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ENVIRONMENTAL PROTECTION

SITE REMEDIATION PROGRAM

Industrial Site Recovery Act Rules

Proposed Readoption: N.J.A.C. 7:26B

Authorized By: Mark N. Mauriello, Acting Commissioner
Department of Environmental Protection

Authority: N.J.S.A. 13:1D-1 et seq., 13:1K-6 et seq.,
58:10B-1 et seq., and 58:10-23.11a, et seq.

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

DEP Docket Number:

Proposal Number: PRN 2009-

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

Leslie W. Ledogar, Esq.

Attention: DEP Docket Number: _____

Office of Legal Affairs

New Jersey Department of Environmental Protection

401 East State Street

P.O. Box 402

Trenton, New Jersey 08625-0402

The Department of Environmental Protection (Department) requests that commenters submit comments on disk or CD as well as on paper. 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.

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This rule proposal can be viewed or downloaded from the Department's web site at <http://www.state.nj.us/dep/rules>.

The agency proposal follows:

Summary

As the Department is providing a 60-day comment period on this notice of proposal, this proposal is exempted from the rulemaking calendar requirements, pursuant to N.J.A.C. 1:30-3.3(a)5.

The Industrial Site Recovery Act Rules, N.J.A.C. 7:26B ("the ISRA Rules") are scheduled to sunset on February 24, 2009 pursuant to N.J.S.A. 52:14B-5.1 et seq. This expiration date has been extended by 180 days to August 24, 2009 pursuant to N.J.S.A. 52:14B-5.1 as a result of the timely filing of this proposal to readopt the rules. The Department has evaluated the rules at N.J.A.C. 7:26B, and has determined that they are necessary, reasonable and proper for the purpose for which they were originally promulgated without amendment, as explained in more detail below.

The Industrial Site Recovery Act ("ISRA or the Act") was originally known as the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 et seq., and was signed into law on June 16, 1993. The purpose of the Act is to protect the public health and safety, and the environment by encouraging efficient and timely remediation of contaminated industrial establishments. The Act requires that the owners and operators of these industrial establishments remediate the contamination to the Department's satisfaction prior to transferring or closing the industrial establishment. Ensuring that industrial establishments are remediated in an expeditious and environmentally sound manner greatly reduces the number of abandoned contaminated sites, thus promoting economic vitality within the State.

N.J.A.C. 7:26B, the rules implementing ISRA, became effective on December 21, 1987. The rules require owners and operators of an industrial establishment to obtain a no further

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action letter from the Department, or Departmental approval of a remedial action workplan or remediation agreement as a precondition for the closing of operations or transferring of ownership or operations at these facilities. A business is regulated by ISRA if it meets the definition of an industrial establishment pursuant to N.J.A.C. 7:26B-1.4. In order for a facility to be considered an industrial establishment, it must have a North American Industry Classification System (NAICS) code number listed in Appendix C dated and published in 2002 by the Executive Office of the President of the United States, Office of Management and Budget, ISBN 0-934213-87-9 NTIS PB2002-502024, subject to the specified exceptions and limitations, and must have engaged in operations on or after December 31, 1983, which involve the generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances and wastes on-site, above or below ground unless otherwise provided at N.J.A.C. 7:26B-2.1.

The owner or operator of an industrial establishment becomes subject to ISRA at the time of closing operations or transferring the property or the business operations. The owner or operator must submit to the Department, for approval, either a remedial action workplan or a negative declaration, or, alternatively, enter into a remediation agreement prior to closing operations at, or transferring the ownership or operations of, an industrial establishment. A remedial action workplan is a document that details the measures necessary to remediate the industrial establishment. A negative declaration is a statement by the owner or operator that there has been no discharge of hazardous substances on the site, or that any discharge has been remediated in accordance with the procedures and rules approved by the Department. The Department approves a negative declaration by issuing a no further action letter, which is a written determination by the Department that, based upon an evaluation of the site, including historical usage, any discharge of hazardous substances or hazardous wastes at the site or any discharged hazardous substances or hazardous wastes that have migrated from the site, have been remediated in accordance with applicable remediation standards..

The current process used by the Department's Site Remediation Program (SRP) to review remediation documents and the lack of aggressiveness on the part of some dischargers has

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inhibited the Department's ability to ensure timely remediation of contaminated sites in New Jersey. In order to ensure that the Department can protect human health and the environment from the threats posed by hazardous discharges at contaminated sites and spur redevelopment, significant reforms are needed to the site remediation process. The Department is currently working with the Legislature and the regulated community on a bill (S. 1897) to reform the site remediation process by creating a Licensed Site Remediation Professional program in New Jersey. The legislation as currently drafted, will require all persons responsible for conducting the remediation of a contaminated site (except for the remediation of discharges from unregulated underground storage tanks) to utilize the services of a Licensed Site Remediation Professional (LSRP). The LSRPs will be required to demonstrate that they have the requisite experience in remediating contaminated sites in New Jersey, will have to pass a rigorous exam concerning regulations and other requirements that describe remediating contaminated sites so that they are protective of public health, safety and the environment, and will be held to a strict code of conduct. The legislation will substantially change the process of remediating sites in New Jersey, including sites being remediated pursuant to the ISRA rules. It is anticipated that this bill will be enacted by the summer of 2009 and will require substantial amendments to the ISRA rules. Therefore, the Department has decided to readopt the ISRA rules without change at this time in anticipation of the enactment of the legislation establishing the LSRP program.

Subchapter Summaries and Proposed Amendments

The following is a summary of each subchapter that is proposed for readoption. Subchapter 1, General Information, is the introduction to the ISRA Rule. This subchapter provides general information that describes the scope of the chapter and the entire ISRA rule. This information includes, but is not limited to, terms and definitions, forms and submissions, certifications and signatories and right of entry and inspections.

Subchapter 2, Applicability, sets forth the transactions and operations that are not subject to ISRA, lists those operations with ISRA-excluded SIC codes, and sets forth the criteria for applicability determinations and de minimis quantity exemptions. N.J.A.C. 7:26B-2.1(a)2 sets

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forth two situations involving transactions that involve the transfer of stock or assets that are not ISRA subject.

Subchapter 3, General Information Notice, pertains to the procedures for an owner or operator of an industrial establishment to notify the Department upon closing or transferring operations of an industrial establishment. This subchapter details the ISRA Initial Notice process as well as other components that help to streamline the ISRA administrative process.

Subchapter 4, Remediation Agreement, provides the criteria and procedures for a person to obtain a Remediation Agreement. A Remediation Agreement allows a person to complete a transfer of ownership or operations of an industrial establishment prior to the Department's issuance of a No Further Action letter or approval of a Remedial Action Workplan.

Subchapter 5, Expedited Compliance Options, describes the alternatives to the standard ISRA compliance procedure by which an owner or operator of an industrial establishment may obtain a no further action letter or receive authorization to close operations or transfer ownership or operations of the industrial establishment. These alternatives streamline the ISRA remediation process.

Subchapter 6, Remediation Procedures, establishes the basic components of the remediation process that an owner or operator of an industrial establishment must comply with to obtain a no further action letter.

Subchapter 7, Protection of Confidential Information, contains the process by which the Department will manage confidential information submitted by an owner or operator pursuant to this chapter.

Subchapter 8, Fee Schedule and Direct Billing Fees, contains the fee schedule and describes the method that the Department will calculate oversight costs for reviewing documents submitted pursuant to ISRA.

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Appendix A, Standard ISRA Remediation Agreement, contains the terms, provisions and format to be used by the owner or operator of an industrial establishment entering into a Remediation Agreement pursuant to N.J.A.C. 7:26B-4.

Appendix B, Standard Landlord/Tenant Petition, contains the petition to be submitted to the Department when seeking a determination as to whether it is the landlord or tenant of an industrial establishment that is liable to comply with ISRA.

Appendix C, ISRA Subject NAICS Codes, contains a list of the businesses that meet the definition of an industrial establishment pursuant to N.J.A.C. 7:26B-1.4 are therefore regulated by ISRA. In order for a facility to be considered an industrial establishment, it must have a North American Industry Classification System (NAICS) code number listed in Appendix C dated and published in 2002 by the Executive Office of the President of the United States, Office of Management and Budget, ISBN 0-934213-87-9 NTIS PB2002-502024.

Social Impact

Contaminated sites affect everyone in the State, either directly by proximity to the contaminated site that may increase human health risks, or indirectly due to the potential cost to taxpayers, businesses and other individuals to remediate these sites. The proposed readoption of these rules will allow the Department to continue to facilitate the remediation of contaminated sites. The implementation of current rules has resulted in the proactive remediation of contaminated sites by the regulated community, thereby improving the quality of the environment for the use and enjoyment of the citizens of New Jersey. For example, the expedited review option in N.J.A.C. 7:26B-5.1 allows for an owner or operator of an industrial establishment that was previously remediated to proceed with his/her ISRA transaction without further remediation when the owner or operator certifies that there has not been a discharge subsequent to the last remediation, or that a subsequent discharge has been remediated and approved by the Department.

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In sum, the rules proposed for readoption will help address contaminated sites in a way that lessens the overall impact from contaminated environmental media impacting residents, lenders, businesses and/or potable water supplies and fewer taxpayer and private dollars being spent to remediate contaminated sites. As such, the rules proposed for readoption will have a positive social impact on the State.

Economic Impact

The rules proposed for readoption without amendments effectuates the purpose of the State's environmental laws and reaffirms the State's commitment to the environment while recognizing that environmental concerns must coexist with the State's responsibility to foster a prosperous and sustainable economy. The Department's intent in proposing to readopt the ISRA rules mirrors the legislative intent for the enactment of ISRA. "The remediation of contaminated property in an efficient and cost-effective manner will advance the economic health of the State. The performance of remediations will allow businesses to avoid the uncertainty of future liability, will result in the early discovery of contamination which is less costly to cleanup, and will thus prevent the spread of contamination. The cleanup of contaminated property will also safeguard the public health and the environment which are vital to the State's future economic prosperity." Senate Environment Committee, *Statement to Senate Committee Substitute for SENATE No. 1070*, page 2 (March 15, 1993).

The expedited compliance options set forth at N.J.A.C. 7:26B-5 of the rules proposed for readoption will continue to have a positive economic impact on the State. Owners and operators of industrial establishments who are required to comply with ISRA for a site where someone has previously performed a full-site or area of concern-specific remediation or are currently addressing the areas of concern under another remediation program, may utilize the expedited compliance mechanisms to satisfy the compliance requirements of ISRA. Not having to perform all of the remedial steps required to determine the nature and extent of contamination at a site greatly reduces the cost of compliance.

Compliance with N.J.A.C. 7:26B results in certain costs to the Department as well as to the owners and operators of the industrial establishments subject to ISRA. Department staff are

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required to provide services to the regulated community such as reviewing and acting on expedited compliance applications, as well as reviewing and providing feedback on reports required by N.J.A.C. 7:26B-6. The rules proposed for readoption without amendments contain fees by which the regulated community reimburses the Department for services rendered. The Department has established a fee schedule in N.J.A.C. 7:26B-8.1 for certain routine services which the Department provides. This schedule varies from \$ 150.00 for a relatively simple task such as a negative declaration review to \$ 1,500 for reviewing and acting on a remediation agreement application. Owners and operators of industrial establishments benefit from the fee schedule in that it allows them to plan and allocate their economic resources when complying with ISRA. The Department anticipates further savings to the regulated community when the Licensed Site Remediation Professional Program is implemented, as the reviews of remediation documents currently done by the Department will, for the most part, be performed by the Licensed Site Remediation Professional's.

Environmental Impact

The rules proposed for readoption will have a positive environmental impact by continuing to provide for the streamlined ISRA remediation process of the existing rules, thereby expediting the remediation of contaminated sites without sacrificing the standards which safeguard the public health and safety and the environment. The substantial numbers of contaminated sites that would be remediated in the State by virtue of the rules proposed for readoption and amendments will improve the environment for the use and enjoyment of the citizens of New Jersey.

Federal Standards Analysis

Executive Order 27 (1994), and N.J.S.A. 52:14B-1 et seq. (P.L. 1995, c.65), require that state agencies which adopt, readopt or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document, a Federal Standards Analysis.

The rules proposed for readoption implement ISRA and do not contain any standards or requirements that exceed those imposed by Federal law. ISRA was not enacted under the

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authority of, or in order to implement, comply with, or participate in, a program established under Federal law. Moreover, the ISRA rules do not incorporate Federal law, Federal standards or Federal requirements.

ISRA does, however, contain several references to remediation programs established by Federal law. These references grant equivalent status to those remediations performed under Federal law for the purpose of determining an owner or operator's compliance requirements pursuant to ISRA. For example, the expedited review process at N.J.A.C. 7:26B-5.1 permits an owner or operator of an industrial establishment that has undergone a Federally approved remediation to submit a certification to the Department in lieu of proceeding with the standard ISRA remediation process. A component of this certification is the requirement that the industrial establishment was previously remediated and was issued a no further action letter or similar approval pursuant to the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C.A. §9601 et seq., Resource Conservation and Recovery Act, 42 U.S.C.A. §6901 et seq., or other equivalent Federal program.

The references to Federal law in these rules are not the type of references that require further analysis pursuant to Executive Order 27 or N.J.S.A. 52:14B-1 et seq. because they are incidental to the administration of the ISRA program. In fact, the inclusion of equivalent Federal approvals in these rules proposed for readoption promotes the policy objectives outlined in Executive Order 27 and N.J.S.A. 52:14B-1 et seq. Therefore, the Department has determined that this rules proposed for readoption implementing ISRA do not contain any standards or requirements which exceed those imposed by Federal law, and no further analysis under Executive Order 27 or N.J.S.A. 52:14B-1 et seq. is required.

Jobs Impact

The rules proposed for readoption will continue to have a positive impact on the generation of jobs. The rules proposed for readoption will continue to foster new business and investment opportunities that will provide continued job growth in industries regulated by ISRA. The ISRA program has an impact on certain professions and skilled labor that are routinely

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employed by an owner or operator of an industrial establishment. Generally, an owner or operator will hire an environmental consultant and/or an attorney to oversee the completion of remedial activities at the industrial establishment and to ensure that all necessary documentation is properly prepared and filed with the Department. The environmental consultant prepares workplans and reports and performs ISRA-mandated remedial activities, e.g., the sampling of soil and groundwater, while the attorney addresses legal issues arising from these activities. For example, N.J.A.C. 7:26B-6.3 requires the owner or operator of an industrial establishment to submit to the Department a remedial action workplan for any remedial action involving the remediation of ground water or surface water. The development of a remedial action workplan detailing how contaminated ground or surface water will be remediated is a highly technical endeavor. Typically, an owner or operator will hire a consultant to determine the nature and extent of ground and/or surface water contamination and to develop a workplan for remediation.

Agricultural Impact

The Department has evaluated this rulemaking to determine the nature and extent of the impact of the rules proposed for readoption and amendments on the agricultural industry. The current rules have not had an impact upon agriculture in New Jersey because the rules only apply to owners and operators of industrial establishments, not to owners and operators of properties used for agricultural purposes. The rules proposed for readoption is not expected to have an impact upon the State's agricultural industry.

Regulatory Flexibility Analysis

In accordance with the New Jersey Regulatory Flexibility Act (Act), N.J.S.A. 52:14B-16, et seq., the Department has determined that the rules proposed for readoption would affect a significant number of small businesses as defined in the Regulatory Flexibility Act.

The threat that a contaminated site poses to the public health and safety and the environment is independent of the size of the business that is responsible for the remediation. A small business must remediate a contaminated site to levels that are protective of the public health and safety and the environment as would any other size business. This approach

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establishes a consistent process regardless of the size of the business conducting the remediation. Therefore, the rules proposed for readoption cannot establish separate requirements for small businesses.

The rules proposed for readoption implementing ISRA applies to all persons closing operations or transferring ownership or operations of an industrial establishment. Many such persons are likely to be small businesses as defined in the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.; however, since N.J.A.C. 7:26B applies to facilities involved in particular types of transactions or occurrences, rather than to particular types of businesses, the Department cannot accurately assess how many small businesses would be subject to compliance with the rules proposed for readoption.

Small business owners and operators subject to ISRA and the rules proposed for readoption would be required to remediate their industrial establishments to the same level of environmental protectiveness as owners and operators of large businesses. Such remediation is often expensive, time consuming and often requires the services of an environmental consultant. As such, ISRA compliance could pose substantial financial burdens on small businesses. The Department recognizes, however, that not all sites involve the same level of contamination or pose the same risk to human health and the environment. The Department thus has developed ISRA compliance options that would reduce the time and the cost of ISRA compliance at certain ISRA sites. These options are available to small businesses in appropriate circumstances and would continue to be available under the rules proposed for readoption. The options include: the de minimis quantity exemption set forth at N.J.A.C. 7:26B-2.3; the expedited review procedure set forth at N.J.A.C. 7:26B-5.1; the Area of Concern review set forth at N.J.A.C. 7:26B-5.2; the Regulated Underground Storage Tank Waiver procedure set forth at N.J.A.C. 7:26B-5.3; the Remediation in progress waiver set forth at N.J.A.C. 7:26B-5.4; the limited site review procedure set forth at N.J.A.C. 7:26B-5.5; the Minimal Environmental concern review procedure set forth at proposed N.J.A.C. 7:26B-5.6; the limited conveyance procedure set forth at N.J.A.C. 7:26B-5.7; and the remedial action workplan deferral procedure set forth at proposed N.J.A.C. 7:26B-5.8.

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As indicated above, in order to comply with the rules proposed for re-adoption, a small business subject to the provisions of ISRA will often be required to retain the services of an environmental consultant to conduct the investigative and remedial components of any required remediation at the industrial establishment. However, the purpose of the ISRA compliance options, de minimis quantity exemption and closing operations waiver is to benefit small businesses.

Smart Growth

Executive Order No. 4 (2002) requires State agencies which adopt, amend or repeal any rule adopted pursuant to Section 4(a) of the Administrative Procedure Act, to describe the impact of the proposed rule on the achievement of smart growth and implementation of New Jersey State Development and Redevelopment Plan (State Plan). The Department has evaluated this rulemaking to determine the nature and extent of the impact of the rules proposed for re-adoption on smart growth and the implementation of the State Plan. The Governor's order on Smart Growth calls for conservation of New Jersey's natural resources, revitalization of its urban centers, and protection of the quality of the State's environment, while promoting beneficial economic growth, development and renewal. The rules proposed for re-adoption promote the principles of smart growth by promoting efficient and timely cleanups of contaminated industrial sites, while eliminating the unnecessary financial burdens associated with site remediation through the various compliance options in the rule.

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 ISRA rules as proposed for re-adoption with amendments to determine their impact, if any, on the affordability of housing. The Department has determined that the rules will impose an insignificant impact because there is an extreme unlikelihood that the rules will evoke a change in the average costs associated with housing. However, the rules

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do provide an overall positive impact to residences in the vicinity of industrial establishments subject to the ISRA rules since ISRA requires the remediation of contaminated industrial establishments that may be located near residences, thus raising the property values in the surrounding community. Accordingly, while the ISRA rules support the continued use and habitability of existing residences, they do not affect the average costs of housing.

Smart Growth Development Impact Analysis

Pursuant to N.J.S.A. 52:14B-4(a), the Department has evaluated the rules proposed for readoption of the ISRA rules to determine what, if any, impact these rules will have on smart growth development. Because these rules provide for the remediation of industrial establishments that have been contaminated by a discharge of a hazardous substance, they do not impact the type or number of housing units, increase or decrease the availability of affordable housing in any manner, or affect new construction within Planning areas 1, 2, or within designated centers, under the State Development and Redevelopment Plan.

Full text of the proposed readoption may be found in the New Jersey Administrative Code at N.J.A.C. 7:26B.

Based on consultation with staff, I hereby certify that the above statements, including the Federal Standards Analysis addressing the requirements of Executive Order No. 27 (1994), permits the public to understand accurately and plainly the purposes and expected consequences of this proposed readoption. I hereby authorize the proposal of this readoption.

Date: _____

Mark N. Mauriello, Acting Commissioner
Department of Environmental Protection