

NOTE: THIS IS A COURTESY COPY OF THIS RULE PROPOSAL. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE JULY 20, 2009 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE PROPOSAL, THE OFFICIAL VERSION WILL GOVERN.

**DEPARTMENT OF ENVIRONMENTAL PROTECTION
SITE REMEDIATION PROGRAM
PROCESSING OF DAMAGE CLAIMS PURSUANT TO THE SANITARY LANDFILL
FACILITY CLOSURE AND CONTINGENCY FUND ACT**

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

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

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.

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

DEP Docket Number: 10-09-06/703

Proposal Number: PRN 2009-703

Submit written comments by September 18, 2009 to:

Leslie W. Ledogar, Esq.
Attn.: DEP Docket No. 10-09-06/703
Office of Legal Affairs
Department of Environmental Protection
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. 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 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 Department is proposing to readopt, with amendments, its Processing of Damage Claims Pursuant to the Sanitary Landfill Facility Closure and Contingency Fund Act (Landfill Claims rules), N.J.A.C. 7:11. These rules are scheduled to expire on July 29, 2009 pursuant to the provisions of Executive Order No. 66 (1978). The expiration date was extended by 180 days to January 29, 2010 pursuant to N.J.S.A. 52:14B-5.1c as a result of the timely filing of this proposal to readopt the rules. The Department has evaluated these rules and has determined that they are necessary, reasonable and proper for the purpose for which they were originally promulgated, as proposed herein and discussed below.

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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. 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 following is a summary of each subchapter proposed for readoption and the amendments proposed for that subchapter, as applicable.

N.J.A.C. 7:1I-1, General Provisions, sets forth the general provisions of these rules including their scope and purpose, construction and applicability, severability, delegation, definitions, the liabilities for damages, signatures and certifications, notices and other communications, and the computation of time under the chapter. At N.J.A.C. 7:1I-1.5, the Department proposes to add the phrase “or for other non-potable purposes” to the definition of “potable water” to clarify that potable water does not include water used for any non-potable use, rather than only the non-potable uses of firefighting and agricultural purposes. The Department also proposes to amend N.J.A.C. 7:1I-1.8(a) to correct the address of the Environmental Claims Administration office.

N.J.A.C. 7:1I-2, Claims Generally, sets forth the general requirements to be followed by a person who wishes to submit a claim for damages to the Department. In general, a claim is eligible for compensation only if the claimant has actually suffered damages. In addition, this section also requires the claimant to have exercised reasonable diligence and ordinary care prior to purchasing property near a sanitary landfill facility, and requires the claimant to take affirmative measures to prevent the damages from occurring in the first instance or from increasing or being aggravated. In addition, N.J.A.C. 7:1I-2 sets forth the restrictions on claims by responsible parties or by owners or operators of the sanitary landfill that is the subject of a claim, and the procedures by which the Department may administratively close a claim.

N.J.A.C. 7:1I-3, Claims Procedures, establishes the procedure for submission and for the initial processing of claims. As provided by this subchapter, claims must be filed with the Department no later than one year after the date of the discovery of damages, or in the case of property diminution claims, within one year of the sale of the property. This subchapter also contains the requirements for the content of the claim, and for determining if the claim has been timely filed.

N.J.A.C. 7:1I-4, Property Value Diminution Claims, establishes the criteria for measuring and processing claims for any reduction in the value of property proximately resulting from the

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improper operation or closure of a sanitary landfill facility. Subchapter 4 also establishes requirements that must be satisfied if a property value diminution claim is to be eligible for compensation, including the requirements for appraisals of the subject property and other information affecting the property value.

N.J.A.C. 7:11-5, Settlement and Determination of Claim, establishes the procedure through which the claimant must notify the Department if the claimant settles privately with any owner or operator or other person. This subchapter also establishes the procedure through which the Department will notify a claimant of its decision to either deny or pay the claim through the issuance of a Notice of Intent (NOI). Subchapter 5 also outlines the procedure for requesting an adjudicatory hearing if the Department issues a final decision denying the claim.

N.J.A.C. 7:11-6, Conditions of Payment, sets forth the procedures the Department follows in paying claims from the SLF Fund. Subchapter 6 also provides that the Department shall not make any payment from the SLF Fund unless the Department acquires all rights of the claimant to recovery of the damages from the owner or operator of the sanitary landfill facility.

Social Impact

The Landfill Claims rules set forth at N.J.A.C. 7:11 have had a positive social impact by providing claimants with the means of obtaining reimbursement for losses suffered in connection with the improper operation and improper closure of sanitary landfill facilities. The rules proposed for readoption and amendment will continue to have a positive social impact upon claimants by providing them with specific, orderly procedures for making claims against the SLF Fund.

Economic Impact

N.J.A.C. 7:11 has had a positive economic impact upon persons who have suffered losses due to improperly operated and improperly closed sanitary landfill facilities by providing a method by which these persons may obtain compensation for such damages, and the Department anticipates that the readoption of these rules with minor amendments will ensure that this positive economic impact will continue. By establishing claims processing requirements, these rules help and will continue to help ensure that those persons who have been damaged are fairly and uniformly compensated. In addition, by providing standards as to what claims will and will not be compensable, these rules have helped and will continue to help preserve the limited assets of the SLF Fund so that monies are available to pay other eligible claims.

Environmental Impact

The rules proposed for readoption and amendment will continue to have a positive environmental impact. As discussed in the Economic Impact Statement above, the rules will continue to prevent the potential overpayment of claims, which would otherwise reduce the assets of the SLF Fund. This will ensure that funds are preserved to reimburse claimants for damages that are proven by a preponderance of the evidence to be proximately caused by the

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improper operation or closure of a sanitary landfill facility. Providing reimbursement from the SLF Fund for environmental damages will encourage a timelier remediation of property, thus limiting potential exposure to contaminants.

Federal Standards Statement

N.J.S.A. 52:14B-1 et seq. requires 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. 7:11 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.

Jobs Impact

The SLF Fund rules have had a positive effect on jobs in the State and the Department anticipates that re-adoption of these rules with amendments will ensure that this positive impact will continue. The types of jobs that are often associated Landfill Claims include jobs related to real estate appraisal, environmental cleanup consulting, and providing water treatment systems and vapor intrusion systems. The Department anticipates that these types of services will remain in demand as long as claims continue to be made against the SLF Fund, and the re-adoption of the rules with amendments will ensure that a mechanism for making these claims will remain in place.

Agriculture Industry Impact

The re-adoption of the SLF Fund rules with amendments will have a positive impact on agriculture. The rules apply to farms and agricultural land as they do to any other properties in the State that have been damaged as a proximate result of an improperly closed or operated landfill facility. Thus, the re-adoption with amendments will continue to provide owners and operators of farms with the means of obtaining reimbursement for losses suffered in connection with the improper operation or closure of a nearby sanitary landfill facility.

Regulatory Flexibility Analysis

In accordance with the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., small businesses are defined as those that are independently owned and operated, not dominant in their field and that employ fewer than 100 full time employees. With respect to claims filed by small businesses, as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the proposed re-adoption requires property value diminution claimants to submit several documents to be eligible for compensation from the Fund. For property diminution claims, for example, claimants must obtain professional services from real estate brokers through the multiple listing service or its commercial equivalent. However, the Department does not believe that this requirement imposes substantial costs upon small businesses because it is likely that such claimants would retain a real estate broker or other appropriate professional to maintain and review records to market such as properties even if the

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rules do not so require. The rules proposed for readoption make no special provisions for property value diminution claimants who qualify as small businesses because any special provisions would impair the Fund' obligation to protect and insure that the taxes credited to the Fund are spent in a proper manner and for the intended purposes.

The rules proposed for readoption require property value diminution claimants to submit several documents to be eligible for compensation from the SLF Fund. Claimants must also obtain professional services from real estate brokers that are members of a multiple listing service (or its equivalent, for claims involving commercial property or other property not normally sold through a multiple listing service). However, the Department does not believe that this requirement imposes substantial costs of annual costs to small businesses to pursue their claims. The rules proposed for readoption make no special provision for property value diminution claimants that qualify as small businesses because doing so would impair the administrator's ability to perform his or her fiduciary duty to the SLF Fund in processing property value diminution claims.

The provisions of the rules proposed for readoption concerning groundwater contamination claims or other environmental impacts impose certain recordkeeping and reporting requirements upon small businesses. These provisions may require those businesses to obtain professional services in order to submit documentation from accounting, engineering, and/or business services to support the subject businesses claim for damages against the SLF Fund. For example, a claimant making a groundwater contamination claim is required to submit a report certified by a licensed professional engineer. However, because the reasonable cost of these professional services will be compensable from the SLF Fund, the Department does not expect that these rules have an adverse affect on small businesses.

Smart Growth Impact

Executive Order No. 4 (2002) requires State agencies that adopt, amend or repeal any rule 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 Department has evaluated this rulemaking to determine the nature and extent of the impact of the rules proposed for readoption with amendments on smart growth and the implementation of the State Plan. The rules proposed for readoption with amendments do not involve land use policies or infrastructure development.

The Landfill Claims rules neither encourage nor discourage the achievement of smart growth. However, the rules proposed for readoption with amendments are intended to protect public and environmental health, which are goals of the State Plan. Their purpose is to mitigate the effects of environmental harm on homeowners and businesses whose properties and potable water have been affected by the improper operation or closure of a sanitary landfill facility.

Housing Affordability Impact Analysis

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Pursuant to N.J.S.A. 52:14B-4(a), the Department has evaluated the Landfill Claims rules proposed for readoption with amendments to determine what, if any, impact they will have on the affordability of housing. The Department has determined that the rules proposed for readoption with amendments 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. Damages caused by the improper operation or closure of a sanitary landfill facility are paid to effectively return a property to its pre-damaged condition, thereby supporting the continued use and habitability of existing residences. However, reimbursement for these types of damages does 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 with amendments to determine what, if any, impact these rules will have on smart growth development. Although these rules provide for the treatment or replacement of existing potable water sources that have been damaged by the improper operation or closure of a sanitary landfill facility, 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 rules proposed for readoption may be found in the New Jersey Administrative Code at N.J.A.C. 7:11.

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

Subchapter 1. General Provisions

7:11-1.5 Definitions

The following words and terms, when used in this chapter, shall have the following meanings. Where words and terms are used which are not defined herein, the definitions of those words and terms will be the same as the definitions found at N.J.A.C. 7:26-1.4.

...

"Potable water" means drinking water, water for other personal uses, and water for purposes requiring a supply of water which the Department determines is suitable for human consumption pursuant to the Safe Drinking Water regulations set forth at N.J.A.C. 7:10. "Potable water" does not include water for use in fire fighting or for agricultural purposes, or for other non-potable purposes.

...

7:11-1.8 Notices and other communications

(a) All claims, notices, requests, and other communications required or permitted under this chapter shall be given in writing and sent by certified mail, return receipt requested or by

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other means which provides a receipt showing the date of mailing and the date of delivery. All such communications sent to the Department by certified mail shall be sent to the following address:

Department of Environmental Protection

Environmental Claims Administration

PO Box [028]413

Trenton, New Jersey 08625-[0028]413

(b) - (c) (No change.)