

July 27, 2009

Mark N. Mauriello, Commissioner
New Jersey Department of Environmental Protection
401 East State Street
P.O. Box 402
Trenton, NJ 08625-0402

RE: Petition for Rulemaking

Petition to mandate public disclosure of meetings and communications between DEP officials and registered lobbyists and/or private sector representatives; to promote transparency and accountability; and to repeal changes to Press Office policies functions @ NJAC 7:1

- Authority: DEP power to grant rulemaking petition: N.J.S.A. 13:1B-1 *et seq*; N.J.S.A. 13:1D-1 *et seq*; N.J.S.A. 13:1D-9.t.
- Rulemaking Placement: N.J.A.C. 7:1 – Department Organization

Dear Commissioner Mauriello:

Please accept this letter on behalf of Public Employees for Environmental Responsibility (PEER) as a Petition for Rulemaking pursuant to N.J.S.A.52:14B-1 *et seq*. PEER is a national support group for professionals in state and federal agencies.

This letter petition is filed pursuant to N.J.S.A. 52:14B-4, which provides that:

“(f) An interested person may petition an agency to adopt a new rule, or amend or repeal any existing rule. Each agency shall prescribe by rule the form for the petition and the procedure for the submission, consideration and disposition of the petition. The petition shall state clearly and concisely:

- (1) The substance or nature of the rule-making which is requested;
- (2) The reasons for the request and the petitioner's interest in the request;
- (3) References to the authority of the agency to take the requested action.”

I) Background

Governor Corzine reaffirmed in his Executive Order No. 1 that “public officials must avoid conduct that violates the public trust or creates an appearance of impropriety.”

Executive Order No.1 echoes the requirements of the principal state ethics law which mandates “public employees shall hold the respect and confidence of the people. Public officials must, therefore, avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.” N.J.S.A. 52:13D-12.

New Jersey’s “pay to play” ethics legislative reform debates have narrowly focused on political campaign contributions and government procurement and oversight of expenditures of public funds. However, Executive Order No. 1 recognized the importance of public disclosure of information related to a far broader scope of executive branch government powers that must be considered in ethics reforms. Accordingly, the requirements of Executive Order No.1 apply to public officials exercising discretion in multiple functions –

“that perform important governmental functions in areas such as **regulation, policy-making, and the expenditure of public funds.**” [Emphasis added]

Similarly, recent legislation enacted in 2004, known as the “Legislative and Governmental Process Activities Act,” N.J.S.A. 52:13C-18 *et seq.* (“Act”), seeks to promote transparency via mandatory public disclosure and reporting requirements. The Act requires disclosure of all activities that may influence government processes. The Act greatly expands the definition of lobbyist to include those who seek to influence governmental processes, and requires disclosure of activities to influence governmental processes. The Act regulates persons who may influence legislation or regulations, including governmental affairs agents who influence legislation, regulation or governmental processes.

Under the Act, "influence governmental processes" is defined as making any attempt, whether successful or not, to help a represented entity or group to engage in communication with, or to secure information from, an officer or staff member of the executive branch, or of any authority, board, commission or other agency or instrumentality in or of a principal department, authorized by law to administer governmental processes or perform other functions related to such processes.

The term "governmental process" is defined to mean promulgation of executive orders; rate setting; development, negotiation, award, modification or cancellation of public contracts; issuance, denial, modification, renewal, revocation or suspension of permits, licenses or waivers; procedures for bidding; imposition or modification of fines or penalties; procedures for purchasing; rendition of administrative determinations; or award, denial, modification, renewal or termination of financial assistance, grants and loans.

The Act exempts from the law as it relates to influencing these governmental processes any communication, matter or act of an attorney falling within the attorney-client privilege while engaging in the practice of law to the extent that confidentiality is required in order for the attorney to exercise ethical duties as a lawyer, as well as any communication, matter or act involving collective negotiations, or the interpretation or violation of collective negotiation agreements, of a labor organization of any kind which exists or is constituted for the purpose, in whole or in part, of collective bargaining, or of dealing with employers concerning the grievances, terms or conditions of employment, or of other mutual aid or protection in connection with employment.

The Act is implemented by the Election Law Enforcement Commission (ELEC). Pursuant to ELEC regulations, there is a presumption that communications with specific government officials is for the purpose of influencing a government process:

“It shall be a rebuttable presumption that a communication, except as provided in N.J.A.C. 19:25-20.3(b), by a governmental affairs agent is a communication for the purpose of influencing legislation, influencing regulation, or influencing a governmental process if the communication is made to the Governor, the Governor’s staff, or the Governor’s Chief of Staff, or to the Commissioner, Deputy Commissioner, Assistant Commissioner, Division Director, Chief of Staff, Executive Director, policy advisor, or a person in an analogous position in a principal department in the Executive Branch of State Government, or in any authority, board, commission or other agency or instrumentality in or of such a principal department, or to a person empowered by law to issue, adopt, or promulgate administrative rules.” (19:25-20.3A Presumption of lobbying activity)

ELEC regulations broadly define the terms “communication”, “government process” and “influence” within the executive branch.

II) Rule-Making Requested

PEER requests that the Department promulgate regulations to govern mandatory public disclosure of activities of private individuals that may influence Department of Environmental Protection (DEP) governmental processes as defined above. Specific regulations should be adopted to govern the following DEP activities:

- **Open Calendars.** Open calendars are needed so that DEP meetings regulators regulated industry and others can be monitored, so that the public made aware of access to and influence on DEP decisions; and to promote transparency, accountability and ethical government.
- **Public Disclosure of Meetings.** Rules should require that all meetings of the Commissioner, Deputy Commissioners, Chief of Staff, and/or Assistant Commissioners with any non-departmental persons be publicly disclosed. Disclosure requirements should include meeting attendance sheets; meeting objectives; meeting minutes; and all presentations, notes or written materials distributed or discussed at the meeting. Disclosure should include the individual

identities of private parties (and clients they represent) and any non-departmental employees and the specific projects, DEP approvals sought,.

Disclosure could be accomplished efficiently and cost effectively via posting of information on a dedicated page the Department's website, on a daily or weekly basis.

Disclosure rules should mandate that all other meetings, correspondence, and/or communications between regulated private individuals with DEP assistant and deputy commissioners and Division Directors be defined as public records pursuant to Open Public Records Act.

- **Repeal Gag Order on DEP Staff.** PEER urges that the rule governing Press Office functions codified at NJAC 7: 1-1 *et seq* be rescinded. In the *New Jersey Register* of September 6, 2005 (37 NJR 3336), the Department readopted and amended the Department's Organizational rules @ NJAC 7:1 – 1 *et seq*.

An important policy change was made in rules governing the functions of the Press Office. Specifically, the press office functions were revised so that the Press Office now –

“serves as a **single point of contact** between the Department and all media outlets, reporters, editorial writers, and columnists for the purpose of facilitating the release of accurate and timely information to the press and ensuring that all Department communications with the press reflect the current policies and priorities of the Commissioner.” [Emphasis added]

This rule change requires that DEP staff contact the Press Office and receive official approval before speaking with any media outlet or press or distributing public information to the press. In practice, a Press Office person must be present or on the phone during any DEP staff conversations or interview with media.

This approval applies to the content of what DEP staff may communicate to press. The information distributed and the views of staff expressed to media are required to conform to “the current policies and priorities of the Commissioner,” as opposed to the DEP staff's ethical obligation to provide the complete facts, and/or best available science.

Because some DEP staff members are also members of professional organizations, the requirement that communications to press reflect “the current policies and priorities of the Commissioner” violates professional ethics. For example, the ethics code for members of the American Institute of Chemical Engineers” provides:

“Members of the American Institute of Chemical Engineers shall uphold and advance the integrity, honor and dignity of the engineering profession by: being honest and impartial and serving with fidelity their employers, their clients, and the public; striving to increase the competence and prestige of the engineering profession; and using their knowledge and skill for the enhancement of human welfare. To achieve these goals, members shall –

- **Hold paramount** the safety, health and welfare **of the public and protect the environment** in performance of their professional duties.
- **Formally advise their employers** or clients (and consider further disclosure, if warranted) if **they perceive** that **a consequence of their duties** will adversely affect the present or future health or safety of their colleagues or **the public**.
- **Accept responsibility** for their actions, seek **and heed critical review of their work** and offer objective criticism of the work of others.
- Issue statements or present information only in an objective and truthful manner. (<http://www.aiche.org/About/Code.aspx>) [Emphasis added]

The National Society of Professional Engineers Code of Ethics Section II.1.a provides:

“Engineers **shall** at all times recognize that their **primary obligation** is to protect the safety, health, property and welfare of **the public**. If their professional judgment is **overruled** under circumstances where the safety, health, property, or welfare of the public are endangered, **they shall notify** their employer or client **or other authority** as may be appropriate.” [Emphasis added]

In other words, when information or science conflicts with the priorities of the Commissioner (or the “official line” of the Press Office), then professional codes of ethics virtually mandate violation of the Press Office regulation, or whistleblowing.

This Press Office regulation is inconsistent with the public interest, restricts the free flow of public information, violates professional ethical standards and duties to the public interest, and limits the public’s right to know and access to the best available science. The regulation chills the free speech rights of DEP employees, who risk retaliation for expressing “inconvenient truths” that are inconsistent with policy and priorities of the Commissioner.

Accordingly, this rule should be repealed in its entirety.

III) Rationale for the request and the petitioner's interest in it.

The public has a right to know about who has access to and influence on the Department. Private off the record meetings between the Department and regulated industry or their representatives frustrate open government, transparent decision-making and the public participation process established by the regulatory framework the Department operates under.

Off the record meetings enable private entities to exert undue political and/or economic pressure on Department decision-makers, and thereby undermine the scientific and technical recommendations of Department scientists and staff. Private off the record meetings with regulated interests also defeats the purpose of public hearings and may undermine the comments and concerns expressed by the public.

Private off the record meetings between the Department and regulated industries or their lobbyists creates “a justifiable impression among the public that such trust is being violated” and therefore raises ethics concerns.

In a democratic form of government, accurate and complete information is vital to effective citizenship and government accountability. One of the most effective mechanisms for dissemination of information is via the media. Any action by the Department that could undermine the free exchange of public information undermines the ability of the public to participate in decisions and hold public officials accountable.

The petition request is consistent with and furthers the objective of the aforementioned statutory provisions, Executive Order No.1, the Public Right to Know and Open Public Records laws, and professional ethics. Granting of this petition would improve implementation and assist in monitoring compliance with the “Legislative and Governmental Process Activities Act”, N.J.S.A. 52:13C-18 *et seq.*

PEER is a national non-profit organization working to assist those in public service who seek to uphold responsible resource management, ethical conduct of the people’s business and the faithful execution of laws. To that end, PEER is designated as a tax-exempt organization under section 501 (c) (3) of the Internal Revenue code.

IV) Agency Authority to Take Requested Action

The Department is authorized to adopt the requested regulations pursuant to NJSA 13:1B-1 *et seq.* and NJSA 13:1D-1 *et seq.* (also known as the Department’s “organic authority”).

The requested regulations also further the mission of DEP as expressed in the provisions of NJSA 13:1D-9.t, including, but not limited to –

“Keep complete and accurate minutes of all hearings held before the commissioner or any member of the department pursuant to the provisions of this act. All such minutes shall be retained in a permanent record, and shall be available for public inspection at all times during the office hours of the department.”(13:1D-9 (t))

We appreciate your timely and favorable consideration of this petition for rulemaking.

Sincerely,

Jeff Ruch
Executive Director
Public Employees for Environmental Responsibility (PEER)