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ENVIRONMENTAL PROTECTION

OFFICE OF THE COMMISSIONER

General Practice and Procedure; Non-Public Records

Proposed New Rules: N.J.A.C. 7:1D-3

Authorized By: Bob Martin, Commissioner, Department of Environmental Protection

Authority: N.J.S.A. 47:1A-1, 52:4B-9, 52:13D-21, 52:17B-4, 52:17B-170, and

Executive Order No. 9 (Hughes 1963)

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

DEP Docket Number: 11-10-11

Proposal Number: PRN 2010-

Submit written comments by February 4, 2011 to:

Alice A. Previte, Esq.

Attention: DEP Docket Number 11-10-11

Office of Legal Affairs

P.O. Box 402

Trenton, N.J. 08625-0402

The agency proposal follows:

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Summary

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

The Open Public Records Act, N.J.S.A. 47:1A-1 et seq. (OPRA), provides that all government records shall be subject to public access unless exempt from such access by P.L. 1963, c.73 as amended and supplemented, any other statute, resolution of either or both houses of the Legislature, regulation promulgated under the authority of any statute or Executive Order of the Governor, Rules of Court, any Federal law, Federal regulation or Federal order.

OPRA provides that a public agency should be mindful of the need to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure would violate the citizen's reasonable expectation of privacy. There are also categories of documents the disclosure of which would interfere with Department operations, or the safety and security of citizens of New Jersey. Proposed new N.J.A.C. 7:1D-3 is designed to serve both of these legislative policies by facilitating public access to government records while balancing citizens' reasonable expectations of privacy and the integrity and effectiveness of governmental operations.

N.J.A.C. 7:1-3 Non-Public Records

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Proposed new Subchapter 3 identifies records that the Department has identified as non-public and not subject to production. Unlike confidential information, which the Department will redact in accordance with OPRA, N.J.S.A. 47:14A-1.1 (Definitions, particularly “government record”), 47:14A-5 (Times during which records may be inspected, examined, copied; access; copy fees), rule of court, or similar protection, the Department will not produce documents of the type identified in proposed Subchapter 3. The categories of documents are the same as were protected under Executive Order 21 (McGreevey 2002), as modified by Executive Order 26 (McGreevey 2002) (collectively, the EOs), except as specifically identified below.

As set forth in proposed N.J.A.C. 7:1D-3.1, Scope, the records identified are not the only records that are not subject to production. Throughout the Department’s rules in Title 7 of the Administrative Code are program-specific categories of records. The categories in the proposed subchapter are also in addition to those documents that are exempt, or are not deemed “government records,” under OPRA, N.J.S.A. 47-14A-1.1, Definitions.

The Department proposes at N.J.A.C. 7:1D-3.2(a)1 to make records relating to mediation proceedings conducted by or on behalf of the Department confidential. This exemption is intended to help ensure the integrity of the mediations the Department conducts, since mediations may not involve attorneys, and the attorney-client privilege would not attach as it would for settlement discussions. The New Jersey courts have stressed that mediation proceedings should be confidential. The final agreement that

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results from the mediation will be a government record, subject to production under OPRA.

Proposed N.J.A.C. 7:1D-3.2(a)2 makes confidential those records that reveal the identity of a complainant. This exemption is supported by the OPRA exemption for records of criminal investigations, which records would include the identity of the complainant. However, the Department believes protection of the identity of complainants who provide information to the Department in non-criminal matters is necessary. Release of the identity of complainants could have a chilling effect, for instance, on the use of the Department hotline to register complaints or potential violations of the environmental laws and regulations.

Proposed N.J.A.C. 7:1D-3.2(a)3, which applies to documents related to threatened and endangered animal species, endangered plant species and plant species of concern, is not among the categories of documents protected under the EOs. The Department will disclose to a property owner the location of threatened and/or endangered animal species, endangered plant species and plant species of concern, if the animal or plant is on the property. Likewise, if a permit, application or approval decision is challenged, and the decision was based on the location of an endangered and/or threatened animal species, endangered plant species, or plant species of concern, then the Department will provide records relating to the specific resource and location relied upon. A confidentiality agreement may be required if the Department determines that such is necessary to

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prevent harm to the plant or animal species or its habitat. Harm could include, for example, further depletion through poaching, collection; or destruction of habitat.

The Department does not want to risk the possibility that someone will harm (intentionally or otherwise) a plant or animal that is the subject of Department protection, which could happen if the Department made the locations of the plants or animals readily available. Through this exemption, the Department is trying to balance the need of property owners against the Department's obligation to protect threatened and endangered animal species, endangered plant species and plant species of concern.

Proposed N.J.A.C. 7:1D-3.2(b) identifies as non-public those records that have homeland security implications. If access to the record would interfere with the State's security, then the record will not be produced. Records that fall into this category include policies or plans for responding to emergencies, certain information relating to nuclear power plants, low level generators of radioactive waste, national defense information relating to Lockheed Martin's Aegis Radar System facility, environmental emergency procedures, inundation maps that are submitted as part of Emergency Action Plans under the Dam Safety Standards; Discharge Prevention Containment and Countermeasures and Discharge Cleanup Removal Plans and related general site plans; and certain radioactive materials licenses and advisories.

The Department does not propose to include offsite consequence analyses developed pursuant to the Toxic Catastrophe Prevention Act, which are included in the

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EOs, because such records have been addressed in the Toxic Catastrophe Prevention Act Program rules, N.J.A.C. 7:31 (40 N.J.R. 5109(a), 41 N.J.R. 1206(b)).

The Department proposes at N.J.A.C. 7:1D-3.2(c) to protect information related to Green Acres and Natural Lands Trust acquisitions, program offerings, active projects, and title investigations, if disclosure would jeopardize these transactions. The Department is concerned that releasing this information would hamper negotiations for land purchases. The State's bottom line would be known, while the seller or other potential purchaser of a property would not be required to divulge such information while negotiating a possible sale. The records shall be made available no later than 48 hours before formal action is to be taken, except under certain circumstances.

The proposed exemption is not identical to the exemption authorized under the EOs, insofar as the Department proposes to define "active project" as one that has been initiated within two years of the date of the appraisal. This will limit the exemption to only those projects that are likely to be undertaken. Records regarding projects that have not been initiated more than two years after the date of the appraisal would be subject to access under OPRA.

The confidentiality of the information until the closing of title is essential to the integrity of the contracts for purchase, the functioning of the programs, and the achievement of the goals of acquiring and preserving open space and natural resources. This exemption balances the public's interest in the information with the Department's

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obligation to ensure that the taxpayers' and State's interests in these transactions are protected.

Social Impact

The proposed new rules implement the requirements of OPRA. The proposed rules will have a positive social impact by establishing the scope of public access to government records held or controlled by the Department. OPRA requires that government records be readily accessible for inspection, copying or examination by citizens of this State unless exempt by law or regulation, and also calls upon a public agency to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure would violate the citizen's reasonable expectation of privacy. These proposed rules attempt to balance the competing policies in the statute and to exclude records where it would not be in the public interest to permit disclosure or copying of certain records. The proposed rules also provide safeguards to protect endangered and/or threatened animal species, endangered plant species or plant species of concern from further harm; Green Acres and Natural Land Trust land acquisitions if disclosure would jeopardize those transactions; emergency information such as certain emergency preparedness information or nuclear power plant information where disclosure would jeopardize health, safety and welfare; records that reveal the identify of a complainant; and certain information that is a concern from a domestic security perspective.

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Economic Impact

The proposed new rules will not have an economic impact on the public. The rules impose no fees or other charges. To the extent that the public must pay for access to government records, the fees are set forth in OPRA, N.J.S.A. 47:1A-1 et seq.

Federal Standards Statement

Executive Order No. 27(1994) and N.J.S.A. 52:14B-1 et seq. (P.L. 1995, c. 65) 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. Although there is a comparable Federal law (Freedom of Information Act, 5 U.S.C. 550a et seq.), the Federal law does not apply to records of State government. Accordingly, no Federal standards analysis is required.

Jobs Impact

The proposed new rules will not have an impact on the number of jobs generated or lost in New Jersey.

Agriculture Industry Impact

The proposed new rules will not have an impact on the agriculture industry in New Jersey.

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Regulatory Flexibility Analysis

As required by the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has evaluated the reporting, recordkeeping and other compliance requirements that the proposed rulemaking would impose upon small businesses. The proposed new rules do not impose reporting or recordkeeping requirements on small businesses, as defined in the Regulatory Flexibility Act. The proposed rules impose restrictions on access to Department documents on all persons seeking access to government records pursuant to OPRA.

There is no exception for small businesses. As set forth in the Summary above, OPRA provides that a public agency should be mindful of the need to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure would violate the citizen's reasonable expectation of privacy. There are also categories of documents the disclosure of which would interfere with Department operations, or the safety and security of citizens of New Jersey. An exception for small businesses would defeat the purpose of the rules. Accordingly, no such exception is provided.

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 amendments on the achievement of

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smart growth and implementation of the State Development and Redevelopment Plan (State Plan). The proposed rulemaking does not relate to the State's official land use and development policies in a way that would either encourage or discourage any development or redevelopment in this 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.

Housing Affordability Impact

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 proposed rulemaking to determine the impact, if any, on the affordability of housing. The Department has determined that the proposed rules will evoke no influence in the overall average cost associated with housing in the State. The rules relate solely to the Department's production of government records.

Smart Growth Development Impact

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 proposed rulemaking to determine its impact, if any, on smart growth development. The Department has determined that the proposed rules will not impact housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan, as the proposed rules relate to production of government records.

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Full text of the proposed new rules follows:

SUBCHAPTER 3 NON-PUBLIC RECORDS

7:1D-3.1 Scope

The categories of records in N.J.A.C. 7:1D-3.2, Records not subject to disclosure, is in addition to protections that are contained in the Open Public Records Act (OPRA), N.J.S.A. 47:14A-1 et seq., any applicable statute, resolution of one or both houses of the Legislature, regulation, Executive Order of the Governor, court order, or subject area-specific protection in Title 7, Department of Environmental Protection, of the New Jersey Administrative Code.

7:1D-3.2 Records not subject to disclosure

(a) The documents, files, data and other records of the Department that are listed below shall not be deemed to be government records subject to public access pursuant to OPRA. Such records shall not be available for inspection, examination or copying by members of the public or by any other individual except authorized members and employees of the Department or except as provided by order of the Governor of the State, a court or tribunal of competent jurisdiction, or applicable law:

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1. Records relating to mediation proceedings conducted by or on behalf of the Department, except that any records that were open for public inspection, examination or copying prior to mediation shall continue to be available for public inspection, examination or copying during and after mediation. Final agreements resulting from mediation shall be available for public inspection, examination or copying;
2. Records that reveal the identity of a complainant; and
3. Portions of records containing the precise location of endangered and/or threatened animal species or endangered plant species or plant species of concern.
 - i. Notwithstanding paragraph (a)3 above:
 - (1) The Department shall disclose the precise location of endangered and/or threatened animal species, endangered plant species or plant species of concern to the owner of land upon which the animal or plant species has been located.
 - (2) If the Department denies or issues any permit or approval, where any of the aforementioned actions is the subject of a challenge in any administrative or judicial forum, the applicant, or any other person with a constitutional or statutory right to a hearing on that action by the Department, may request, and the Department shall provide, only those Department records containing the location(s) of endangered and/or threatened animal species, endangered plant species or plant species of concern relied upon by the Department to make any of the denials, approvals, or determinations.
 - (3) Prior to providing the records containing the location(s) of endangered and/or threatened animal species, endangered plant species or plant species of concern under (1)

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or (2) above, the Department shall redact the name(s) of the person(s) who provided the information contained in the records provided under (1) or (2) above if the Department determines that the person(s) providing such information did not provide this information in the course of his or her employment with the State of New Jersey.

ii. If the Department determines that disclosure under (a)3i above likely to create a substantial risk of harm, theft, or destruction to the species or habitats or the area or place where the species or habitats are located, the Department may require the recipient of the information to state in writing prior to access to the records that he or she shall keep the precise location of endangered and/or threatened animal species, endangered plant species or plant species of concern confidential.

iii. For the purposes of (a)3, the term “endangered and/or threatened animal species” shall have the meaning(s) of the terms “endangered” and/or “threatened” as these terms are defined at N.J.A.C. 7:25-4.1. The term “endangered plant species” shall have the meaning of “endangered species” as the term is defined at N.J.A.C. 7:5C-1.4. The term “plant species of concern” shall have the meaning as set forth at N.J.A.C. 7:5C-3.1.

(b) The Department shall withhold any record if the Department determines that the inspection, examination or copying of that record would substantially interfere with the State’s ability to protect and defend the State and its citizens against acts of sabotage or terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of sabotage or terrorism. Such records include, but are not limited to:

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1. Any inventory of enforcement resources, including standard operating procedures, compiled and any policies or plans compiled by the Department pertaining to the mobilization, deployment, or tactical operations involved in responding to emergencies, including employee emergency contact information;
2. Information related to a nuclear power plant, which, if disclosed, would jeopardize the public health, safety and welfare or the security of the plant;
3. Listing of Low Level Radioactive Waste generators including amounts of waste generated and shielding designs for sources of radiation;
4. National defense related information from Lockheed Martin's Aegis Radar System facility;
5. Environmental Emergency Procedures detailing plans such as emergency procedures for wastewater treatment facilities pursuant to New Jersey Pollutant Discharge Elimination rules, N.J.A.C. 7:14A-6.12(D);
6. Inundation maps submitted as part of Emergency Action Plans pursuant to Dam Safety Standards, N.J.A.C. 7:20-1.7(f) and 1.11(i);
7. Discharge Prevention Containment and Countermeasures and Discharge Cleanup Removal Plans and related general site plans; and
8. Radioactive Materials Licenses issued by the Nuclear Regulatory Commission and advisories issued by the Nuclear Regulatory Commission that address lessons learned, security or enforcement issues.

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(c) Information related to Green Acres and Natural Lands Trust land acquisitions, program offerings and active projects, including appraisals, valuations and title investigations shall be made available for public inspection, examination and copying no later than 48 hours before formal action is to be taken on any land transaction, program offering or active project unless the land transaction, program offering or active project is actively under negotiation, a binding contract has not been executed, or disclosure of the information would jeopardize the land transaction, program offering or active project. An active project is one that has been initiated within two years of the date of appraisal.

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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) and N.J.S.A. 52:14B-23, permit the public to understand accurately and plainly the purposes and expected consequences of this proposal. I hereby authorize this proposal.