapping publications. This information is often not available elsewhere, and/or would cost significant financial resources to compile. The Department also provides access to the data in several easy to use and understand formats that integrate with most standard digital data analysis, viewing and mapping software.

Environmental Impact

The rules governing petitions for rulemaking have no direct impact on the environment; however, the Department believes that the rules may have a positive indirect effect by assisting interested persons to identify rules that the Department might promulgate, amend or repeal to improve or enhance environmental protection. Similarly, the rules governing extensions of comment period, public hearings on proposed rules and providing notice of proposals do not have a direct impact on the environment; however, they may have a positive indirect effect. They provide the public with information, which it may use to comment upon the Department's rule proposals, and call the Department's attention to issues that will improve or enhance environmental protection.

N.J.A.C. 7:1D-2, governing debarment, suspension and disqualification, also has no direct environmental impact, but may have a positive indirect impact by assisting the Department in maintaining minimum standards of competition and performance for its contractors. As a result, the Department will be able to focus its resources on those contractors that have a history of achieving an acceptable level of performance.

The mapping and digital data standards of Appendix A will continue to allow the Department to respond to issues and to plan its environmental protection activities for the future. As stated above, the use of GIS generally increases the Department's ability to identify environmentally sensitive areas and to detect and recognize environmental, demographic and other trends within the State.

Federal Standards Analysis

N.J.S.A. 52:14B-4 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 rules proposed for readoption with amendments have not been formulated in accordance with the authority of or in order to implement, comply with or participate in any program established under Federal law. There exists the voluntary “Geospatial Positioning Accuracy Standards” that the Federal Geographic Data Committee (FGDC) has developed and endorsed. The FGDC prepared its standards with the intent that they provide a single method that defines how to report the positional accuracy for all point geospatial data collected, produced or disseminated by the Federal government and the nation. To the extent that the FGDC standards apply to activities to which the Department’s Mapping and Digital Data Standards apply, the Department’s standards are consistent with the Federal standards.

Jobs Impact

The Department does not anticipate that the rules proposed for readoption with amendments will have any impact on job creation or retention in the State, except that that N.J.A.C. 7:1D-2 may have a negative impact on those businesses that are debarred, suspended or disqualified from contracting with the Department. However, the rules have no effect on the number of contracts that the Department enters into; therefore, the number of jobs that may result from those contracts will remain constant.

Agricultural Industry Impact

The Department does not anticipate that the rules proposed for readoption with amendments will have any impact upon agriculture in New Jersey.

Regulatory Flexibility Analysis

N.J.A.C. 7:1D imposes procedural requirements upon any person choosing to petition the Department to promulgate, amend or repeal a rule. This could include “small businesses” as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Since a petition for rulemaking may be made by a letter to the Department, a small business can prepare a petition that satisfies the requirements of N.J.A.C. 7:1D-2 at nominal cost. Therefore, the rule minimizes any adverse impact upon small businesses.

Under N.J.A.C. 7:1D-2, persons, including small businesses, can be suspended, debarred or disqualified from contracting with the Department for failure to comply with certain State and Federal laws, contract specifications or other requirements. This subchapter is consistent with Executive Order No. 34 (1976), which requires that all departments that engage in State contracting develop and maintain rules and regulations governing causes, conditions and procedures applicable to determinations of debarment, suspension and disqualification by that department or agency. The standards set forth in the rules proposed for readoption are necessary for the Department to maintain minimum standards of competition and performance for its contractors. Accordingly, the Department has not established different requirements or exemptions for small businesses.

The rules proposed for readoption at N.J.A.C. 7:1D-5 do not impose any reporting, recordkeeping or compliance requirements on small businesses. Therefore, no regulatory

flexibility analysis is required. The rules establish the required sufficient public interest standards for request that the Department conduct public hearings or for 30-day comment period extensions on proposed Department rulemakings, as well as the types of notice that the Department will provide for its rulemakings.

Appendix A proposed for re-adoption does not have an impact on small businesses. The mapping and digital data standards in Appendix A do not establish who must submit geographical data to the Department. The standards are implemented only through the requirements of each particular regulatory program. To the extent that the requirements of the individual programs have an impact on small businesses, the rules of those individual programs provide, where appropriate, some specific relief from the mapping criteria, as discussed above in the Economic Impact.

Appendix A provides some additional relief, even if the facility may not otherwise qualify for an exemption through one of the individual programs. At subsection 2.3, Threshold Accuracy Values, the Department recommends testing by one of two methods to ensure the accuracy of the data that is provided to it. However, if the map producer is unable to test the quality of the data by either the NSSDA or NMAS test methods, it may submit its data with documentation stating that the data is not tested.

Smart Growth Impact

Executive Order No. 4 (2002) requires State agencies that adopt, amend or repeal State regulations to include in the rulemaking document a Smart Growth Impact statement that describes the impact of the proposed rule on the achievement of smart growth and implementation of the State Development and Redevelopment Plan (State Plan).

The rules proposed for readoption with amendments do not relate to the State's land use and development policies in a way that would either encourage or discourage any development or redevelopment in the State contrary to the guiding principles of the State Plan. As a result, the Department does not expect this rulemaking to have an impact on the State's achievement of smart growth or implementation of the State Plan.

The rules proposed for readoption with amendments are consistent with the goals of the State Plan, inasmuch as Appendix A, containing Geographic Information Systems Mapping and Digital Data Standards, enhances the Department's ability to respond to issues and to plan its environmental protection activities for the future.

Housing Affordability Impact Analysis

Pursuant to N.J.S.A. 52:14B-4, as amended effective July 17, 2008 by P.L. 2008, c. 46, the Department has evaluated the rules proposed for readoption to determine their impact, if any, on the affordability of housing. The Department has determined that the rules proposed for readoption will have no impact because it is extremely unlikely that the rules will evoke a change in the average costs associated with housing. The rules proposed for readoption with amendments relate to petitions for rulemaking, contracting with the Department, extensions of rulemaking comment periods, public hearings on rulemaking, and the Department's mapping and digital data standards, which do not relate directly to housing in the State; accordingly, the Department anticipates that the rules will have little if no impact on housing or its affordability.

Smart Growth Development Impact Analysis

Pursuant to N.J.S.A. 52:14B-4, as amended effective July 17, 2008, by P.L. 2008, c. 46, the Department has evaluated the rules proposed for re adoption with amendments and determined that it is extremely unlikely that the rules will evoke a change in housing production within Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan. The rules relate to petitions for rulemaking, contracting with the Department, extensions of rulemaking comment periods, public hearings on rulemaking, and the Department's mapping standards, which do not relate directly to housing production in the State; accordingly, the Department anticipates that the rules proposed for re adoption with amendments will not evoke a change in housing production in Planning areas 1 or 2, or within designated centers.

Full text of the rules proposed for re adoption may be found in the New Jersey Administrative Code at N.J.A.C. 7:1D.

Full text of the proposed amendments follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]).

7:1D-1.1 Procedure to petition for a rule

(a) – (b) (No change.)

(c) Petitions for the promulgation, amendment or repeal of a rule by the Department of Environmental Protection shall be addressed to:

Office of Legal Affairs

Attention: Rulemaking Petitions

Department of Environmental Protection

401 East State Street, 4th Floor

PO Box 402

Trenton, New Jersey 08625-0402

(d) – (g) (No change.)

(h) In accordance with N.J.A.C. 1:30-4.2(b), a specific period of more than 90 days for further deliberations under (g)3 above and/or to initiate a rulemaking proceeding under (g)2 or 3 above may be agreed upon, in writing, by the petitioner and the Department. An agreement to extend either period or both periods shall constitute an action on the petition for which notice shall be submitted to the Office of Administrative Law for publication in the New Jersey Register.

7:1D-2.4 Procedures, period and scope of debarment

(a) When the Department or any agency within its control or jurisdiction seeks to debar a person or his affiliates, the person or persons shall be furnished with a written notice stating that:

1. – 2. (No change.)

3. An opportunity will be afforded to such person or persons for a hearing if the hearing is requested within seven days from the date of personal delivery or the date of mailing of such notice. Such request shall be filed with the Department at the following address:

Office of Legal Affairs

ATTENTION: Adjudicatory Hearing Requests

Department of Environmental Protection

401 East State Street, **4th Floor**

PO Box 402

Trenton, New Jersey 08625-0402

(b) – (e) (No change.)

7:1D-2.7 Procedures, period and scope of suspension

(a) – (c) (No change.)

(d) A request for a hearing under (a) above shall be filed with the Department at the following address:

Office of Legal Affairs

ATTENTION: Adjudicatory Hearing Requests

Department of Environmental Protection

401 East State Street, **4th Floor**

PO Box 402

Trenton, New Jersey 08625-0402

7:1D-5.3 Notice of proposed rule

(a) (No change.)

(b) In addition to the notice provided in accordance with (a) above, the Department shall [provide public notice for all of its rule proposals in at least one newspaper of general circulation having a distribution area sufficient to inform those persons most likely to be affected by or interested in the proposed rule] **distribute by electronic mail a notice of each Department rule proposal to a distribution list that the Department maintains to communicate regarding rulemaking with the regulated community and interested parties, including environmental organizations, permittees, trade organizations and other interest groups and individuals.**

(c) In addition to the notice provided in accordance with (a) and (b) above, the Department may provide public notice of a rule proposal using one of the following methods:

1. – 2. (No change.)

3. Publication in a newsletter or trade, industry, government or professional publication whose distribution list includes persons most likely to be affected by or interested in the proposed rule; [or]

4. Distribution at regularly scheduled meetings of advisory groups or councils whose members are most likely to be affected by or interested in the proposed rule[.]; **or**

5. Publication in at least one newspaper of general circulation having a distribution area sufficient to inform those persons most likely to be affected by or interested in the proposed rule.