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**DEPARTMENT OF ENVIRONMENTAL PROTECTION
SITE REMEDIATION PROGRAM**

**Administrative Requirements for the Remediation of Contaminated Sites and
Technical Requirements for Site Remediation**

Adopted Amendments: N.J.A.C. 7:1-5.7; 7:14A-3.1, 7.5, 8.7, 22; 7:14B-1.4, 1.6, 1.7, 2.1 through 2.4, 2.6, 2.7, 3.5, 3.7, 5.1, 5.4 through 5.9, 6.5, 6.7, 7.1 through 7.4, 8.1, 8.3, 9.1, 9.2, 9.4, 9.5, 10.1, 10.3, 10.4, 10.6, 12.1, 12.3, 13.1, 13.2, 13.4, 13.8, 13.10, 12.4, 15.1, 16.9; 7:26B-1.4, 1.5, 1.8, 1.10, 1.11, 2.1, 3.2, 5.3, 5.4, 5.7, 5.9, 8.1 and Appendix C; 7:26C-1.1 through 1.18, 2.1, 2.2, 2.3, 2.4, 3.2, 3.3, 4.1, through 4.8, 5.1 through 5.13, 6.2, through 6.4, 7.1, 7.2, 7.4 through 7.10, 9.5, 10.4, 10.6, 13.3, 13.4, 13.5, and Appendix C; and 7:26D-1.4, 1.5, 2.2, 3.2, Appendix 4 and Appendix 5

Adopted Repeals and New Rules: N.J.A.C. 7:14B-3.7 and 12.1; 7:26B-8.1; 7:26C-1.2, 2.2 and 7.3; and 7:26E

Adopted Repeals: N.J.A.C. 7:14B-1.8, 3.6, 3.8, 8.2, 8.4 through 8.8, 9.3, 12.3, 14; 7:26B-1.7, 1.9, 3.3, 3.4, 4, 5.1, 5.2, 5.5, 5.6, 5.8, 6, 7, 8.2 through 8.4; 7:26C-2.3, 7.3; and 7:26E

Adopted New Rules: N.J.A.C. 7:26B-1.12, 3.3, 3.4; 7:26C-1.7, 1.8, 4.2, 4.5, 7.2, 7.3, 7.5, 14, 15, 16, Appendix B and D; and 7:26E except for 3.9 and 5.5

Proposed: August 15, 2011 at 43 N.J.R. _____

Adopted: _____, 2012 by: Bob Martin, Commissioner, Department of Environmental Protection

Filed: _____, 2012 as R. 2011 d. ____, **with substantive changes** not requiring additional public notice and opportunity for comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 13:1K-6 et seq., 58:23-11 et seq., 58:10A-21 et seq., 58:10B-1 et seq., 58:10C-1 et seq.

DEP Docket Number: 12-11-07

Effective Date: _____, 2012

Expiration Date _____

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The Department is adopting amendments, repeals, and new rules (the Final Rules) to implement P.L. 2009, c. 60 (the Act). The Act includes the Site Remediation Reform Act (SRRA), N.J.S.A. 58:10C-1 et seq., and related amendments to the Industrial Site Recovery Act (ISRA), N.J.S.A. 13:1K-6 et seq., the Spill Compensation and Control Act (Spill Act), N.J.S.A. 58:23-11 35 seq., the Underground Storage of Hazardous Substances Act (UST Act), N.J.S.A. 58:10A-21 et seq., and the Brownfield and Contaminated Site Remediation Act (Brownfield Act), N.J.S.A. 58:10B-1 et seq. SRRA established a new paradigm for the remediation of contaminated sites in New Jersey, including the requirement that a person responsible for conducting the remediation employ a licensed site remediation professional (LSRP) to supervise the remediation. This adoption includes amendments to the Discharges of Petroleum and Other Hazardous Substances (DPHS) rules, N.J.A.C. 7:1E; the Underground Storage Tank (UST) rules, N.J.A.C. 7:14B; the Industrial Site Recovery Act (ISRA) Rules, N.J.A.C. 7:26B; and the Administrative Requirements for the Remediation of Contaminated Sites (ARRCS), N.J.A.C. 7:26C. This adoption also includes the repeal and replacement of the Technical Requirements for Site Remediation (Technical Requirements), N.J.A.C. 7:26E, with new rules of the same name and citation.

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This adoption is the third of three phases of the Department's initiative to implement the requirements of SRRA: (1) the special adoption of Interim Rules, which included the replacement of the former Oversight of the Remediation of Contaminated Sites rules with the new ARRCs rules and amendments to 14 other rules related to site remediation, and which was effective on November 4, 2009 (see 41 N.J.R. 4467(a) (December 7, 2009) for the special adoption); (2) the readoption of the Interim Rules with minor amendments to continue the Interim Rules in effect while the Department phases in the new site remediation paradigm (see 43 N.J.R. 1070(a) (May 2, 2011); 43 N.J.R. 2581(b) (October 3, 2011); and (3) this adoption of major amendments, repeals, and new rules (the Final Rules), which will fully implement the new site remediation paradigm as required by SRRA. Under SRRA, as of May 7, 2012, all remediation projects must be supervised by an LSRP, and the Department's oversight role will be considerably curtailed.

Summary of Hearing Officer's Recommendations and Agency Response:

The Department published the proposal in the New Jersey Register at 43 N.J.R. 1935(a) on August 15, 2011. A public hearing concerning this proposal was held on September 13, 2011 at 9:00 a.m. in the public hearing room at Department headquarters, 401 E. State Street, Trenton. The comment period for the proposal closed on October 14, 2011. Dr. Barry Frasco, Assistant Director, Site Remediation Program Technical Support

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Element, served as the hearing officer. Forty people attended the public hearing and thirteen people offered comments. The Hearing Officer recommended that the Department adopt the rules as proposed, with the changes described below in the summary of public comments and agency responses and the summary of agency-initiated changes. The Department has accepted the Hearing Officer's recommendation. A transcript of the public hearing is available for inspection in accordance with applicable law by contacting:

Office of Legal Affairs
Attn: DEP Docket Number 12-11-07
Department of Environmental Protection
401 East State Street
Mail Code 401-04L; P.O. Box 402
Trenton, New Jersey 08625-0402

This adoption document may be viewed on the Department's website at www.nj.gov/dep/rules.

Summary of Public Comments and Agency Responses:

The following persons timely submitted written and/or oral comments.

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<u>Number</u>	<u>Last Name</u>	<u>First Name</u>	<u>Affiliation</u>
1.	Bee	John	
2.	Beneduce	William	Norris Mclaughlin & Marcus, P.A.
3.	Bluhm	Sara	NJ Business and Industry Association on behalf of Site Remediation Industry Network (SRIN)

Incorporated by reference with no additional comment by:

	Baldisserotto	Bob	Hoffmann-La Roche Incorporation
	Egenton	Michael	New Jersey State Chamber of Commerce
	George-Cheniara	Elizabeth	NJ Builders Association
	Lukas	Michael	DuPont Corporation
4.	Bush	Milton	American Council of Independent Laboratories
5.	Cozzi	Andrew	Bluestone Environmental Services, LLC
6.	De Rose	Nicholas	Licensed Site Remediation Professional Association
	Goldstein	Kenneth	Licensed Site Remediation

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			Professional Association
	Fisher	Mark	Licensed Site Remediation
			Professional Association
7.	Destefano	William	Groundwater and Environmental Services, Incorporated
8.	Digangi	Tom	Association of General Contractors of New Jersey
9.	Donohue	John	Fuel Merchants Association of New Jersey
10.	Doupe	Amy	Lancaster Laboratories, Incorporated
11.	Draikiwicz	Michael	Novartis Pharmaceutical Corporation
12.	Egenton	Michael	New Jersey State Chamber of Commerce
13.	Ferguson	Roger	
14.	Greenberg	Marilynn	Riker Danzig on behalf of Newport Association
	Lyonott	Kenneth	Riker Danzig on behalf of Newport Association
	Senior	Steven	Riker Danzig on behalf of Newport Association

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|-----|-----------|------------|---|
| 15. | Greyer | Deb | Stanley Black & Decker,
Incorporated |
| 16. | Hall | Debra | Hopewell Junction Citizens for Clean
Water |
| 17. | Jones | J. Forrest | McCarter & English on behalf of
KDC Solar LLC |
| | Kurzweil | Lanny | McCarter & English on behalf of
KDC Solar LLC |
| 18. | Katcher | Bruce | Manko Gold Katcher and Fox on
behalf of CSX Railroad,
Consolidated Railroad, and Norfolk
Southern Railroad |
| 19. | Kitts | Dave | Mannington Mill Incorporated |
| 20. | Laird | H. Scott | URS Corporation |
| 21. | Lambert | T.H. | International Matex Tank Terminals
(IMTT) – Bayonne |
| 22. | Lawson | Frank | JCP&L |
| 23. | Lavorerio | Bob | Chevron Environmental Management
Company |
| 24. | Martin | Amy | PSEG |

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- | | | | |
|-----|---------------|---------|--|
| 25. | Matri | Michael | Hess Corporation |
| 26. | McGuinness | Michael | National Association of Industrial and Office Properties (NAIOP) |
| 27. | Powley | Jeffery | TRC Environmental Corporation |
| 28. | Rosera | Richard | Reckitt Benckiser, Inc. |
| 29. | Russo | Anthony | Chemistry Council of New Jersey (CCNJ) |
| 30. | Semeraro, Jr. | Michael | International Council of Shopping Center |
| 31. | Shoyer | Rick | Synergy Environmental |
| 32. | Smith | Steve | BASF Corporation |
| 33. | Spiegel | Robert | Edison Wetlands Association |
| | Patterson | Dana | Edison Wetlands Association |
- On behalf of the following:
- | | | |
|-----------|-------|---|
| Carluccio | Tracy | Delaware Riverkeeper Network |
| Wolfe | Bill | New Jersey Public Employees for Environmental Responsibility (NJPEER) |
| Zipf | Cindy | Clean Ocean Action |
| Godber | Alan | Lawrence Brook Watershed |

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		Partnership	
	Tittel	Jeff	NJ Sierra Club
	Montague	Peter	Environmental Research Foundation
	Sheehan	Bill	Hackensack Riverkeeper
	Riggiola	Lisa	Citizens for a Clean Pompton Lakes
	Mans	Debbie	NY/NJ Baykeeper
	Schultz	Bill	NY/NJ Baykeeper
	Pringle	David	NJ Environmental Federation
34.	Speis	David	Accutest Laboratories
35.	Steinberg	Micheal	Morgan, Lewis & Bockius LLP on behalf of RCRA Corrective Action
36.	Tittel	Jeff	Sierra Club - New Jersey Chapter
37.	Tornick	Barry	USEPA
38.	Toskos	Ted	
39.	Walsh	Diane	Commerce and Industry Association of New Jersey (CIANJ)
40.	Wilson	Buffy	ConocoPhillips
41.	Wilson	Kendall	Paulsboro Refining Company LLC
42.	Wolfe	Bill	New Jersey Public Employees for Environmental Responsibility

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(NJPEER)

43. Worden Brian

The timely submitted comments and the agency's responses are summarized below. The number(s) in parentheses after each comment identifies the respective commenters listed above.

General Comments

1. COMMENT: The commenters support the Department's efforts in creating new rules to implement the requirements of SRRA. (3, 6, 9, 12, 14, 17, 18, 20, 22, 24, 26, 29, 39)

RESPONSE: The Department acknowledges the commenters' support of this rulemaking.

Remedial Priority System Ranking

2. COMMENT: SRRA at N.J.S.A. 58:10C-27b(4) provides that the Department may undertake direct oversight of a remediation of a contaminated site where the site is ranked

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by the Department in the category requiring the highest priority pursuant to the ranking system developed pursuant to N.J.S.A. 58:10-23.16. Accordingly, the listing of a site on the remedial priority system is one basis for the Department to assume direct oversight of a case. While assumption of direct oversight is discretionary, that does not take away from the significance of the remedial priority system. (33, 42)

3. COMMENT: SRRA includes an essential safeguard that mandates (no Department discretion) that the Department perform additional review of all remediation of “high priority” sites, as determined by the remedial priority system. See N.J.A.C. 58:10C-21. (42)

RESPONSE to COMMENTS 2 and 3: The Department agrees that SRRA at N.J.S.A. 58:10C-27b(4) provides that the Department may undertake direct oversight of a remediation of a contaminated site where the site is ranked by the Department in the category requiring the highest priority pursuant to the ranking system developed pursuant to N.J.S.A. 58:10-23.16.

The Department also agrees that N.J.S.A. 58:10C-21 directs the Department to inspect all documents and information submitted by the LSRP on receipt, and mandates at N.J.S.A. 58:10C-21b(1) additional Department review of those documents when, among other

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things, a site is ranked in a category requiring the highest priority on the remedial priority system.

Accordingly, N.J.A.C. 7:26C-14.3(a)4 provides that one factor that the Department considers when determining whether to exercise its discretion to undertake direct oversight of a portion, condition or the entire remediation of a contaminated site is the category in which the site falls on the remedial priority system. Additionally, as mandated by SRRA, the Department intends to perform additional review of any document submitted for a site ranked in a category requiring the highest priority on the remedial priority system.

The remedial priority system is one of several tools that the Department intends to use to encourage persons responsible for conducting the remediation to quickly and effectively clean up their sites, to keep the public informed concerning the progress of remediation of contaminated sites throughout New Jersey, and to assist the Department in focusing its resources on those sites where its expertise is needed most. In fact, every contaminated site is included on the Department's known contaminated sites list (see www.state.nj.us/dep/srp/kcsnj/), and data concerning each of these sites, including detailed information describing the case history at a site, is already available through the Data Miner reporting tool (see datamine2.state.nj.us/dep/DEP_OPRA/). As sites are

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remediated, they are removed from the known contaminated site list, and they will no longer be ranked on the remedial priority system list. The Department anticipates that it will be able to provide information to responsible entities and to publish the remedial priority system categories along with the most up-to-date known contaminated sites list by late summer 2012.

4. COMMENT: SRRA mandated that the Department adopt a remedial priority system no later than one year after the date of enactment of SRRA, that is, by May 7, 2010. The timing of this remedial priority system deadline is critical and was intended to allow the Department to design a risk based LSRP program and for the public to have some assurance that essential science based safeguards are in place. See N.J.S.A. 58:10-23.16.

(42)

5. COMMENT: A science-and-risk-based remedial priority system is an essential safeguard to protect the public interest, given the conflicts of interest inherent in the LSRP program, and the potential for economic or political factors to override science-based public health protection. The LSRP program should not be implemented unless the remedial priority system is first adopted. (33, 42)

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6. COMMENT: The Department is violating the public trust and the Department's responsibility by not taking the time to rank the contaminated sites in New Jersey, and by not retaining direct oversight over the most contaminated sites. (33, 42)

RESPONSE to COMMENTS 4 through 6: The Department is currently in the process of developing the remedial priority system, with substantial input from external stakeholders who have both technical and policy expertise. The Department has expended significant resources since the passage of SRRA to fine tune the remedial priority system so that it reflects both site specific conditions and proximate receptors. The Department recognizes that the statute required the remedial priority system to be in place by May 2010.

However, because of the complexity and importance of the system, the Department determined that it was more important to ensure that the system met the goals of the statute than meeting the proscribed deadline. The Department anticipates that it will be able to provide information to responsible entities and to publish the remedial priority system categories along with the most up-to-date known contaminated sites list by late summer 2012. However, it would not be appropriate to put the implementation of SRRA on hold until the remedial priority system is in final form because to do so would be a violation of SRRA's mandate that, after May 7, 2012, all sites must be remediated using the services of an LSRP and without Department oversight unless otherwise directed by the Department. The intent of SRRA is to allow LSRPs to make decisions regarding

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remediation of a site using their professional judgment, and to not delay remediations by requiring Department review and approval of activities before they occur. Additionally, SRRA gives the Department discretion as to whether to assume direct oversight of sites that are ranked by the Department in the category requiring the highest priority pursuant to the RPS system. As long as sites are continuously remediating and remain in compliance such that the remediation is protective of public health and of the environment, the Department does not intend to assume oversight and most likely cause delays in the remediation due to staff reviewing and approving documents. Sites that are not continuously remediating or do not remain in compliance will be subject to direct oversight, especially so for those sites that are ranked by the Department in the category requiring the highest priority pursuant to the RPS system. Based on the implementation of the licensed site remediation program to date, and with the knowledge that the remedial priority system will be in place by summer 2012, the Department believes that it is being consistent with its public trust responsibilities.

7. COMMENT: No Department-petitioned environmental justice sites or other sites where the human health and ecological impacts are significant should be delegated to the LSRP program. Department petitioned environmental justice communities include Camden, Newark, Upper Ringwood, Linden, and Long Branch. The Department has already made a verbal commitment that environmental justice sites will not become

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LSRP sites, but this claim must be substantiated. This irresolute support of environmental justice communities is our most significant concern, since it could undermine many years of effective remedial planning and actions with the impacted, underprivileged communities that have developed a relationship of trust with the Department. (33)

RESPONSE: One primary goal of SRRA and of the LSRP program is to ensure that persons who have an affirmative obligation under N.J.S.A. 58:10B-1.3a to conduct remediation understand that they must do so without Department supervision unless otherwise directed by the Department. Another key goal is to ensure that sites are remediated quickly. Continuous remediation is a key component to ensuring that sites are remediated quickly, thereby reducing and ultimately eliminating the impact of contamination on the health of citizens in any community, but especially in communities in which a disproportionately large number of contaminated sites are located. In fact, the amendments to the Brownfield Act that accompanied SRRA require all persons responsible for conducting the remediation to, by May 2012, hire an LSRP and conduct the remediation without the prior approval of the Department, unless directed otherwise by the Department. See N.J.S.A. 58:10B-1.3b. Accordingly, SRRA requires that all sites, regardless of whether they are environmental justice sites, must be remediated under the supervision of an LSRP.

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Even though environmental justice sites must be continuously remediated using an LSRP, the Department takes SRRA's mandate to provide a closer review of LSRP work at such sites very seriously. See N.J.S.A. 58:10C-21b, which requires the Department to perform additional review of any document, or to review the performance of a remediation, under one of four circumstances, including if the contaminated site is located in a low-income community of color that has a higher density of contaminated sites and permitted discharges with the potential for increased health and environmental impacts, as compared to other communities.

In addition to SRRA's directive, the Department, on its own initiative, continues to advance strategies and policies that empower communities disproportionately impacted by environmental stressors. The Department's Office of Environmental Justice is a dedicated point of contact for residents, and it is responsible for coordinating Department programs to address environmental justice concerns in a holistic way.

The commenter and other interested parties are directed to the Department's environmental justice website at www.nj.gov/dep/ej/ for contact information and other materials regarding environmental justice matters.

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8. COMMENT: The Department should adopt a risk-based approach so that the sites that present the highest risk get prioritized for cleanup first. This highest risk group includes sites where human and environmental exposure is not under control, and where there are immediate environmental concerns (IEC), such as sites where people are drinking contaminated water or being exposed to contamination at unacceptable levels. However, this rule suggests a performance-based approach that will allow LSRPs to place a cap on every site or in some cases simply put fencing around them as the engineering control. This rule is set up so that the LSRP decides who can interpret exposure, and as long as the ends justify the means, it would be acceptable. This performance-based approach is unacceptable, and a risk-based approach must be used in the LSRP program. (33)

RESPONSE: The Department already requires the person responsible for conducting the remediation to proactively address IECs. Pursuant to the Technical Requirements and ARRCs, such situations require specific time frames for ensuring that people are protected at these sites with immediate environmental concerns. Additionally, the rules require the assignment of a Department case manager to help in the addressing of the IEC, to ensure that the time frames to protect people and other receptors are met and that remediation of the source areas is timely completed. In situations where there is no responsible party conducting the remediation, the Department will step in and perform

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the necessary tasks, such as protecting people and other receptors, and source control. In the situations of both impacted potable wells and vapor intrusion, the source must be removed, rather than simply capped or fenced off. Source removal is the sole method that ensures that contamination no longer migrates through the ground water and eliminates the threat of exposure of people to the contamination.

9. COMMENT: The commenter incorporates by reference its December 2010 testimony to the Senate Environment Committee regarding the remedial priority system and offered links to web based documents and reports on this topic. (42)

RESPONSE: The commenter did not provide the testimony to which the commenter referred. From the comment, however, the Department infers that the commenter is commenting on the development of the remedial priority system, which is not a topic of this rulemaking. Accordingly, this comment is beyond the scope of this rulemaking.

Guidance Documents vs. Rules

Remedial action performance standards

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10. COMMENT: N.J.A.C. 7:26C-1.2(a) provides a list of statutes, rules and guidance that an LSRP must follow to ensure that remediation is protective of public health, safety and environment, including all applicable New Jersey rules (including ARRCs, the Technical Requirements, the Remediation Standards, and any other applicable standards adopted by law); all available Department guidance documents, relevant EPA guidance documents; and any other relevant methods and practices (emphasis added). It will be difficult to find any and all relevant guidance. The Department should provide specific cross-references. (7, 11)

11. COMMENT: ARRCs should only require that the responsible party use sound practices as they are presented in the professional literature, including guidance. Alternately, the requirement should be the “person responsible for conducting the remediation shall do so in accordance with the ordinary standard of care.” As a practical matter, the Department guidance is conservative and occasionally lagging in adopting current methodologies. The remediating party should have the option to choose the methodologies that they believe are best suited for their circumstances and should not be constrained by a ladder of document authority. Ultimately, the remediating party needs to focus on achieving remediation that is protective of human health and the environment, not meeting the letter of the guidance.

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Accordingly, N.J.A.C. 7:26C-1.2 should be revised to read as originally written, as follows:

(a) The person responsible for conducting the remediation shall conduct the remediation in accordance with all applicable statutes, rules, and guidance, including, but not limited to, the Remediation Standards rules, N.J.A.C. 7:26D, the Technical Requirements for Site Remediation rules, N.J.A.C. 7:26E, this chapter and the Department's guidance at www.nj.gov/dep/srp/srra/guidance. (6)

12. COMMENT: Requiring at N.J.A.C. 7:26C-6.2(g) that the LSRP only issue an RAO when he/she has determined that remediation was completed pursuant to N.J.A.C. 7:26C-6.2(c) will result in cases of conflicting requirements that will prevent the issuance of RAOs under the requirements of this paragraph because of the many cross-cutting topics within the various guidance documents. (6)

RESPONSE to COMMENTS 10 through 12: It is the Legislature, through SRRA, that requires the LSRP to issue an RAO only after the LSRP has determined that the remediation has been completed, and that the LSRP base his or her opinion as to whether to issue an RAO on a hierarchy of statutes, rules and regulations. Similarly, the

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requirement to apply any available and appropriate technical guidance issued by the Department is also required pursuant to SRRA.

In SRRA at N.J.S.A. 58:10C-14(d), the Legislature requires that:

Upon completion of the remediation, the licensed site remediation professional shall issue a response action outcome to the person responsible for conducting the remediation when, in the opinion of the licensed site remediation professional, the site has been remediated so that it is in compliance with all applicable statutes, rules and regulations protective of public health and safety and the environment

The Department codified this requirement at N.J.A.C. 7:26C-6.2(g). The LSRP may only issue an RAO when he/she has determined that remediation was completed pursuant to N.J.A.C. 7:26C-6.2. N.J.A.C. 7:26C-6.2(a) allows the LSRP issue an RAO when, in the opinion of the LSRP, the site or area of concern (AOC) has been remediated pursuant to N.J.A.C. 7:26C-6.2(c), including the applicable statutes, rules and regulations listed at N.J.A.C. 7:26C-1.2(a).

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The Legislature set forth with specificity at N.J.S.A. 58:10C-14c in the form of a hierarchy the statutes, rules, regulations, and technical guidance that the Legislature requires the LSRP to use when determining whether to issue an RAO. The Department disagrees that the rules do not properly implement this hierarchy.

The first part of the hierarchy, N.J.S.A. 58:10C-14c(1), requires the LSRP to make each decision concerning a contaminated site in order to meet the health risk and environmental standards established pursuant to the following: (1) the Brownfield Act at N.J.S.A. 58:10B-12, (2) the remediation standards adopted by the Department pursuant to the Brownfield Act at N.J.S.A. 58:10B-12, (3) the maximum contaminant levels (MCLs) for building interiors adopted by the Department of Health and Senior Services pursuant to N.J.S.A. 52:27D-130.4, as applicable, and (4) any other applicable standards adopted pursuant to law. The Department codified these requirements in the ARRCs rules at N.J.A.C. 7:26C-1.2(a)1.

The second part of the hierarchy, N.J.S.A. 58:10C-14c(2), requires the LSRP to apply the technical standards for site remediation adopted by the Department pursuant to the Brownfield Act at N.J.S.A. 58:10B-1, et seq., the mandatory remediation timeframes and the expedited site specific timeframes adopted by the Department pursuant to SRRA at N.J.S.A. 58:10C-28, and the presumptive remedies adopted by the Department pursuant

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to the Brownfield Act at N.J.S.A. 58:10B-12. The Department codified these requirements in the ARRCs rules at N.J.A.C. 7:26C-1.2(a)2.

The third and fourth parts of the hierarchy, N.J.S.A. 58:10C-14c(3) and (4), allow the LSRP to exercise professional judgment, in certain circumstances, as long as the LSRP so documents. The LSRP must apply any available and appropriate technical guidelines concerning site remediation as issued by the Department. However, if the LSRP is of the opinion that “there is no specific requirement provided by the technical standards for site remediation adopted by the Department, and guidelines issued by the Department are not appropriate or necessary,” to meet the remediation requirements listed in N.J.A.C.

58:10C-14c(1), the LSRP may make decisions regarding a remediation by using “relevant guidance from the Federal Environmental Protection Agency or other states and other relevant, applicable, and appropriate methods and practices that ensure the protection of the public health and safety, and of the environment.” If the LSRP chooses to exercise professional judgment pursuant to this provision, SRRA requires the LSRP to set forth justification for such use, in the relevant submittal. The Department codified these requirements in the ARRCs rules at N.J.A.C. 7:26C-1.2(a)3, concerning the use of guidance documents.

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As indicated above, the requirement to use this hierarchy is not optional. It is prescribed by the Legislature through SRRA. Accordingly, the Department is required to implement these provisions, and it is doing so through the ARRCs rules at N.J.A.C. 7:26C-1.2(a), and the requirements at N.J.A.C. 7:26C-6.2 that the LSRP must base his or her opinion as to whether to issue the RAO on the hierarchy in N.J.A.C. 7:26C-1.2(a).

While adherence to the hierarchy is mandatory, the hierarchy does allow the LSRP to use professional judgment. As discussed above, N.J.S.A. 58:10C-14c(3) and (4) allow the LSRP to exercise professional judgment, in certain circumstances, as long as the LSRP so documents, including in cases where the LSRP perceives conflicting requirements. The Department is implementing this provision throughout the ARRCs and Technical Requirements. N.J.A.C. 7:26C-1.2(a)3 provides that the LSRP may use guidance issued by the EPA or other states, or “[a]ny other relevant, applicable, and appropriate methods and practices to ensure the protection of the public health and safety, and of the environment” under two circumstances: (1) when the LSRP determines that there is no specific technical guidance issued by the Department, or (2) that the guidance issued by the Department is inappropriate or unnecessary to meet the remediation requirements.

The hierarchy appeared in the version of N.J.A.C. 7:26C that is amended by this adoption at N.J.A.C. 7:26C-6.2(c), and N.J.A.C. 7:26C-1.2(a) then read as the commenter points

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out. However, the Department determined it to be more clear and effective to codify the hierarchy at the beginning of N.J.A.C. 7:26C, and therefore recodified it from N.J.A.C. 7:26C-6.2(c) to N.J.A.C. 7:26C-1.2(a). N.J.A.C. 7: 26C-6.2(c) now includes a cross reference to the hierarchy at N.J.A.C. 7:26C-1.2(a).

13. COMMENT: Both the ARRCs and the Technical Requirements should embrace the hierarchy for professional judgment presented in N.J.S.A. 58:10C-14c. However, the proposed Technical Requirements have not cited the hierarchy from SRRA. (6)

RESPONSE: Both the ARRCs rules and the Technical Requirements incorporate the hierarchy of statutes, rules and technical guidance documents from SRRA at N.J.S.A. 58:10C-14c. The Technical Requirements at N.J.A.C. 7:26E-1.5(a) require remediation to be conducted pursuant to the ARRCs rules at 7:26C-1.2 and the hierarchy is itself set forth at N.J.A.C. 7:26C-1.2. Accordingly, adding additional rule text at N.J.A.C. 7:26E-1.5 is unnecessary and redundant.

14. COMMENT: The Technical Requirements at N.J.A.C. 7:26E-1.5(a) require the person responsible for conducting the remediation to conduct remediation pursuant to ARRCs at N.J.A.C. 7:26C-1.2, and in N.J.A.C. 7:26E-1.5(b), using “any and all appropriate technical guidance concerning site remediation issued by the Department.”

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The phrase “as determined to be appropriate by the LSRP of record” should be inserted at the end of the sentence in (b). (7)

RESPONSE: The proposed amendment is unnecessary. As discussed above, the ability to deviate from the Department’s technical guidance is already at the discretion of the LSRP, as provided at N.J.A.C. 7:26C-1.2(a)3.

Enforcement of Guidance

15. COMMENT: Properly developed and vetted guidance documents are important tools to assist an LSRP in the remediation process. Guidance should provide a suggested path to attaining the objectives of the regulations but, inherent in the guidance concept is that other paths to the same goal may, and do, exist. (6)

16. COMMENT: Guidance must allow for sufficient flexibility and exercise of professional judgment; otherwise, it is not truly “guidance” but, rather, regulation. (6)

17. COMMENT: The complexity and inflexibility of the Technical Requirements has been replaced by more detailed and complex guidance documents that will be enforced as

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if they were regulations by the Department as opposed to true “guidance,” thereby imparting even more inflexibility into the site remediation process. (18)

18. COMMENT: The Department’s position that SRRA provides the authority for the Department to enforce the use of a guidance document is contrary to the language of SRRA at N.J.S.A. 58:10C-14c, as well as inconsistent with the established rule making procedures and the due process requirements in New Jersey. (6)

19. COMMENT: While the Rule Proposal has significantly reduced the technical regulations that guide cleanups in New Jersey, the same prescriptive requirements have been inserted in guidance documents, adherence to which is mandated by rule. Rather than providing the flexibility for evaluating alternative approaches that may be able to achieve the same environmental objectives in a more cost effective or timely manner, the guidance documents continue to require the application of overly conservative remediation standards to all contaminated sites regardless of the risk (or lack thereof) that such sites pose to human health and the environment. All references to “compliance” with guidance documents are inappropriate, contrary to law, and must be deleted. (3, 11, 23)

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20. COMMENT: Although the Department is to be commended for reducing the prescriptive nature of the Technical Requirements, the rule proposal still contains too many prescriptive regulations and it would compel compliance with prescriptive guidance documents. This approach is inconsistent with a "performance based" program, which would rely on the exercise of professional judgment by LSRPs, and it improperly suggests that "guidance" is enforceable as law. (12)

21. COMMENT: Guidance documents appear to improperly be considered supplemental regulations and are considered "enforceable." For example, ARRCS requires at N.J.A.C. 7:26C-1.2(a)3 that the person responsible for conducting the remediation shall conduct the remediation by applying any available and appropriate technical guidance concerning site remediation as issued by the Department. Similarly, the Technical Requirements at N.J.A.C. 7:26E-1.6(b)4ii require the person responsible for conducting the remediation to include, in each remedial phase workplan and report, a list of all rationales submitted for deviations from any technical guidance pursuant to N.J.A.C. 7:26C-1.2(a)3.

Effectively, the above-referenced provisions of ARRCS and the Technical Requirements constitute regulating through guidance, since the remediating party "shall apply guidance" and "shall include rationale for deviations from guidance." Mandating that guidance is enforceable is contrary to Executive Order #2. (3, 6, 39)

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22. COMMENT: The Department is inappropriately attempting to give guidance documents the same force and effect as regulations, without complying with the requirements of the Administrative Procedure Act (APA). In exercising discretion when discharging its statutory duty, an agency may choose between formal action, such as rulemaking or adjudication, and informal action, provided the choice complies with due process requirements and the APA. N.J.S.A. 52:14B-1 et seq. Moreover, an agency's informal action may constitute *de facto* rulemaking, despite how the agency may have categorized it, Metromedia, Inc. v. Div. of Taxation, 97 N.J. 313 (1984), thereby requiring the agency to also comply with the APA requirements. A “rule” is “each agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency.” See N.J.S.A. 52:14B-4(a)(1); N.J.S.A. 52:14B-4(a)(2). The requirement to comply with the guidance documents and the fact that the guidance documents are prescriptive in nature and are written in mandatory terms is evidence that they are either rules that are not properly promulgated or are *de facto* rules, and are therefore unenforceable. (3, 11, 15)

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23. COMMENT: In order to enable the LSRP's use of professional judgment in the application of applicable guidance, the Department should add to N.J.A.C. 7:26E-1.7, as follows, to emphasize the consistency with the legislative intent of SRRA:

(c) The person responsible for conducting the remediation may deviate from the Department's applicable site remediation guidance referenced in N.J.A.C. 7:26E-1 through 5. The licensed site remediation professional may use the following additional guidelines to make decisions regarding a remediation, and shall set forth justification for such use, in the relevant submittal:

- (1) relevant guidance from the federal Environmental Protection Agency or other states; or
- (2) other relevant, applicable and appropriate methods and practices that ensure the protection of the public health and safety, and of the environment. (6)

RESPONSE to COMMENTS 15 through 23: The requirement to apply Department technical guidance or otherwise document when the technical guidance is inappropriate or unnecessary is not a unilateral attempt by the Department to enforce a requirement without statutory authority. Rather, as discussed at length above, this requirement is imposed by the Legislature pursuant to SRRA at N.J.S.A. 58:10C-14c(3) and (4). Built in to those provisions of SRRA is the flexibility in choosing how to achieve the standards set forth in the hierarchy of standards at N.J.S.A. 58:10C-14c(4).

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SRRA at N.J.S.A. 58:10C-14c(3) specifically requires the Department to “provide interested parties the opportunity to participate in the development and review of technical guidelines issued for the remediation of contaminated sites.” The Legislature thus did not require promulgating this technical guidance pursuant to the APA, but rather using stakeholder input. The Department has complied with this legislative direction.

The purpose of the Department’s technical guidance is to provide Departmentally acceptable policies and scientifically based approaches to achieving compliance with the Department’s rules. The person responsible for conducting the remediation’s LSRP may, in certain circumstances, use professional judgment in meeting remedial objectives.

The rules do not require “compliance” with technical guidance, and the Department will not be enforcing whether a person responsible for conducting the remediation “complied” with a particular provision in a guidance document. Rather, the rules require and the Department will enforce the requirement to comply with N.J.A.C. 7:26C-1.2(a)3 if that person failed to provide justification for a deviation from the technical guidance.

The penalty table that follows N.J.A.C. 7:26C-9.5(b) provides a list of rule provisions and their corresponding penalty amounts. Included in this list is the violation of N.J.A.C.

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7:26C-1.2(a), currently summarized as “failure to conduct remediation in accordance with all applicable statutes, rules, standards and guidance,” which may be misleading. N.J.A.C. 7:26C-9.5(b) states that the penalty table includes summaries of the rules on which the Department will enforce, and that in the event of a conflict between the summary and the corresponding rule provision, the corresponding rule provision shall prevail. Accordingly, on adoption the Department is modifying the description of N.J.A.C. 7:26C-1.2(a) in the penalty table at N.J.A.C. 7:26C-9.5(b) to state, “failure to conduct remediation in accordance with all applicable statutes, rules, and standards [and technical guidance], or to provide a written rationale and justification for any deviation from technical guidance” (new text underlined, deleted text in brackets). The Department is also changing the companion provision in the Technical Requirements to ARRCs at N.J.A.C. 7:26C-1.2(a)3, namely N.J.A.C. 7:26E-1.5(b), to clarify that the person responsible is to apply the technical guidance pursuant to N.J.A.C. 7:26C-1.2(a)3, which includes the requirement to provide a rationale and justification for any deviation from guidance.

As discussed more fully below in response to Comments 32 through 46, submitting a variance from the Technical Requirements and documenting a deviation from technical guidance are two separate tools that should not be confused. Documenting deviations from technical guidance is implemented through the ARRCs rules at N.J.A.C. 7:26C-

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1.2(a)3, while submitting a variance from a technical requirement is implemented through the Technical Requirements at N.J.A.C. 7:26E-1.7.

24. COMMENT: The Department should not abandon mandatory rules in favor of voluntary and unenforceable guidance. The Department has no legal authority to enforce the “guidance,” because only a regulation has the force of law. A guidance document is merely a suggestion, and the LSRPs are given the ability to interpret them however they see fit. For example, if the cleanup standard for the recently federally classified cancer-causing Trichloroethylene is one part per billion in drinking water, the guidance would allow the LSRP to interpret that standard in any way they saw appropriate and this may result in a failure to remediate contaminated drinking water at the expense of families who depend on those water supplies for their potable water. (33)

RESPONSE: The LSRP does not have the authority to interpret the risk associated with a particular contaminant at a site such as TCE in the commenter’s example, and then make decisions that would not be protective of public health and safety and the environment. All remediation must be conducted so that it is protective of public health and safety and the environment. See, N.J.S.A. 58:10C-16a. The Brownfield Act, at N.J.S.A. 58:10B-12g, instructs the Department and the person responsible for conducting the remediation on how to determine the appropriate remediation standard or remedial

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action. The burden to demonstrate that a remedial action is protective of public health and safety and the environment, as applicable, is with the person responsible for conducting the remediation, pursuant to N.J.S.A. 58:10B-12g. However, SRRA did not amend the requirement in the Brownfield Act that contamination be remediated to health based standards; this requirement remains in effect. Additionally, the Remediation Standards are promulgated rules at N.J.A.C. 7:26D, and are not technical guidance; therefore, an LSRP does not have the authority to “to interpret that standard in any way they saw appropriate...”

Documenting deviations from technical guidance

25. COMMENT: Under proposed N.J.A.C. 7:26C-1.2(a)3, “when there is no specific technical guidance issued by the Department or in the judgment of a licensed site remediation professional the guidance issued by the Department is inappropriate or unnecessary to meet the remediation requirements of (a)1 and 2 above, the person responsible for conducting the remediation may use the following additional guidance [e.g., federal or other states’ guidance; other relevant methods], provided that the person includes in the appropriate report a written rationale concerning why the technical guidance issued by the Department is inappropriate or unnecessary to meet the

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remediation requirements of (a)1 and 2 above , and justifies the acceptability of the guidance or other methods that were utilized: ...”

By comparison, N.J.S.A. 58:10C-14c(4), upon which the above is based, provides “when there is no specific requirement provided by the technical standards for site remediation adopted by the department, and guidelines issued by the department are not appropriate or necessary, in the professional judgment of the licensed site remediation professional, to meet the remediation requirements listed in paragraph (1) of this subsection, the licensed site remediation professional may use the following additional guidelines to make decisions regarding a remediation, and shall set forth justification for such use, in the relevant submittal: ...”

The Department must revise N.J.A.C. 7:26C-1.2(a)3 to correspond with N.J.S.A. 58:10C-14c(4) because the listed guidance documents are by definition “acceptable” and therefore, their acceptability should not have to be separately justified. To require this additional justification unnecessarily increases paperwork requirements and associated costs. (18)

26. COMMENT: The requirement that deviation from technical guidance must be documented should be removed. As a practical matter, most guidance published to date

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lists arbitrary requirements, most importantly sampling schemes, without providing any rationale or explanation for how such requirements were derived. In the absence of a technical basis for the requirements listed in the guidance, the requirement to present the rationale for deviation is meaningless. It would be more appropriate to recast the requirement that the person responsible for conducting the remediation must document how the use of guidance or other appropriate references resulted in a technically defensible document and a remedial action that is protective of human health and the environment. (6)

RESPONSE to COMMENTS 25 and 26: N.J.A.C. 7:26C-1.2(a)3 does not require a justification of the acceptability of technical guidance. Rather, it requires justification when the LSRP believes that the technical guidance issued by the Department is inappropriate or unnecessary to meet the remediation requirements set forth in the applicable statutes and rules. Documentation of deviations from technical guidance is mandated by SRRA at N.J.S.A 58:10C-14c(4). Based on the comments received, and in order to clarify that the Department is not requiring a demonstration of “acceptability” of other guidance, the Department is replacing the word “acceptability” with the word “use.”

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27. COMMENT: The Department must revise N.J.A.C. 7:26C-1.2(a)3 to correspond with N.J.S.A. 58:10C-14c(4) because the LSRP is the party designated by the statute to provide the justification for using the alternative guidance, not the person responsible for conducting the remediation. (18)

RESPONSE: The Department agrees that N.J.S.A. 58:10C-14c(4) places the obligation on the LSRP and not on the person responsible for conducting the remediation to justify using alternative guidance:

(4) When there is no specific requirement provided by the technical standards for site remediation adopted by the department, and guidelines issued by the department are not appropriate or necessary, in the professional judgment of the licensed site remediation professional, to meet the remediation requirements listed in paragraph (1) of this subsection, the licensed site remediation professional may use the following additional guidelines to make decisions regarding a remediation, and shall set forth justification for such use, in the relevant submittal:

Accordingly, to comport N.J.A.C. 7:26C-1.2(a)3 with this statutory provision, on adoption, the Department is substituting “licensed site remediation professional” for “person responsible for conducting the remediation.”

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28. COMMENT: The requirement that an LSRP must document and justify any deviation from the Department's guidance documents, including past, present or future, did not exist prior to this rule proposal. Accordingly, it is possible that an LSRP who is preparing a remedial action report for a site on which remediation has been ongoing for many years could feel compelled to go back and try to document many historic deviations. This approach would be unworkable and overly burdensome, with no corresponding benefit to public health or the environment. Any requirement to document significant deviations by an LSRP must apply to future actions only. (6)

RESPONSE: N.J.A.C. 7:26C-1.2(a)3 requires the LSRP to document why, in the LSRP's judgment, the guidance issued by the Department is inappropriate or unnecessary. The rule does not require documentation of future deviations as that would be an impossibility because the deviation has not yet occurred.

The commenter's assertion that the requirement that an LSRP must document and justify any deviation from the Department's guidance documents did not exist prior to the rule proposal is incorrect. This requirement originated in SRRA on May 7, 2009. SRRA provides that it is the responsibility of the LSRP to determine the protectiveness of the

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remedial action regardless of prior work on the site or whether guidance existed prior to 2009 .

Where guidance exists, SRRA places the initial responsibility on the LSRP to determine when all or a part of a particular technical guidance document is appropriate for a particular site. The Legislature made it clear, in N.J.S.A. 58:10C-14c, how the person responsible for conducting the remediation and the person's LSRP are to apply the Department's technical guidance, and the Department has reflected that application in N.J.A.C. 7:26C-1.2.

The requirement to justify now any prior deviations from the Department's guidance is relevant only back to May 7, 2009, as SRRA does not contain any obligation to document deviations from guidance that occurred prior to May 7, 2009. Accordingly, any requirement to document significant deviations by an LSRP applies to any deviations from guidance after May 7, 2009. That said, nothing precludes the LSRP from submitting any additional information concerning deviations from historical guidance that the LSRP may deem necessary to justify a particular course of action.

29. COMMENT: N.J.A.C. 7:26C-1.2(a)(3), which requires a written justification for a deviation from any Department guidance, is unnecessary, overly burdensome, and

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contrary to the intent of SRRA. If the new site remediation paradigm is to be successful, an LSRP must stand behind his or her work product, and the Department can review any work conducted by an LSRP in order to make the ultimate determination regarding whether a site has been addressed appropriately. Accordingly, there is no benefit to be gained from the extra expense associated with documenting deviations from technical guidance. (3, 11)

30. COMMENT: The deviation documentation requirement has the potential to be so onerous that it will result in the focus of an investigation and/or remediation being diverted from protectiveness to administrative compliance. There are many alternative approaches that are relatively minor departures from the Department's technical guidance that will have broad applicability to a large number of sites. Thus, the requirement to justify every variation from guidance would include justifications for variations that do not significantly affect the outcome of the remediation, and which will result in excessive administrative burdens on the Department and the regulated community. (3, 6, 11)

31. COMMENT: The only circumstance in which specific rationale on a “deviation” should be required is when the LSRP decides to completely ignore an existing Department guidance document in lieu of some other guidance/technically-justified approach (as provided for in SRRA). The LSRP should not be required to document why

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the LSRP chose not to follow each specific aspect of each Department guidance document. (6)

RESPONSE to COMMENTS 29 through 31: The Department agrees that the skill and integrity of the LSRP, including the LSRP's commitment to stand behind his or her work, and the Department's ability to review that work and require additional work as necessary, is critical to the success of the LSRP program and to the effectiveness of remediation in this State.

Technical guidance provides Departmentally acceptable policies and scientifically based approaches to achieving compliance with the Department's rules. The Legislature recognized that due to the site specific nature of remedial actions, the technical guidance will not apply to every action at every site. The Legislature clearly and unambiguously determined that documentation of deviations from guidance is required. See N.J.S.A. 58:10C-14c, which provides that, "The licensed site remediation professional . . . shall set forth justification for such use, in the relevant submittal." Accordingly, LSRPs have the ability to use professional judgment to select an alternative approach if that approach is protective of public health and safety and the environment.

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The complexity of the explanation of a deviation will be relative to the complexity of site conditions. LSRPs should exercise their professional judgment regarding the level of detail needed to adequately justify decisions that were made. For additional information on this issue, the commenters are referred to

www.nj.gov/dep/srp/srra/training/matrix/important_messages/variance_and_bpj.pdf.

The task of weighing the expense to LSRPs and the persons responsible for conducting the remediation of documenting deviations from technical guidance against not doing so fell to the Legislature at the time that it crafted the language of SRRA. Since the Legislature did include this requirement in SRRA, the clear inference is that the Legislature ascertained that the benefit was worth the cost. The Department is without authority to re-enter this debate via regulations.

Varying from the Technical Requirements

32. COMMENT: The Department's proposed requirement to document deviations from guidance is similar to the requirement to document a variance from the Technical Requirements. This similarity of requirements blurs the differences between enforceable regulations and guidance as reasonable practice. As a result, the Department's requirement for documentation of "deviations" sends an incorrect message to LSRPs and

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remediating parties suggesting “compliance” with guidance is required by law and undercuts the exercise of professional judgment by LSRPs to complete the efficient and timely remediation of contaminated sites. (6)

33. COMMENT: The numerous rule provisions that mandate compliance with guidance documents will result in an over-reliance on variances in order for an LSRP to utilize professional judgment and do his or her work effectively. (6, 12, 39, 42)

34. COMMENT: N.J.A.C. 7:26E-1.7 requires that the person responsible for conducting the remediation must make a separate submission, including completion of a separate Department form, justifying the variance prior to varying from the requirement. In contrast, the current provision governing variances and the statutory provision applicable to varying from the Department’s technical guidance, N.J.S.A. 58:10C-14(c)4, which is similar to this variance, requires the justification for the variance to be included in the relevant submittal (e.g., the remedial investigation, remedial action report, etc.), not prior to varying from the requirement. This provision should be modified to correspond to this approach which is greatly simplified as compared to having to make a separate submission and file a separate form for each variance as the newly proposed regulations requires. This would also clarify that the rationale was prepared by the LSRP using its

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professional judgment and not by the party responsible for conducting the remediation as the proposed regulations now require.

Further, the standards for demonstrating the supporting rationale of the variance should be limited to explaining how the variance will not impact the protectiveness of the remediation rather than the multi-faceted rationale required under the proposed regulations (has verifiable and reproducible results, achieves the objectives of the requirement which is varied and furthers the attainment of the purpose of the specific remedial phase). Unnecessary documentation requirements should be discouraged in the proposed regulations – protectiveness of the remediation should be the standard for a variance. (18)

RESPONSE to COMMENTS 32 through 34: The rules provide a mechanism for deviating from technical guidance and a separate mechanism for varying from the Technical Requirements that should not be confused with each other. First, the person responsible for conducting the remediation may deviate from the Department's technical guidance by following the ARRCs rules at N.J.A.C. 7:26C-1.2(a). If the Department's technical guidance or a portion thereof is not appropriate or necessary, the LSRP must provide adequate justification within the applicable remedial phase report that the decisions made are as protective of public health, safety and the environment as if the

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technical guidance was followed without deviation. The rules, as modified on adoption (see response to Comment 27), mirror the statute in requiring the LSRP to provide the rationale for deviating from the technical guidance. The complexity of the explanation will be relative to the complexity of site conditions, and is to be determined by the LSRP, within his or her professional judgment.

Second, the person responsible for conducting the remediation may vary from the Technical Requirements by following the variance application procedure set forth in the Technical Requirements at N.J.A.C. 7:26E-1.7. The Department is unable at this early juncture to determine the frequency of which persons or their LSRPs will rely on this provision. Before varying from a Technical Requirement, the person must submit an application that identifies, by rule citation, the requirement from which the person is varying, describes how the proposed course of action varies from the regulatory requirement, and includes supporting documentation demonstrating that the variance provides verifiable and reproducible results, achieves the objective of the cited technical requirement, and furthers the attainment of the specific remedial phase.

The person responsible for conducting the remediation must submit the required information in detail to the Department prior to each time the person determines to vary from the Technical Requirements so that the Department has the opportunity review the

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variance application when first proposed if it so chooses, and so that the Department has enough information to evaluate the protectiveness of the remediation that would result after the person has varied from the rules. However, the person need not wait for Department approval of the variance because the requirement to notify the Department in advance of varying from the Technical Requirements does not mean that the Department will be responding to each application. Moreover, a lack of response from the Department should not be interpreted as tacit approval of the variance application. Rather, SRRA provides that the person is to continue remediation unless directed otherwise by the Department, and also provides that the Department may audit all submissions, including the response action outcome, up to three years after the response action outcome is submitted to the Department. Additionally, if the Department determines that the remediation is not protective of public health and safety and the environment, the Department may invalidate the response action outcome, as long as the invalidation determination is made up to three years after the submission of the response action outcome. Accordingly, the person should proceed with the remediation unless the Department notifies the person otherwise.

35. COMMENT: The commitment of limited Department resources to log in, review and respond to the variance request form will prove draining to those resources, will result in delays to the remediation process (due to misinterpretations based on the limited

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information on the form compared with the detail to be found in the associated key document), and will drive up the costs to implement SRRA and the LSRP Program (due to both the delays encountered and the additional program costs to the Department that will almost certainly require an increase in Annual Remediation Fees). Accordingly, the requirement to submit a variance request form prior to the submission of the associated key document should be deleted from the proposed rule. (6)

36. COMMENT: N.J.A.C. 7:26E-1.7 requires the submission of a Department form for any variance to its provisions prior to varying from any technical requirement.

Accordingly, the number of variances is expected to be numerous. Additionally, the need to submit a form before the variance occurs is overly burdensome and will delay the implementation of site remediation. Under the current program, an LSRP may vary from a regulatory technical requirement without submitting a form or seeking advanced approval of the variance from the Department. Rather, the variance is discussed and the proper justification is provided within the body of the submitted key document. This approach provides a sufficient level of notification and documentation and should be maintained. (6, 11)

37. COMMENT: Except for the requirements listed in N.J.A.C. 7:26E-1.7(b), the Technical Requirements at N.J.A.C. 7:26E-1.7 allows the person responsible for

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conducting the remediation to vary from the requirements of subchapters 1 through 5 of the Technical Requirements, if a variance form and the information described in N.J.A.C. 7:26E-1.7(a)1 through 3 is provided “prior to varying from any technical requirement.”

Variances should not be required to be submitted prior to the implementation of the variance. There is no requirement for the Department to approve variances; therefore, there is no reason to submit variances prior to implementation. Further, LSRP review of prior work may result in variances for work previously conducted. The LSRP has the obligation to determine the appropriateness of variances and prior submittal suggests the DEP must approve the variance. (7)

38. COMMENT: The Department should adopt the following language based on the existing Technical Requirements, to promote the LSRP’s use of professional judgment in the remediation of contaminated sites, at N.J.A.C. 7:26E-1.7, as follows (deletions shown in brackets, addition in underline):

(a) Except as provided in (b) below, the person responsible for conducting the remediation may vary from certain technical requirements in N.J.A.C. 7:26E-1 through 5, provided that the person responsible for conducting the remediation submits the following technical information [and a variance form found on the Department’s website

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at www.nj.gov/dep/srp/srra/forms, prior to varying from any technical requirement] in the next applicable remedial phase report:

1. The regulatory citation for the requirement;
2. A description of how the work performed deviated from the rule requirement; and
3. The rationale for varying from the requirement that includes supporting information as necessary to document that the work conducted has:
 - i. [Provides] Provided results that are verifiable and reproducible;
 - ii. [Achieves] Achieved the objectives as the rule requirement from which it varied; and
 - iii. [Furthers] Furthered the attainment of the goals of the specific remedial phase. (6)

39. COMMENT: LSRPs should not be able or allowed to grant themselves waivers from any rule without any direct oversight or sign off from the Department. LSRPs should not have the ability to waive certain remediation controls without any DEP oversight. Since the LSRP signs off on the final cleanup, there is no way for the Department to know if the waivers actually met the objective of cleaning up and securing the site. Years later, when toxins leaking out of the site are discovered there will not be a mechanism to go

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after the LSRP for all the problems they allowed to continue on the site due to the various waivers. (36)

40. COMMENT: The waiver procedure as proposed does not ensure waivers will not be used to weaken the intent to have these sites properly cleaned up. There is no guarantee that multiple waivers will not be granted to the same project, thereby making SRRA meaningless. (36)

RESPONSE to COMMENTS 35 through 40: The Technical Requirements provide two stop gaps to ensure that the Department has every opportunity to review variance applications to ensure that, notwithstanding the proposed variance, the remediation is being conducted in a way that is protective of public health and safety and the environment. First, N.J.A.C. 7:26E-1.7(a) requires that the person responsible for conducting the remediation submit the required information prior to varying from a technical requirement, so that the Department may review the variance application when first proposed if it so chooses. Additionally, amended N.J.A.C. 7:26E-1.6(b)4i requires that the person responsible for conducting the remediation submit, in each remedial phase workplan and report, a list of all variances submitted pursuant to N.J.A.C. 7:26E-1.7, so that, as the remediation progresses, the Department will have the opportunity to review the progress of the remediation and evaluate the appropriateness of all of the variances

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implemented during the remediation, and to direct the person responsible for conducting the remediation to take additional measures as necessary to ensure the protectiveness of the remediation. See also response to Comment 42.

Since there is no requirement to suspend remediation while the Department reviews an application for a variance, the remediation may proceed. In fact, the ARRC rules at N.J.A.C. 7:26C-2.3(a)3 require the person responsible for conducting the remediation to conduct remediation without prior Department approval except in certain circumstances as described in N.J.A.C. 7:26C-2.3(a)3i. Accordingly, the requirement to submit a variance prior to actually varying from a Technical Requirement will not stop or slow down the remediation process. That said, the Department always retains its discretion to require that remediation stop or proceed in a different manner at any time that it determines that the remediation is not being conducted in compliance with all applicable statutes and rules or in a manner that is protective.

Whether prior work at a site was completed before the enactment of SRRA or after is irrelevant. SRRA makes it incumbent upon the LSRP to use professional judgment to determine whether the ultimate remedy is protective of public health and safety and the environment. If an LSRP reviews historical remediation and determines that the work is acceptable, then there is no need for a variance. If the LSRP determines that the work is

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not acceptable, then it is necessary to perform additional remediation. This does not require a variance for the historical work conducted.

Multiple variances are not precluded, provided that the variances are submitted to the Department pursuant to the rule, and that each of the variances provides verifiable and reproducible results, achieves the objectives of the cited technical requirement, and attains the purpose of the specific remedial phase, and thus ensuring the remediation remains protective of public health and the environment.

41. COMMENT: N.J.A.C. 7:26E-1.7(b)5 provides that an LSRP may not vary from a requirement to comply with a quality assurance laboratory requirement, instead of allowing primary oversight of most site remediation matters to an LSRP pursuant to the LSRP's professional judgment. Laboratory sampling methodologies that are deemed best practices at one point in time may be determined to be less effective or appropriate as new methodologies are developed. For example, certain environmental professionals were using the Extractable Petroleum Hydrocarbon method prior to it being formally required by the Department. In order to stay current with best practices as the science of quality assurance evolves over time, an LSRP should be able to vary from a laboratory requirement by satisfying the requirements of N.J.A.C. 7:26E-1.7(a). (26)

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RESPONSE: The quality assurance laboratory requirements codified at N.J.A.C. 7:26E-2 are designed to ensure that all samples are analyzed consistently and correctly. Without these requirements, there would be no assurances that remediation is being conducted based on meaningful, reliable and verifiable data. Accordingly, allowing an LSRP to vary from any part of N.J.A.C. 7:26E-2 by using the procedure set forth at N.J.A.C. 7:26E-1.7 would not be appropriate. Nothing, however, prevents a person from requesting that a laboratory use different methods as long as the methods are Department certified pursuant to N.J.A.C. 7:18 and will enable data quantification to the Remediation Standards. Allowing a variance to the quality assurance laboratory requirements would be in conflict with N.J.A.C. 7:18 (Regulations Governing the Certification of Laboratories and Environmental Measurements), as the variance process of the Technical Requirements does not apply to those regulations.

42. COMMENT: The Technical Requirements at N.J.A.C. 7:26E-1.6(b)4i requires the person responsible for conducting the remediation to include in each remedial phase report a list of all variances the person applied for pursuant to N.J.A.C. 7:26E-1.7. The Department should replace “variances applied for” with “variances issued by the LSRP.”

(7)

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RESPONSE: The commenter mischaracterizes the Technical Requirements. Using professional judgment, an LSRP determines whether it is appropriate to vary from the Technical Requirements. The Department recognizes that as proposed, N.J.A.C. 7:26E-1.6(b)4i could be misinterpreted to mean that remediation should stop while the Department reviews and approves a variance application. This is contrary to the basic tenet of SRRA that remediation proceed without Department approval except in limited circumstances. In fact, the Department will no longer approve and issue a variance from the Technical Requirements, nor is an LSRP required to do so. Accordingly, the Department is modifying N.J.A.C. 7:26E-1.6(b)4i on adoption to replace “applied for” with “submitted.” The person responsible for conducting the remediation is required to submit a list of and explanation for all such variances.

43. COMMENT: The LSRP should not be allowed to select alternative compliance mechanisms without having the Department approve of that selection. (36)

44. COMMENT: Waivers would allow the use of weak institutional and engineering controls, potentially creating “pave and wave” situations. According to numerous scientific studies, these types of controls will fail. Caps will crack from the weight of buildings. Sewer lines have the potential to destroy the cap, unleashing toxic materials and gasses. Since there will be no real oversight, houses or apartments can be built on top

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of these sites. Additionally, it will be difficult to hold LSRPs responsible when these controls fail. (36)

45. COMMENT: The proposed rules would allow LSRPs to circumvent regulations through the use of waivers and the expanded use of classification exception areas and would severely limit the scope of any investigation or enforcement ability by the Department. These rules do not foster an open and transparent process. (36)

RESPONSE to COMMENTS 43 through 45: The Technical Requirements do not contain any waiver procedures. There is, instead, a variance procedure, codified at N.J.A.C. 7:26E-1.7. SRRA did not change the longstanding provisions of the Brownfield Act at N.J.S.A. 58:10B-13 that allow for the use of institutional and engineering controls. In some instances, sites simply cannot be remediated without the use of long term solutions, including institutional controls (such as deed restrictions and classification exception areas [CEAs]) or engineering controls (such as long term pumping and treating of ground water). In those instances, SRRA, at N.J.S.A. 58:10C-19a and c, authorizes the Department to establish a permit program to regulate the operation, maintenance, and inspection of engineering and institutional controls and related systems as part of a remedial action for a contaminated site. A permittee is required to provide financial assurance to guarantee that funding is available to operate, maintain and inspect any

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engineering control installed as part of the remedial action for a contaminated site. The Department is implementing this requirement through the ARRCs rules at N.J.A.C. 7:26C-7. The Department maintains oversight, and the person responsible for conducting the remediation is required to ensure the protectiveness of those controls, through the permit program established pursuant to N.J.A.C. 7:26C-7.

46. COMMENT: N.J.A.C. 7:26E-1.7 was adopted by the Department without the benefit of public comment pursuant to Executive Order 2. (6)

RESPONSE: New N.J.A.C. 7:26E-1.7 is being adopted as a part of this rulemaking, and, since it is a new rule, it is effective upon publication in this issue of the New Jersey Register.

Executive Order 2 was signed by Governor Christie on January 20, 2010. Paragraph 1a. of EO 2 requires State agencies to:

engage in the “advance notice of rules” by soliciting the advice and views of knowledgeable persons from outside of New Jersey State government, including the private sector and academia, in advance of any rulemaking to

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provide valuable insights on the proposed rules, and to prevent unworkable, overly-proscriptive or ill-advised rules from being adopted.

However, even prior to Executive Order 2, the Department was engaged in a robust stakeholder process concerning the enactment and subsequent implementation of SRRA. Faced with the challenge of ensuring that several thousand contaminated sites in New Jersey are properly remediated in a timely manner, the Department worked closely with the New Jersey Legislature and stakeholders to develop legislation that is dramatically changing the process used to conduct environmental investigations and cleanups. SRRA was signed into law on May 7, 2009.

Working with a broad range of stakeholders continues to be essential in making the transition from the old SRP paradigm to a new successful LSRP program. The Department has set up an extensive stakeholder process for general program issues, rules and guidance. Names of the stakeholder committees, DEP chairpersons, and goals of each of these stakeholder committees are provided at www.nj.gov/dep/srp/srra/stakeholder/. Included on this list is the stakeholder committee that provided input in the development of the new Technical Requirements, of which N.J.A.C. 7:26E-1.7 is an important part.

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Efficiencies/Cost

47. COMMENT: In order to accelerate the return of sites to productive use, it is critical for the applicable regulations to be clear, provide certainty and to minimize the time, cost and inefficiencies in the process.

The commenters applaud the Department for its efforts to generate an extensive set of regulations to implement the important reforms enacted by SRRA. Nevertheless, the proposed regulations and the parallel development of guidance documents to replace the current Technical Requirements do not effectively streamline the site remediation process in New Jersey. (18)

48. COMMENT: Despite establishing rigorous licensing requirements to become an LSRP, the rules dictate prescriptive requirements for how sites will be managed and retain the decision-making for the Department. In order to gain the efficiencies envisioned, the Department should adopt flexible guidelines that enable LSRPs to use their professional judgment to guide cleanups that will be protective, cost-effective, sustainable, and focused on reuse. (23, 24)

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49. COMMENT: An LSRP's ability to utilize his or her professional judgment is very limited by the prescriptive nature of the rule proposal and accompanying guidance documents. Additionally, some of the more prescriptive provisions will drive up the costs associated with remediation. Examples include:

- Putting many of the existing and new requirements in “guidance” documents and mandating compliance with guidance, thus increasing rather than decreasing the prescriptiveness of the entire program;
- Failing to contemplate risk-based approaches to remediation, and instead continuing to require overly conservative remediation standards on many sites that do not warrant it; and
- Including numerous prescriptive statements such as requiring an LSRP to collect samples (UST rule) rather than direct/oversee the work. (39)

50. COMMENT: The degree of prescriptiveness for the IEC, Receptor Evaluation, Presumptive Remedy and the monitored natural attenuation sections and some of the related timeframes will not add to protection of public health and safety and the environment and they take away from the fundamental need for LSRPs to be able to exercise professional judgment. (6)

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RESPONSE to COMMENTS 47 through 50: The new remediation paradigm created by SRRA has: (1) empowered LSRPs to make all decisions on remediation without the Department's prior approval except in limited situations, thereby expediting the remediation process; (2) imposed affirmative obligations on liable parties to meet regulatory and mandatory timeframes, thereby facilitating the timely remediation of contaminated sites; (3) in most instances, replaced the Department's oversight fees with fixed annual remediation fee structure, which brings increased certainty and predictability to the budget process; and (4) moved the prescriptive remediation requirements from the Technical Requirements into various technical guidance documents, which allows LSRPs to use professional judgment, thereby allowing a more expeditious and cost effective remediation process.

The establishment of mandatory remediation timeframes and, where necessary, expedited site specific remediation timeframes pursuant to SRRA at N.J.S.A. 58:10C-28, to protect the public health and safety and the environment, is ensuring that sites are remediated in a timely manner. As long as the person responsible for conducting the remediation meets each mandatory timeframe (or any Department approved extension thereof), SRRA provides that the person may continue to conduct the remediation under the supervision of an LSRP, with no further Departmental oversight. See also, SRRA at N.J.S.A. 58:10C-27, which requires that if the person responsible for conducting the remediation fails to

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meet a mandatory timeframe, the Department must undertake direct oversight of the remediation of the contaminated site.

While it is still too early in the program implementation to quantify, the Department continues to anticipate that transactional costs associated with a given remediation may actually decrease. The person responsible for conducting the remediation will no longer be responsible for paying Department oversight costs associated with multiple reviews and comments on each phase of the remediation. Rather, the person simply pays the annual remediation fee as calculated pursuant to N.J.A.C. 7:26C-4. That fee, which is based on the number of areas of concern and the number of contaminated media, ranges from \$450 for fewer than two areas of concern and no affected media to \$13,700 for a site with more than 20 contaminated areas of concern and contamination in the ground water, surface water and sediment. Necessarily, that fee will decrease as areas of concern and contaminated media are remediated. This fee structure gives parties increased and direct control of the remediation schedule, and provides for a faster, more flexible and more cost-effective remediation. Accordingly, direct transactional costs to the person responsible for conducting the remediation should, at a minimum, be more predictable, and may actually decrease in the long term.

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Additionally, the transactional costs to the citizens of New Jersey should also decrease. As sites are remediated more quickly, the potential health risks to residents and workers in the vicinity of the site will be ameliorated. Health impacts from contamination, whether through contact with contaminated soils or ground water, have been well documented, and health care costs associated with treatment of maladies resulting from exposure through any of these pathways can be expensive. The more quickly sites are remediated, the more rapidly health risks due to exposure may be minimized.

Lastly, concerning the comment regarding risk based remediation standards, as the commenter should be aware, pursuant to the Brownfield Act at N.J.S.A. 58:10B-12d(1) and (2), the Department is statutorily mandated to set minimum soil remediation health risk standards that for human carcinogens, as categorized by the United States Environmental Protection Agency, will result in an additional cancer risk of one in one million, and for noncarcinogens, will limit the hazard index for any given effect to a value not exceeding one. Accordingly, by statute, standards must be set to meet these minimum requirements, regardless of perceived or actual risks at a given site.

Guidance Stakeholder Process

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51. COMMENT: As guidance is updated or issued, there will be no opportunity for feedback from the LSRPs or responsible parties who will be "required" to rely upon and implement the guidance. Potentially, new requirements will be added to guidance documents that may not further the objectives set forth in SRRA or are not applicable to certain situations, yet the person responsible for conducting the remediation will be compelled to either comply with the guidance, or provide substantial justification for not doing so. (3, 11)

RESPONSE: Working with a broad range of stakeholders is essential to making the transition from the old SRP paradigm to a new successful LSRP program. The Department has established an extensive stakeholder process for general program issues, rules and technical guidance, and will continue to use that process to when revising or developing new technical guidance. Names of the stakeholder committees, DEP chairpersons, and goals of each of these stakeholder committees are provided at www.state.nj.us/dep/srp/srra/stakeholder/. It is the Department's intent to reconvene stakeholder groups to update technical guidance as needed, including, as applicable, when rule amendments necessitate revisions to the technical guidance, and when changes in the scientific field would require updates to the technical guidance.

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A person who is not a member of any of the above stakeholder groups and who wishes to comment on a particular draft technical guidance when it is available for review may request a copy of the technical guidance and associated comment/review form from the Department's chairperson of the technical guidance committees. See www.nj.gov/dep/srp/srra/stakeholder/.

52. COMMENT: Most Department technical guidance published to date provides somewhat arbitrary requirements, without providing any specific technical rationale or explanation for how such requirements were derived. (6)

53. COMMENT: Given the Department's attempt to mandate compliance with its technical guidance, the commenter wishes to restate all of its comments on the Department's guidance documents previously submitted to the Department. (3)

54. COMMENT: There are multiple contradictions between ARRCs, the Technical Requirements and Guidance Documents, and these contradictions must be reconciled. (39)

RESPONSE to COMMENTS 52 through 54: Writing rules and developing technical guidance concurrently is extremely challenging. The Department recognizes that there

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may have been redundancies and contradictions during the period that preceded the adoption of these rules. The Department is currently working to identify these occurrences and to provide clarification where needed.

Comments on specific technical guidance are beyond the scope of this rulemaking. Such comments should be submitted to the appropriate technical guidance committee chairperson in response to a solicitation from the Department's chairperson of the technical guidance committees. The Department's stakeholder process for the rules and technical guidance is discussed above in response to Comment 51.

55. COMMENT: All guidance documents issued by the Department should include language that specifies that:

- The intent of the document is to provide examples of approaches that will achieve the requirements set forth in regulation;
- An LSRP has the ability to exercise professional judgment when determining the applicability of the guidance based on site specific conditions; and

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- Written justification for established and/or minor variations from guidance is not necessary, provided the variations result in an approach that achieves the specified goals of regulation and remain protective of human health and the environment.

A white paper regarding this matter was distributed to the Interested Party Steering Committee; however, this issue must be corrected within the rule, rather than through a policy statement. (3, 6, 11)

RESPONSE: Technical guidance provides Departmentally acceptable policies and scientifically based approaches to achieving compliance with the Department's rules, but the guidance is not enforceable. LSRPs have the flexibility to use professional judgment in meeting remedial objectives, providing they can demonstrate that the resulting remedial action is protective of human health and the environment. Accordingly, there is no need to add the suggested provisions to the technical guidance, and to do so may confuse the issue of using professional judgment that is clearly set forth in both the Technical Requirements and the ARRCS rules.

The Department is not sure to which white paper the commenter refers. To the extent a Department white paper is a precursor to the SRRA, it is superseded by SRRA. To the

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extent that a Department white paper is a precursor to these rules, it is superseded by these rules (i.e., Technical Requirements and the ARRCs).

56. COMMENT: The definition of “technical guidance” should be revised as follows, to make it consistent with the definition of technical guidance in SRRA at N.J.S.A. 58:10C-14c:

“Technical Guidance” means “the various documents listed within N.J.S.A. 58:10C-14c, including guidelines that the Department publishes, after stakeholder input, that reflect generally accepted technical practices that meet the statutory and regulatory requirements applicable to the remediation of a contaminated site.” (6, 11)

57. COMMENT: The definition of “technical guidance” should cross reference SRRA by stating, “Technical guidance means the various guidance listed within N.J.S.A. 58:10C-14(c), including guidelines that the Department publishes. . . .” (6)

RESPONSE to COMMENTS 57 and 57: The Department declines to revise the definition of “technical guidance” at N.J.A.C. 7:26E-1.8 because the definition as used in the Technical Requirements refers strictly to technical guidance issued by the Department. However, on adoption , the Department is modifying N.J.A.C. 7:26E-1.5(b)

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to state “The Department's technical guidance can be found on the Department's website at www.nj.gov/dep/srp/srra/guidance” (new text underlined) to clarify that this term only applies to technical guidance issued by the Department. Adding to the definition of technical guidance a cross reference to N.J.S.A. 58:10C-14c(3) or referring to the guidelines listed therein would not add to the understanding of what constitutes “technical guidance.” SRRRA at N.J.S.A. 58:10C-14c(3) requires the LSRP to “apply any available and appropriate technical guidelines concerning site remediation as issued by the Department,” and goes on to require the Department to “provide interested parties the opportunity to participate in the development and review of technical guidelines issued for the remediation of contaminated sites.” The existing definition of “technical guidance” refines the concept of what constitutes “appropriate technical guidelines concerning site remediation” by including in the definition the phrase “the various guidelines . . . that reflect the generally accepted technical practices necessary to meet the statutory and regulatory requirements applicable to the remediation of a contaminated site.” The definition also incorporates the concept of public participation by stating that “technical guidance” means “the various guidelines that the Department publishes, after stakeholder input. . . .” Additionally, the requirement to apply the hierarchy of statutes, rules and guidance that SRRRA mandates at N.J.S.A. 58:10C-14c is set forth with specificity at N.J.A.C. 7:26C-1.2(a). Adding a further cross reference to this hierarchy in the definition of “technical guidance” would be unnecessary and redundant.

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Regulatory and Mandatory Time Frames

58. COMMENT: The requirements for regulatory timeframes should be eliminated from the regulations. The SRRA only authorizes the adoption mandatory timeframes and not a second set of parallel timeframes established for the purpose of better ensuring that persons conducting remediations will meet their mandatory timeframes with the attendant risk of being subject to penalties and other enforcement consequences for missing those regulatory timeframes. (18)

59. COMMENT: The regulatory timeframes set forth in the Rule Proposal are not authorized by SRRA and are contrary to the express provisions of Executive Order No. 2. (3, 11, 15)

60. COMMENT: The timeframes that the Department has established at N.J.A.C. 7:26C-3.2 are unrealistic and expose responsible parties to additional enforcement actions and penalties that are inappropriate and not sanctioned by the Legislature. (3, 11)

RESPONSE to COMMENTS 58 through 60: SRRA at N.J.S.A. 58:10C-28 requires the Department to establish mandatory remediation timeframes for the completion of various

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remediation tasks, and at N.J.S.A. 58:10C-29, to promulgate rules that establish the standards, goals, and timeframes for remediation. The Brownfield Act at N.J.S.A. 58:10B-1.3a provides that the person responsible for conducting the remediation has an affirmative obligation to remediate the discharge of a hazardous substance pursuant to all timeframes established by the Department:

An owner or operator of an industrial establishment subject to the provisions of P.L.1983, c.330 (C.13:1K-6 et al.), the discharger of a hazardous substance or a person in any way responsible for a hazardous substance pursuant to the provisions of subsection c. of section 8 of P.L.1976, c.141 (C.58:10-23.11g), or the owner or operator of an underground storage tank regulated pursuant to the provisions of P.L.1986, c.102 (C.58:10A-21 et seq.), that has discharged a hazardous substance, shall remediate the discharge of a hazardous substance (emphasis added).

Additionally, the Brownfield Act at N.J.S.A. 58:10B-1.2 mandates “regulatory action that is timely and efficient.” In addition, the Industrial Site Recovery Act at N.J.S.A. 13:1K-7 declares that it is the policy of the State “to promote efficient and timely cleanups.” Accordingly, the Department has ample authority to establish both regulatory and

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mandatory timeframes. Moreover, even prior to the enactment of SRRA, the Department was authorized to set timeframes for the completion of various tasks; timeframes that appear in rules are by definition regulatory timeframes.

Executive Order No. 2 section 1f states that State agencies shall “[t]ake action to cultivate an approach to regulations that values performance-based outcomes and compliance, over the punitive imposition of penalties for technical violations that do not result in negative impacts to the public health, safety or environment.” The regulatory timeframes are intended to ensure that the affirmative obligation to conduct remediation is completed in a timely fashion. Remediations not conducted in a timely fashion will result in negative impacts to the public health, safety or environment.

The regulatory timeframes are a tool the Department has codified in the rules to help the person responsible for conducting the remediation track the progress of the remediation and ensure that the person does not miss a mandatory time frame. SRRA at 58:10C-27a(2) requires the Department to assume direct oversight of remediation when the person misses a mandatory timeframe, and the Brownfield Act makes the person who fails to meet a mandatory timeframe liable to the enforcement provisions of the Spill Act at N.J.S.A. 58:10-23.11u. See N.J.S.A. 58:10B-1.3e. The consequences of direct Department oversight are that remediation may not progress without prior Department

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approval, and that the Department may dictate the course and nature of the remediation, a consequence that most persons wish to avoid.

In addition to including regulatory timeframes to aid the person responsible for conducting the remediation in meeting the mandatory timeframes, the rules also provide a mechanism to extend a regulatory timeframe, which is self-certifying (see the ARRCS rules at N.J.A.C. 7:26C-3.2). At this time, the Department intends to utilize compliance assistance when regulatory timeframes are not met. Accordingly, requiring compliance with regulatory timeframes is not overly burdensome or contrary to Executive Order No. 2, which encourages agencies to codify rules that are less burdensome to the regulated community.

61. COMMENT: The Department is proposing to add to the ARRCS rules mandatory timeframes by which the remedial investigation must be completed and the remedial action must be implemented. Mandatory timeframes are statutory timeframes, not regulatory. There is no indication that the New Jersey Legislature plans to add new mandatory timeframes to SRRA. If new mandatory timeframes are going to be imposed, they should be added to both SRRA and ARRCS. (27)

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RESPONSE: SRRA, at N.J.S.A. 58:10C-28a(5) through (7), requires the Department to establish mandatory remediation timeframes for the performance of each phase of the remediation including preliminary assessment, site investigation, remedial investigation and remedial action, completion of remediation, and any other activities deemed necessary by the Department to effectuate timely remediation. The mandatory timeframes at N.J.A.C. 7:26C-3.3(a)5 and 6 for the completion of remedial investigation and the remedial action are in response to the statutory mandate. The Department agrees that if the Legislature adds new mandatory timeframes to SRRA, corresponding amendments to the ARRCs rules and the Technical Requirements will also be needed.

62. COMMENT: Contrary to the assertions of other commenters who opine that the cleanup deadlines would be too tough to meet, and would cost a lot of money to meet, and who asked for more “flexibility,” the timeframes the Department proposed are meaningless because they do not apply to actual site cleanup, but just the various steps in the process. (42)

63. COMMENT: The rules should specify the timeframes for the actual remedial action once the actual investigative work is done and the remedial action process begins. (33)

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RESPONSE to COMMENTS 62 and 63: Remediation is comprised of phases or steps, including the preliminary assessment, the site investigation, the remedial investigation, and the remedial action. The Department has established in the Technical Requirements and the ARRCs rules, respectively, a regulatory and mandatory timeframe to complete each such phase. Requiring that each phase of the remediation be completed in a timely fashion ensures that the site or area of concern, as applicable, is timely remediated, and ensures that remediation will not languish.

64. COMMENT: Given the large number of sites, the limited number of LSRPs and the work still required at some sites, numerous regulatory deadlines appear to be poised to be missed, thus setting the program up for failure before it gets off the ground. (39)

RESPONSE: As discussed above, the Department established regulatory timeframes to help promote timely cleanups, and to aid a person responsible for conducting the remediation in meeting mandatory timeframes. The Department is making every effort to ensure that all persons are aware of any fast-approaching deadlines, including posting compliance alerts on its website and mailing compliance letters to each person who is in jeopardy of failing to meet the first mandatory deadlines for hiring an LSRP and submitting a receptor evaluation. Accordingly, the rules and the efforts by the Department are designed to ensure that the program succeeds rather than fails.

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65. COMMENT: The ARRCs rules at N.J.A.C. 7:26C-3.3(a)5 and 6 set the mandatory timeframe for completion of a remedial investigation and remedial action of the entire site at two years beyond the regulatory timeframes listed in the Technical Requirements. The use of the term “entire site” is inconsistent with the Technical Requirements. The timeframes in N.J.A.C. 7:26E are dependent upon individual dates of releases. “Entire site” should be changed to “case.” (7)

RESPONSE: The Department agrees that the use of the phrase “entire site” at N.J.A.C. 7:26C-3.3(a)5 and 6 is misleading since the Technical Requirements to which these rule provisions cross reference do not include that phrase. Rather, they refer only to the contaminated site. Accordingly, on adoption, the Department is modifying the language at both N.J.A.C. 7:26C-3.3(a)5 and 6 to be “[entire] contaminated site” (new text underlined, deleted text in brackets). The Department will not use the word “case” rather than “site,” as these rules apply to contaminated sites, not cases.

66. COMMENT: At N.J.A.C. 7:26E-4.10(a), the Department should not extend the May 2014 deadline for completion of the “remedial investigation,” in spite of requests to do so submitted by other commenters to these rules, because this is a statutorily mandated deadline. (42)

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RESPONSE: The Department agrees that the timeframe for contaminated sites where a discharge was discovered prior to May 7, 1999 should not and, in fact, cannot be extended as it is statutorily mandated at N.J.S.A. 58:10C-27. N.J.A.C. 7:26E-4.10(a) concerns remedial investigation regulatory timeframes, which can be extended. Since a statutorily mandated deadline cannot be extended, it is not only misleading, but it is improper to include this deadline in a section that concerns deadlines which otherwise can be extended. Accordingly, the Department has determined not to adopt N.J.A.C. 7:26E-4.10(a). This necessitates the recodification of N.J.A.C. 7:26E-4.10(b) through (f) as 4.10(a) through (e). Additional changes to the text of those subsections are discussed later in this document.

67. COMMENT: From a practical standpoint, regulatory timeframes are unnecessary and impose an additional level of process and administration that will only serve to divert resources from the ultimate goal of investigating and remediating contaminated sites. Persons responsible for conducting the remediation and their LSRPs should be well equipped to manage their remediation projects in a manner that will allow them to meet the milestones necessary to ultimately comply with the Department's mandatory timeframes. (3, 11, 15)

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68. COMMENT: The Department must recognize that the cost and magnitude of the many remedial actions require significant resources. For many persons responsible for conducting the remediation, these resources in both personnel time and financing cannot be made available to meet the mandatory deadlines without having a negative impact to businesses in New Jersey. (24)

RESPONSE to COMMENTS 67 and 68: The Department recognizes that remediation can be a cost intensive endeavor. Establishing regulatory timeframes in the rules should help businesses to plan and budget for expenditures relating to remediation. To the extent that the person responsible for conducting the remediation encounters a delay in the provision of Federal or State funding for remediation or the person is an owner of a small business who can demonstrate to the Department's satisfaction that he or she does not have sufficient monetary resources to meet the mandatory remediation timeframe, N.J.A.C. 7:26C-3.5 allows for an extension of the mandatory timeframe. Necessarily, if a regulatory timeframe is also to be impacted, the person should also seek an extension of that timeframe.

69. COMMENT: The remediating party should have the option to propose an alternate site-specific timeframe that may be revised based on the risk that a particular site poses to

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human health and the environment. Many sites pose little to no risk and therefore should not be subjected to mandatory timeframes. (24)

RESPONSE: The Department recognizes that site specific factors may impact the ability of the person responsible for conducting the remediation to meet a particular timeframe, and the rules accommodate such scenarios by providing that the person may seek an extension of a timeframe under certain circumstances.

The rules do focus on the risk posed by certain contaminants. The person responsible for conducting the remediation at those sites on which there are conditions of immediate environmental concern or LNAPL must adhere to timeframes that are more stringent than the timeframes set for other sites because the Department has determined that these situations pose enhances risk to public health and safety and the environment.

As discussed at length above, SRRA requires the Department to establish mandatory timeframes for the completion of various enumerated remediation tasks. Accordingly, mandatory timeframes are applicable to all sites; there are no statutory exemptions that would support the commenter's suggestion. However, that is not to say that a site, such as a low risk site suggested by the commenter, cannot be remediated in timeframes shorter than the timeframes set forth in the rules. A person should be able to quickly

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remediate a site that poses little risk, and should have little difficulty in meeting the mandatory timeframes.

70. COMMENT: The Department's basis for its proposed five year completion requirement at N.J.A.C. 7:26E-5.9 for the remedial action phase is not substantiated or does not appear to be based upon any information regarding the reality of what is required actually to remediate a contaminated site. (6)

71. COMMENT: Given the multiplicity of factors affecting remediation, it is unrealistic to require all remediations to fit within the same timeframes, subject to case by case exceptions. The Department should establish timeframes that provide for greater flexibility in completion of the various stages of remediation to avoid the need for persons responsible for conducting remediations to be filing repeated requests for extensions of both regulatory and mandatory time frames. (18, 24)

72. COMMENT: Completing a remedial investigation and remedial action is often a time consuming, expensive and legally complex endeavor that is beyond the control of a person responsible for conducting the remediation. (24)

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RESPONSE to COMMENTS 70 through 72: The Department recognizes that the remedial investigation and remedial action are the most complex and time consuming phases of the remediation, and that the length of time that is required to finish the remedial investigation and remedial action can vary significantly, depending on site specific attributes such as the size of the site, the number of contaminated areas of concern at the site, the impacted media, the types of contaminants found at the site, and the complexity of the geology of the site. The codified timeframes balance allowing a person responsible for conducting the remediation enough time to effectively delineate the entire extent of contamination and to implement a remedial action that is protective of public health and safety and the environment, with the simultaneous goal of encouraging timely completion of these two remedial phases. Based on its twenty-plus years of experience in overseeing the remedial investigation and remedial action of sites, and based on extensive input from stakeholders, the Department has determined that the regulatory and mandatory timeframes as established in the Technical Requirements and the ARRCs rules achieve that balance.

The Technical Requirements include provisions to lengthen the base regulatory time frames to complete a remedial investigation for soil and all other media based on six conditions of site complexity. For the remedial action, the rules recognize site complexity by providing a shorter timeframe to conduct a soil-only remediation and a

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longer timeframe for a remediation involving any other media. In addition, the rules contain a self-certifying process to obtain an extension to the regulatory time frame to complete the remedial investigation and the remedial action. Extensions to mandatory timeframes are possible as well.

The Department is adopting regulatory and mandatory timeframes that it has determined are realistic and achievable under most circumstances. For those instances where additional time is needed, the rules provide mechanisms for extending those timeframes in certain circumstances.

73. COMMENT: N.J.A.C. 7:26C-3.2 and 3.3 concerning the regulatory and mandatory timeframes for submission of various documents should be simplified to better ensure compliance and to reduce the cost of compliance. This approach is used in other regulatory programs with success. For example, Federal RCRA Biennial Reporting is required on March 1st of even years. The Department should consider establishing fixed dates for as many of these routine submissions as possible, including public notification and outreach, biennial certifications, and LNAPL reporting. For those requirements that directly relate to exposure (i.e., receptor evaluations, IEC), it is understood that this approach would not be used. (6)

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RESPONSE: The Department declines to adopt fixed dates for all submissions as suggested by the commenter, because to do so would take flexibility away from the person responsible for conducting the remediation afforded by the adopted submission deadlines. Each of the timeframes to which a person must adhere begins to run as of the date that the person triggered the requirement to comply with ARRCS as set forth at N.J.A.C. 7:26C-2.2(a). It would be unfair, for example, to set a fixed date for the submission of a key document, and then require someone who triggered compliance with ARRCS only a month before that date to comply with that deadline. Additionally, establishing fixed dates for all submissions would pose logistical and administrative burdens on the Department, both in processing the submissions if they were all to come in on the same day, and in meeting the deadlines imposed by SRRA for inspecting and reviewing those submissions.

74. COMMENT: The regulatory and mandatory timeframes do not take into account changes in standards, technical guidance and requirements that are likely to come into effect during the course of investigating and/or remediating a contaminated site. For example, in certain situations, it may be impossible to complete a remedial investigation given the changing set of rules governing the work, and the need to re-do work to meet changing requirements. (3, 6, 11, 15)

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RESPONSE: When the person responsible for conducting the remediating submits to the Department a remedial action workplan that the LSRP has approved, the remediation standards in effect at that time are the standards that apply to the remedial action, with the exception of a subsequent change in a standard by an order of magnitude. N.J.A.C.

7:26C-3.5 allows the person responsible for conducting the remediation to request an extension to a mandatory timeframe, including when a significant regulatory change such as a change in a remediation standard that occurs prior to the remedial action workplan approval or when the Department determines to update a guidance document, may result in an inability to meet the mandatory timeframe.

75. COMMENT: Although SRRA mandates the promulgation of mandatory timeframes, the Department has inappropriately chosen to impose the same arbitrary and unrealistic timeframes on all contaminated sites. The timeframes for remediation should be defined in the schedule to be supplied with the remedial action workplan (RAWP). (3, 6, 15)

76. COMMENT: It is unrealistic and inappropriate to set remedial investigation and remedial action timeframes before any assessment of a site has been completed. Rather, these timeframes must be established based upon a full evaluation of the site so that they can be realistic and reflect the true conditions of the site and level of effort that will be required at each subsequent phase of the investigation/remediation. The rules should

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provide for an appropriate mandatory timeframe by which an LSRP must provide a binding schedule for the completion of an RI, and for an appropriate mandatory timeframe (which will be calculated from the completion of the RI) by which the LSRP must establish a binding schedule for the completion of the RA. By adopting this approach, the Department will meet the Legislature's mandate of establishing mandatory timeframes, while providing the necessary flexibility to develop realistic, achievable timeframes that take into account the unique circumstances at a contaminated site. (3, 6, 11)

RESPONSE to COMMENTS 75 and 76: The Legislature placed the burden of establishing particular mandatory timeframes on the Department. Therefore, the commenters' suggestion that the timeframes for remediation should be defined in the schedule to be supplied with the remedial action workplan does not comport with N.J.S.A. 58:10C-28. The Department does not object to the person responsible for conducting the remediation or the LSRP to include the applicable mandatory timeframes in the schedule in the remedial action workplan to enable the Department to determine compliance.

77. COMMENT: The regulatory timeframes for the completion of the remedial investigation at N.J.A.C. 7:26E-4.10 and the remedial action at N.J.A.C. 7:26E-5.9 fail to

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consider the site complexity and the nature and level of investigation and remediation that will be required at a contaminated site as mandated by SRRA. Insufficient justification has been provided for the proposed remedial investigation timeframes, with a specific lack of recognition of site complexity that will result in the need for added time at many sites, beyond the “one time” extensions provided in the rule for completion of the remedial investigation. Instead, the Department should allow the use of Department-approved site-specific schedules. (6)

78. COMMENT: N.J.A.C. 7:26C-3.3(a)5 and 6 should specifically acknowledge that the regulatory timeframes from which the mandatory timeframes are calculated may be extended. As the extension of a regulatory time frame in this context would not be workable absent a corresponding extension of the mandatory timeframe, it is inferred that the mandatory timeframe would also be extended for two years from the regulatory time frame. (3, 11)

RESPONSE to COMMENTS 77 and 78: If the purpose of extending a regulatory timeframe is to give the person responsible for conducting the remediation the time to complete the remediation phase, and the limitation in N.J.A.C. 7:26C-3.2(b)1ii that the requested extension of the regulatory timeframe will not exceed any mandatory timeframe is met, there is no need for an extension of the related mandatory timeframe.

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N.J.A.C. 7:26C-3.2(d) provides that if the person responsible for conducting the remediation expects to or has missed a regulatory timeframe that may result in the person exceeding a mandatory remediation timeframe or an expedited site specific timeframe, a regulatory timeframe extension request shall not be approved. This is because remediation must proceed in a timely fashion without Department oversight.

If a person believes that it would be appropriate to extend a mandatory timeframe, the person must follow the procedures set forth in N.J.A.C. 7:26C-3.5. N.J.A.C. 7:26C-3.5 provides the criteria by which a request for an extension to a mandatory timeframe may be granted.

79. COMMENT: The timelines and specifics for actual breaking of ground of the remediation actions must be included in this rule; otherwise there is no endpoint for cleanup. It is unacceptable to include only the remedial investigation deadlines for this highly-technical rule without continuing to discuss the actual removal of toxic waste that impacts the families of New Jersey as outlined in existing Subchapter 5, and which the summary describes as including the “development and selection of remedial actions, including the requirement to establish the remedial action objectives and goals for the site or area of concern, and outlines the conditions under which a feasibility study is required to be submitted and when a presumptive remedy should be used.” (33)

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RESPONSE: The commenter correctly quotes the Department's summary of former N.J.A.C. 7:26E-5. However, as described at length in the proposal summary, with this adoption, the Department is repealing and replacing the Technical Requirements in their entirety. Contrary to the commenter's assertion, new N.J.A.C. 7:26E-5.9 (recodified on adoption as N.J.A.C. 7:26E-5.8) sets forth the remedial action regulatory timeframes, which include the actual "breaking of ground" timeframes for implementing remedial actions.

80. COMMENT: The remedial action timeframe rules at N.J.A.C. 7:26E-5.9 should contain extension provisions that are based on complexity factors like those allowed for an extension of the remedial investigation timeframe. (6)

RESPONSE: The rules concerning remedial investigations contain complexity factors by which the timeframe for conducting the remedial investigation may be lengthened because the remedial investigation is the more complicated of the two phases. By the time the person responsible for conducting the remediation reaches the remedial action phase, issues that add to the complexity of the remediation should already have been addressed. For example, the LSRP should understand the full extent of contamination by the time the remediation reaches the remedial action phase because of the delineation

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undertaken during the remedial investigation. In addition, where a person had to negotiate an access agreement for offsite remedial investigation work, that person is aware that a similar agreement will be needed to implement the remedial action, and this agreement can be negotiated well in advance of remedial action implementation.

That said, the timeframes for completion of the remedial action do take into consideration the fact that a multimedia remediation is more complex than a soil-only remediation by allowing more time for the completion of the multimedia remediation. Additionally, the person may take advantage of the self-certifying extension process for regulatory time frames should additional complications occur during the remedial action.

81. COMMENT: The proposed start date for the remedial action regulatory timeframe at N.J.A.C. 7:26E-5.9 is the earliest applicable regulatory timeframe to submit a remedial investigation report. However, this approach ignores the fact that additional time is needed to conduct pilot testing, perform remedial alternative analysis, select a remedy, and obtain permits and access agreements. Accordingly, any timeframes established for the completion of a remedial action must, at a minimum, account for all of the site specific issues that will need to be addressed. (11)

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RESPONSE: The Department agrees that the time needed to conduct pilot testing, perform remedial alternative analysis, and select a remedy as part of the time frame required to complete a remedial action should be considered in setting the regulatory timeframe for beginning the remedial action and has done so. The fact that the Department established different timeframes, depending on whether the remediation is only of soil or involves other media, is in recognition of the complexity of multimedia remediations. Additionally, to the extent that additional time is needed beyond that already built into the rule for complex situations, the person responsible for conducting the remediation may use the self-certifying extension process for regulatory time frames should additional complications occur at a given site.

82. COMMENT: The commenter supports an accelerated process to address immediate environmental concerns (IECs) and to conduct receptor evaluations. These regulatory requirements, combined with realistic regulatory and mandatory timeframes, have resulted in a substantial increase in actions taken by remediating parties to address contaminant impacts since the adoption of SRRA in May 2009. (6)

RESPONSE: The Department acknowledges the commenter's support for its regulatory initiative and the commenter's report that the initiative is having a positive impact.

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83. COMMENT: Persons responsible for conducting the remediation of an unregulated heating oil tank (UHOT) should not be exempt from adhering to the mandatory timeframes at N.J.A.C. 7:26C-1.4(d) and -3.2(a) and from the LNAPL reporting mandatory timeframe at N.J.A.C. 7:26C-3.3(a). Instances where a discharge from a UHOT has occurred may result in LNAPL and may impact potable water supplies. Implementation of two separate sets of rules is bad policy and that these exemptions should be deleted from the Final Rule. (6)

RESPONSE: The Department agrees with the commenter that it is important to remediate a discharge from a UHOT. The commenter should be aware that ARRCs at N.J.A.C. 7:26C-1.4(d) only exempts UHOTs from mandatory timeframes, not regulatory timeframes. The result of missing a mandatory timeframes is that the site is in direct Department oversight. The Department does not intend to place UHOT sites into direct Department oversight.

84. COMMENT: Which of the timeframes set forth at N.J.A.C. 7:26E-1.10 apply to existing cases that involve LNAPL after May 7, 2012, when the requirement to proceed under the LSRP program is triggered? (20)

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RESPONSE: The regulatory timeframes for all cases with LNAPL contamination, including existing cases, are set forth at N.J.A.C. 7:26E-1.10. As provided at N.J.A.C. 7:26E-1.10(b), the person responsible for conducting the remediation has 60 days from the date that the LNAPL is discovered to notify the Department and to initiate LNAPL recovery. N.J.A.C. 7:26E-1.10(c) provides that the person has one year from the date of discovery of the LNAPL to complete LNAPL delineation; initiate implementation of an LNAPL interim remedial measure to prevent LNAPL migration, reduce LNAPL contaminant mass to the extent practicable and initiate monitoring of the interim remedial measure; and document all actions taken.

85. COMMENT: N.J.A.C. 7:26C-3.3(a)(4) appears to require the initiation of interim recovery for LNAPL at all sites where it is present. In effect, the Department is treating all occurrences of LNAPL as a high priority. However, if it has been demonstrated that LNAPL is not migrating and no receptors are threatened, implementation of interim recovery measures would not be necessary or warranted. Accordingly, this provision should be revised to only require interim LNAPL recovery measures at sites where a valid immediate threat to human health or the environment is present. (3)

RESPONSE: N.J.S.A. 58:10C-28 requires the Department to establish mandatory remediation timeframes for the control of ongoing sources of contamination. LNAPL,

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regardless of its current migration status or whether a receptor is proximate, is an ongoing source of contamination and is therefore subject to the mandatory time frame. LNAPL is a continuing source of ground water contamination, whether or not it is migrating. The Department has determined that ground water is a receptor that must be protected from LNAPL. Accordingly, LNAPL recovery is necessary to restore ground water quality.

DPHS Rule Amendment regarding DPCC Plans

86. COMMENT: The Department should not delete N.J.A.C. 7:26C-1.4(b)(3), which exempts from compliance with the provisions of this chapter those persons who are responding to a discharge pursuant to a discharge prevention, containment and countermeasures (DPCC) plan in accordance with N.J.A.C. 7:1E. (3)

87. COMMENT: N.J.A.C. 7:1E already requires that a discharge cleanup and removal (DCR) plan, certified by the facility owner, signed and sealed by a New Jersey licensed professional engineer and approved by the Department, be in place prior to operation of the facility. The DCR plan is required to be comprehensive and contain procedures for determining the recycling or disposal options for hazardous substances or contaminated soil, debris, etc., gathered during housekeeping or cleanup and removal activities, provisions for an environmental assessment of the impact of any off-site discharges,

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extensive mapping of the facility (including, but not limited to, land use, environmentally sensitive areas, topography, and area of potential impacts), and demonstration of financial responsibility for cleanup and removal activities. For the owner or operator of a major facility, financial responsibility in the minimum amount of \$1 million per occurrence and \$2 million annual aggregate must be demonstrated. Additionally, financial responsibility per occurrence and annual aggregate coverage amounts do not in any way limit the liability of the owner or operator.

The DCR plan requirements allow a facility to respond to non-reportable discharges (as defined under N.J.A.C. 7:1E-5.3(e)) based on predetermined procedures that are protective of human health and the environment and to allow the facility to continue to operate as a major facility. Therefore, the DCR plan requirements are consistent with the objectives of ARRCS. The additional burden imposed by the proposed amendment would not contribute to more effective discharge response and cleanup, but would require that a major facility continually modify its response to such a discharge to comply with the ARRCS rules (and associated guidance documents). Such additional requirements for facilities that have a DCR plan add unnecessary costs and obligations with no apparent benefit to human health or the environment.

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The amendment should be deleted and the current requirement to respond to a discharge by either following the facility's approved DCR plan or to remediate the discharge pursuant to the ARRCs rules should remain in place. (22, 39)

RESPONSE to COMMENTS 86 and 87: N.J.A.C. 7:26C-1.4(b) requires compliance with both the rules for DCR plans and the ARRCs rules because each of these rules has different objectives and requirements, and each is necessary to protect the public health and safety and the environment when a discharge occurs. As one of the commenters outlined, the rules for discharge cleanup and removal (DCR) plans are directed toward the development of those plans, that they be certified by the facility owner, signed and sealed by a New Jersey licensed professional engineer and approved by the Department. In contrast, the ARRCs rules and the Technical Requirements are focused on the procedures and requirements concerning the implementation of remediation.

The DCR requirements are not consistent with the objectives of ARRCs, as the commenters opine. For example, the objectives of ARRCs, promulgated in part pursuant to SRRA, N.J.S.A. 58:10C-1 et seq., and the 2009 amendments to the Brownfield Act, N.J.S.A. 58:10B-1 et seq., include (i) the use of an LSRP to ensure that all work is actually approved by an independently licensed professional, (ii) the delineation of all contamination, both on-site and off-site, to ensure the protection of the public health and

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safety and the environment, and (iii) ensuring that all remediation is performed consistent with the statutory and regulatory hierarchy at N.J.S.A. 58:10C-14c. The result of the amendment will be that the owner of a major facility will have to use an LSRP to remediate discharges conducted in accordance with the owner's DCR and DPCC plans. As with other remediation pursuant to SRRA and the 2009 amendments to the Brownfield Act, the quality of the remediation should improve and the Department will not have to incur the expense of document review and approval previously necessitated for reports submitted pursuant to DCR and DPCC plans.

The Department, therefore, disagrees with the commenters that it should retain this regulatory exemption. The Site Remediation Program will, however, work with the Division of Environmental Safety, Health and Analytical Programs, and its stakeholders, to help ensure that subsequent amendments to N.J.A.C. 7:1E minimize, to the extent possible, any negative operational or financial burdens that this new rule might have on the persons subject to N.J.A.C. 7:1E.

88. COMMENT: In N.J.A.C. 7:26C-1.4(e), the Department should replace "petroleum" with "non-hazardous," and should also modify the rule to be consistent with non-reportable spills as discussed at N.J.A.C. 7:1E-5.3(e)3. In addition, many of these spills occurred prior to the promulgation of ARRCS, were reported by the responsible party,

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and addressed at the time of the spill in accordance with the statutes and rules in effect at the time. However, some of these cases remain “open” with the Department due to, among other reasons, the low risk and low priority of these cases and the large backlog of cases being managed by each Department case manager. Since the time of these spills, remediation standards have been revised, typically to more stringent levels. While the exemption from having to retain an LSRP is welcome, the Department should also provide that such small quantity spills that occurred prior to November 4, 2009 will be closed and are exempt from further investigation or remediation.

In addition, the Department should include an exemption from investigation and remediation of surface spills of 50 gallons or less that do reach the waters of the State during an emergency situation (e.g., natural disaster). (24)

RESPONSE: The Department based the exemption at N.J.A.C. 7:26C-1.4(e) on the characteristics of the hazardous substance involved (i.e., petroleum products) and the limited volume discharged, along with an expectation that the discharge would be promptly cleaned up. Remediation of non-hazardous substances is not required; therefore, the Department is not changing “petroleum” to “non-hazardous.”

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The Department will not make the proposed change to include historical discharges in this exemption. For sites where the discharge was properly addressed at the time of the spill and a remedial action report submitted to the Department, the Department intends to review these documents and, as appropriate, issue no further action letters prior to May 7, 2012.

The exemption at N.J.A.C. 7:26C-1.4(e) applies to the need to remediate discharges. However, the exemption in the Discharges of Petroleum and Other Hazardous Substances (DPOHS) rules at N.J.A.C. 7:1E-5.3(e)3 applies to the need to report discharges from transformers that contain less than 50 parts per million PCBs and the discharge either (1) is less than 25 gallons and meets certain other requirements or (2) occurs during a state of emergency. These two exemptions are unrelated, and therefore the Department will not make the suggested change at N.J.A.C. 7:26C-1.4(e) to be consistent with N.J.A.C. 7:1E-5.3(e)3.

The commenter also suggested that the Department include an exemption from investigation and cleanup of surface spills of 50 gallons or less that reach the waters of the State during an emergency situation such as a natural disaster. Such an amendment would be too broad as 50 gallons of certain hazardous substances, such as dioxin, even when discharged during an emergency, would present exactly the type of unacceptable

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risk to the public health and safety and the environment that the New Jersey Legislature has addressed in numerous environmental statutes. Such an exemption would be inappropriate, therefore, because it would allow such discharges to continue unabated, with the risks to the public health and safety and the environment ignored.

UST Rules - Subchapter 1: General Information

89. COMMENT: N.J.A.C. 7:14B-1.7(d) should not require the LSRP to certify release detection monitoring systems because release detection monitoring systems have nothing to do with site remediation. This certification should be made by the licensed underground storage tank (UST) system installation contractor, who is specially certified under N.J.A.C. 7:14B-13 or 16 to handle the operational and maintenance aspects of UST systems. While it is true that SRRA prohibits the use of a certified subsurface evaluator from performing remediation, SRRA did not authorize the Department to transfer all of the previous responsibilities of a certified subsurface evaluator (which go beyond remediation as defined by SRRA) to LSRPs. The same issue arises at N.J.A.C. 7:14B-10.3(b)9, and it is also not appropriate for the same reasons. (6, 27)

RESPONSE: N.J.A.C. 7:14B-10.3(b)9 requires that an owner or operator of an UST system who chooses to use vapor or product monitoring points as the method for release

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detection monitoring must include in the permit application a certification by an LSRP pursuant to N.J.A.C. 7:14B-1.7(d) that the number and location of those points are sufficient to monitor the UST system. The Department amended N.J.A.C. 7:14B-10.3(b)9 and N.J.A.C. 7:14B-1.7(d) to require that the LSRP and not the subsurface evaluator provide this certification because, after May 2012, work conducted on regulated underground storage tanks relating to the remediation of a discharge must be performed and certified by an LSRP, and not by a subsurface evaluator.

The term “remediation” is defined very broadly in SRRA to include “all necessary actions to investigate” any “known, suspected or threatened discharge.” The Department considers the certification of a release detection monitoring system to be part of the “remediation” and therefore consistent with SRRA for the intended purpose of identifying discharges in the subsurface at regulated UST facilities.

The prior version of N.J.A.C. 7:14B-13.2(b)2 and 5, which set forth the certification requirements for individuals and business firms who provide services on UST systems, specifically exempted the activity of release detection monitoring using observation wells from both the categories of service of the entire system installation and from the release detection monitoring system installation, and instead specifically placed the responsibility for these activities with subsurface evaluators. This was done because subsurface

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evaluators met the minimum experience criteria related to the skill set needed to select boring locations, characterize soils, determine soil permeability and determine depth to ground water. However, since the enactment of SRRA, this skill set is now the responsibility of LSRPs. According to Department records as of March 1, 2012, 62 percent of the temporary LSRPs were certified subsurface evaluators who were previously allowed to perform this activity.

If an LSRP is requested to perform this service, the LSRP may either accept or refuse the work particularly if this activity is outside the LSRP's area of expertise. The LSRP also has the ability to rely on the "technical assistance of another professional whom the LSRP has reasonably determined to be qualified by education, training, and experience" (see N.J.S.A. 58:10C-16c.) to conduct this work.

UST Rules - Subchapter 5: General Operating Requirements

90. COMMENT: The Department proposed at N.J.A.C. 7:14B-5.1 to replace the phrase "spills and overfills" with "discharges" so that the provision now requires the owner or operator of an UST system to report, investigate, and remediate any discharge from an UST system in accordance with the ARRCs rules. This amendment is necessary to ensure that discharges from the underground storage tank system are remediated in

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accordance with N.J.A.C. 7:26C. It is important that “spills and overfills,” which can occur during product transfers at the facility, are differentiated from discharges from the UST and its components. This amendment provides a mechanism for the remediation of minor spills to be conducted in an efficient and expedient manner. It provides that simple problems can be fixed simply in cases where the circumstances of the spill or overfill meet the criteria set forth in N.J.A.C. 7:26C-1.4(e).

However, this amendment diminishes the original intent of N.J.A.C. 7:14B and is, to a certain degree, redundant. N.J.A.C. 7:14B-2.7, 7.3 and 9 sufficiently alert the owner or operator of the responsibility to retain an LSRP. Historically, it was determined to be important that the owner or operator understand that, in addition to the responsibility to remediate releases at the facility, the owner and operator are responsible for remediating releases due to “spills and overfills” (product transfer operations) at the facility, even though their direct actions may not have caused the release.

While it is important to differentiate between a surface spill and a release, the redundant emphasis on retention of an LSRP lessens the emphasis on the need to and responsibility for remediation of spills and overfills. N.J.A.C. 7:14B-7 sufficiently addresses investigation of discharges and N.J.A.C. 7:14B-5.1 should cross reference N.J.A.C. 7:26C-1.4(e)1, which identifies the exemption from the need to retain an LSRP. (9)

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91. COMMENT: In N.J.A.C. 7:14B-5.1(a) and (c), the Department is deleting the words “spills and overfills” from the UST rules, thereby effectively expanding the requirements of discharge prevention, reporting, investigation, and remediation beyond the scope of the rules. N.J.A.C. 7:14B-5.1 specifically relates to spill and overfill control, and not to any and all discharges from USTs. Therefore, the amendment should be deleted. (24)

RESPONSE to COMMENTS 90 and 91: The Department disagrees that replacing the phrase “spills and overfills” with “discharge from the underground storage tank system” adds any new or expanded requirements. Under both versions of these rules, the owner or operator is required to “report, investigate, and remediate any discharge from an underground storage tank system.” When a hazardous substance is “spilled” or “released,” whether due to an overfill, a spill or a release, “into the waters or onto the land of the State,” it is a “discharge” (see N.J.A.C. 7:14B-1.6). Spills or overfills that are fully contained by spill catchment equipment that do not enter into the waters or onto the land of the State are not reportable incidents under N.J.A.C. 7:14B. However, when the discharge occurs into the waters or onto the land of the State from product transfers at the facility or other UST system components, the discharge must be reported, investigated and remediated.

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The commenter correctly references amended N.J.A.C. 7:26C-1.4(e), which exempts parties responsible for small petroleum surface spills from hiring an LSRP when the spill does not reach the waters of the State, the date and volume of the discharge are known and the spill is remediated within 90 days. This amendment should provide an added incentive for owners and operators of USTs to act promptly to address any such discharges. The Department disagrees that any emphasis on retention of an LSRP lessens the emphasis on the need to and responsibility for remediation of the spill.

The Department does not believe that there is a need to cross-reference the exemption in ARRCS at N.J.A.C. 7:26C-1.4(e). No other rules include a cross-reference to this provision. The LSRP knows that the site is to be remediated pursuant to ARRCS, and therefore should recognize whether the exemption applies. Therefore, the Department will not be making the requested change.

92. COMMENT: The Department should fix the typographical error at N.J.A.C. 7:14B-5.4(a). The phrase should be “obtain a permit *from* the Department.” (6)

RESPONSE: The rule text reads as the commenter suggests; no amendments are necessary.

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93. COMMENT: The Department should fix the typographical error at N.J.A.C. 7:14B-5.4(a)6. The word “request” should be inserted in the phrase “operator may make a written *request* to the Department.” (6)

RESPONSE: The rule text reads as the commenter suggests; no amendments are necessary.

94. COMMENT: N.J.A.C. 7:14B-5.5(a)3 requires the owner or operator of an UST system to include in the release response plan the name and telephone number of any retained LSRP. The use of the term “any retained” is overly broad and should be amended to state “any currently retained” or “any actively engaged” LSRP. A release response plan is a contingency plan that sets forth the actions to be taken in the event a release is either suspected or confirmed. Unless the release impacts the ongoing activities for which an LSRP is directing remediation, requiring the contact information of “any LSRP” retained by the owner or operator provides no benefit to the quality of the release response plan and may be of no benefit in responding to a suspected release or correcting the cause of a confirmed release. Additionally, many regulated UST facilities that undertook the required action to comply with N.J.A.C. 7:14B do not have a relationship with an LSRP. (2, 9, 24)

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95. COMMENT: The amendment to N.J.A.C. 7:14B-5.5(a)3 that deleted the requirement to include the name of the corrective action contractor in the release response plan should not be adopted. Release response plans should to continue to include the name of the corrective action contractor. The corrective action contractor provides immediate response to conditions such as an overfill or a customer “drive off” that results in a spill. Investigation of suspected releases often entails performing compliance inspection of the release detection equipment. This requires individuals with manufacturer training be retained. It is more likely that a corrective action contractor, who is routinely engaged in the maintenance of regulated UST systems, will have the necessary skill set to provide the needed services rather than an LSRP. (9)

RESPONSE to COMMENTS 94 and 95: The release response plan required at N.J.A.C. 7:14B-5.5 is for responding to any leak or discharge. Requiring that a plan be in place helps to ensure that the owner or operator considers the issues that are to be addressed in the plan before the leak or discharge occurs. The Department agrees that the release response plan is a contingency plan. To be a viable release response plan, the UST owner or operator must be able to respond to emergency and non-emergency situations in accordance with Department rules, including, when applicable, having the ability to engage an LSRP on short notice to oversee remediation.

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N.J.A.C. 7:14B-5.5(a)3 requires that the plan include the name and telephone number of any “retained” LSRP; before, it required that the plan include the name and telephone number of the “retained” corrective action contractor. The concept is the same in both cases: Should the need arise to activate a release response plan, it is in the best interest of the UST owner or operator to engage the LSRP as early as possible to oversee the response to the discharge and ensure the protection of public health and the environment. If the LSRP is offering the service as the contact on a release response plan, the LSRP should either have the capability to oversee a response (emergency or non-emergency) or the LSRP should be able to rely on other service providers that do possess the necessary expertise.

96. COMMENT: At N.J.A.C. 7:14B-5.7(a), if the Department intends to conduct remediation at a property with an UST, it should follow similar procedures for conducting publicly funded remediation as presented in the ARRCs rules at N.J.A.C. 7:26C-9, and N.J.A.C. 7:26C-9 should be cross referenced here. If a different procedure will be implemented, it should be described here. For consistency, the commenter does not recommend that a different procedure be implemented. (6)

RESPONSE: This amendment is intended to ensure that the UST owner or operator is aware that access must be granted to the facility, as a condition of receiving a registration

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to operate USTs in New Jersey. The owner or operator must allow access for more than just sampling, but rather all aspects of remediation. The Department is unsure as to the reference to N.J.A.C. 7:26C-9 regarding publicly funded remediations because N.J.A.C. 7:26C-9 concerns enforcement.

UST Rules - Subchapter 7

Release Reporting and Investigation

97. COMMENT: The Department should not adopt N.J.A.C. 7:14B-7.1(b), which prohibits the introduction of product into an underground storage tank undergoing a suspected release investigation. Regulated facilities should not be subjected to a delivery ban and denied their right to conduct commerce while they are conducting the required investigation of the suspected release in the time specified.

Imposition of a regulatory delivery ban on facilities conducting investigation of a suspected release goes beyond the intent of this chapter and exceeds Federal standards. The rule allots the facility a very short period of time to complete the investigation, and significant penalties can be levied for failure to conduct this investigation.

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It is premature and punitive to require every owner or operator of an UST in the State that experienced, for example, water ingress after a severe storm event, to self-impose a delivery ban while the owner or operator completes an investigation to prove the observed water ingress was merely the result of extreme weather occurrences and not a failure in the UST system. Instead of imposing a delivery ban, the rule should set forth a schedule for investigating potential releases and ruling out whether the UST system is the cause of the release.

Additionally, the condition cited at N.J.A.C. 7:14B-7.1(a)3 that provides that, “There is evidence of a hazardous substance or resulting vapors in the soil, in surface water, or in any underground structure or well in the vicinity of the facility,” is sufficiently vague as to require numerous facilities to be subject to a delivery ban, even when the investigation will eventually reveal that none of those facilities are responsible for the condition described.

Moreover, N.J.A.C. 7:14B-7.1(a)5 erroneously equates erratic behavior of product dispensing equipment to a suspected release. Mechanical, electrical and micro-processor related failures can cause erratic behavior in product dispensing equipment. A delivery ban should not be imposed while the diagnosis of any or all of these systems is conducted. The facility is unable to continue commerce while normal equipment repair,

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which is in no way related to a release or condition which would give rise to a suspected release, is completed. (9)

RESPONSE: N.J.A.C. 7:14B-7.1(a) is not a new requirement. Rather, it is a reiteration of the requirements codified at N.J.A.C 7:14B-5.9(a). A short term disruption in the introduction of product into an UST system suspected to be leaking is well worth the investment, considering the cost and ramifications of a discharge that is allowed to continue unabated.

Commerce need not be halted during the investigation of a suspected release. A delivery prohibition bars introduction of product but does not bar continued dispensing. In addition, delivery is only prohibited to the tank system or tank systems that may be leaking. Moreover, N.J.A.C. 7:14B-7.1(a) requires that the investigation of a suspected release be completed within seven days to ensure that the owner or operator quickly responds to the suspected release and is able to either bring the UST system that is the subject of the investigation rapidly back on line, or otherwise determine that further investigation is warranted. Additionally, the rules allow the owner or operator to utilize available information during this investigation, including inventory records, leak detection data and monitoring well sampling data, so that the owner or operator does not have to take further time to collect data not already in his or her possession. Finally, if

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the results of the suspected release investigation indicate that the UST system is not a source of a release, then product delivery can immediately resume.

Setting forth with specificity in the rules the conditions for a delivery prohibition when a release is suspected sends a clear message that a failure to evaluate the integrity of the UST system is unacceptable and failure to act in a manner that is not consistent with this provision is subject to defined penalties. Furthermore, the ability to expedite the investigation rests with the owner or operator and the faster an ongoing discharge can be ruled out, the sooner deliveries can be resumed.

The UST rules implement the Water Pollution Control Act, which provides at N.J.S.A. 58:10A-21:

“The Legislature finds and declares that millions of gallons of gasoline and other hazardous substances are stored prior to use or disposal, in underground storage tanks; that a significant percentage of these underground storage tanks are leaking due to corrosion or structural defect; that this leakage of hazardous substances from underground storage tanks is among the most common causes of groundwater pollution in the State; and that it is thus necessary to provide for the registration and the systematic testing and monitoring of underground storage

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tanks to detect leaks and discharges as early as possible and thus minimize further degradation of potable water supplies. The Legislature further finds and declares that with the enactment by the United States Congress of the ‘Hazardous and Solid Waste Amendments of 1984,’ Pub.L. 98-616 (42 U.S.C. s. 6991) it is necessary to authorize the Department of Environmental Protection to adopt a regulatory program that permits the delegation of the authority to carry out the federal act, but also recognizes the need of this State to protect its natural resources in the manner consistent with well-established environmental principles.”

Clearly, the Legislature intended for the Department to enact rules to prevent and minimize discharges of hazardous substances. This provision is entirely consistent with the intent of N.J.S.A. 58:10A-21 “to detect leaks and discharges as early as possible” in order for the State “to protect its natural resources.”

A delivery ban does not go beyond the intent of the Federal regulations, which provide at 40 C.F.R. 281.41(a):

(a) Any state agency administering a program must have the authority to implement the following remedies for violations of state program requirements:

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(4) To prohibit the delivery, deposit, or acceptance of a regulated substance into an underground storage tank identified by the state to be ineligible for such delivery, deposit, or acceptance in accordance with § 9012 of the Solid Waste Disposal Act.

Further, the 2005 Federal Energy Policy Act and the Federal guidelines for establishing delivery prohibitions as a condition of states receiving grant funding under the Leaking Underground Storage Tank Trust Fund confirm that establishing a program for delivery prohibitions is consistent with Federal standards.

The presence of vapors or product in soil or ground/surface water indicates that a discharge has occurred. It is critical to immediately identify the source and, if necessary repair the problem or cease use.

In the example of water ingress into a UST, the UST owner or operator should be able to quickly conduct the investigation required at N.J.A.C. 7:14B-7.2(a) and determine if a storm event occurred since the last water accumulation check to rule storm water infiltration in or out. If water is entering the UST system, that condition, regardless of the source, must be repaired promptly since the UST system is compromised. In

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addition, if the suspected release investigation is triggered based on malfunctioning dispensing equipment, the owner or operator can conduct the “seven day” investigation (which can certainly be conducted in less than seven days) and if the results conclusively indicate that the UST system is not leaking, the owner or operator can resume deliveries while any dispensing equipment repairs are made. Results of the investigation must be documented and maintained at the facility.

Dispensing equipment that works erratically is one indication that some portion of the system is not operating properly, and therefore may indicate that a release has occurred. As noted by the commenter, system failures such as microprocessor failures do cause equipment to work erratically. However, this alone is not determinative that system integrity has been compromised. When a system is malfunctioning, its use should be discontinued until the source of the problem is identified and repaired.

98. COMMENT: N.J.A.C. 7:14B-7.1(b) forbids the introduction of product into any UST undergoing a suspected release investigation. The proposed language is essentially a delivery ban preventing a facility from receiving product and continuing to operate during the seven day investigation period permitted by N.J.A.C. 7:14B-7.1(a). The original intent of N.J.A.C. 7:14B-7.1(a) was to provide an UST operator with a reasonable period of time to conduct a suspected release investigation while continuing to

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use the UST system. Modern retail locations with high customer demand typically receive several deliveries per day and may have only hours until product runs out and operations are terminated. The proposed language surreptitiously nullifies the seven day investigation period provided by N.J.A.C. 7:14B-7.1(a) and should be removed from the rules. (25)

RESPONSE: The delivery ban with respect to a suspected release investigation has been codified at N.J.A.C 7:14B-5.9(a) since 1997. N.J.A.C 7:14B-5.9(a) prohibits the introduction of a hazardous substance into an UST system which is known or suspected to be leaking, except in the very limited circumstances set forth at N.J.A.C. 7:14B-8.1(a)2ii. When conducting a suspected release investigation, the delivery ban must be imposed on the system(s) suspected to be leaking to prevent the introduction into the system of additional hazardous substances that may then also leak out. The seven day investigation prescribes the timeframe in which the UST owner or operator must confirm or disprove the release. These are related, but distinctly different, requirements.

Photoionization detector (PID) readings

99. COMMENT: The Department has not provided any scientific or factual basis for the new requirement at N.J.A.C. 7:14B-7.2(a)6 to use a photoionization detector (PID) or for

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using a “reading” of 50 units as a trigger for further investigation, other than the statement in the proposal summary that, “A reading of greater than 50 units with a [PID] is a strong indicator that a discharge has occurred and that additional soil or ground water sampling is needed in that area.” The UST rules regulate the storage of dozens and dozens of hazardous substances. Not every hazardous substance can be detected using a PID because not every hazardous substance is aromatic or volatile, and those that are detectable by a PID have individual responses to the sensitivity of the PID. Fifty units may or may not be “a strong indicator” of a discharge. (27)

100. COMMENT: The selection of “50 units” on a photoionization detector (PID) or flame ionization detector (FID) as the trigger for the requirement to hire an LSRP to collect a soil or groundwater sample is arbitrary and instrument specific. Further, background readings due to other sources such as operating motor vehicles, hydrogen sulfide, and other interfering chemicals, may impact the PID and FID results. (6)

101. COMMENT: Rather than relying on PID readings, perhaps the regulated party is better served by reverting to reliance on field observations such as “visual staining and olfactory indicators” when cleaning up minor spills or investigating suspected releases at regulated UST facilities, as reliance on these indicators allows the responsible party to proceed quickly with the collection of soil and groundwater samples. (7, 9)

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102. COMMENT: A positive response on field screening instruments in the interstitial spaces should not be considered to be evidence of a discharge to the environment as defined by the Spill Act or SRRA but rather as the trigger for a suspected release investigation as already provided at N.J.A.C. 7:14B-7.1(a)3. (6)

RESPONSE to COMMENTS 99 through 102: Setting the regulatory trigger at a PID reading of “50 units” is not arbitrary. Since 2004, Department UST inspectors have used PIDs in the field screening part of the UST inspection process and have used a reading of 50 units as the criterion on which owners or operators are directed by UST inspectors to take further action. Since 2004, owners and operators at 545 UST locations were directed by UST inspectors to rescreen their sites or collect sample(s) based upon this criterion. Of those, rescreening was conducted at 277 sites and results were below 50 units. Samples were collected at 268 of the 545 facilities (49 percent). Of these 268 facilities, 135 or 50 percent identified contamination in soil or ground water above remediation standards. These data demonstrate that contamination was identified at 50 percent of all facilities where the “50 unit” criterion was used to trigger sampling. This contamination would have gone unreported if it had not been identified by Department inspectors. The significant percentage of facilities identifying contamination justifies the incorporation of this PID reading threshold for soil and/or groundwater sampling in the rules.

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The Department recognizes the issues raised by the commenter regarding background readings at gasoline UST facilities, and acknowledges that it is not atypical for the Department to encounter 20 units as background, measured on a PID. However, based on the data presented above, the reading of 50 units or greater in soil or associated with ground water are significant screening data that can lead to identifying contamination.

103. COMMENT: The basis for selecting a reading of 50 “units” on a photoionization detector (PID) as the basis for the collection of soil and/or groundwater samples is unclear since a “unit” is not a defined standard. Therefore, it is not possible to assess whether this regulation is reasonable. Additionally, the Department does not specify what calibration gas is to be utilized for the PID or the electron volt rating of the lamp in the PID. (1, 24)

104. COMMENT: The term “units” is unspecific and should be struck from the proposed regulation. The PID, or for that matter a flame ionization detector (FID), is not calibrated to specific compounds, but rather to a common compound (e.g., 100 parts per million isobutylene for the PID or methane for the FID), where every individual compound detected will possess its own unique response factor to the detector depending

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on a number of factors, including the actual calibration gas used, the ionization potential of the PID lamp, flow rate and humidity. (6)

RESPONSE to COMMENTS 103 and 104: When the Department inspects an UST facility, the Department utilizes photoionization detectors (PIDs) to field screen for contamination in the environment. The PIDs used by Department UST inspectors have 10.2 electron volt (eV) lamps and are calibrated to 100 parts per million (ppm) isobutylene. Since the air/vapors are being measured in the field (and not a calibration gas of known composition and concentration), units of measure such as “ppm” or “ppb” are inappropriate. Regardless of whether one is measuring in ppm or ppb, the fact that the meter has a reading of 50 will trigger the requirement to sample. On adoption, the Department is clarifying N.J.A.C. 7:14B-7.2(a)6 to add “meter” to modify “units” so that the threshold reading is “50 meter units.”

105. COMMENT: The Department’s intent of the “50 units” requirement is not clear, but it appears that the requirement may be intended to apply to interstitial monitoring of a regulated UST system. (6)

106. COMMENT: Proposed N.J.A.C. 7:14B-7.2(a)6 does not define where the PID reading shall be taken. There are structures within the UST system that are secondarily

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contained and may accumulate vapors under normal operation (examples: spill buckets, dispenser pans, submersible turbine pump (STP) sumps, automatic tank gauge (ATG) manholes and other associated access points). This change should specifically reference the monitoring points to be inspected with the PID (examples: monitoring wells or native soils) or specifically exclude the components referenced in the previous sentence. This will eliminate confusion during Department compliance inspections and the associated LSRP corrective action. (25)

107. COMMENT: The proposed rule specifies groundwater and soil collection in the “immediate area” of the meter reading. In many circumstances this is technically infeasible and may be reckless given that UST equipment is in close proximity and may be compromised by the sampling activities. The rule should be revised to state that samples are to be collected if a suitable sampling point is accessible. (25)

108. COMMENT: N.J.A.C. 7:14B-7.2(a)6 does not state what the PID is measuring or “reading.” For example, is it the air at the area of the suspected release? Is it a soil sample? Is it a ground water sample? Is it the air inside a tank field release detection monitoring well? Is it the air inside a tank field release detection vapor monitoring point? (27)

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RESPONSE to COMMENTS 105 through 108: This requirement is not intended to apply to interstitial monitoring as suggested by the commenter. PID readings should be collected in exposed soils adjacent to tank system components or from the headspace of monitoring wells. To help eliminate readings related to vapors that may originate from tank system components such as from a dry break, PID readings should be taken in exposed soils approximately 10 to 18 inches below grade. It is not necessary to collect PID readings from within containment structures that may accumulate vapors as part of normal operations. Based on these comments, the Department is modifying N.J.A.C. 7:14B-7.1(a)6 on adoption to state with specificity that the PID readings are to be collected from soil or ground water.

109. COMMENT: N.J.A.C. 7:14B-7.2(a)6 exceeds the intent of this chapter and should be entirely deleted. N.J.A.C. 7:14B-6 requires that release detection be installed and maintained at regulated UST facilities. These systems are maintained by certified contractors. The facility owner or operator generally relies on a certified contractor both to respond to and to investigate the majority of the eight conditions listed at N.J.A.C. 7:14B-7.1(a)1 through 8. Requiring that only an LSRP collect a sample under any of those conditions only slows down the confirmation of a release. In the majority of cases, a corrective action contractor is already on site. Although SRRA requires that

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remediation must be performed by an LSRP, it does not establish the LSRP as being uniquely qualified to collect soil and or ground water samples. (9)

110. COMMENT: N.J.A.C. 7:14B-7.2(a)6 should be reworded to be consistent with the role of an LSRP as envisioned by the Legislature through SRRA. In SRRA, the LSRP may manage, supervise or perform remediation activities. In addition to undercutting the authority of LSRPs, requiring the LSRP physically to collect soil samples will likely result in increased costs to the regulated community with no benefit in terms of the protectiveness of the remedial action. There is no credible technical reason UST cases should require a different definition of the role and responsibilities of an LSRP in managing an investigation. The LSRP should be able to manage or supervise the work as this is in keeping with the traditional oversight interpretation for the certified subsurface evaluator performing closure of a regulated UST. (6, 7, 9)

111. COMMENT: Requiring at N.J.A.C. 7:14B-7.2(a)6 that the owner or operator use an LSRP to collect the soil sample is not more protective of human health and the environment than the current paradigm under which the certified individual must be on site to direct the investigation. Certified individuals are required to demonstrate specific expertise with UST facilities and cannot delegate to “his or her representative” as can the LSRP. This assures the regulated community and the Department that samples are

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collected by individual who understands the intricacies of UST facilities as opposed to a generic environmental field technician or a trainee. (9)

112. COMMENT: N.J.A.C. 7:14B-7.2(a)6 should be amended to be consistent with N.J.A.C. 7:14B-13.2(b)3, to allow for sample collection by either the LSRP or a representative of the LSRP. (7)

113. COMMENT: The Technical Requirements already describe how to investigate a suspected release: retain an LSRP and conduct a site investigation in accordance with the Technical Requirements rules. There is no reason to add N.J.A.C. 7:14B-7.2(a)6. (27)

114. COMMENT: PID readings do not quantify risk or quantity. Common practice is to remediate minor soil impacts and collect samples only to document that contaminants do not remain at concentrations above the remediation standards. However, this practice does not require the retention of an LSRP. (9)

115. COMMENT: The commenter questions whether the Department intends to invalidate laboratory data confirming a discharge when the PID reading is over 50 but the sample was not collected by an LSRP as is required by N.J.A.C. 7:14B-7.2(a)6, but to

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then accept data for a sample collected by an individual who is not an LSRP that indicates a discharge is confirmed but the PID reading was less than 50. (9)

116. COMMENT: N.J.A.C. 7:14B-7.2(a)6 requires the owner or operator to hire an LSRP to prove or disprove the existence of the discharge. This is an excessive requirement and it fails to provide any added protection of human health and the environment while it sets forth a meaningless PID reading value of 50 as a “standard” on which to regulate. (9)

RESPONSE to COMMENTS 109 through 116: The Department agrees that it is unnecessary to have an LSRP collect a soil sample or that a soil sample must be collected at the preliminary stage of confirming or disproving a suspected release, which is the stage to which N.J.A.C. 7:14B-7.2(a) pertains. The appropriate time to collect soil and/or ground water samples is during the site investigation, not at the juncture of proving or disproving a release. Since N.J.A.C. 7:14B-7.2(b) requires the owner or operator to conduct a site investigation if the suspected release cannot be disproved, and site investigation necessarily involves soil and groundwater sampling that is overseen by an LSRP, it is unnecessary and redundant to also require the collection of a soil or groundwater sample at N.J.A.C. 7:14B- 7.2(a). Accordingly, on adoption, the Department is modifying N.J.A.C. 7:14B-7.2(a)6 to instead require that the UST owner

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or operator determine whether there are any PID readings above 50 meter units. If the PID registers a reading above 50 meter units, it is possible that the reading is the result of the operation of the tank system and/or a discharge, and therefore the test is inconclusive, and the owner or operator would then be required, pursuant to N.J.A.C. 7:14B-7.2(b), to perform remediation pursuant to N.J.A.C. 7:26E-3, beginning with a site investigation pursuant to the Technical Requirements, since the obligation to use an LSRP is in the ARRCs rule.

117. COMMENT: Many UST facilities have pre-existing discharges that are already being investigated and remediated. New N.J.A.C. 7:14B-7.2(a)6 does not take into account that elevated meter readings may result from a pre-existing discharge and therefore may be a false indicator of a new release. The rule should be revised to exempt pre-existing/ongoing remediation sites. (25)

RESPONSE: It is not unusual for new discharges to be discovered at operating UST facilities that are undergoing remediation. If the area is not an area of concern under investigation or samples are not reflective of the condition encountered, for example in an area that was previously field screened and sampled as part of a site investigation and no contamination was found or soil contamination is at depth and PID readings indicate shallow soil contamination, samples must then be collected.

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As explained in response to comments 109 through 116, the Department is modifying the rule at N.J.A.C. 7:14B-7.2(a)6 on adoption to require that the owner or operator determine whether there are any photoionization detector readings above 50 meter units. If detected, the owner or operator must conduct a site investigation pursuant to the Technical Requirements.

118. COMMENT: N.J.A.C. 7:14B-7.2(a)6 does not indicate who would be using the PID. An unqualified person using a PID to investigate a suspected release may not use the instrument properly, and this may lead to a false negative reading. (27)

119. COMMENT: The PID is nothing more than a tool utilized to assess field conditions. PIDs are subjective devices that are used to generate indicators of site conditions. The user becomes familiar with the device they use, and the same PID in the hands of two different operators will generate different unit readings. Additionally, different devices used by the same technician will generate different readings, and the product being screened and its age, along with weather conditions and temperature combined with variations in soil types and pore space make PID readings inconsistent.

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RESPONSE to COMMENTS 118 and 119: It is incumbent upon any individual using field equipment be properly trained in its use. In addition, the equipment should be properly maintained and calibrated. Moreover, the PID reading is not the only data that would be determinative of a release. Rather, the owner or operator is to look at all applicable lines of evidence listed in N.J.A.C. 7:14B-7.2(a)1 through 6. If the results of any of the applicable lines of evidence are inconclusive, then there is a suspected discharge that requires investigation; a PID reading of less than 50 meter units alone is not sufficient to conclude that a discharge has not occurred. One could conclude, however, that a discharge has not occurred if all of the conditions at N.J.A.C. 7:14B-7.2(a)1 through 6 indicate that a discharge has not occurred.

As explained in response to comments 109 through 116, the Department is modifying the rule at N.J.A.C. 7:14B-7.2(a)6 on adoption to require that the owner or operator determine whether there are any photoionization detector readings above 50 meter units. If such readings are detected, it is possible that the reading is the result of the operation of the tank system and/or a discharge, and therefore the test is inconclusive, the owner or operator is required to hire an LSRP to conduct remediation pursuant to N.J.A.C. 7:26E-3, beginning with a site investigation required pursuant to N.J.A.C. 7:14B-7.2(b). The location of samples should be based on the LSRP's professional judgment using applicable Department rules and technical guidance.

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120. COMMENT: N.J.A.C. 7:26C-1.4(e)1 exempts the regulated community from the requirement to retain an LSRP when remediating a spill of petroleum products. However, N.J.A.C. 7:14B-7.2(a)6 contradicts ARRCs in cases where the responsible party responds to a spill or overfill. Certainly the Department is not inferring that a PID reading over 50 indicates a spill of greater than 100 gallons. (9)

RESPONSE: N.J.A.C. 7:26C-1.4(e)1 deals with a known discharge, whereas N.J.A.C. 7:14B-7.2(a)6 deals with the investigation of a possible discharge. Thus, there is no contradiction between these two provisions. The Department, furthermore, is not inferring a PID of 50 meter units indicates a spill greater than 100 gallons. All of the conditions at N.J.A.C 7:26C-1.4(e)1 must be met in order to qualify for this exemption. It is imperative that any UST owner or operator who wishes to take advantage of the exemption at N.J.A.C. 7:26C-1.4(e)1 report the discharge when it occurs, report the quantity discharged at that same time, complete the cleanup in 90 days, ensure that the discharge did not impact ground water, and maintain a copy of the report documenting the cleanup on site. It should be noted that the report is subject to inspection and verification, including the collection of samples at the facility by Department personnel.

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121. COMMENT: The discharge reporting obligation at N.J.A.C. 7:14B-7.3(a) should only apply to the LSRP of record for the site, not to any other LSRP, or LSRP representative, in accordance with SRRA. (6)

RESPONSE: The Department agrees with the commenter that SRRA mandates that only the LSRP is required to report a discharge at a site, and does not place such a requirement on representatives of the LSRP. Accordingly, the Department is modifying the rule on adoption to delete the phrase “or his or her representative” at N.J.A.C. 7:14B-7.3(a). The Department is also modifying this provision to correct grammatical errors. However, the Department declines to limit the reporting requirement to only the LSRP of record because this reporting requirement is already limited. As amended, the provision applies to the LSRP performing remediation.

122. COMMENT: The Department proposes to require at N.J.A.C. 7:14B-7.3(a)3 that the results from a closure plan be implemented, rather than conducted. The Department should clarify what it means by “results.” “Results” should be changed to “proposals.” (1)

RESPONSE: The term “results” in the context of N.J.A.C. 7:14B-7.3(a)3 must be interpreted very broadly as any condition identified during closure activities that confirms

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a discharge. Activities in the context of a UST closure clearly overlap with some of the other conditions identified under N.J.A.C. 7:14B-7.3(a). These include, but are not limited to, any and all observations (i.e., visual confirmation of contamination in/on soil or ground water, odors, compromised condition of product bearing UST equipment), field instrumentation readings, and analytical sample results.

The term “proposal” does not fit in the context of this rule. This rule applies to activities taken to implement a closure plan and the conditions that confirm a discharge. A discharge is not confirmed based on a “proposal.”

123. COMMENT: N.J.A.C. 7:14B-7.4 requires that if the owner or operator has information indicating that a facility may be the source of a discharge, the owner or operator is required to perform an unknown source investigation. The rules define an unknown source investigation as “an investigation involving the collection of soil and/or groundwater sample to verify whether a facility is the source of a discharge.” The Department should change “a facility” to “their facility” to clarify and limit the reach of this requirement. (9)

RESPONSE: The suggested change is unnecessary because the rule already provides that an owner or operator is only required to conduct an unknown source investigation when that owner or operator has information that his or her facility may be the source of a

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discharge. Where no such information exists, an unknown source investigation is not required.

124. COMMENT: N.J.A.C. 7:14B-7.4, which requires the owner or operator to conduct an unknown source investigation, exceeds the intent of the statute, exceeds the authority of the Spill Act and contravenes a basic tenet of our legal system, that one is “innocent until proven guilty.” Is the owner of a UST facility in the State of New Jersey somehow denied this right?

Consider the scenario where contamination from products similar to those stored by a UST facility which has double wall tanks and lines, all the required release detection equipment and impeccable inventory records is identified in an offsite adjacent utility chase or storm drain, and the site is also in close proximity to several other UST sites. On what basis does the Department determine on which of the sites to compel an investigation, including collection of soil and groundwater samples? The Department has only circumstantial evidence, no established pathway and the on-site indicators yield no evidence of a release, yet this provision requires the owner operator to conduct a prescriptive investigation within 90 days.

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Just recently, the New Jersey Appellate Division held in NJDEP v. Dimant, 418 NJ Super. 530, 544 (App. Div. 2011), that a nexus must exist between the discharge and the contamination being remediated in order to assign Spill Act liability. The sole fact that a party used the contaminant being remediated was an insufficient basis, standing alone, to find that party liable. This very same nexus must be demonstrated prior to requiring an UST owner/operator to undertake any investigation. (9)

RESPONSE: The commenter is confusing burden of proof in a suit for natural resource damages such as was the case in Dimant with the standards that the appellate court would apply in a challenge to administrative rulemaking. Dimant was not concerned with Department rulemaking authority. It is reasonable for the Department to promulgate a rule that requires an owner or operator having information indicating that its UST facility may be the source of a discharge to investigate further. Whether a specific owner or operator has such information will be fact specific and thus will depend on the circumstances involved with each such analysis.

The Department drafted the unknown source investigation requirements in furtherance of the legislative findings “that a significant percentage of . . . underground storage tanks are leaking due to corrosion or structural defect; that this leakage of hazardous substances from underground storage tanks is among the most common causes of groundwater

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pollution in the State; and that it is thus necessary to provide for the registration and the systematic testing and monitoring of underground storage tanks to detect leaks and discharges as early as possible and thus minimize further degradation of potable water supplies.” N.J.S.A. 58:10A-21.

125. COMMENT: In the proposal summary, the Department states that it is amending N.J.A.C. 7:14B-7.4 to include situations where “the Department makes the owner or operator aware of a condition, such as the presence of a contaminant not from the owner’s or operator’s UST, that would prompt the need for an “unknown source investigation. . . .” Pursuant to existing N.J.A.C. 7:14B-7.4, the owner or operator of the facility is required to perform an unknown source investigation at the facility by conducting a site investigation, which includes hiring an LSRP to collect soil and/or ground water samples. This statement is misleading because existing N.J.A.C. 7:14B-7.4 does not require an unknown source investigation. N.J.A.C. 7:14B-7.4 requires a site investigation to be conducted. It is only in this iteration of the rule that the Department defines “unknown source investigation.”

It appears the Department has merely added additional language to mandate another condition whereby the owner operator is required to engage an LSRP under terms where the Department can prescribe the actions to be taken by the LSRP. (9)

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126. COMMENT: The requirements at N.J.A.C. 7:14B-7.4 are extraneous. The Technical Requirements already describe how to investigate a discharge or release of hazardous substances. Neither the Technical Requirements nor the ISRA rules distinguish between discharges from known and unknown sources. A discharge is a discharge and should be investigated using the procedures described in the Technical Requirements. If the Department wants to specifically regulate discharges from “unknown sources,” the regulations should apply to all contaminated sites, not just regulated UST facilities. (27)

127. COMMENT: The Department provides no substantive justification for the requirement at N.J.A.C. 7:14B-7.4 to complete an unknown source investigation within 90 days. The rule is vague regarding how this investigation should be conducted, other than stating that the entire site should be investigated and the results should be submitted to the Department in the form of a site investigation report. Furthermore, considering the degree of concern the Department seems to have with discharges from unknown sources at regulated UST facilities, it does not appear to require the owner and/or operator to retain an LSRP to conduct this remediation. For large facilities, this regulation is overly burdensome. The investigation of unknown sources of contamination is complex and requires the experience of an LSRP. A preliminary assessment of the entire regulated

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UST facility should be conducted before embarking on an investigation and/or sampling of the entire site. (27)

128. COMMENT: Amended N.J.A.C. 7:14B-7.4 requires a site investigation of the UST system when the owner or operator has information that the UST system may be the source of a discharge. The proposed amendment broadens the existing language by requiring an unknown source investigation, which is no longer tied to a discharge from the UST system. If the intent is to require the owner/operator to investigate if its USTs are the source of an unknown discharge where the contaminants of concern match the products stored in the UST system, then there is no reason to amend the current provision. If the intent is to have the owner/operator investigate other discharges with an unknown source (such as contaminants of concern not stored in the UST system), then this provision should be removed from the UST rules and placed within ARRCs or the Technical Requirements, and should be applicable to all property owners. SRRA does not transfer responsibility for the investigation of unknown discharges to the UST owner/operator.

The process/logistics for an “unknown source” investigation are the same as for a site investigation regardless of how the Department tries to re-word it in this amendment.

There should not be a timeframe of 90 days for this investigation separate from the

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preliminary assessment/site investigation timeframes. The separate type of “report” and timeframe for an “unknown source” investigation adds an additional level of confusion. The Department’s explanation/justification of 90-day timeframe is contradictory because it indicates that a shorter timeframe is needed to ensure the ongoing release is halted. Requiring the submittal of a report at an earlier time does not lead to a faster response to abating a release. Once a discharge is confirmed as part of the investigation, it must be immediately reported to the Hotline and addressed pursuant to ARRCS and the Technical Requirements. The “unknown discharge” report should be submitted with the same timeframe as a site investigation report and under the same rationale.

If a section for unknown discharges is needed, it should be detailed in N.J.A.C. 7:26E so it can be applicable to all types of facilities and not just USTs. For N.J.A.C. 7:14B, a simple paragraph reference to the unknown source investigation within the Technical Requirements should suffice and be appropriate.

If the Department elects to keep the section as is, the owner or operator should be given the option of hiring an LSRP to conduct the unknown source investigation. If it is determined that no discharge from the UST system has occurred, the LSRP can so notify the Department. If a discharge has occurred, the LSRP can manage the remediation of the discharge pursuant to ARRCS and the Technical Requirements regulations. (6)

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RESPONSE to COMMENTS 125 through 128: The requirement to conduct an unknown source investigation is not new. What the Department has added is the term “unknown source investigation” to make a clear distinction between a site investigation to be completed and submitted within one year at an UST facility (e.g., UST Closure) and a prompt investigation of an UST facility to determine if the facility is the source of contamination in the environment in proximity to the UST facility. N.J.A.C. 7:14B-7.4 clearly provides that this requirement applies to the substances stored in the USTs at the facility: “If the owner or operator has information indicating that a facility may be the source of a discharge...” The UST rule at N.J.A.C. 7:14B-1.6 defines facility as “...one or more underground storage tank systems owned by one person on a contiguous piece of property.” There are urgent conditions at UST facilities that prompt completion of an investigation in much shorter timeframes to protect public health and the environment. The Department expects that in most scenarios where this will be required, there is an urgency to determine the source of the contamination because of, for example, impacts to surface water, potable wells or indoor air quality.

In addition, the Department is not prescribing in this rule the exact remediation requirements that an LSRP must pursue to determine if the client’s facility is the source of the contamination. For example, if the contamination near the facility is found in

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ground water, the owner or operator may define an appropriate ground water investigation of sufficient scope to determine if the facility is a source, without conducting soil samples. In other instances, the owner or operator may decide to follow the site investigation requirements in the Technical Requirements more closely to determine if the site is the source.

An LSRP is required to perform these activities because if the owner or operator of a facility has information indicating that a facility may be the source of a discharge, the owner or operator of the facility shall investigate the facility in accordance with N.J.A.C. 7:26E, which requires the services of an LSRP. This unknown source investigation is investigating a discharge, and therefore, again, an LSRP is required.

129. COMMENT: The UST rules at proposed N.J.A.C. 7:14B-7.4 require an owner or operator to prepare an unknown source investigation report following the format presented in the Technical Requirements at N.J.A.C. 7:26E-3.14, and to submit the report and a form available from the Department's website within 90 days after receipt of information indicating facility may be source of discharge. Ninety days is an insufficient amount of time to conduct a preliminary assessment and site investigation, and to prepare a report of that investigation which satisfies the requirements of N.J.A.C. 7:26E. The LSRP should determine the appropriate timeframe. (7)

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RESPONSE: The Department disagrees that 90 days is insufficient when there is a condition that warrants prompt attention. It has been the Department's experience that most contractors have the capability to mobilize quickly to conduct an expedited investigation when needed. The rule does not require a preliminary assessment or site investigation. The rule requires an investigation to determine if the facility is the source of the discharge and that the report be submitted following the format of a site investigation report at N.J.A.C. 7:26E-3.14 (recodified on adoption as N.J.A.C. 7:26E-3.13).

Since the rule does not require that a comprehensive preliminary assessment and site investigation be conducted in connection with an unknown source investigation, the Department agrees that it is confusing to then require the owner or operator to prepare a report in the format of N.J.A.C. 7:26E-3.13, because to so require implies that a site investigation is to be conducted, otherwise, the owner or operator would not be able to comply with the requirements for a site investigation report set forth at N.J.A.C. 7:26E-3.13. Accordingly, on adoption, the Department is modifying N.J.A.C. 7:14B-7.4 to require that the owner or operator prepare an unknown source investigation report following the format presented in the Technical Requirements at N.J.A.C. 7:26E-3.13, but limited to N.J.A.C. 7:26E-3.13(a)2 through 4 and 6ii.

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UST Rules - Subchapter 8 Remediation

130. COMMENT: The commenter welcomes the Department's acknowledgement that responses to leaks are different than responses to discharges and supports the addition of N.J.A.C. 7:14B-8.1(a). (9)

RESPONSE: The Department acknowledges the commenter's support for the rule.

UST Rules - Subchapter 9: Out-of-Service Underground Storage Tank Systems and Closure of Underground Storage Tank Systems

131. COMMENT: The UST rules at proposed N.J.A.C. 7:14B-9.2, which contain the closure requirements for UST systems, should provide that when an unknown UST is found during excavation of a known UST, the unknown UST may be closed, registered and the notice of intent to close completed within 30 days of closing the unknown UST. (7)

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RESPONSE: The Department agrees that a mechanism must be established to address the issue regarding the discovery of unknown UST systems during removal of known USTs, and the Department will consider this topic for future rulemaking. When an unknown UST is encountered during the removal of USTs under an existing notice of intent to close, the removal can occur and the registration can subsequently be updated if the UST is regulated pursuant to N.J.A.C. 7:14B by contacting the Department's Bureau of Case Assignment and Initial Notice. This would only apply in those circumstances where the facility is registered with the Department and a Notice of Intent was submitted for the removal of known underground storage tanks. Following the removal of any underground storage tank regulated pursuant to N.J.A.C. 7:14B, the owner or operator must submit the UST Facility Certification Questionnaire within seven calendar days after tank closure (see N.J.A.C. 7:14B-2.4(c)).

132. COMMENT: At N.J.A.C. 7:14B-9.2(a)2iv, the Department is requiring the owner or operator to include the license number of the LSRP performing remediation when notifying the Department of a regulated UST closure. Not all UST closures occur at contaminated sites and not all UST closures result in remediation of contamination. Unless the site is contaminated and requires remediation, the owner or operator does not need retain an LSRP. (27)

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RESPONSE: SRRA does not exempt closure of regulated USTs from the requirement to hire an LSRP. In order to properly close a regulated UST, the owner or operator must implement a closure plan, which consists of a site investigation pursuant to N.J.A.C. 7:26E-3.3 and a tank decommissioning plan. Pursuant to SRRA, only an LSRP may conduct a site investigation. Accordingly, N.J.A.C. 7:14B-9.2(a)2iv is consistent with SRRA.

133. COMMENT: The Department should amend N.J.A.C. 7:14B-9.2(a)3 to change “applicable municipal and county health department” to “applicable municipal OR county health department,” because it is redundant to provide notice to both. (9)

RESPONSE: The Department disagrees with the commenter. Municipal and county health departments are often separate entities and each is to be notified to ensure that both agencies are aware of the activities at the site so both are aware of closure activities and can attend. Additionally, notifying both entities ensures that the public can obtain information regarding closure activities, regardless of which entity is contacted.

134. COMMENT: N.J.A.C. 7:14B-9.2(a)5, which requires that if any contamination is detected above any applicable remediation standard, the owner or operator must conduct the remediation pursuant to the ARRCs rules, should be deleted in its entirety. The

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provision fails to account for protections afforded regulated facility owners and operators who completed remediation of the facility prior to adoption of the remediation standards. If the remediation standard is now lower, but not by an order of magnitude, additional remediation is not required, even though “contamination may exist above any applicable remediation standard.”

The owner or operator of a regulated facility cannot be made responsible for any contaminant at any concentration at the site unless there is a clear connection between the products stored at the site by the owner or operator and unless there is a direct evidence that the presence of the contaminants is related to the current activities of the owner or operator during their tenure operating the site. (9)

RESPONSE: The Department agrees with the first observation of the commenter and is modifying N.J.A.C. 7:14B-9.2(a)5 on adoption by adding: “except as provided in N.J.S.A. 58:10B-13e.” That provision of the Brownfield Act contains the order of magnitude limitation to which the commenter refers concerning the Department’s discretion to require further remediation based upon its adoption of new and more stringent remediation standards after the completion of remediation (signified by receipt of an NFA letter or an RAO).

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As to the commenter's second point concerning the alleged need to prove the nexus between the contamination and the UST facility, the commenter raised a similar issue concerning the trigger for an unknown source instigation. See Comment 123 above, and the Department's response. The commenter is again confusing the burden of proof in a civil trial with the standards that an appellate court would apply in a challenge to administrative rulemaking. It has been the Department's experience in implementing the UST Act for more than 20 years that contamination discovered during the closure of an UST is typically associated with the UST. It is reasonable, therefore, for the Department to promulgate a rule that requires an owner or operator that is closing an UST to investigate and remediate the contamination discovered during the closure activities.

135. COMMENT: N.J.A.C. 7:14B-9.2(d) requires the owner or operator to close an underground storage tank pursuant to the American Petroleum Institute's "Practice for the Abandonment or Removal of Used Underground Service Tanks," in publication at the time the tank is to be closed (available from the American Petroleum Institute, 1220 L Street Northwest, Washington, DC 20005). This citation should be updated to "API Recommended Practice 1604: Closure of Underground Storage Tanks," which is the publication to which N.J.A.C. 7:14B-9.1(b) refers. The title cited by the Department was discontinued with the 1989 edition of the recommended practice. (9)

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RESPONSE: The Department agrees that N.J.A.C. 7:14B-9.1(b) and N.J.A.C. 7:14B-9.2(d) should refer to the same document and is modifying N.J.A.C. 7:14B-9.2(d) on adoption accordingly.

136. COMMENT: The Department should delete N.J.A.C. 7:14B-9.2(d)1, 2, and 4 because these requirements are integral components of American Petroleum Institute's Recommended Practice 1604 and are therefore redundant. (9)

RESPONSE: The Department agrees with the commenter and is deleting N.J.A.C. 7:14B-9.2(d)1, 2, and 4 on adoption.

137. COMMENT: N.J.A.C. 7:14B-9.2(e) provides that the owner or operator may abandon an underground storage tank in place if no contamination is detected above applicable remediation standards or if removal is not feasible. The Department should delete this provision in its entirety as it is contradictory to the UST Rules, the ARRCs rules and the Technical Requirements, and it is in direct contravention to N.J.S.A. 58:10A-25 with respect to New Jersey regulations being more stringent than the Federal counterpart.

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N.J.A.C. 7:14B-9.2(d) requires the owner or operator to close an underground storage tank pursuant to the successor of the American Petroleum Institute's "Practice for the Abandonment or Removal of Used Underground Service Tanks," API Recommended Practice 1604. API 1604 places no prohibition on the method of tank closure, and specifies a Closure Assessment be performed prior to closure, but does not condition closure in place to the results of the closure assessment. N.J.A.C. 7:14B-9.2(e) is effectively contradictory.

In the alternative, N.J.A.C. 7:14B-9.2(e)2 should be truncated to "Following the procedures at (d) above." (9)

138. COMMENT: N.J.A.C. 7:14B-9.2(e)1 requires a licensed New Jersey professional engineer to explain why the removal is not feasible, but API 1604 makes no such requirement. N.J.A.C. 7:14B requires the UST be closed and the remediation conducted by an LSRP in accordance with the ARRCs rules. The ARRCs rules empower the LSRP to use professional judgment in conductance of all aspects of remediation and do not encumber the LSRP to seek the approval of a New Jersey licensed professional engineer, so these provisions are in conflict and should be reconciled. (9)

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139. COMMENT: N.J.A.C. 7:14B-9.2(e) should not condition tank abandonment on the presence of contamination in excess of applicable remediation standards because it effectively prohibits closure in place in the presence of contaminants. An LSRP, having conducted all remedial investigations in accordance with the Technical Requirements can, in accordance with the ARRCS rules, propose remedial action in the form of engineering and institutional controls. The LSRP is empowered to conduct the remediation. When the responsible party chooses to abandon the tank in place, and the LSRP performs the necessary remedial investigation and then designs and implements a remedial action in the form of engineering and/or institutional controls and generates the RAO and files for the Remedial Action Permit, upon what authority is the Department relying to mandate that the tank be removed? (9)

RESPONSE to COMMENTS 137 through 139: The Department disagrees with the basis for the suggested changes. N.J.S.A. 58:10A-25a(2) pertains to the standards related to construction, installation, and operation of underground storage tanks, not closure of underground storage tanks. N.J.S.A. 58:10A-31 grants broad authority to the Department to adopt any rule and regulation to implement the Underground Storage of Hazardous Substances Act. N.J.A.C. 7:14B-9.2(d), which governs how to abandon an UST in place, is consistent with N.J.S.A. 58:10A-31. Removal of the UST system when contamination is present and when practicable allows for a full and thorough visual assessment of the

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condition of the UST system at the time of closure and aids in the identification and remediation of any contaminated soil and/or ground water. Addressing the UST system in accordance with N.J.A.C. 7:14B-9.2(d) is not subject to professional judgment.

The Department agrees that when contamination is found and thoroughly investigated, the owner or operator may have the opportunity to leave contamination in place by implementing engineering and institutional controls, provided that soil contamination is not impacting ground water. In addition to the visual assessment of the UST system, removal of the system prevents the tank structure itself from being a hindrance to the prompt and effective remediation of any contaminated soil, ground water and free product.

API 1604 is an industry standard for the manner in which a service is performed, and is in no way a limitation on any regulation or statute. The document does not address when to perform closure or abandonment. It only covers how to properly and safely close an UST system. In fact, the 1996 version states that no representation is made that the recommendations conform with any requirements imposed by state or local agencies. In addition, section 4.5.1 of the same edition states that the determination to close a tank in place or remove it depends upon local regulations which may prohibit or restrict closure in place.

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Requiring removal of an object that obstructs or hinders the ability to completely assess the extent of a discharge is necessary. This is not a new requirement; it has been in the UST rules since 1990. The prompt removal of contaminant mass, which in many instances is located under the tank itself, is essential to the timely remediation of tank discharges.

140. COMMENT: N.J.A.C. 7:14B-9.2(e)3 and (e)4 should be deleted as they pertain to topics included in API 1604 in accordance with which the closure is performed. (9)

RESPONSE: The Department disagrees with the commenter. N.J.A.C. 7:14B-9.2(e)3 requires inspecting and photographing the interior of an UST when it is to be abandoned. API Recommended Practice 1604 does not address inspection of the interior of an abandoned UST nor does it discuss inspection of the exterior of a removed UST. As with the removal of the tank, observations documenting the condition of a tank to be abandoned-in-place are useful in determining whether a tank has potentially discharged and if additional biased soil borings are necessary.

N.J.A.C. 7:14B-9.2(e)4 requires the filling of all abandoned tanks and piping with an inert solid such as sand or cement. The Department agrees that the Recommended

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Practice 1604 contains a similar requirement, but the Recommended Practice 1604 only deals with the tank and not piping. API Recommended Practice 1604 does state at 4.2.2 that all product piping should be disconnected and where accessible, it should be removed. It does not describe any procedure for permanently closing piping or sections of piping that cannot be removed. For those situations, to prevent an accidental introduction of product, all remaining piping should be sealed with an inert, solid material such as concrete.

141. COMMENT: N.J.A.C. 7:14B-9.2(e)5 should be deleted as API 1604 requires the removal or closure of all piping including fill pipes. (9)

RESPONSE: The Department agrees that API Recommended Practice 1604 at 4.2.5 requires removal of the fill pipe when abandoning a tank in place. However, the API document does not take into account situations where the fill pipe cannot be wholly removed, such as a tank under a structure with a remote fill pipe. The intent of N.J.A.C. 7:14B-9.2(e)5 is to ensure that product cannot be accidently introduced into piping. By removing as much of the fill pipe as possible and sealing the remaining portion, the chances of this happening are eliminated.

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142. COMMENT: N.J.A.C. 7:14B-9.2(f) provides that if the underground storage tank is located under a permanent structure or is physically inaccessible, or the owner or operator submits a certification, signed and sealed by a licensed New Jersey professional engineer, stating that the sampling requirements for site investigations at N.J.A.C 7:26E-3.3 will cause damage to the structure, the owner or operator may use an alternate method for determining the integrity of the tank, provided that it is documented pursuant to N.J.A.C. 7:26E-1.7.

This provision should be deleted in its entirety as it is redundant. The LSRP is empowered to design and implement the site investigation and remedial investigations which may be required in accordance with the Department's rules and technical guidance. The LSRP is required to document deviations from technical guidance and variances from the Technical Requirements for any site where remediation is being conducted. The citation is rhetorical as the condition that sampling requirements could cause damage to a structure and alternate assessment may be necessary is not solely specific to UST sites. Additionally, the inclusion of certification, signed and sealed by a licensed New Jersey professional engineer as a separate condition is unnecessary, conflicts with N.J.A.C. 7:26C and only contributes confusion to the issue. (9)

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RESPONSE: As part of the code of conduct set forth in SRRA at N.J.S.A. 58:10C-16, LSRPs are not allowed to operate outside of their area of expertise. As necessary, the LSRP may rely on others who they have determined have the requisite knowledge and training. In order to ensure that these types of decisions are made by a person with the requisite credentials, N.J.A.C. 7:14B-9.2(f) merely establishes that the individual making decisions regarding structural damage assessments must possess a New Jersey Professional Engineer's License.

It is correct that SRRA and ARRCS allow LSRPs to make all judgments concerning a remediation. However, judgments made on how a tank removal may affect an adjacent structure are decisions that must be made by a Professional Engineer pursuant to local building codes.

143. COMMENT: N.J.A.C. 7:14B-9.4(a)2 should be amended to clarify whether the site investigation report needs to be prepared by an LSRP. (6)

RESPONSE: N.J.A.C. 7:14B-9.4(a)2 does not need to be amended as suggested by the commenter because it already requires that a site investigation report must be prepared in accordance with N.J.A.C. 7:26C and N.J.A.C. 7:26E, and those rules require that the site investigation report be prepared by an LSRP.

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144. COMMENT: The UST rules at proposed N.J.A.C. 7:14B-9.5(b) require an owner or operator to submit a site investigation report and a form found on the Department's website. The Department should replace "a form" with "the PA/SI Form." (7)

RESPONSE: The Department is not including the specific names of forms in the rule text so that if the form name changes in the future, the Department will not have to amend the rule text to correct the name of the form. Instead, the owner or operator is directed to the Department's website where the form is available. On the website, each form is keyed to the rule citation to which the form applies so that the owner or operator knows which form to select.

145. COMMENT: The requirement at N.J.A.C. 7:14B-9.5(c)1 to permanently maintain all records is unrealistic. Natural occurrences of fire and flood along with human error and misplacement may cause the owner or operator to become non-compliant through no fault of his or her own. The Department should encourage but not require the permanent maintenance of records. (9)

RESPONSE: The owner or operator must take all reasonable steps to safeguard documentation concerning the closure of their USTs. Maintaining these records is in the

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best interest of the owner or operator, as this information may be needed for future business transactions, including property transactions. Maintaining these records also serves to protect the current owner or operator from claims made by future owners or operators that prior remediations were not conducted and completed properly.

UST Rules - Subchapter 10: Permitting requirements for underground storage tank systems

146. COMMENT: At N.J.A.C. 7:14B-10.6(b) the Department should use “N.J.A.C.”, not “N.J.S.A.” (7)

RESPONSE: The rule text reads as the commenter suggests; no amendment is necessary.

UST Rules - Subchapter 12: Penalties, remedies, and administrative hearing procedures

147. COMMENT: The UST rules at N.J.A.C. 7:14B-12.1(a) describe the enforcement actions the Department may take against an owner or operator upon a finding that the owner or operator has failed to comply with any requirement of the State Act or N.J.A.C.

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7:14B-1, 3, or 7 through 11. The phrase “negligently or willfully” should be added in front of “failed.” (7)

RESPONSE: The Department declines to amend the rule as suggested by the commenter. The penalty is based on the failure to comply with the State Act or the rules, irrespective of whether the action was due to negligence or willful conduct.

148. COMMENT: The requirement at N.J.A.C. 7:14B-12.2(b)9 that the person requesting an adjudicatory hearing include “a clear indication of the person’s willingness to negotiate a settlement with the Department” should be deleted. It is unreasonable to condition the request for a hearing to challenge an alleged violation upon the requirement that the person be willing to negotiate a settlement. There is no basis for the denial of due process in situations where the willingness to negotiate settlement with the Department is not predetermined. (9)

RESPONSE: N.J.A.C. 7:14B-12.2(b)9 requires that the person requesting an adjudicatory hearing include in the hearing request a clear indication of the person’s willingness to negotiate a settlement with the Department so that the Department may engage in settlement negotiations as early in the hearing process as possible. Settlement of cases prior to adjudication helps conserve both judicial and hearing requestor

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resources. Whether a person is willing to negotiate a settlement with the Department is not a criterion for granting or denying a hearing request.

UST Rules - Subchapters 13 and 16

149. COMMENT: Concerning N.J.A.C. 7:14B-13.2(b)3 and N.J.A.C. 7:14B-16.3(b)5, if an LSRP is allowed to have a representative present for the closure of an UST, in lieu of the LSRP's presence, does the same provision apply to subsurface evaluators working on unregulated heating oil tanks? (6)

RESPONSE: A subsurface evaluator is only required to be present for unregulated heating oil tank remedial activities after the determination that a discharge has occurred. However, the subsurface evaluator may not send a representative, as suggested by the commenter. The subsurface evaluator must provide direct on-site supervision during crucial decision making processes in the remedial action. This includes, but is not limited to field screening, determining the horizontal and vertical extent of contamination, determining depth to ground water, and selecting locations of soil samples and ground water sampling points.

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ISRA Rules

150. COMMENT: The Department should reinstate the letter of non-applicability (LNA) service for the limited purpose of obtaining the Department's determination of ISRA applicability in the context of a corporate transaction analysis. While this former service is not necessary in the context of determining the appropriate North American Industry Classification System (NAICS) number, it is very much needed in the context of a corporate transaction that may fall within one of the transaction exceptions. Since the deletion of N.J.A.C. 7:26B-2.2 and the removal of the LNA program, parties have no means of determining whether a transaction is excepted. (2)

RESPONSE: The Department repealed N.J.A.C. 7:26B-2.2 (“Applicability determinations”) as part of the November 2009 special adoption (see 41 NJR 4467(a)), because it determined that it no longer needs to perform this function. These determinations were not required by statute, but were included in the rule as a service provided by the Department to the regulated community. With the special adoption, the Department moved towards only including in the rule requirements mandated by the various enabling statutes. The Department has completed guidance that follows the format of the former N.J.A.C. 7:26B-2.2, which is available at www.nj.gov/dep/srp/isra/isra_applicability.htm.

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151. COMMENT: The commenter supports the Department's proposal to amend N.J.A.C. 7:26B Appendix C to exempt photovoltaic electric power generation (PV) establishments from the requirements of the Industrial Site Recovery Act, N.J.S.A. 13:1K-6 et seq. (ISRA). Most solar modules and other equipment used in PV generation contain virtually no hazardous substances. Moreover, with respect to those types of modules that do contain any such substances, they are present in a solid form and in very low amounts and are encased within solid protective layers, thus eliminating any meaningful threat of release to soil, sediment or groundwater. As a result, these establishments do not pose a risk to public health and safety. Moreover, the exemption would foster the placement of PV establishments on brownfield and landfill sites (among other locations), an express objective of New Jersey's draft Energy Master Plan. (17)

RESPONSE: The Department acknowledges the commenter's support of this amendment.

ISRA Rules - Subchapter 1: General Information

152. COMMENT: The definition of "industrial establishment" at N.J.A.C. 7:26B-1.4 has been changed to include the phrase "regardless of location" in the designation of an

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area of concern (AOC) subject to ISRA for leased properties with two or more leased spaces. The Department also eliminated the phrase, “Except as provided below for lease properties.” As a result, for leased properties with two or more leased spaces, the “industrial establishment” potentially has no geographic limits. This expansion of the industrial establishment definition is inappropriate and goes beyond the authority granted to the Department by SRRA. (11)

RESPONSE: When an industrial establishment occupies a part of a multi-tenant building, the industrial establishment is defined by the leasehold space as described in the contract between the landlord and tenant. However, if a tenant is required to store hazardous materials off the leasehold, to comply, for example, with a local fire code, this storage area and the route used to convey the materials into the actual leased space is part of the leasehold for compliance with ISRA, regardless of the actual landlord/tenant lease agreement. The Department has consistently enforced the leasehold provision of ISRA in this manner. The purpose of amending the definition of industrial establishment is to provide clarity in view of the fact that the LSRPs are now taking on the Department’s role of defining the scope of the ISRA case and because the leasehold provision has frequently been misinterpreted by the regulated community.

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153. COMMENT: N.J.A.C. 7:26B-1.8(a), which describes the circumstances under which an owner or operator of an industrial establishment can transfer ownership or cease operations of an industrial establishment prior to the issuance of a final remediation document should cross reference N.J.A.C. 7:26B-1.10, which describes an owner or operator's liability under ISRA. (7)

RESPONSE: N.J.A.C. 7:26B-1.8(a) describes when an owner or operator can transfer an industrial establishment prior to the issuance of a final remediation document. N.J.A.C. 7:26B-1.10 identifies the joint liability of the owner or operator to comply with ISRA and lists all of the events that authorize a transfer to occur, including the issuance of a final remediation document and the compliance with any of the alternative options listed in N.J.A.C. 7:26B-1.8(a). The Department does not believe a cross reference to N.J.A.C. 7:26B-1.10 is necessary at N.J.A.C. 7:26B-1.8(a) because these two provisions are to be read in concert; an owner or operator would not be required to comply with ISRA unless a listed event occurred.

154. COMMENT: At N.J.A.C. 7:26B-1.11(b), the Department has deleted the phrase "to remediate contamination," so that the Department may assess a civil administrative penalty for any violation of ISRA, including administrative requirements. This additional

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enforcement authority for “violations” that do not affect public health, safety or the environment is unnecessary. (11)

RESPONSE: The Department disagrees. Administrative requirements play an important role in the ISRA rules. Not only is an ISRA subject owner or operator required to remediate its industrial establishment in a timely fashion when an ISRA triggering event occurs, but the owner or operator is also required to comply with the administrative requirements of the ISRA rules. For example, an owner or operator is required to timely notify the Department when the triggering event occurs. If an owner or operator intentionally delays notification to the Department that ISRA was triggered, the owner or operator could be putting the public at risk by delaying the identification of contamination. Another example of an important administrative requirement, and one that is at the core of the ISRA statute, is the requirement to obtain authorization prior to selling an industrial establishment; a failure to obtain authorization is a direct violation of ISRA and should be subject to a penalty.

ISRA Rules - Subchapter 3: Notification and Remediation Requirements

155. COMMENT: N.J.A.C. 7:26B-3.2(e) requires the owner or operator to submit an amendment to the general information notice (GIN) for any event listed in N.J.A.C.

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7:26B-3.2(a). It is unreasonable for the GIN for one owner or operator to be amended by a subsequent triggering event by a different owner or operator. Instead, a separate GIN should be submitted for each triggering event so that the separate entities retain their individual responsibilities. (7)

RESPONSE: The Department agrees that each owner or operator is responsible for submitting a GIN whenever that owner or operator triggers ISRA.

The purpose of N.J.A.C. 7:26B-3.2(e) is to ensure that the GIN submitted by the current owner or operator is updated when any other triggering event that affects that owner or operator occurs after cessation of operations. N.J.A.C. 7:26B-3.2(e) does not require a subsequent owner or operator to update a GIN for the prior owner or operator.

After ceasing operations, the owner or operator has the continuing obligation to comply with ISRA until the owner or operator receives a final remediation document or an authorization letter pursuant to N.J.A.C. 7:26B-1.8. If, for example, the owner or operator enters into a sales agreement for the industrial establishment before receiving a final remediation document or authorization letter, the sale cannot occur unless the Department is notified. Accordingly, N.J.A.C. 7:26B-3.2(e) provides that in that

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instance, the GIN is to be amended to include the pending sale, and the final remediation document, when issued, should authorize both the sale and cessation of operations.

156. COMMENT: Pursuant to N.J.A.C. 7:26B-3.3(c)1, an LSRP must prepare and certify ISRA compliance costs on a remediation certification form. The cost estimate should include the cost of the implementation of the remediation, including the Department's fees and oversight costs, but excluding the estimated cost to operate, maintain and inspect engineering controls as part of a remedial action. (27)

RESPONSE: The Department disagrees with the commenter. The remediation certification must include an estimate of the entire cost of the remediation, including remedial actions that involve the use of an engineering control. "Remediation" is defined in the Technical Requirements at N.J.A.C. 7:26E-1.8, to which the ISRA rules cross reference, as "all necessary actions to investigate and clean up or respond to any known . . . discharge, including, as necessary, the . . . remedial action. . . ." "Remedial action" is defined as "those actions taken at a contaminated site as may be required by the Department. . . . A remedial action continues as long as an engineering control or an institutional control is needed to protect the public health and safety and the environment, and until all unrestricted use remediation standards are met." Therefore, the cost to

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operate, maintain and inspect engineering controls are remediation costs that must be included in an ISRA cost estimate.

ISRA Rules - Subchapter 5: Alternate Compliance Options

157. COMMENT: It is unclear why Department approval, and not LSRP approval, is required for the alternative compliance options that remain under ISRA. The Department has not provided any justification or rationale for requiring its approval, and this requirement has the potential to impede transactions, investigations and remediations, contrary to the goals of SRRA. If an LSRP was to be given authority to approve these alternative compliance options, the Department would still have the opportunity to review and invalidate these approvals if they were improperly issued. Accordingly, this section should be revised to allow LSRP approval of alternative compliance options. At a minimum, however, this section must provide for specific criteria for Department review and approval of these applications, or the alternate compliance options will be deemed much less effective. (11)

RESPONSE: None of the alternate compliance options in N.J.A.C. 7:26B-5 results in the issuance of a response action outcome or a remediation certification. Accordingly, the

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suggested amendment goes beyond the purview of an LSRP under SRRA and is therefore inappropriate.

The Department believes it can successfully and effectively implement the alternate compliance provisions of ISRA based upon the criteria present in ISRA itself. The Department does not believe, therefore, that additional rules will improve the decision making process necessary for these approvals.

158. COMMENT: The Department proposes eliminating five alternate compliance options, N.J.A.C. 7:26B-5.1, 5.2, 5.5, 5.6., and 5.8, including the expedited review, the area of concern waiver, the limited site review, the minimal environmental concern waiver and the remedial action workplan deferral. The first four are to be eliminated on the grounds that they are unnecessary in light of the availability of the remediation certification procedure whereby an LSRP may issue a remediation certification that enables a transaction to proceed without the need for further Department action. While this may be a good justification for eliminating these options, it ignores the fact that they have been authorized by statute and cannot be eliminated without the repeal of the statutory provisions. (6)

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RESPONSE: The Department disagrees that it may not proceed with these amendments until the Legislature deletes those alternate compliance options that are specifically enumerated in the ISRA. The Department compared the requirements of ISRA to those of SRRA and related amendments, and, as discussed at length in the proposal summary (43 N.J.R. 1941-1942), is interpreting SRRA as making these alternative compliance options either unnecessary (expedited review, limited site review, area of concern review, and minimum environmental concern waiver) or inconsistent with the affirmative obligation to remediate pursuant to SRRA (remedial action workplan deferral). The Department refers the commenter to that discussion.

The Department is often required to reconcile the provisions of various statutes with whose implementation the Department is charged. In so doing, the Department employs fundamental principles of statutory construction, including the principle that, where there is an inconsistency between two statutes that deal with the same or related subject matter, the provisions of the more specific statute will generally prevail. See, In re Highlands Master Plan, 421 N.J. Super. 614 (App. Div. 2011). The Brownfield Act provides a new affirmative obligation to remediate, and requires remediation to proceed without Department supervision. ISRA contains provisions that would halt remediation until the Department approves an alternate compliance option, even though the end result of the alternate compliance option is necessarily a response action outcome to be issued by the

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LSRP. In order to reconcile this statutory contradiction, the Department has determined to not hold up remediation while the Department reviews a request to use one of these alternate options.

159. COMMENT: The fifth alternate compliance option, (the remedial action workplan deferral) is to be eliminated on the grounds that the deferral of a remedial action workplan is inconsistent with the affirmative obligation to remediate; however, this is not necessarily the case. ISRA contains a provision that indicates that a deferral of a remedial action workplan under this alternate compliance option does not affect the Department's ability to require remediation under another statute, e.g., the new affirmative obligation. N.J.S.A. 13:1K-11.c. Therefore, these two provisions can be read in a consistent manner if they are read to exempt the subject remediation from ISRA but not from the independent obligations pursuant to SRRA. This would respect the Legislature's intent to exempt the subject transaction or cessation of operations from ISRA, but not to exempt the owner or operator from complying with the affirmative obligation by otherwise complying with the ARRCS and the Technical Requirements. Therefore, this option also should not be eliminated without a statutory repeal. (6)

RESPONSE: The Department acknowledges that N.J.S.A. 13:1K-11.c provides that a deferral of a remedial action workplan under this alternate compliance option does not

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affect the Department's ability to require remediation under another statute. However, as explained in the proposal summary, SRRA contains the affirmative obligation to remediate. To allow remediation to be deferred under ISRA and then invoke the affirmative obligation to remediate under SRRA would not conform with the Administrative Procedure Act and the standard of clarity set forth in the Rules for Agency Rulemaking, N.J.A.C. 1:30-2.1. As stated in the proposal summary, authorizing the closure or transfer of operations without the preparation, approval and implementation of a remedial action workplan for the industrial establishment, where the owner or operator of the industrial establishment is to be subject to substantially the same use as its current use, means that remediation may be deferred indefinitely pursuant to ISRA. The Department would then have to invoke its authority under SRRA and the Brownfield Act to require the site to be remediated. Instead of this "stop and go" approach, the Department has determined to implement the straightforward approach of eliminating from the ISRA rules the alternate compliance option of a remedial action workplan deferral.

160. COMMENT: N.J.A.C. 7:26B-5.4(c)2ii should be reworded as follows: "Any discharged hazardous substance or hazardous waste that occurred at the industrial establishment during the owner's or operator's ownership or operation has been remediated, [provided that] and the owner or operator includes identification of the spill

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incident number(s) and a copy of the final remediation document for the remediation of the discharge(s).” (27)

RESPONSE: The Department agrees that the suggested rewording of this provision would make the provision clearer. Accordingly, it is making the suggested change on adoption.

161. COMMENT: N.J.A.C. 7:26B-5.4, pertaining to the Remediation in Progress Waiver, has been modified to require that the owner or operator seeking such a waiver must submit a preliminary assessment (PA) and, as applicable, a site investigation (SI), documenting that there have either been no discharges during the owner or operator’s ownership or operation of the industrial establishment or that any discharges that have occurred have been remediated and a final remediation document has been issued. In contrast, under the current version of the rule, the owner or operator only has to certify that the PA and SI have been prepared and, if necessary, that a final remediation document has been issued. Given that an LSRP will be overseeing the preparation of the PA and SI, it should be satisfactory (and consistent with the LSRP program) for the LSRP to certify that an appropriate PA and SI have been prepared without the need to submit these reports for Department review. (6)

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RESPONSE: The Department agrees that prior to these amendments, N.J.A.C. 7:26B-5.4(c)3 required only a certification that the PA and SI where needed had been completed, and N.J.A.C. 7:26B-5.4(d) stated that the Department may require the submission of the PA and SI reports. Under new N.J.A.C. 7:26B-5.4(c), the PA and SI must be submitted with the application for a remediation in progress waiver because SRRA established mandatory timeframes for the submission of documents to the Department to ensure sites are remediated expeditiously. All documents are required to be submitted so that the Department can properly inspect and review documents submitted as is required by SRRA.

162. COMMENT: N.J.S.A. 7:26B-5.4(b) is a confusing sentence with the “or” and “and” mixed within and should be reworded. (6)

RESPONSE: The Department agrees the provision as proposed was confusing. Accordingly, on adoption, the wording is revised so that the phrase “without the submittal of a remediation certification” is placed following the clause to which it relates.

163. COMMENT: The purpose of the *de minimis* quantity exemption at N.J.A.C. 7:26B-5.9(e)1 is to exempt certain industrial establishments that use minimal amounts of hazardous materials from the provisions of ISRA. These industrial establishments are

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already subject to other laws and regulations that require the remediation of discharges as stated in this section at N.J.A.C. 7:26B-5.9(a). Many of the establishments applying for this exemption are small businesses, or tenants in multi-tenant facilities. Therefore the site may not have been the subject of an investigation, or the tenant may not be in a position to certify that the industrial establishment is not contaminated above any Remediation Standard. This should not preclude the applicant from obtaining a de minimis quantity exemption from ISRA. (27)

RESPONSE: The Department agrees with the commenter. Additionally, the de minimis quantity certification should be consistent with other certifications required of persons responsible for conducting the remediation. Specifically, N.J.A.C. 7:26B-5.9(a)1 requires that the de minimis quantity application form is to be certified in accordance with N.J.A.C. 7:26B-1.6 (which cross-references the certification requirements at N.J.A.C. 7:26C-1.5), and that it contain a certification that the industrial establishment is not contaminated above any standard set forth in the Remediation Standards, N.J.A.C. 7:26D.

However, the certification applicable to a person responsible for conducting the remediation under the ARRCs rules at N.J.A.C. 7:26C-1.5 does not require such an unequivocal certification. Rather, the person responsible for conducting the remediation

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is required to certify all submissions in accordance with the certification instructions on the applicable form. The ISRA *de minimis* application form requires the applicant to certify to the best of the applicant's knowledge. Accordingly, the Department is modifying N.J.A.C. 7:26B-5.9(e)1 on adoption to include the qualifier, "to the best of the owner or operator's knowledge."

164. COMMENT: The Department has added a new requirement that the applicant for a *de minimis* quantity exemption must certify that the industrial establishment is not contaminated above any standard set forth in the Remediation Standards, N.J.A.C. 7:26D. No such certification requirement appears in the current version of the regulations or in the statutory exemption. Does the Department intend that the owner or operator retain an LSRP to prepare a preliminary assessment and if applicable a site investigation to make this certification? It should be enough that the Legislature has not required this certification as a prerequisite to obtaining a *de minimis* quantity exemption and it should be eliminated. (6)

RESPONSE: As discussed above, the Department is amending the certification requirements on adoption. The owner or operator may hire someone to assist with making an application for a *de minimis* exemption but it is not necessary that it be a LSRP. If the owner or operator knows the site is contaminated through the owner's or

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operator's own actions or through the actions of a prior owner or operator, the owner or operator does not qualify for the *de minimis* exemption. The Legislature charged the Department with implementing ISRA through codified rules, and the Department has determined that the certification requirement is an essential compliance tool.

165. COMMENT: Concerning N.J.A.C. 7:26B-5.9(f)2, the Department's disapproval of the *de minimis* quantity exemption should not compel an owner or operator to embark upon a remediation. If the owner or operator proceeds to comply with ISRA, then a remediation will be initiated. However, if the owner or operator opts not to trigger ISRA, then there should not be a requirement to initiate a remediation. Remediation of discharges is already required pursuant to other laws and regulations. A disapproved application for a *de minimis* quantity exemption should not compel a party to initiate the remedial process. (27)

RESPONSE: The statutory definition of remediation includes the completion of a preliminary assessment through a remedial action, as necessary and applicable to the situation. Subsequent to a triggering event, an owner or operator subject to ISRA is required to either file a general information notice (GIN) and remediate the site or file a *de minimis* quantity application. If the Department determines that the owner or operator exceeds the limits to qualify for the *de minimis* exemption or the Department has

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knowledge the site is contaminated, the owner or operator is required to fully comply with ISRA if the transaction will still occur. As provided in N.J.A.C. 7:26B-3.2(c), if the event that triggered compliance with ISRA will no longer proceed, the *de minimis* quantity application becomes irrelevant and the owner or operator may submit an affidavit to withdraw from the ISRA process.

The Department agrees, however, that N.J.A.C. 7:26B-5.9(f) should more clearly state that the owner or operator may withdraw the notice (and is therefore not required to comply with ISRA) if the event that triggered compliance with ISRA will no longer proceed. Accordingly, on adoption, at N.J.A.C. 7:26B-5.9(f)2, the Department is adding a cross-reference to N.J.A.C. 7:26B-3.2(c), which contains the procedures for withdrawing the GIN when the owner or operator determines that none of the transactional events that trigger compliance with ISRA will occur.

166. COMMENT: Under the revisions proposed to N.J.A.C. 7:26B-5.9, dealing with the *de minimis* quantity exemption, the owner or operator qualifying for the exemption would be exempt from the “substantive requirements” of the ISRA regulations as opposed to the current version of the regulation that makes the owner or operator exempt from the “provisions” of the ISRA regulations without reference to either substantive or procedural requirements. The latter formulation is consistent with the statutory

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exemption at N.J.S.A. 13:1K-9.7, which makes no reference to “substantive requirements” and simply indicates that the owner or operator will be exempt from the “provisions of” N.J.S.A. 13:1K-9. The addition of the word “substantive” is not correct, in that the owner or operator is exempt from both substantive and procedural requirements. The wording should be left as in the current version of the regulation so as to be consistent with the statute and not create uncertainty as to the applicability of procedural, as opposed to substantive requirements. (6)

RESPONSE: An owner or operator who uses *de minimis* quantities of hazardous materials is still subject to ISRA and that owner or operator must obtain a *de minimis* quantity exemption approval from the Department before a sale can proceed or before a cessation of operations is authorized. ISRA does not exempt the owner or operator from the requirement to submit a notice of the triggering event and to qualify for the exemption.

167. COMMENT: At N.J.A.C. 7:26B-5.3(e)2, 5.6(d), and 5.9(f), the Department should add “administrative” before “requirements” in the cross references to the ARRCs rules. (6)

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RESPONSE: The Department agrees and on adoption is correcting the title of the cross-referenced rules at N.J.A.C. 7:26B-5.3(e)2 and 5.9(f), as well as at N.J.A.C. 7:26B-5.4(d)2. However, the correction is not required at N.J.A.C. 7:26B-5.6(d) because that provision is reserved.

ARRCS rules – General comments

168. COMMENT: The ARRCS rules should be amended and re-proposed so that Department professionals have more oversight at cleanups on New Jersey's toxic sites.
(36)

RESPONSE: In 2009, the Legislature enacted P.L. 2009, c. 60 (the Act), which includes the Site Remediation Reform Act (SRRA), N.J.S.A. 58:10C-1 et seq., and related amendments to the Industrial Site Recovery Act (ISRA), N.J.S.A. 13:1K-6 et seq., the Spill Compensation Control Act (Spill Act), 58:23-11 et seq., the Underground Storage of Hazardous Substances Act (UST Act), N.J.S.A. 58:10A-21 et seq., and the Brownfield and Contaminated Site Remediation Act (Brownfield Act), N.J.S.A. 58:10B-1 et seq., and charged the Department with its implementation.

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The Act specifies the type of Department oversight and the circumstances under which the Department may exercise that oversight. However, for most sites, the Act specifies that licensed site remediation professionals (LSRPs), who are licensed environmental consultants who have the requisite knowledge and experience, are to play a much larger role than contractors formerly had when remediating sites.

SRRA does not, however, discharge the Department from responsibility for sites being remediated under the supervision of an LSRP. Rather, the statute requires an LSRP to submit all key documents to the Department and provides a mechanism by which the Department provides varying levels of review of these documents. In addition, the Act provides that for the sites that pose the greatest risk to the public health and environment, either because the person responsible for conducting the remediation has demonstrated a reluctance to properly remediate the site, or because of environmental factors at the site, the Department directly oversees the site or portion of the site posing the risk.

The ARRCs rules carefully balance the legislatively mandated role of the Department and the LSRP as prescribed in the Act.

169. COMMENT: The rules require that public outreach be conducted in certain circumstances, including, for example, where the site is located in an environmental

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justice community or if residents express an interest by submitting a petition. However, regardless of the concerns raised by the public, there is no requirement that the LSRP incorporate the public's comments or concerns into the site plan, and there should be.

(36)

RESPONSE: The Department acknowledges that the rules do not specifically require an LSRP to incorporate the public's comments into the site plan. However, SRRA specifies that the LSRP's highest priority in the performance of professional services is the protection of public health and safety and the environment. Additionally, SRRA charges the LSRP to use best professional judgment. See N.J.S.A. 58:10C-16. Accordingly, where the public raises legitimate comments and concerns, it is incumbent on the LSRP to consider them in the course of remediating the site.

170. COMMENT: The ARRCs rules at N.J.A.C. 7:26C-1.4(a)4i do not make sense as written. The Department should add a comma between "occurred" and "at" in N.J.A.C. 7:26C-1.4(a)4i. (1)

RESPONSE: The Department declines to make the suggested revision because the provision is grammatically correct as proposed.

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171. COMMENT: The rules should specify how an LSRP should address chronic non-compliance by the LSRP's clients, such as delays on the part of the client in complying with the mandatory schedules, non-payment and noncooperation from a client.

(1)

RESPONSE: The person responsible for conducting the remediation has the responsibility for remediating sites in accordance with all environmental rules and statutes so that the site is remediated to be protective of public health and safety and the environment. To the extent that the person responsible for conducting the remediation does not comply with the rules, the ARRCs rules provide sanctions for that person's non-compliance. For example, the ARRCs rules provide at N.J.A.C. 7:26C-3.3(c) that if the Department determines that a person responsible for conducting the remediation has failed to meet a mandatory remediation timeframe, that site shall become subject to direct Department oversight pursuant to N.J.S.A. 58:10C-27.

The commenter has asked the Department to intervene in a private contractual matter between an LSRP and its client. The Department declines to intervene in matters concerning how individual LSRPs engage with their clients. The LSRP would have a decision to make whether or not she or he would continue to represent and work with a client who is in chronic non-compliance. The Department directs the commenter to the

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LSRP's code of conduct at N.J.S.A. 58:10C-16, which provides some general guidelines, and encourages all LSRPs to become familiar with its provisions.

172. COMMENT: The rules may actually exceed the Board's authority under SRRA.
(36)

173. COMMENT: The SRPL Board's proposed regulations on Professional Conduct should address the investigation of complaints by the Board and the involvement of the public in that process, and those issues should be addressed before these rules are adopted. (36)

RESPONSE to COMMENTS 172 and 173: The amendments and new rules do not pertain to the Site Remediation Professional Licensing (SRPL) Board or its authority. Rather, they pertain to persons responsible for conducting the remediation. The SRPL Board is in the process of drafting proposed new rules concerning the Board and LSRPs.

174. COMMENT: Delaying bringing certain sites not cleaned by the May 7, 2013 deadline back under Department jurisdiction, will allow toxic sites to continue to contaminate our communities and ground and surface waters. The statute was very

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specific that these sites needed to be cleaned by the deadline and this should not be delayed for one year. (36)

RESPONSE: The Department is unaware of the May 7, 2013 deadline to which the commenter refers, as there is no reference to such a deadline in either SRRA or in the amendments and new rules herein adopted.

To the extent that the commenter is referring to the May 7, 2014 deadline for completion of the remedial investigation for sites where a discharge was discovered prior to May 7, 1999, this deadline is established by SRRA at N.J.S.A. 58:10C-27, which requires the Department to undertake direct oversight of a site at which the person responsible for conducting the remediation failed to complete the remedial investigation of the site within five years of the May 7, 2009 enactment of SRRA. The Department has codified this requirement in the ARRCS rules at N.J.A.C. 7:26C-14.2(a)3. The Department agrees that this deadline should not be extended, as explained in response to Comment 66.

ARRCS - Subchapter 1: General Information

175. COMMENT: While SRRA abolished the use of the Memorandum of Agreement as an oversight document, it did not create any other mechanism to recognize and

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distinguish parties who voluntarily remediate without any other statutory obligation to do so. Voluntary cleanups are a common occurrence in the State, particularly in the development community. The State should incentivize such cleanups, even if the transaction ultimately is not completed and the developer walks away because the parties with legal responsibility to remediate must complete any unfinished work and undertake any ongoing compliance obligations. If the Department is in favor of developers continuing to consider redevelopment of environmentally impaired properties in the State, there needs to be an avenue for developers and other volunteers who are not otherwise liable for remediation to be recognized as such. (26)

RESPONSE: An innovative and important premise of the new site remediation program under SRRA is that there no longer exists a need for negotiated oversight documents governing the Department's oversight of remediation in most cases. With the enactment of P.L. 2009, c. 60 (the Act), more specific statutory and regulatory provisions have replaced the detailed oversight mechanisms utilized by the Department in the past. Although the Department has discontinued using memoranda of agreement (MOAs), it believes that SRRA and related amendments to the Spill Act and the Brownfield Act, together with these ARRCs rules, incentivize the voluntary remediation and redevelopment of brownfield sites by persons who have no statutory obligation to do so

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in much the same way that voluntary remediations utilizing MOAs did this before the Act.

The ARRCs rules establish the administrative procedures and requirements for the remediation of contaminated sites under new site remediation paradigm created by the Act. See N.J.A.C. 7:26C-1.1(a). N.J.A.C. 7:26C-1.4 identifies persons who are subject to the ARRCs rules:

1. Persons who have executed or are subject to a judicial or administrative order, a judicial consent judgment, an administrative consent order, a memorandum of understanding, a remediation agreement, or any other legally binding document with the Department for the remediation of a contaminated site;
2. Each owner and operator of a regulated underground storage tank who is liable for the remediation pursuant to the UST Act;
3. Each owner and operator of an industrial establishment who is liable for remediation of that establishment pursuant to ISRA;
4. Each person in any way responsible for any discharged hazardous substance pursuant to the Spill Act (examples cited in the rule omitted here);
5. Any person who is responsible for remediating a site pursuant to N.J.S.A. 58:10-23.11g of the Spill Act; and
6. A person responsible for conducting the remediation when:
 - a. The Department rescinds an NFA letter or invalidates an RAO; or

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- b. The LSRP rescinds his or her RAO; and
- c. Any other person who is responsible for remediating a site pursuant to N.J.S.A. 58:10B-1.3.

A person may voluntarily elect to remediate a contaminated site who is not liable for remediation under the Spill Act, ISRA or the UST Act and not subject to a judicial or administrative order, a judicial consent judgment, an administrative consent order, a memorandum of understanding, a remediation agreement, or any other legally binding document with the Department for the remediation of a contaminated site. If that person voluntarily undertakes remediation and then withdraws prior to completing the remediation, that person will not be liable for penalties pursuant to subchapter 9 of the ARRCs rules. However if that person wishes to obtain a final remediation document, that person must complete the remediation in compliance with all ARRCs rules and Technical Requirements. If that person fails to comply with a mandatory remediation timeframe and then elects to withdraw from the remediation, that person will not be subject to the requirements of Department direct oversight, although pursuant to the mandate of N.J.S.A. 58:10C-27.a the site will then be placed under Department direct oversight; however, if that person elects to continue with the remediation once the site is placed under Department direct oversight, that person must comply with all of the direct oversight requirements in N.J.S.A. 58:10C-27.c . Should such a person voluntarily

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implement a remedial action requiring an engineering and/or institutional control, that person will become a permittee on the remedial action permit issued by the Department.

176. COMMENT: At N.J.A.C. 7:26C-1.3, the definition of “remediation costs” has been unnecessarily expanded to include investigation and other costs, thereby expanding the cost tracking requirements of responsible parties as well the remediation funding source amounts that will need to be established. This definition should be revised to differentiate between costs that are associated with the actual remedy required at a site and costs associated with studies or other actions that may be required to determine if a remedy is needed. Since remediation costs are generally much more significant than investigation costs, the expansion of this definition provides no real benefit to the protection of public health or the environment, but does impose significant additional burdens upon a responsible party. (3, 11)

RESPONSE: The amendments to the definition of remediation costs merely clarify what is meant by “all costs associated with the development and implementation of a remediation.” As amended, the definition now lists each phase of the remediation, consistent with the statutory definition of that term, so that the public is aware that when the Department undertakes remediation, it, like everyone else who is tasked with

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remediating a site, performs a preliminary assessment, a site investigation, a remedial investigation, a feasibility study when applicable and a remedial action.

The Department and the person responsible for conducting the remediation use remediation costs to determine the amount of the financial assurance (FA) or remediation funding source (RFS) that the person needs to establish in case the person fails to complete the remediation and the Department has to take over the remediation using the funds in the FA or RFS. If the Department takes over the remediation, it would have to conduct the investigations, the cost of which are part of the remediation costs.

The Department agrees, however, that adding to the definition of remediation costs the costs incurred by a certified public accountant and certain legal costs to the extent that are directly supporting the remediation may cause the person responsible for conducting the remediation to have to post additional funds as a part of the remediation funding source. However, these amendments merely implement amended N.J.S.A. 58:10B-2.1 which now allows the Department to be reimbursed for these types of costs.

177. COMMENT: At N.J.A.C. 7:26C-1.3, the definition of “deed notice” has been redefined to state that it must be identical to the model deed notice provided for in Appendix D to the ARRCs. While it is important to have consistency in the deed notice

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used at contaminated sites, there may be instances where it is appropriate and necessary to amend certain language in a deed notice. An LSRP must be given the authority and flexibility to amend a deed notice if necessary, and this new definition will prevent him or her from doing so. (6)

RESPONSE: The definition of “deed notice” coincides with the requirement at N.J.A.C. 7:26C-7.2(a) that, where the person responsible for conducting the remediation, rather than the LSRP, chooses to implement a remedial action that requires an institutional control in the form of a deed notice, that the deed notice must be worded exactly as the model deed notice found in chapter Appendix B. The model deed notice in chapter Appendix B, however, does contain provisions that require insertion of site-specific information. The Department appreciates the commenter’s recognition that consistency is important, and believes that allowing the model deed notice to include site-specific information strikes an appropriate balance between consistency and site-specific flexibility.

178. COMMENT: The definition of “statutory permittee” mixes a regulatory requirement into the definition, where the definition states that a statutory permittee means “a person who subsequently becomes an owner, operator, or tenant of a site for which the Department has issued a remedial action permit pursuant to this chapter;

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provided however, that the Department may terminate a person's status as a statutory permittee if that person follows the applicable procedures in this chapter." The termination procedure should be in the rule, not in the definition. (6)

RESPONSE: ARRCs at N.J.A.C. 7:26C-7 sets forth with specificity how a person may transfer, modify or terminate a remedial action permit. See N.J.A.C. 7:26C-7.11, 12 and 13, respectively. The referenced language in the definition helps distinguish this permittee from other permittees concerning potential termination of status.

179. COMMENT: The Department should consider adding an additional exemption at N.J.A.C. 7:26C-1.4(c) for any person (including major facilities) that has reported, investigated, and remediated any discharges that occurred prior to the promulgation of the proposed regulations. (24)

RESPONSE: The proposed amendment is unnecessary because, if a person responsible for conducting the remediation, including the owner or operator of a major facility, has completed remediation as evidenced by the receipt of a final remediation document, that person is not subject to the ARRCs rules since the person is not a person responsible for conducting the remediation. Since 1993, the Legislature has mandated that a discharge is not remediated until the Department has issued a no further action letter. In 2009, the

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Legislature expanded this to include a response action outcome. To the extent that a person (including major facilities) that has reported, investigated, and remediated any discharges that occurred prior to the promulgation of the proposed regulations, indicated by the receipt of either a no further action letter or a response action outcome (collectively final remediation document), that person is not subject to these rules, beyond compliance with the biennial certification requirements for engineering and/or institutional controls.

Any person that does not wish to remediate a site using an LSRP must ensure that remediation is complete and that the Department has issued a no further action letter prior to May 7, 2012.

180. COMMENT: The Department should include on the list of exemptions at N.J.A.C. 7:26C-1.4(c) through (d) all due diligence activities, including pre-purchase Phase 1 environmental site assessment (ESA) due diligence under CERCLA. Without excluding CERCLA, the sale of properties in New Jersey could be affected. (7)

RESPONSE: N.J.A.C. 7:26C-1.4(c)1 exempts anyone who not otherwise liable to remediate the site pursuant to N.J.A.C. 7:26C-1.4(a) and who is conducting due diligence. See N.J.S.A. 58:10B-1.3d(2)(b), which exempts a person who “conducts a

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preliminary assessment or site investigation of the contaminated site for the purpose of conducting all appropriate inquiry into the previous ownership and uses of the property” as provided in the Spill Act at N.J.S.A. 58:10-23.11g. To the extent that a person engages in any activities that fall within this exemption, the person is exempt. The Department does not have the statutory authority to specifically carve out “pre-purchase Phase 1 ESA due diligence under CERCLA,” as neither the Spill Act nor the Brownfield Act contain such an exemption.

181. COMMENT: Listed at N.J.A.C. 7:26C-1.4(a) and N.J.A.C. 7:26C-2.2 are those categories of persons that are obligated to comply with ARRCs. The Department has improperly expanded the scope of responsible parties beyond that which is mandated by the controlling statutes. For example, N.J.A.C 7:26C-2.2(a)4 provides that “a person shall remediate a site in accordance with this chapter when ... the person discovers a discharge on property that person owns.” As drafted, this provision fails to take into account the innocent purchaser defense provide in the Spill Act, and goes substantially beyond the Court decisions that have specifically set forth when a property owner is responsible for addressing contamination on its property. Notably, this provision (unlike other subparagraphs in this section) fails to include any reference to statutory authority. (3)

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RESPONSE: The commenter is misreading the rule in concluding that “listed at N.J.A.C. 7:26C-1.4(a) and N.J.A.C. 7:26C-2.2 are those categories of persons that are obligated to comply with ARRCS.” The cited provisions address different issues. N.J.A.C. 7:26C-1.4(a) provides the persons to whom the ARRCS rules apply. N.J.A.C 7:26C-2.2(a), on the other hand, provides when the ARRCS rules apply to a person who is subject to these rules pursuant to N.J.A.C. 7:26C-1.4(a). The ARRCS applicability section, N.J.A.C. 7:26C-1.4(a), takes into account the innocent purchaser defense the Spill Act provides, and thus is consistent with the Court decisions that have specifically set forth when a property owner is responsible for addressing contamination on its property.

182. COMMENT: The liability protection afforded the development community under the Spill Act at N.J.S.A. 58:10-23.11g(d) is paramount to continued brownfield redevelopment in the State. N.J.A.C. 7:26C-1.4(a)4 would expand the definition of a liable party under the Spill Act in a manner that is inconsistent with the Spill Act and established case law. The Department should not include at N.J.A.C. 7:26E-1.4(a)4ii each subsequent owner of property where a discharge occurred prior to the filing of a final remediation document, without acknowledging that such owner may be able to avail itself of defenses from liability under the Spill Act. (26)

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183. COMMENT: The Department should amend N.J.A.C. 7:26C-1.4(a)4 and - 1.4(a)5 to clarify that any “passive interim owner” or person who may establish an innocent purchaser defense to liability pursuant to the Spill Act is not a person “in any way responsible” or required to comply with ARRCs. By failing to take account of the innocent purchaser defense and New Jersey judicial decisions that refrain from imposing Spill Act liability on passive interim owners who acquire properties after a discharge has occurred, see, e.g., State, Department of Environmental Protection v. Ventron Corporation, 94 N.J. 473, 502 (1983); see also White Oak Funding, Inc. v. Winning, 341 N.J. Super. 294, 301 (App. Div. 2001), proposed N.J.A.C. 7:26C-1.4(a)4ii and -1.4(a)5 improperly expand the definition of a person “in any way responsible” for a discharge.

(6)

RESPONSE to COMMENTS 182 and 183: N.J.A.C. 7:26C-1.4(a) does not expand the scope of persons who are liable for discharges under the Spill Act or fail to take into account innocent purchaser defenses established in the Spill Act. N.J.A.C. 7:26C-1.4(a)4 includes only those persons liable for cleanup and removal costs pursuant to the Spill Act. If a court were to find that such a person has a defense to that liability pursuant to N.J.S.A. 58:10-23.11g.d.(2)(a) through (d), then that person would not be liable pursuant to the Spill Act, and thus would be exempt from the ARRCs rules. However, a person who has a defense to Spill Act liability pursuant to N.J.S.A. 58:10-23.11g.d.(2)(e) is

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statutorily required to complete the remediation as a condition of that defense, unless they relied on a valid final remediation document for a remediation performed prior to acquisition of the property. As a result, a person who has a defense to Spill Act liability pursuant to N.J.S.A. 58:10-23.11g.d.(2)(e), and has not relied on a valid final remediation document, is not exempt from the ARRCS rules.

The ARRCS applicability section, N.J.A.C. 7:26C-1.4(a), takes into account the defenses to liability the Spill Act provides and is consistent with the Court decisions. Therefore there is no need to amend the rule as suggested.

184. COMMENT: N.J.A.C. 7:26C-1.4(a)1 provides that each person who has executed or is otherwise subject to the enumerated “binding” documents shall be required to comply with the ARRCS. This requirement has the potential to impose remediation obligations on parties that may not be “in any way responsible” pursuant to the Spill Act. In addition, the documents referenced in this provision generally specify certain requirements (including obtaining Department approval) and timeframes that may no longer be applicable under, or may conflict with provisions of, the ARRCS and the LSRP program. This will leave the responsible party and their LSRP in the untenable position of determining which provisions of these documents are no longer applicable or

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enforceable. Accordingly, the Department should provide a mechanism to either amend or close out the agreements and/or orders referenced in this section of the ARRCs. (3)

RESPONSE: The 2009 amendments to the Spill Act include a definition of “person responsible for conducting the remediation,” which includes “(1) any person who executes or is otherwise subject to an oversight document to remediate a contaminated site” N.J.S.A. 58:10-23.11b. The Brownfield Act amendments mandate that remediation now proceed without prior Department approval and under the oversight of an LSRP. This mandate applies to all persons responsible for conducting the remediation, including all persons conducting remediation pursuant to an ACO, MOU, or a RA, with the exception of some RCRA, CERCLA and Federal Facilities. This does not include persons conducting remediation pursuant to a memorandum of agreement. To ensure that such oversight documents do not conflict with the obligations to remediate by persons subject to the oversight documents, the Department will hold in abeyance all requirements in an oversight document that concern obtaining the Department’s preapproval of reports, workplans, progress reports, and all requirements to meet ACO/RA-specific timeframes. Parties are expected to proceed with remediation using an LSRP in accordance with N.J.A.C. 7:26C-2.4, and to meet all regulatory and mandatory timeframes contained in the applicable rules, including N.J.A.C. 7:14B, N.J.A.C. 7:26B, N.J.A.C. 7:26C and N.J.A.C. 7:26E. All other requirements of an existing oversight

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document remain in effect and are not held in abeyance, including, but not limited to, requirements for a remediation funding source (RFS), the RFS surcharge, and stipulated penalty provisions.

185. COMMENT: The requirements at N.J.A.C. 7:26C-1.6(b)2 concerning the submission of laboratory data deliverables are unnecessary, because of the existing requirement in the Technical Requirements at N.J.A.C. 7:26E-2.1(a)15 and Appendix A. Additionally, the submission of full deliverables in a paper copy is unduly burdensome and costly. All laboratory deliverables should be submitted to the Department in portable document format, as well as in the HAZSITE electronic format. Further, the requirement to submit paper copies of laboratory deliverables, often thousands of pages, is neither green nor sustainable as defined by the rules at N.J.A.C. 7:26C-1.3 and N.J.A.C 7:26E-1.9. (6)

RESPONSE: The Technical Requirements at N.J.A.C. 7:26E-2.1(a)15 and Appendix A describe the laboratory data deliverables that a person responsible for conducting the remediation is required to submit to the Department. These are technical requirements that belong in the Technical Requirements. The ARRCs rules at N.J.A.C. 7:26C-1.6(b)2 describe the way in which the person is to submit documents (including laboratory data

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deliverables) to the Department. These are administrative requirements that belong in the ARRCS rules.

Paper copies of data deliverables are necessary to help facilitate the Department's review and data validation. Data validation requires the reviewer to make comparisons from one page to another and this comparison is not easily accomplished from a single computer screen. As multiple pages are required to be viewed simultaneously during the validation process, using paper copies expedites the process.

The Department disagrees that the requirement is overly burdensome and costly. Paper copies are only required for full deliverables, that is, only for data that will be validated by the Department such as potable water data, vapor intrusion data, hexavalent chromium data and dioxin data. The rules do not require paper copies of any other data.

ARRCS - Subchapter 2: Obligations of the person responsible for conducting the remediation of a contaminated site

186. COMMENT: N.J.A.C. 7:26C-2.2(a)4 and (a)5 should not apply to a person who has a defense to liability under the Spill Act, where for example, the person complied with the provisions of N.J.S.A. 58:10-23.11g(d) or (e) or the person is a passive, interim

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owner as held by New Jersey courts. It is neither reasonable nor prudent make an LSRP responsible for the legal determination as to whether a party is liable and when the rules apply to that party. These provisions should be modified or deleted so as not to be inconsistent with the important liability protections in the Spill Act that are key to the development community's willingness to take on brownfield redevelopment and its attendant liability exposure. (26)

187. COMMENT: N.J.A.C. 7:26C-2.2(a)5 and 6 provide that “a person shall remediate a site in accordance with this chapter when ... (5) a no further action letter is rescinded or a response action outcome is invalidated; [or] (6) [t]he Department determines that additional remediation is necessary after the Department has issued a remedial action permit for a remedial action;” These provisions should include a reference to statutory authority. In addition, while this section purports to identify when a person is responsible for complying with this subchapter, these provisions fail to identify which person is responsible for acting when any of the “triggers” in N.J.A.C. 7:26C-2.2(a)5 or 6 occur. (3)

RESPONSE to COMMENTS 186 and 187: As previously stated in response to comments 182 and 183, N.J.A.C. 7:26C-1.4(a) lists the persons to whom the ARRCs rules apply. N.J.A.C. 7:26C-2.2 applies only to the persons identified in N.J.A.C. 7:26C-

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1.4(a) as subject to the ARRCs rules. The defenses and situations the commenters raise, such as “interim, passive owners,” relate to the analysis of the applicability of the ARRCs rules under N.J.A.C. 7:26C-1.4(a), rather than to an analysis of when persons subject to the ARRCs rules must initiate remediation pursuant to N.J.A.C. 7:26C-2.2.

Additionally, the ARRCs rules do not, as the commenter implies, require the LSRP to make the legal determination as to the liability of the person responsible for conducting the remediation. The rules at N.J.A.C. 7:26C-2.2 apply to a person responsible for conducting the remediation. It is the responsibility of the person responsible for conducting the remediation and not the LSRP to determine if the person is liable pursuant to the Spill Act.

Contrary to the commenter’s assertion, N.J.A.C. 7:26C-2.2 will not have a detrimental effect on Brownfield remediations because that rule does not alter the current statutory scheme of liability.

188. COMMENT: N.J.A.C. 7:26C-2.2 should acknowledge that an LSRP-approved workplan is deemed by the Department to meet the statutory requirement of N.J.S.A. 58:10-23.11g.d(2)(e). (26)

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RESPONSE: The Department disagrees that N.J.A.C. 7:26C-2.2 should acknowledge that an LSRP-approved workplan is deemed by the Department to meet the statutory requirement of N.J.S.A. 58:10-23.11g.d(2)(e). While the Legislature made other amendments to this statutory provision, it did not make an amendment that would support the commenter's suggestion. Thus it would be inappropriate for the Department to do so in a regulation.

In pertinent part, N.J.S.A. 58:10-23.11g.d(2)(e) provides that if a person who acquires contaminated property, among other things, obtains Department approval of a remedial action workplan, that person has no liability for further remediation of the site if the person follows the additional requirements of N.J.S.A. 58:10-23.11g.d(2)(e). An LSRP-approved remedial action workplan does not have the same effect as a workplan approved by the Department under this provision of the Spill Act because the Spill Act does not mention LSRP approval of a remedial action workplan.

189. COMMENT: At N.J.A.C. 7:26C-2.2(a)2ii the cross reference to N.J.A.C. 7:14B-8.1(a)6 needs to be corrected because the revised version of this rule only goes up to N.J.A.C. 7:14B-8.1(a)4. (27)

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RESPONSE: The Department agrees that the cross-reference is incorrect. On adoption, the cross reference at N.J.A.C. 7:26C-2.2(a)2ii is corrected to N.J.A.C. 7:14B- 8.1(b)6.

190. COMMENT: N.J.A.C. 7:26C-2.2(a)2ii cross references N.J.A.C. 7:14B-9.1(d). Is closure considered remediation? What if there is no discharge/release from the underground storage tank? (27)

RESPONSE: N.J.A.C. 7:14B-9.1(d) requires that an owner or operator of an underground storage tank (UST) system that is out of service for greater than 12 months without complying with the requirements of N.J.A.C. 7:14B-9.1(c) must close the system in accordance with the closure requirements for UST systems at N.J.A.C. 7:14B-9.2. Part of those closure requirements, N.J.A.C. 7:14B-9.2(a)5, requires the owner or operator to conduct remediation if any contamination is detected above any applicable remediation standard. Conversely, if no contamination is detected, remediation is not required.

191. COMMENT: N.J.A.C. 7:26C-2.3(a)1 exempts Federal lead sites being remediated partially or solely to satisfy the obligations under the Resource Conservation and Recovery Act (RCRA) from the requirement to hire an LSRP. However, the rule does not take into account or address how the person also responsible for completing remediation under ISRA for the same site is to satisfy or document ISRA compliance

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(without issuance of a final remediation document or approved remedial action workplan) authorizing the owner or operator to transfer ownership or operations of the industrial establishment, particularly in the instance when the ongoing RCRA remediation will not be completed until sometime well into the future (after the transfer is to occur). It appears that the intent of this proposed rule is to alleviate the burden of placing unnecessary additional layers of regulatory requirements on the responsible party by exempting all Federal lead sites undertaking RCRA remediation from complying with ISRA. However, it is not all that clear as currently drafted. The Department should clarify this issue and identify the mechanism for demonstrating ISRA compliance at a Federal lead site in the rule. (2)

RESPONSE: ISRA exempts from the definition of industrial establishment any facility or part of a facility that is subject to the RCRA closure and post-closure maintenance requirements. N.J.S.A. 13:1K-8. Thus, there does not seem to be the overlap of which the commenter complains.

192. COMMENT: In discussions between EPA and the Department, it was agreed that the Department would conduct “traditional” oversight for the Department-lead RCRA Government Performance and Results Act (GPRA) facilities. The Department drafted guidance on this, and forwarded letters to facilities informing them that they shall hire

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LSRPs, but that they need to obtain approval from the Department before proceeding with remediations, and the EPA approves of this effort. However, it is unclear from N.J.A.C. 7:26C-2.3(a)3i(1) that RCRA GPRA sites cannot proceed without Department approval because the RCRA GPRA sites are supposed to be included in a category that notes that sites can proceed without Department approval “except if the Department directs otherwise.” The rules should be made a little clearer that RCRA GPRA sites cannot proceed without Department approval. (37)

RESPONSE: The Department agrees that the rules could be clearer on this point.

N.J.A.C. 7:26C-2.3(a)1i provides that a person who is conducting remediation at a RCRA GPRA site for which the EPA is the lead need not hire an LSRP. However, the Department erroneously carried the “Federal lead” concept over to N.J.A.C. 7:26C-2.3(a)3i, which requires all persons responsible for conducting the remediation to conduct remediation without Department approval unless the site is a RCRA GPRA site for which EPA is the lead. This provision effectively carves Department lead RCRA GPRA remediations from obtaining Department approval. As the commenter correctly points out, no remediation at a RCRA GPRA site may proceed without Department approval, regardless of whether EPA or the Department is the lead agency. Accordingly, the Department, on adoption, is modifying N.J.A.C. 7:26C-2.3(a)3i to so provide.

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193. COMMENT: RCRA Corrective Action sites that are EPA lead will require Department approvals prior to proceeding with remedial actions, because no exemption is provided for RCRA Corrective Action GPRA priority sites that are Department lead. However, there is no specific mention of RCRA Corrective Action GPRA priority sites that are Department lead in any part of the rule proposal. Thus, under N.J.A.C 7:26C-2.3(a), RCRA Corrective Action GPRA priority sites that are Department-lead sites are no different than any other Department-regulated site and are required to proceed as any other LSRP site. The Department has correctly recognized that EPA will not accept the LSRP as a substitute for the Department's case team. As stated in the preamble to the Rule Proposal, "EPA does not have a program licensing remediation professionals so that they could 'stand-in the shoes' of the Federal government in determining compliance with Federal requirements, and thus the EPA would not accept a decision made by an LSRP that a site was remediated pursuant to Federal requirements." (37)

194. COMMENT: Prior to this proposed rulemaking, the 107 RCRA Corrective Action GPRA priority sites in New Jersey were subject to an agreement between the Department and EPA whereupon Department case teams performed stepwise review and approvals, and EPA relied upon the detailed reviews conducted by the Department as a basis for their own determinations of work adequacy and completion. Under the rule proposal, however, persons responsible for the remediation of GPRA priority sites that are

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Department lead sites will have no choice but to hire an LSRP and proceed per all relevant timeframes and requirements set forth in the rules, despite the fact that EPA will not accept that work as valid without Department case team approval. (3)

RESPONSE to COMMENTS 193 and 194: The ARRCs rules require a person responsible for conducting the remediation to proceed with remediation unless the Department determines otherwise. RCRA GPRAs priority sites are sites on which the Department would direct the person only to proceed with the Department's approval. For these sites, the person is required to hire an LSRP, but the Department intends to require the person to obtain prior Department approval before implementing each remediation phase. These requirements are usually set forth with specificity in the administrative order or other oversight document that controls the remediation. Accordingly, no amendments to the rules are necessary.

195. COMMENT: The provisions of the rule proposal stand in stark contrast to the Department's position set forth on June 20, 2011, less than two months prior to release of the Rule Proposal, in an official directive to RCRA Corrective Action GPRAs priority sites that are Department lead. The rule must be revised to address the realities of the dual regulation status of these 107 Department lead, RCRA Corrective Action GPRAs sites, with a particular focus on addressing the stepwise review and approval cycles

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required, in order to ensure that both Department and EPA are in agreement with the remediation as it proceeds towards completion. In particular, these revisions must provide relief from regulatory and mandatory timeframes, since the RCRA Corrective Action GPRA priority sites that are Department lead sites will be subject to the review cycle times of both agencies, over which the persons responsible for remediation exercise no control. Department lead RCRA GPRA priority Corrective Action sites must not be put at risk of missing regulatory and mandatory timeframes while awaiting EPA review and approval of proposed remedies or the prerequisite investigations and plans, or proceeding and risk EPA disapproving the work after it is completed. Similarly, since EPA will not accept the LSRP as decision-maker, requiring an LSRP be retained for these sites provides no identifiable benefit. Without these necessary revisions, the Rule Proposal presents an unacceptable and unduly burdensome paradigm for these NJDEP lead sites and accordingly it must be revised to incorporate a workable solution for this category of sites. (3)

RESPONSE: The amendments and new rules do not provide for dual oversight of RCRA/GPRA sites where EPA is the lead, and do not require that the RCRA/GPRA responsible party also hire an LSRP and comply with remediation time frames. In fact, the ARRCs rules at N.J.A.C. 7:26C-2.3(a)3i exempt the owner or operator of a Federal

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lead site from the obligation to hire an LSRP, because the Federal Environmental Protection Agency has the ultimate authority on directing the remediation.

The ARRCs rules require a person responsible for conducting the remediation to proceed with remediation unless the Department determines otherwise. RCRA GPRA priority sites are sites on which the Department would direct the person to not proceed. For these sites, the person is required to hire an LSRP, but the Department intends to require the person to obtain prior Department approval before implementing each remediation phase. These requirements are generally set forth with specificity in the administrative order or other oversight document that controls the remediation.

The ARRCs rules at N.J.A.C. 7:26C-3.3 include methods for obtaining an extension of mandatory timeframes, including for circumstances under which the person responsible for conducting the remediation is waiting for Department or other agency approvals. For further information, please see the Department's website at www.state.nj.us/dep/srp/srra/listserv_archives/2011/20110404_1430_srra.htm.

196. COMMENT: At N.J.A.C. 7:26C-2.3(a)2, regarding the notification form for an LSRP, the form should include the number of contaminated areas of concern and impacted media known at the time the form is submitted. (27)

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RESPONSE: The Department agrees. The form reflects the requirements of the rule in this regard.

197. COMMENT: N.J.A.C. 7:26C-2.3(a)2 cross references N.J.A.C. 7:26C-4.3(b)2, which is associated with contaminated media for brownfields. Is this an incorrect cross reference? Is the Department asking for a preliminary assessment or review of the case file to be performed, or is the Department requiring the LSRP to just identify what is known to him/her at time form submitted? The commenter prefers the latter. (27)

RESPONSE: The Department agrees that N.J.A.C. 7:26C-2.3(a)2 incorrectly cross references to N.J.A.C. 7:26C-4.3(b)2. The correct cross-reference, which the Department is revising on adoption, is to N.J.A.C. 7:26C-4.2. The LSRP Retention or Dismissal form requires the person responsible for conducting the remediation who is not remediating the entire site to indicate the number of known contaminated areas of concern that the LSRP named in the form the AOC that the LSRP is addressing. These are the areas of concern that are known to the person responsible for conducting the remediation at the time the form is being submitted.

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198. COMMENT: N.J.A.C. 7:26C-2.3(a)(2), as drafted, is unclear and should be clarified. It reads, from the end of the paragraph, “within 45 days after [the date] if the earliest. . . .” (26)

RESPONSE: N.J.A.C. 7:26C-2.3(a)2 correctly leads into a series of “if/then” statements that describe the triggering events from which the 45-day notification submission deadline would run. However, the triggering date is missing at N.J.A.C. 7:26C-2.3(a)2i. As noted in the proposal summary at 43 N.J.R. 1949, N.J.A.C. 7:26C-2.3(a)2i should reference May 7, 2012. Accordingly, on adoption, the Department is inserting this date at N.J.A.C. 7:26C-2.3(a)2i.

199. COMMENT: N.J.A.C. 7:26C-2.3(a)3 sets forth when a person should conduct remediation without prior Department approval. N.J.A.C. 7:26C-2.3(a)3i(2) through (5) goes on to list scenarios where the Department has statutory authority to retain direct oversight of a matter. However, N.J.A.C. 7:26C-2.3(a)3i(1) prohibits a person from proceeding without prior Department approval where the Department directs otherwise. This provision implies that the Department may take direct oversight of a matter if it so directs.

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N.J.S.A. 58:10C-27 sets forth the specific circumstances when the Department shall take direct oversight of a matter and the clear expression of the statute is of critical importance as direct oversight significantly impacts the control, the cost and potentially the duration of a cleanup. The statute does not provide the Department discretion as to when it can take direct oversight. Accordingly, N.J.A.C. 7:26C-2.3(a)3i(l) should be deleted. (26)

RESPONSE: The commenter is confusing N.J.A.C. 7:26C-2.3(a)3i(l), which allows the Department to direct the person responsible for conducting the remediation to stop remediation, with N.J.A.C. 7:26C-14, which sets forth how the Department would determine whether and when it will undertake direct oversight of the remediation. A determination by the Department to stop remediation under N.J.A.C. 7:26C-2.3(a)3i(l) may be made without the Department taking over the remediation. The Department's authority to direct an LSRP to stop working without Department approval is not limited to direct oversight situations embodied in N.J.S.A. 58:10C-27. For example, where the person has varied from a technical requirement under N.J.A.C. 7:26E-1.7, the person is to continue to remediate unless the Department directs otherwise.

200. COMMENT: N.J.A.C. 7:26C-2.3(a)3i requires the person responsible for conducting the remediation to conduct the remediation without prior Departmental approval, except if the Department directs otherwise. What criteria will the Department

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use to so direct? Are there examples of which types of remediation the Department will not allow without its approval? (27)

RESPONSE: As amended, the Brownfield Act at N.J.S.A. 58:10B-1.3b(3) commands the person responsible for conducting the remediation to “conduct the remediation without the prior approval of the department unless directed otherwise by the department.” N.J.A.C. 7:26C-2.3(a)3i implements this provision. The Brownfield Act at N.J.S.A. 58:10B-12g requires that the development, selection and implementation of any remedial action must ensure that it is protective of public health, safety and the environment. SRRA also requires the remediation to be conducted pursuant to the hierarchy at N.J.S.A. 58:10C-14c. Accordingly, the Department may direct a person to cease remediation and proceed only with Department approval when that person’s remediation is not being conducted pursuant to the hierarchy at N.J.S.A. 58:10C-14c and N.J.A.C. 7:26C-1.2(a), or is otherwise not protective of the public health and safety or the environment. For example, if a Department inspection of a key document submitted by a LSRP indicates that the LSRP is directing the person responsible for conducting the remediation to remediate a site in a manner that will result in a remedy that is not protective, the Department may direct the person responsible for conducting the remediation to obtain Department approval prior to moving forward with the remediation pursuant to N.J.A.C. 7:26C-2.3(a)3i(1).

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201. COMMENT: Concerning N.J.A.C. 7:26C-2.3(a)3i(4), if anthropogenic radionuclide contamination is present on the site from a clearly documented unrelated source, does the person responsible for conducting the remediation still have to obtain pre-approval from the Department to remediate comingled non-radionuclide contamination? (20)

RESPONSE: N.J.A.C. 7:26C-2.3(a)3i(4) excepts from the requirement to proceed with the remediation without Department approval those conditions involving suspected or known contamination with anthropogenic radionuclide contamination of any media because those conditions can pose a grave risk to public health and the environment. Contamination from anthropogenic radionuclides is unique, and determining appropriate remedial actions and acceptable standards is complex. Therefore, as stated in the proposal summary, the Site Remediation Program defers on these issues to the Department's Radiation Protection Program.

In the situation posed by the commenter, where contamination from anthropogenic radionuclides is comingled with contamination from other sources, pre-approval from the Department to remediate the non-radioactive contamination would be necessary for the very reason that it is comingled with the radioactive contamination. The remedy for each

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type of contamination must be carefully designed to avoid exacerbating contamination from either contamination source during remedy implementation.

202. COMMENT: N.J.A.C. 7:26C-2.3(a)3i(5) should be deleted because it is inconsistent with the recently updated IEC Guidance Document. Pursuant to the Immediate Environmental Concern (IEC) Technical Guidance Document DRAFT, version 1.0 (August 2011), www.state.nj.us/dep/srp/guidance, the Department will not specifically “approve” an engineered response action for an IEC. Additionally, the requirements at N.J.A.C. 7:26E-1.11(a)6 (IEC requirements) do not contemplate any type of proposal submission to the Department for an engineered system response action. Rather the person responsible for conducting the remediation must simply implement the IEC engineered response action within 60 days of identifying the IEC conduction, and then submit an engineered system response action report within 120 days after identifying the IEC. Even though the Department will assign a case manager for all IECs, there are no formal workplan/proposal submissions to be made to the case manager (and therefore, no “approvals”), as this would simply delay the implementation of the necessary IEC mitigation activities. (3, 6, 11)

RESPONSE: The Department agrees with the commenter that the requirement in the ARRCs rules at N.J.A.C. 7:26C-2.3(a)3i(5) to obtain Department approval for

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implementation of an engineered response action in connection with an immediate environmental concern contradicts the requirements in the Technical Rules at N.J.A.C. 7:26E-1.11 to immediately implement the actions necessary to investigate and contain the source of the immediate environmental concern to reduce the risk of human exposure to contamination to acceptable standards. The Department therefore is not adopting new N.J.A.C. 7:26C-2.3(a)3i(5).

The effect of not adopting N.J.A.C. 7:26C-2.3(a)3i(5) will be that the person responsible for conducting the remediation must address the IEC in a timely manner, without Department pre-approval, in accordance with the Technical Requirements at N.J.A.C. 7:26E-1.11(a)1. However, the requirement that the person immediately call the Department's hotline, and immediately notify the Department's case manager if one has already been assigned, upon the identification of an immediate environmental concern will remain at N.J.A.C. 7:26E-1.11(a)1, and this requirement is extremely important. The Department anticipates that, upon notification, the Department's case manager and the person responsible for conducting the remediation will establish an informal dialogue to ensure that the IEC is timely and appropriately addressed and people and the environment are protected. To the extent that the person responsible for conducting the remediation is not timely and appropriately addressing the IEC, the Department continues to have the

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option, as set forth at N.J.A.C. 7:26C-2.3(a)3i(1), to direct the person responsible for conducting the remediation to stop remediation as discussed above.

203. COMMENT: Why does the rule text under N.J.A.C. 7:26C-2.4, to be recodified at 2.3(a) state “4.- 6. (No change.) and 8 .- 9. (No change.)”? (27)

RESPONSE: N.J.A.C. 7:26C-2.4(a) is to be recodified at N.J.A.C. 7:26C-2.3(a). The Department is carrying forward existing N.J.A.C. 7:26C-2.4(a)4 through 6 and 8 and 9, but is recodifying them at N.J.A.C. 7:26C-2.3(a) 4 through 6 and 8 and 9 with no change in the existing text.

204. COMMENT: N.J.A.C. 7:26C-2.3 and 2.5 require the person responsible for conducting the remediation (not the LSRP) to maintain and preserve all data, files, etc. Also if the Department requests documentation, the person responsible for remediating site is to so provide. This conflicts with SRRA, which requires the LSRP to maintain the file. However, requiring an LSRP to retain the entire file and be responsible for its preservation forever (even after leaving the company, or retiring) is not practical. What is the Department’s stance on this issue? (27)

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RESPONSE: As the Department stated in the proposal summary regarding the repeal of N.J.A.C. 7:26C-2.5 (see 43 N.J.R. 1949), SRRA at N.J.S.A. 58:10C-20 places record retention responsibilities on the LSRP. However, SRRA also provides at N.J.S.A. 58:10C-21d that “the licensed site remediation professional and the person responsible for conducting the remediation shall provide any data, documents or other information as requested by the department to conduct a review of the remediation pursuant to this section.” Implicit in this statutory requirement is the authority to require that both the person responsible for conducting the remediation and the LSRP maintain records and submit them to the Department. Accordingly, on adoption, the Department is not proceeding with the repeal of N.J.A.C. 7:26C-2.5, and is also revising this provision to require only one copy of each document as opposed to three. The Department recognizes that issues remain regarding the duration of record keeping requirements, but is unwilling to address this issue at the infancy of the program. As the program matures, the Department will be in a better position to determine how long records should be maintained and will revisit this issue at that time with stakeholder input.

205. COMMENT: At N.J.A.C. 7:26C-2.3(b), “2.3(a)” should be inserted at end of the sentence, rather than having it say only “(a) above.” (27)

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RESPONSE: The citation to “(a) above” correctly cross references N.J.A.C. 7:26C-2.3(a); accordingly, the Department declines to make the suggested amendment.

ARRCS Subchapter 4 – Fees and Oversight Costs

206. COMMENT: N.J.A.C. 7:26C-4.2(b)4i(2) requires an annual remediation fee to be paid, even if the only contaminated AOC on the site is historic fill. As historic fill is, by definition, unrelated to the operations of the site, the Department is penalizing property owners solely for something unrelated to their operations when (particularly in urban areas) many of their neighbors will not be paying this same fee. This is a disincentive to the proper reporting and remediation of historic fill at all sites. An exemption from remediation fees should be provided for those sites where the only contaminated AOC is historic fill. (6)

RESPONSE: As indicated in the rule proposal summary, the Department will be offsetting sixty-five percent of the costs of administering the Site Remediation Reform Act with the contaminated area of concern fees. The Brownfield Act at N.J.S.A. 58:10B-12h contemplates that historic fill is a contaminated area of concern, and where the owner of the property on which the historic fill is located chooses to leave the historic fill in

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place, N.J.S.A. 58:10B-12h requires that person to implement engineering and institutional controls. Accordingly, for fee purposes, where historic fill remains in place, the historic fill area of concern is treated no differently from cases with other areas of concern. The Department is not penalizing the property owners with historic fill but rather, it is requiring historic fill area of concern property owners to share in the cost to implement the program to the same extent as other persons responsible for conducting the remediation who are remediating contaminated areas of concern.

207. COMMENT: For the purposes of the fee provisions at N.J.A.C. 7:26C-4.2(b)4i, all regulated UST sites are classified as ‘Category 1’ cases. Regulated UST sites are typically remediated as a single area of concern, since the contaminants are all related to motor fuels and the USTs and the appurtenant equipment are regulated as a single system pursuant to N.J.A.C. 7:14B. The fee categories as proposed erroneously presume that regulated UST sites storing motor fuel have numerous tanks and dispenser locations. In reality, it is unlikely that more than one AOC exists at the site. (9)

208. COMMENT: The Department should amend N.J.A.C. 7:26C-4.2(b)4i and ii to restore regulated underground heating oil tanks to the base fee category. N.J.A.C. 7:26C-4.2(a)2ii(2) currently includes in the base fee category, “Any number of contaminated regulated underground storage tank system areas, excluding regulated heating oil tank

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systems, provided there are no other contaminated areas of concern at the site: \$900.00”

(9)

209. COMMENT: In previous iterations of this rule the Department recognized contaminated regulated heating oil UST sites as those sites that most commonly involve a single area of concern. This rule proposal should include the contaminated regulated heating oil UST in Category 1 and should exempt the regulated heating oil tanks from Category 2. (9)

RESPONSE to COMMENTS 207 through 209: The Department agrees with the commenter. When the Department recodified the descriptions of the various categories from N.J.A.C. 7:26C-4.2(a)2ii to N.J.A.C. 7:26C-4.2(b)4, it inadvertently failed to carry over the exception from Category 2 for a regulated heating oil tank system. On adoption, the Department is restoring this exception at N.J.A.C. 7:26C-4.2(b)4ii(2) to maintain the status quo concerning these types of tanks. As a result, consistent with the prior rules, where a regulated heating oil tank system is the only contaminated area of concern at the site, the regulated heating oil tank qualifies as a Category 1 item and will be subject to the base fee of \$450.00.

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210. COMMENT: Due to legal and financial constraints, there will be “no activity” periods during various stages of the site investigation/remediation phases. There should be a procedure to waive the fees during prolonged non-activity periods. Without these provisions, financially weak smaller responsible parties will fail to pay the fees and penalties will accumulate during these dormant stages that could jeopardize the funding for achieving site cleanup goals. (27)

211. COMMENT: The fees for “contaminated media” and “AOCs” should be redefined with its “extents” and there should be provisions to exclude the related cost factors based on “de minimis” rules whenever applicable. For example, a site with a marginally elevated single contaminant detected at a single sampling location (primarily small UST related sites) with less than a five foot radius of extent should not be equated with a complex site with extensive groundwater contamination in overburden and bedrock aquifers. (27)

RESPONSE to COMMENTS 210 and 211: Further amending the rules to allow the fees to be calculated based on various quantities of contaminants or periods of inactivity during the remediation would make the rules far too complicated. Additionally, rules excusing payment during so called “no activity” periods might encourage persons responsible for conducting the remediation to use the “no activity” exception as a way to

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avoid paying fees, even during such times that remediation was progressing, and might encourage persons to stop remediation as a way to avoid paying fees, which would contravene SRRA's mandate to continuously remediate.

212. COMMENT: N.J.A.C. 7:26C-4.2(b)4i through iv contemplate a variable fee based on the Department's budget for administering the Site Remediation Program. It is anticipated that consultants and LSRPs will implement different techniques to count the areas of concern which will result in highly variable fees being paid by the regulated community. Based on the foregoing, the annual remediation fee is no longer fixed, is no longer predictable, and perhaps will be in an amount that is no less than the amount that would otherwise be charged under the traditional oversight program. The Department should keep the existing rules in place for at least another year to provide enough data to assess whether the fee structure is workable. Additionally, instead of the fee structure being based on areas of concern, it should be based on impacted media. (11, 21)

RESPONSE: Rather than adopting a one-size-fits-all approach as implied by the commenter, the fee structure built into the ARRCs rules takes into account the variation among remediation projects by requiring that the person responsible for conducting the remediation calculate the annual remediation fee based on the number of contaminated areas of concern and the number of contaminated media that the person is remediating.

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Thus, a person who is only remediating a single area of concern will be required to pay a significantly lower fee than a person who is remediating several areas of concern.

Additionally, as areas of concern and contaminated media are satisfactorily remediated, the amount of the annual remediation fee will decrease, thereby providing added incentive for conducting remediation in a timely fashion.

The Department expects that LSRPs will use the definition of “area of concern” at N.J.A.C. 7:26E-1.8 in accounting for, and documenting, the number of areas of concern at a site.

213. COMMENT: As originally proposed, the annual remediation fees to be paid by a person responsible for conducting the remediation under the new site remediation program were to be a predictable, fixed amount. In the rule proposal, however, the fixed annual remediation fees have been replaced with a variable fee based on the Department's budget for administering the site remediation program. The Department should go back to the fixed fee concept. (11, 39)

214. COMMENT: The fixed annual remediation fees have been replaced with a variable fee based on the Department's budget for administering the site remediation

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program. This approach suggests that there will be no attempt by, or incentive for, the Department to streamline its processes and reduce costs. (11)

RESPONSE to COMMENTS 213 and 214: The Department acknowledges that the rules now include a formula by which the Department may adjust the annual remediation fee according to its actual costs to implement the program. During the first two years of program implementation, the Department's budget has been relatively stable, and the Department anticipates that this will remain the case. Additionally, although fees may increase upon recalculation pursuant to the formulas in the rules, a decrease in fees is also possible.

SRRA required the Department to streamline its processes, and it has done so. As stated in the Legislative Fiscal Estimate Assembly Committee Substitute for Assembly, No. 2962 State of New Jersey 213th Legislature, March 30, 2009, the Act is designed to augment or enhance the effectiveness of Department staff by allowing LSRPs to undertake some of the more time-consuming or "boilerplate" functions that Department staff now perform, but does not contemplate any reduction in Department staff. In other words, the work performed by LSRPs on project applications, documentation and implementation may serve to facilitate and expedite Department review and approval procedures. If the proposed system works effectively, Department site remediation staff

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should also be able to work more efficiently on a greater number of projects, thereby reducing the backlog of site remediation projects that now exist.

215. COMMENT: The Department should revise the entire fee calculation procedure. The proposed rules on Fees and Oversight Costs are unnecessarily complex which will require considerable administrative resources to update the remediation fees each year. The revised fee calculation procedure should be based on very simple principles of actual review and oversight time and reasonable program management costs in accordance with standard industry practices. (27)

216. COMMENT: “Indirect program cost,” “salary additive factor,” etc. should be eliminated from all cost estimate equations. The Department has introduced unnecessarily complex factors with the potential of frequent challenges by responsible parties. Instead, incorporating a flat hourly rate with a standard multiplying factor would be a more transparent and simple procedure. (11, 21, 27)

217. COMMENT: The Department's fees charged to volunteers should not be based on formulas that include indirect costs, consistent with past Department practice and case law. (26)

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RESPONSE to COMMENTS 215 through 217: In deriving the formulas on which to base the annual remediation fee, the Department utilized its standard fee calculation procedures as used in other programs. A system as suggested by the commenters that is based on actual review and oversight time actually requires more administrative staff time to do the specific cost runs, generate, review and mail billings, and maintain billing payment records. The Department has utilized the simplest and least labor intensive methods to calculate fee amounts.

The Brownfield Act at N.J.S.A. 58:10B-2.1 controls what types of costs the Department may include in its overall calculation of fees for Department oversight. N.J.S.A. 58:10B-2.1a provides that the Department may include in its calculation of the amount of fees and oversight costs it charges to persons liable for remediation pursuant to the Spill Act, ISRA or the UST Act the indirect costs of the Department. Accordingly, fees and oversight cost billings to such persons, consistent with past practice and case law, will continue to include indirect costs, except as provided in N.J.S.A. 58:10B-2.1b, which prohibits the Department from including indirect costs in the calculation of fees or oversight costs to be charged to a person who is not liable for remediation under the Spill Act, ISRA or the UST Act.

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218. COMMENT: N.J.A.C. 7:26C-4.3(a)4 and the related Table 4-1 do not clearly articulate the payment requirements. It is likely that this lack of clarity will result in numerous errors and additional Department costs to resolve incorrect payments. The rules should be clarified to state that following the June 20, 2012 payment of the initial full year plus the prorated fee, the next billing will be one year following the anniversary date listed in Table 4-1. Examples of the payment schedule, such as the following, should be provided in the rules immediately below Table 4-1, in the response to comments upon rule adoption, in a guidance document, on the instructions to the form used for annual fee reporting, or as a “Frequently Asked Question” on the Department’s website. (6)

RESPONSE: The Department agrees that portions of N.J.A.C. 7:26C-4.3(a)4 Table 4-1 are confusing and may not exactly comport with the rule text. On adoption, the Department is deleting Column II of this table because it is confusing, and is renumbering the remaining columns accordingly. The fact that the column was titled “assigned anniversary month” could cause confusion in that people could interpret this as the month that the first annual remediation fee would be due. In fact, the first annual remediation fee for all sites subject to this provision is June 20, 2012. As indicated in the proposal summary, staggering of annual remediation fees occurs for the second and subsequent annual remediation fee. The Department is therefore combining proposed

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columns II and IX into new column VIII, which sets forth the due dates for the second and subsequent annual remediation fees.

As indicated in the proposal summary, the Department is requiring that the anniversary dates for the payment of the second and subsequent annual remediation fees be staggered throughout the year based on the county in which the site is located. Therefore, the Department calculated the amount due for the first annual remediation fee as a prorated amount based on when the second annual remediation fee is due. Column III, recodified on adoption as column II, should indicate only the prorated amount rather than the full year amount plus the prorated amount. Accordingly, the Department is modifying the entries in recodified column II to include only the prorated percentage of the fee amount.

Additionally, since N.J.A.C. 7:26C-4.3(a)4i states that the first annual fee is to be based on the amount listed in lines 1 through 4 of the table, and lines 1 through 4 contain prorated amounts of the full fee, the Department is modifying the descriptions in what is now Column II accordingly. Additionally, since the rule text at N.J.A.C. 7:26C-4.3(a)4ii(1) sets forth the dates on which the second annual remediation fee is due and N.J.A.C. 7:26C-4.3(a)5ii states that subsequent remediation fees are due on the date listed in new Column VIII, the Department is adding descriptive language to new Column VIII to that effect. The Department is also deleting N.J.A.C. 7:26C-4.3(a)4iv(2), which described the contents of Column II that is being deleted on adoption, and is revising the

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column number references throughout the remainder of N.J.A.C. 7:26C-4.3(a)4iv. The Department is deleting the phrase “full annual remediation fee plus the” from the description of new Column II at new N.J.A.C. 7:26C-4.3(a)4iv(2) so that this provision accurately describes the contents of Column II. Finally, the Department is changing the cross reference in new N.J.A.C. 7:26C-4.3(a)4iv(2) from (a)4ii to (a)4i so that it is the first annual remediation fee to which the description of Column II refers.

219. COMMENT: N.J.A.C. 7:26C-4.3(g), concerning the annual remediation fee for direct oversight, should be clarified to make it clear that all direct oversight billings will be sent separately to the person responsible for conducting the remediation. In addition, the Department should clarify whether these oversight charges include Department costs for response to IEC or Vapor Concern cases. (6)

RESPONSE: At the present time, the Department anticipates that it will bill separately for direct oversight costs and for the annual remediation fee. As provided at N.J.A.C. 7:26C-4.3(g), when a portion or condition of the remediation becomes subject to direct oversight, the person responsible for conducting the remediation is required to pay both the Department’s oversight costs and the annual remediation fee. Accordingly, no further clarification is required.

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The suggested clarification concerning whether direct oversight charges include the Department's costs for responses to IEC and Vapor concern cases, in addition to other pertinent charges for the particular site, is also unnecessary. N.J.A.C. 7:26C-4.3(g) cross references the rules concerning direct oversight at N.J.A.C. 7:26C-4.7. N.J.A.C. 7:26C-4.7(a)1 requires the person responsible for conducting the remediation to pay the Department's oversight costs under certain listed circumstances, including when the remediation is subject to N.J.A.C. 7:26C-2.3(a)3i. N.J.A.C. 7:26C-2.3(a)3i requires the person to conduct the remediation without Department approval except "for an immediate environmental concern, for the implementation of an engineered response action" pursuant to the Technical Requirements at N.J.A.C. 7:26E-1.11(a)6.

220. COMMENT: The fees at N.J.A.C 7:26C-4.6 are inappropriately based upon a variable fee formula that is designed to cover the costs of administering the remedial action permit program. However, once a remedial action permit is issued, the Department's oversight role is completed until a request is made to modify or transfer the permit, or a biennial certification is submitted for review. Accordingly, an annual permit fee is inappropriate and unnecessary, as any costs incurred by the Department can be covered by the application/submittal fees associated with the remedial action permit program. (11)

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RESPONSE: N.J.S.A. 58:10C-19d provides that the Department may charge two types of fees in connection with remedial action permits: 1) reasonable application fees to cover the costs of processing the permit application; and 2) reasonable annual fees to cover the costs of the administration and enforcement of the permits. In accordance with this provision, the Department projected its costs to process permit applications, including for new permits, permit modifications, permit transfers and permit terminations, and also calculated the cost to review biennial certifications and associated documents, and these fees are set forth at N.J.A.C. 7:26C-4.5. These fees represent the projected costs for the Department staff to evaluate and approve the various types of remedial action permit applications. The annual permit fee cover the Department costs for the review of all documents submitted after the remedial action permit is issued.

221. COMMENT: The transfer of a remedial action permit is essentially the equivalent of, and in many instances may be less involved than, a remedial action permit modification. However, the fees proposed for a remedial action permit transfer are higher than the fees for a remedial action permit modification. The Department should provide a rationale for this disparity, or eliminate the disparity. (11)

RESPONSE: The remedial action permit application, transfer and modification fees represent the projected costs for the Department staff to develop, modify and transfer the

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remedial action permits. In the course of responding to this comment, the Department determined that it inadvertently proposed the dollar amounts for the permit modification fee as the dollar amounts for the permit transfer fee. As is evident from the fees codified before these amendments, the permit modification fee is several times higher than the permit transfer fee. Moreover, in the summary, the Department indicated its intention to recodify N.J.A.C. 7:26C-4.4, Remedial action permit fees, as N.J.A.C. 7:26C-4.6 and to adjust those fees. Accordingly, it is evident that the Department intended to carry forward the original fee structure, where permit transfer fees are lower than permit modification fees, and only to adjust the fees. Accordingly, on adoption, the Department is modifying N.J.A.C. 7:26C-4.6 to place the fee amounts in the correct columns. The Department is also replacing the phrase “person responsible for conducting the remediation” with “permittee” in the second sentence to make this sentence consistent with the first sentence which refers to the permittee.

222. COMMENT: At N.J.A.C. 7:26E-1.8 and 4.7, material excluded from the definition of historic fill described as “residues” should be changed to “ore smelting residues.” Also, not all “slag” is from ore smelting. USEPA cites the American Coal Ash Association as identifying “boiler slag” being more closely related to “incinerator residue” which is included as historic fill material in the definition. See

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www.epa.gov/osw/consERVE/rrr/imr/ccps/boilslag.htm. The reference to slag in the definition should specify “ore smelting slag.” (20)

RESPONSE: The Department is unable to make the suggested amendment because the Brownfield Act at N.J.A.C. 58:10B-12h states that “historic fill material shall not include any material which is ...waste from processing of metal or mineral ores, residues, slags, or tailings.” The Brownfield Act does not limit residue to ore smelting residue, nor does it limit slag to ore smelting slag. Accordingly, the Department lacks the statutory authority to amend the definition of historic fill as suggested by the commenter.

223. COMMENT: N.J.A.C. 7:26C-4.8(a) states, “The person responsible for conducting the remediation may contest an oversight cost the Department has assessed, pursuant to N.J.A.C. 7:26C-4.7, by submitting a written request to the Department, pursuant to (c) and (d) below, within 30 days after the **billing date** [emphasis added] indicated on the oversight cost invoice that person received from the Department.” In order to afford the person responsible for conducting the remediation with a fair opportunity to challenge and oversight cost invoice, the timeframe should be based on days from the date that the invoice was received. (11)

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RESPONSE: The Department believes that it is most practical from a data tracking stand point to begin the time period for submitting a request to contest an oversight cost on the billing date indicated on the oversight cost invoice. However, after considering the comment, the Department believes that 30 days may not afford the person responsible for conducting the remediation enough time to determine whether to contest an oversight cost. Accordingly, on adoption, the Department is modifying this time period from 30 to 45 days at N.J.A.C. 7:26C-4.8(a), (b)4 and (i).

ARRCS Subchapter 5 Remediation Funding Source and Financial Assurance

224. COMMENT: At N.J.A.C. 7:26C-5.2(b)3, the Department should define “in a timely manner” when referring to the implementation of a remedial action. (6, 11, 27)

RESPONSE: The Department added “in a timely manner” to N.J.A.C. 7:26C-5.2(b)3 because it is included in the Brownfield Act, N.J.S.A. 58:10B-3a, and as a means of encouraging persons responsible for conducting the remediation who, notwithstanding the fact that they are not required to post a remediation funding source, should still remediate the site without delay. The meaning of the phrase is self-evident and, accordingly, no definition is necessary. Note that no penalties attach for failing to remediate in a timely manner according to this rule provision.

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225. COMMENT: The Department should not allow the use of self guarantees to back cleanups because these non-liquid financial instruments are too risky. (42)

226. COMMENT: Excluding the self-guarantee from the financial assurance requirements related to remedial action permits contradicts the intent of SRRA and will heavily burden the regulated community. The Department should allow for the self-guarantee mechanism for remedial action permits as intended by the Legislature. (15)

227. COMMENT: Although the term “financial assurance” is not defined in SRRA, it is clear that its purpose is synonymous with the purpose of the “remediation funding source,” which is to provide a financial guarantee for the availability of resources to complete and maintain a remediation. (3, 11, 21)

228. COMMENT: Financial assurance is an essential element of the legal framework for cleanup of contaminated sites. Financial assurance means that funding will be available for cleanup, and thus prevents such costs from becoming a public liability. Sound and reasonable requirements are necessary to provide such assurance. (35)

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RESPONSE to COMMENTS 225 through 228: The Brownfield Act at N.J.S.A. 58:10B-3.f allows a person responsible for conducting remediation to utilize a self guarantee to satisfy the obligation to establish a remediation funding source if certain enumerated requirements are met. Accordingly, the Department is required under the Brownfield Act to allow the use of the self guarantee as a remediation funding source.

However, the remediation funding source requirements in the Brownfield Act are separate from the financial assurance provision of SRRA at N.J.S.A. 58:10C-19c. SRRA allows the Department to require a person who is issued a remedial action permit for an engineering control to “maintain insurance, financial assurance or another financial instrument” to guarantee that funding is available for the operation, maintenance and inspection of the engineering control. However, other than the quoted phrase, which is broadly worded, SRRA, unlike the Brownfield Act, does not specify the types of mechanisms that the Department must allow a person to utilize to meet their obligation to post financial assurance as part of their remedial action permit.

A predictable long-term, stable source of funding must be available to the Department over the life of the engineering control permit. The Department purposefully excluded the self-guarantee from the list of financial mechanisms that may be used to satisfy the financial assurance requirements associated with remedial action permits. Self-guarantee

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lacks the institutional backing of the other listed financial mechanisms (such as an insurance policy that is backed by an insurance company). In the event a company fails to meet long term obligations pursuant to the permit, the Department must be able to access financial assurance in order to pay for monitoring/maintenance of the remedy; this is not possible with a self-guarantee.

229. COMMENT: We are not aware that the Department has experienced any significant problem with companies that have demonstrated their financial capabilities to self-guarantee their site remediations. (19)

230. COMMENT: Numerous reviews, audits, and policy analyses have failed to find evidence of sudden failures by companies that meet the financial test. (35)

231. COMMENT: Responsible parties that are able to self-guarantee their financial obligations have demonstrated that they are well established and financially stable. As a result, remedial parties should be allowed to provide a required financial assurance through a self-guarantee, as the Legislature intended. (11)

RESPONSE to COMMENTS 229 through 231: In the event that the permittee fails to meet the permittee's long term obligations pursuant to the remedial action permit, the

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Department must be able to access the financial assurance in order to pay for the monitoring and maintenance of the remedy. The stability of the entity who is posting financial assurance is not at issue. Department has chosen to exclude the self-guarantee as an acceptable financial instrument to guarantee performance under a remedial action permit because the Department would be unable to access funds in long-term engineering control cases where a self guarantee is utilized.

232. COMMENT: The “self-guarantee” mechanism is good public policy because it achieves the goal of financial assurance without unnecessary costs. When the “self-guarantee” option, or financial test, is unavailable, persons responsible for conducting the remediation are required to take capital out of circulation, thereby reducing the amount available for other business needs. They may also be required to spend that money on duplicative and unnecessary third-party financial assurance instruments. Every dollar that is diverted in this fashion is unavailable for capital improvements, including environmental enhancements such as proactive investment in pollution control equipment. (26, 35)

233. COMMENT: To prohibit the use of self guarantees under this rule will mean unnecessary additional costs for larger companies that are not otherwise entitled to the available exemptions under SRRA (e.g., the small business exemption) who will have to

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utilize more costly forms of financial assurance (e.g., trust funds, letters of credit, etc.).

These are the very companies that would be likely to utilize the self guarantee and are least likely to default on their obligations. To prohibit them from using a mechanism that the Legislature has found acceptable in an almost identical context sends the wrong message to large businesses who may otherwise be attracted to locate (or maintain) their operations in New Jersey. The Department has the authority under SRRA to permit the use of this mechanism and it should do so. (18)

234. COMMENT: Under the proposal, many companies would, for the first time, be required to arrange for letters of credit to demonstrate the company's fiscal capabilities. A requirement for letters of credit in order to conduct remediation would have a detrimental financial impact on many manufacturing companies within the State. In the case of a company that borrows under an asset based revolving credit facility, any established letter of credit acts the same as future additional borrowing and is automatically subtracted directly from the company's daily availability of funds that it uses for working capital. (19)

RESPONSE to COMMENTS 232 through 234: The Department recognizes that costs are associated with using financial mechanisms other than the self guarantee, and that the costs associated with using other mechanisms reduce the capital available for other

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business needs. However, the issue is that the Department must be able to access the funds should the permittee discontinue meeting its obligations under the remedial action permit, and it is not able to do so if the self guarantee is utilized as financial assurance.

The rules do not require the use of a letter of credit. The letter of credit is one among a number of available options from which permittees may choose to meet their financial assurance obligations.

The costs associated with establishing financial assurance needed for long term operation and maintenance should be evaluated as part of the decision on the remedy. It may be more cost effective for the person responsible for conducting remediation to choose a permanent remedy and avoid the need for a remedial action permit and costs associated with establishing financial assurance.

235. COMMENT: An alternative approach would be to have a financial officer of the company apply and certify a financial test of self-insurance in accordance with the Generally Accepted Accounting Principles. This alternative procedure would be far less burdensome to New Jersey companies, and would provide adequate assurance to the Department regarding the company's ability to fund cleanups to completion. (19)

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RESPONSE: The Department does not agree that applying a financial test of self-insurance is a viable alternative because it poses the same issues as the self-guarantee. As discussed above, funds that reside in the accounts of the entity that is offering to self insure are not readily accessible by the Department in the event that the Department must step in to maintain and monitor the engineering controls under the remedial action permit.

236. COMMENT: EPA has consistently “encourage[d] States to make reasoned judgments in implementing the performance criteria in the existing rules, including providing flexibility for firms in circumstances that States determine to reasonably balance the public and private cost of financial assurance.” See 63 Fed. Reg. at 17,716. The self-guarantee mechanism, or financial test, provides just such a balance of very high benefits and modest costs.

EPA carefully developed the “self-guarantee” mechanism, or financial test, based on extensive analysis and data review, and the Department should rely on EPA’s analysis and data review. The phrase “self-guarantee,” as used by the Department is all but synonymous with EPA’s use of the phrase “financial test.”

Before promulgating the financial test under RCRA in 1982, EPA “conducted an

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extensive analysis of the performance of numerous financial tests and made detailed calculations of the costs they would entail.” See Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities, 47 Fed. Reg. 15,032, 15,035 (Apr. 7, 1982).

EPA recognized that different financial assurance mechanisms are appropriate for different companies, based on the relative level of risk of each company failing to fulfill its obligations. With the adoption of the financial test, EPA sought to minimize both the compliance burden on regulated parties and the potential public burden if a company failed. Each time EPA has reviewed the financial test requirement, it has confirmed this original finding. See, for example, 63 Fed. Reg. 17,706 at 17,723 (April 10, 1998) (concluding that there is “a small probability” that qualifying company would go bankrupt and calling such a failure “unlikely”).

EPA designed the financial test to include the minimum net worth requirement to make it extremely unlikely that a qualifying company would go bankrupt in the next three years (47 Fed. Reg. at 15,032), and this 3-year “look ahead” feature is an important element of the “self-guarantee” or financial test.

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The financial test also requires that new letters and new reports for each subsequent fiscal year must be submitted within 90 days after the end of the qualifying entity's fiscal year. Because a company relying on the financial test must re-qualify each year, there always is at least a 2-year period during which default is highly unlikely.

The program also includes other safeguards designed to ensure that, even if a company experiences financial stress, its closure and post-closure costs will not become public liabilities. For instance, the conservatism built into the test ensures that, even if a company fails the test before its next certification, it is highly likely that the company still will have the financial ability to procure alterative financial mechanisms. Additionally, in the extremely unlikely event that a company should fail entirely within one year, the domestic asset requirement makes it much easier for EPA or a state agency to recover costs in any future proceedings, whether they are bankruptcy proceedings or an action under the joint and several liability provisions of CERCLA.

The 30-year track record of the “self-guarantee” mechanism is overwhelmingly positive. Apart from the studies and analyses of the financial test, three decades of actual experience demonstrate that this mechanism has proven to be extremely effective. (35)

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RESPONSE: The Department agrees that there are certain parallels between EPA's financial test and the Department's self-guarantee requirements. However, notwithstanding EPA's purported success in allowing the use of the financial test, it must be emphasized that, although the Department allows self-guarantee as a remediation funding source, it is not appropriate to use the self-guarantee as a financial assurance funding mechanism for a remedial action permit.

A long-term, stable source of funding must be available to the Department over the life of the engineering control permit. EPA's study was conducted in 1982, and reevaluated in 1998. The state of the economy is significantly different today than it was when the study and reevaluation were conducted, as a significant number of companies who were thought unlikely to fail have done just that. Additionally, the minimum net worth requirement, which is included EPA's financial test, only tests whether a qualifying company would go not bankrupt in the next three years. However, engineering controls that are part of a nonpermanent remedy may be in place for much longer than three years. Given that a company's financial strength cannot reasonably be projected or guaranteed that far into the future, it is reasonable that the Department not allow the self guarantee as a mechanism to satisfy the need for a long term stable funding source.

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237. COMMENT: N.J.A.C. 7:26C-5.2(j) should be revised to permit the use of the self-guarantee mechanism to satisfy the financial assurance requirement in N.J.A.C. 7:26C-5.3(c). Under the Industrial Site Recovery Act (ISRA), the triggering mechanism for many remediation projects in New Jersey, the Legislature allows the use of the self guarantee as a financial assurance mechanism to satisfy ISRA's remediation funding source requirements, which, for this purpose, are indistinguishable from the financial assurance requirements for remedial action permits. Although the Legislature failed to identify specific permissible financial assurance mechanisms for non-ISRA engineering controls under the Site Remediation Reform Act (SRRA), given that it had already deemed self-guarantee an acceptable form of financial assurance under ISRA, to omit this mechanism here would ignore a clear Legislative conclusion that this should be an acceptable mechanism. (18)

238. COMMENT: N.J.A.C. 7:26C-5.3(a)1 requires that the remediation funding source now must include the estimated cost to operate, maintain and inspect engineering controls. Previously, these types of costs had been specifically excluded from the remediation funding source requirement. It is unclear why the Department has chosen to include these costs in the RFS and it can be said that their inclusion is duplicative and unnecessary. (11, 27)

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RESPONSE to COMMENTS 237 and 238: ISRA does not contemplate the use of financial assurance. Rather, ISRA at N.J.S.A. 13:1K-9c prohibits the transfer of an industrial establishment unless a remediation funding source has been established in an amount of the estimated cost of the remediation in accordance with the Brownfield Act at N.J.S.A. 58:10B-3.

The Department has always required that the remediation funding source include the estimated cost to operate, maintain and inspect engineering controls. The Brownfield Act at 58:10B-3a requires that the remediation funding source must be established “in an amount equal to or greater than the cost estimate of the implementation of the remediation.” “Remediation” is defined in the Brownfield Act at N.J.S.A. 58:10B-1 to include all phases of the remediation including the remedial action, and “remedial action” is defined to include engineering or treatment measures.

Accordingly, the amount of the remediation funding source must include the full cost of remediation including the costs of engineering controls.

Pursuant to new N.J.A.C. 7:26C-5.3(b), the person responsible for conducting the remediation may reduce the amount of the remediation funding source by an amount equal to the costs to operate, maintain and inspect an engineering control when the person

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has submitted to the Department a complete remedial action permit application, including evidence of the establishment of financial assurance. This is because the costs related to those activities are reflected in financial assurance established as a remedial action permit requirement. Prior to the issuance of a remedial action permit, the amount of the remediation funding source must reflect all remediation costs, including costs related to the engineering control. Once the permit is issued, and financial assurance established, any remediation funding source associated with remaining areas of concern may be reduced to reflect only those areas not addressed by the permit pursuant to N.J.A.C. 7:26C-5.11.

239. COMMENT: In many instances, the proposed use of an engineering control will not be known at the time a remediation funding source is established. As such, it is inappropriate to also include these costs in the RFS requirement. (11)

RESPONSE: The Department agrees that often a person responsible for conducting remediation may not know whether an engineering control will be employed as part of the chosen remedy at the time the remediation funding source is established. For this reason, routine updates of estimated costs are critical, consistent with N.J.A.C. 7:26C-5.11. The amount of the remediation funding source established must reflect the estimated costs associated with the entire remediation. Until such time as a remedial

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action permit is issued and the associated financial assurance is established as a part of the remedial action permit application, that amount must include costs related to engineering controls when it becomes known that they will be part of the remedy.

240. COMMENT: N.J.A.C. 7:26C-5.3(b) allows the person responsible for conducting the remediation to reduce the amount of the remediation funding source by the amount equal to the cost to operate, maintain and inspect engineering controls only after the person has submitted the remedial action permit application to the Department demonstrating that the person has established the financial assurance for the engineering control. Accordingly, the person must have in place simultaneously both the remediation funding source and the financial assurance, covering the same engineering control costs. This is an insupportable burden on the development community and should be modified to allow for the remediation funding source mechanism to serve as the financial assurance or otherwise be transferred to the financial assurance mechanism. (11, 26)

RESPONSE: The Department recognizes that there may be slight duplicative financial assurance burdens on the regulated community in some instances, depending upon the financial mechanisms that the permittee elects to use for the remediation funding source and for the financial assurance. However, these burdens are relatively short-lived, and

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are offset by the benefit that there is always a mechanism in place to finance completion of remediation.

Provided that the existing remediation funding source is not a self-guarantee, a party may choose to use the existing remediation funding source to satisfy the financial assurance requirements associated with their remedial action permit. If the person responsible for conducting the remediation elects to use a financial assurance mechanism pursuant to the remedial action permit that is different from the remediation funding source for the balance of the remediation, then that person may reduce the amount of the remediation funding source to reflect the amount of the cost to operate, maintain and inspect engineering controls at the same time those costs are included in a financial assurance mechanism submitted with the remedial action permit application. If a party chooses to establish a separate financial instrument to meet the financial assurance requirements of the remedial action permit, that mechanism must be established first, before the reduction or elimination of the remediation funding source, in order to assure that there is always a mechanism in place to guarantee completion of remediation.

241. COMMENT: Most engineering controls are designed to be left in place in perpetuity making it impossible to calculate the financial assurance. The Department guidance document Remedial Action Permit for Soils, version 0.0 (February 24, 2010),

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www.state.nj.us/dep/srp/guidance, states that the financial assurance calculation is based on the yearly cost of maintaining the system, including the labor, power, sampling parameters, and permit costs based on present value, and that the value is multiplied over the duration that the engineering control will be in place up to 30 years. Notwithstanding the guidance, it appears that the Department considers a default permit term of 99 years, making it unclear as how to calculate the financial assurance amount. The rule should be made consistent with the 30 years limit set forth in the guidance. (24, 26)

RESPONSE: The commenter is correct that engineering controls associated with nonpermanent remedies are sometimes left in place in perpetuity, underlining the importance of a stable and available funding source. While the Department has chosen not to limit the number of years-worth of funding that must be available by including the 30 year standard in the rule, the Department has historically utilized, and will continue to utilize, the industry standard of 30 years, as is reflected in the Department's guidance document, Remedial Action Permit for Soils, version 0.0 (February 24, 2010), www.state.nj.us/dep/srp/guidance.

Although comments on guidance documents are outside the scope of this rulemaking, the Department notes that it will modify the Department's guidance document, Remedial Action Permit for Soils, version 0.0 (February 24, 2010),

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www.state.nj.us/dep/srp/guidance to clarify that, although 30 years may be used in the formula used to calculate the dollar figure for the amount of financial assurance, the full amount of the financial assurance must be maintained for the life of the permit. The person responsible for conducting remediation may calculate the net present value of the cost to operate, maintain and inspect the engineering control by discounting future amounts to the present.

242. COMMENT: Pursuant to N.J.A.C. 7:26C-5.11(c)2, for sites under direct oversight, what is the mechanism to challenge a demand by the Department to increase the remediation funding source or financial assurance? (27)

RESPONSE: The requirements for sites under direct Department oversight are included in the ARRCs rules at N.J.A.C. 7:26C-14. However, whether the site is the subject of Department direct oversight or not, when the cost estimate reflects that estimated remediation costs are higher than an established RFS, the person responsible for conducting remediation must increase the RFS to reflect the cost of remediation.

The person responsible for conducting the remediation when a site is in direct oversight may challenge a demand by the Department to increase the remediation funding source or financial assurance when the Department takes an enforcement action in response to the

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failure by that person to increase the amount of the remediation funding source or financial assurance.

243. COMMENT: The Department has proposed to revise N.J.A.C. 7:26C-5.13(a) and (e) to delete the requirement that the Department must provide a person responsible for conducting the remediation 30 days advance notice of an alleged failure to perform a remediation before the Department uses the person's remediation funding source to perform the remediation. This amendment will infringe on a person's right to due process. As drafted, N.J.A.C. 7:26C-5.13 does not afford a person responsible for conducting the remediation any opportunity to either challenge the Department's determination that a remediation is not being performed as required, or to correct any deficiency alleged by the Department. Accordingly, the Department should not adopt the proposed amendments to N.J.A.C 7:26C-5.13. (11)

244. COMMENT: At N.J.A.C. 7:26C-5.13(a), the Department should clarify why it removed the 30 day time period for a person responsible for conducting remediation to fix a "failure to perform remediation."

RESPONSE to COMMENTS 243 and 244: As the Department stated in the summary where it described this amendment, the 30 day timeframe is being deleted to allow the

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Department to immediately avail itself of any monies remaining in the remediation funding source so that it may resume remediation activities at the site as soon as possible. The reason that the Legislature required in the Brownfield Act at N.J.S.A. 58:10B-3 that a remediation funding source be established is so that funds would be readily available to the Department in the event that a person responsible for conducting the remediation failed in its duty to remediate and the Department had to assume the remediation tasks. The Brownfield Act at N.J.S.A. 58:10B-3g allows the Department to access these funds so that it may perform the remediation in place of the person required to establish the remediation funding source.

The Brownfield Act does not provide a mechanism by which the person responsible for conducting the remediation may challenge the Department's access to and use of these funds. Accordingly, the rules did not and do not now provide a mechanism for challenging the Department's availing itself of these funds. Rather, before amendment, the rule required the Department to notify the person responsible for conducting the remediation 30 days prior to accessing funds so as to allow the person 30 days to perform any obligation not performed.

However, the Department has determined that immediate accessibility to remediation funding source monies ensures that the Department will be able to immediately assume

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the remediation tasks, such that no gap in remediation activities that would otherwise potentially risk human health or the environment would occur. This is particularly important where an immediate environmental concern condition has been identified and the Department must step in to protect people and the environment.

245. COMMENT: At N.J.A.C. 7:26C-5.13(d), the Department provides that, “A person may petition the Department for authority to perform the remediation and to avail itself of all or some of the monies in the remediation funding source or financial assurance established by another person pursuant to this subchapter. The Department may, in its discretion, disburse all or some of the monies to the petitioner.” Wholly absent from this provision are: (a) any procedures or threshold requirements that a person must follow and meet in order to make the proposed petition to the Department; (b) any criteria or procedure pursuant to which the Department will review and make a determination on any petitions pursuant to this provision, including notice to and an opportunity for the responsible party to respond to any petition; and (c) an appropriate procedure and opportunity for the responsible party to appeal and or challenge the Department's disbursement of monies pursuant to this provision. As a result this provision needs to be deleted. (11)

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RESPONSE: The Brownfield Act at N.J.S.A. 58:10B-3g authorizes the Department to make disbursements from the remediation funding source to finance the cost of the remediation when the Department must step in to perform the remediation. The Department may do so after making a written determination that the person required to establish the remediation funding source failed to perform the remediation as required or failed to meet the mandatory remediation timeframes or expedited site specific timeframes established by the Department. N.J.A.C. 7:26C-5.13(d) implements this statutory provision, which provides that the Department has discretion to disburse some or all of the monies to the petitioner. This aspect of the ARRCs rules is not new nor does it affect many contaminated sites. Similar provisions were codified in the now-repealed Department Oversight of the Remediation of Contaminated Sites rules at 7:26C-7.12(d). Only a small subset of the persons responsible for conducting the remediation have established a remediation funding source pursuant to N.J.S.A. 58:10B-3. Of this group, yet a smaller number have failed to comply with their remediation obligations entitling the Department to draw on a remediation funding source. In this small number of cases, the Department has received only a handful of petitions seeking to use the remediation funding source monies. The Department has approved these requests to disburse funds only when the estimated cost to complete the remediation is less than the amount in the remediation funding source. This ensures that the remediation will be conducted using private funds before resort is made to the remediation funding source.

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The Department sees no need to establish a hearing right in the rules for a person who has violated the obligation to remediate because in such circumstances the Legislature has authorized the Department to complete the remediation by itself or by disbursing the monies in the remediation funding source to a petitioner to do so.

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246. COMMENT: The requirement at N.J.A.C. 7:26C-6.2(b)2ii to submit one electronic copy of “all data, documents and information concerning remediation including but not limited to ...information relative in any way to the site or AOC...and any contractual documents specifically requested by the Department. . .” is both subjective and overly burdensome. Because N.J.A.C. 7:26C-6.4(a)7 provides that a response action outcome (RAO) may be invalidated if the RAO is not supported by environmental data “as required by this chapter,” it leaves the door open for overturning RAOs. The provision should be reworded to “data and information relative to the determination of the RAO,” because an RAO should not be invalidated because of a failure to submit raw field sampling data such as PID or water quality instrument readings.

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Secondly, the sentence can be interpreted to mean that all analytical data for the entire site are to be submitted, which would not be practical or possible in many cases. If the request is for analytical data, the data that should be required to be submitted should only be those data relevant to the AOC(s) for which the RAO is being issued and it should be optional to submit other analytical data from around the site. Note that electronic copies of data that pre-date the inception of HAZSITE may not be available.

This requirement also requires resubmission of documentation already submitted to the Department. This section should be reworded such that, for existing cases, documents already in the possession of the Department need not be resubmitted. (6)

RESPONSE: N.J.A.C. 7:26C-6.2(b)2ii implements SRRA at N.J.S.A. 58:10C-20, which requires the LSRP to maintain and preserve all data, documents and information concerning remediation activities at each contaminated site the licensed site remediation professional has worked on, including but not limited to, technical records and contractual documents, raw sampling and monitoring data, whether or not the data and information, including technical records and contractual documents, were developed by the LSRP or the LSRP's divisions, employees, agents, accountants, contractors, or attorneys, that relate in any way to the contamination at the site.

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Implicit in this requirement is that the data to be submitted are relevant to the RAO. If the RAO is for a specific AOC or AOCs, then the data submitted should be relevant to that AOC or AOCs. If the RAO is for the entire site, then data for the entire site are to be submitted.

Submittal of raw sampling data, including both analytical results and raw field sampling data such as PID or water quality instrument readings, has always been required in the Technical Requirements and is essential to the Department's data validation team.

SRRA at N.J.S.A. 58:10C-20 requires that electronic copies of the records shall be submitted to the Department at the time the response action outcome is filed with the Department. The purpose of this final submittal of all information at the time of the RAO is to have all information in one electronic "location," rather than in various historical submittals that are not pieced together. "Electronic" submittal does not specifically mean "HAZSITE data." Rather, this means that all information is to be submitted in an electronic format, such as a PDF of the data package.

247. COMMENT: The LSRP should be able to rely upon the documents previously reviewed and approved by the Department in determining the appropriate course of action that is protective of public health and safety and the environment. The topic of

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reliance has been discussed by the Department, the SRPL Board, the Licensed Site Remediation Professional Association (LSRPA) and other stakeholders. All parties have recognized this as a significant issue that merits continued careful deliberation in order to determine the professional standard of care. The documents upon which an LSRP may rely should include a remedial action workplan or similar remediation plan approved by the Department, a no further action letter (NFA) issued by the Department or, as permitted by the LSRP Code of Conduct, a response action outcome issued by an LSRP.

(6)

248. COMMENT: There will be instances where an LSRP will discover issues with a no further action letter (NFA), such as where the site was not properly investigated or the remedy that was implemented is no longer effective (such as a cap or some other type of engineering control). The Department should require that an LSRP certify that the NFA is still applicable at any site where that LSRP takes over the remediation. (33)

RESPONSE to COMMENTS 247 and 248: Nothing in SRRA, the Technical Requirements, or ARRCS precludes an LSRP from relying on documents previously reviewed and approved by the Department. If, in the professional judgment of the LSRP, the historical documents are sufficient to document protection of public health and safety and the environment, then the LSRP may choose to rely on those documents.

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The Department is unaware of any provision in the code of conduct listed in SRRA at N.J.S.A. 58:10C-16 that allows for an LSRP's categorical reliance on an RAO issued by an LSRP.

249. COMMENT: At N.J.A.C. 7:26C-6.2(a)1, the Department should clarify what it means by "in the opinion of the LSRP." Does it mean that the site has been remediated pursuant to the professional judgment of the LSRP or does it mean that the site has been remediated in compliance with the Technical Requirements? (27)

RESPONSE: N.J.A.C. 7:26C-6.2(a)1 states that the LSRP shall issue a RAO when, in his or her opinion, the remediation has been conducted pursuant to N.J.A.C. 7:26C-6.2(c), (f), and (g). These three subsections require that the remediation be conducted pursuant to the hierarchy established in SRRA at N.J.S.A. 58:10C-14 and ARRCS N.J.A.C. 7:26C-1.2(a). The hierarchy requires that the remediation be conducted pursuant to the Technical Requirements. Accordingly, an LSRP shall only issue an RAO when in his or her opinion the site has been remediated in compliance with ARRCS and the Technical Requirements.

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250. COMMENT: N.J.A.C. 7:26C-6.2(b)2ii requires the LSRP to include a copy of contractual documents with the RAO. This requirement goes beyond technical documentation and impermissibly enters into the legal realm of contracting. What are the limits to this requirement? (27)

251. COMMENT: The requirement at N.J.A.C. 7:26C-6.2(b)2ii to submit contractual documentation, should be limited to an LSRP's scope of work, project limitations, and/or assumptions as these pertain to the remediation protectiveness of the remedy. The Department should not be entitled to review contract terms and conditions, proprietary financial negotiations or confidential information related to contract negotiations between a person responsible for conducting the remediation and an LSRP. In all cases, it is only the SRPL Board's right, and not the Department's, to obtain a copy of contractual documents, and this right should be strictly limited to instances of potential disciplinary review. Contractual documents should have no relationship to the protection of public health, safety or the environment and their submission to the Department is unnecessary and overly burdensome. (6)

252. COMMENT: N.J.A.C. 7:26C-6.2(b)2ii has been revised to state that an LSRP is required to submit "any contractual documents specifically requested by the Department" in connection with the filing of an RAO. Contractual documents between a responsible

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party and its LSRP, or any other parties, have no bearing upon the effectiveness of a remedy or the appropriateness/validity of an RAO. Moreover, these types of documents often contain confidential and privileged information. Accordingly, there exists no basis for the Department to request these types of documents, and this provision needs to be deleted from the Rule Proposal. (11)

RESPONSE to COMMENTS 250 through 252: N.J.A.C. 7:26C-6.2(b)2ii partially implements SRRA at N.J.S.A. 58:10C-20, which, among other things, requires an LSRP to submit to the Department a copy of all documents and information that relate in any way to the contamination at the site, at the time the LSRP files the response action outcome with the Department. The Legislature, at N.J.S.A. 58:10C-20, decided that these documents must include contractual documents.

N.J.A.C. 7:26C-15 addresses the commenter's concerns about confidentiality by establishing procedures for maintaining the confidentiality of information received by the Department.

253. COMMENT: N.J.A.C. 7:26C-6.2(c)4 allows the use of EPA guidance, or other relevant, applicable and appropriate methods and practices to be implemented if no specific Department technical standards or technical guidance is "appropriate" or

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“necessary.” Does this mean professional judgment can be used to determine that Department technical guidance is not relevant to a specific issue and an alternate can be used? How does one decide what is appropriate and/or necessary? (27)

254. COMMENT: The rules improperly allow the LSRP to make the determination as to when compliance with the ground water and surface water standards has been achieved, but the LSRP is not required to use any empirical data to prove they are in compliance. (36)

RESPONSE to COMMENTS 253 and 254: As described in the proposal summary, N.J.A.C. 7:26C-6.2(c) is being deleted from the ARRCs rules because the requirement to follow the Department’s guidance and to document deviations therefrom is codified at N.J.A.C. 7:26C-1.2(a). The LSRP must issue an RAO based upon the hierarchy of statutes, rules, and technical guidance, reflected at N.J.A.C. 7:26C-1.2(a), which are in effect at the time of the RAO. The LSRP is expected to use his or her professional judgment to determine whether a particular technical guidance is available and appropriate to a specific situation and what alternate approach can be used. All reports must be accompanied by all data collected, including all data that support the conclusion that the site has been remediated to the ground water and surface water standards, as applicable. Unsupported conclusions are not acceptable.

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255. COMMENT: N.J.A.C. 7:26C-6.2(g), which provides that the RAO may only be issued after a determination has been made that the remediation has been completed pursuant to the Technical Requirements, contradicts the requirement to issue an RAO only after the LSRP uses professional judgment to determine that the remediation is complete. How do variances and professional judgment apply? (27)

RESPONSE: The Department disagrees that there is any contradiction in the rules governing when an LSRP is to issue an RAO. N.J.A.C. 7:26C-6.2(a) requires an LSRP to issue a response action outcome when, in the opinion of the LSRP, as required in N.J.A.C. 7:26C-6.2(c), the site or area of concern has been remediated pursuant to the hierarchy in N.J.A.C. 7:26C-1.2(a), as required in N.J.A.C. 7:26C-6.2(f), the contaminants at the site or area of concern meet all of applicable remediation standards, and as required in N.J.A.C. 7:26C-6.2(g), the remediation has been completed pursuant to N.J.A.C. 7:26C-1.2(c), so that all contaminated soil has been remediated and all contaminated groundwater has been remediated.

Variances from technical requirements in N.J.A.C. 7:26E-1 through 5 are governed by the Technical Requirements for Site Remediation, N.J.A.C. 7:26E. See N.J.A.C. 7:26E-

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1.7. The ARRCS rules do not provide for variances. Many decisions by LSRPS will call for the exercise of professional judgment. However, exercises of professional judgment by LSRPS should not be confused with the obligation of the persons responsible for conducting the remediation to comply with the ARRCS rules and the Technical Requirements.

256. COMMENT: N.J.A.C. 7:26C-6.2(f) requires that if an LSRP issues an RAO based upon a preliminary assessment or a site investigation, the LSRP must certify that the contaminants at the site or area of concern meet all applicable standards. This requirement is inappropriate, as it will require an LSRP to either gather data at all AOCs, regardless of whether there is any evidence of a release, or certify that contamination is not present without any analytical data to support that determination. This requirement is illogical and contrary to requirements of a preliminary assessment and site investigation that have been applied to contaminated sites in New Jersey. Accordingly, this provision should be revised to make the certification required by this provision consistent with the certifications provided for in the Technical Requirements, namely, that an area of concern is not subject to additional investigation if it is not suspected to contain contamination.

(11)

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RESPONSE: N.J.A.C. 7:26C-6.2(f) requires that if an LSRP issues an RAO based upon a preliminary assessment or a site investigation, the LSRP must certify that the contaminants at the site or area of concern meet all applicable standards. The LSRP will be in a position to issue an RAO at the completion of a preliminary assessment or a site investigation when the LSRP concludes that the data collected during each of these two remediation phases do not contravene any applicable remediation standard. This determination may be made, for example, because no contamination is present above any standard or because the site is already governed by an institutional or engineering control that addresses any contamination present such that the standards are not applicable. If the LSRP has any doubts to this certification, then that LSRP should analyze all samples necessary to document that conditions at the site are protective of public health and safety and the environment.

257. COMMENT: N.J.S.A. 58:10C-22 allows the Department to invalidate a response action outcome (RAO) only if the RAO is not protective of public health, safety, or the environment or where the remediation was not implemented using a required presumptive remedy. N.J.A.C. 7:26C-6.4 as amended improperly expands the set of circumstances under which the Department may use its power to invalidate an RAO, and it improperly defines the phrase “not protective of the public health and safety and the environment” to be the equivalent of any one of those circumstances. This amendment

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would then permit the Department to invalidate an RAO for a violation of requirements, even where the violation would not make the remedial action less protective, including many minor, ministerial and non-substantive requirements such as submitting the wrong number of electronic copies of documents to the Department. The rule should be modified to reflect the narrow statutory authority set forth in the statute. (26)

258. COMMENT: SRRA does not authorize the Department to invalidate an RAO for non-material reasons or because the Department may have conducted the remediation differently, thereby offering a higher degree of finality and predictability to the remediation process. However, in the rules as amended, the Department appears to be moving away from both the limited circumstances permitted under SRRA to invalidate an RAO and from acknowledging the professional opinion of the LSRP back to the traditional Department oversight model. (26)

259. COMMENT: The list of conditions at N.J.A.C. 7:26C-6.4(a) significantly revises the threshold that the Department can use to invalidate an RAO, undermining the ability of the LSRP to apply professional judgment in the remediation of a site. The amendments include factors that can be considered in assessing whether a remedial action is protective, but it cannot be presumed that any remedial action that meets these conditions will be “not protective.” Moreover, some of the listed conditions are so vague

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as to be open to broad discretionary interpretation by the Department, further undermining the role of the LSRP as contemplated by SRRA. (6)

260. COMMENT: Each of the scenarios in N.J.A.C. 7:26C-6.4(a) is problematic. For example, N.J.A.C. 7:26C-6.4(a)9 would allow the Department to invalidate, modify or rescind an RAO for mistakes or errors in the final remediation document that may result in detrimental reliance on the final remediation document by a third party. Neither the Department nor an LSRP would be in a position to predict when detrimental reliance may occur. The unintended consequences of this vague wording could severely limit the use of professional judgment by LSRPs and imperil final determinations made by them, particularly in light of the fact that under the rule, as drafted, an RAO can be easily invalidated and there is perhaps no more likely scenario for detrimental reliance than an RAO being overturned.

Likewise, N.J.A.C. 7:26C-6.4(a)7 would allow the Department to invalidate an RAO for the absence of any item of data, whether or not the omission is material. The Department would be able to invalidate the RAO under N.J.A.C. 7:26C-6.4(a)8, even where the cleanup is broader than the RAO. The rule should be modified to be consistent with the limited authority provided to the Department under the Act. (6, 26)

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261. COMMENT: N.J.A.C. 7:26C-6.4(a) and (c), when read together, require the Department to invalidate a response action outcome (RAO) whenever any of the criteria set forth in N.J.A.C. 7:26C-6.4(a) are present. This construct forces the Department to presume that the statutory prerequisite to the invalidation of a RAO, namely that the remedy is not protective of public health, safety or the environment, is present whenever any of the criteria set forth in 7:26C-6.4(a) are found to be present by the Department. This is simply not the case, particularly when it comes to the new criteria that the Department added to support a non-protectiveness finding under N.J.A.C. 7:26C-6.4(a).

For example, whether the scope of the RAO and the actual remedy are consistent does not necessarily implicate the protectiveness of the remedy. The same is true with respect to the adequacy of the supporting environmental data in the RAO and the potential for detrimental reliance by a third party on an RAO containing mistakes or errors. Further, the addition of an invalidation criterion based on a finding that the remediation was not conducted in accordance with N.J.A.C. 7:26C-6.2(c), (f) or (g) opens the RAO to being invalidated based on a finding that the LSRP did not comply with any applicable statute, regulation or guidance, regardless of whether that particular statutory, regulatory or guidance deficiency results in a non-protective remedy. The Legislature stipulated that the basis for revocation was the overall protectiveness of the remedy, not whether every “i” had been dotted and every “t” had been crossed in implementing the remediation.

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In view of the above, these provisions should be modified to provide that the criteria set forth under N.J.A.C. 7:26C-6.4(a) “may” be used by the Department in making a determination as to whether the remedy is protective - they cannot presumptively define what is not protective because there are many circumstances under which these criteria may be present and the remedy may still be protective.

In addition, the criterion requiring invalidation in the event that a presumptive remedy was not implemented as required, which is a statutory requirement under N.J.S.A. 58:10C-22, should be moved from N.J.A.C. 7:26C-6.4(a) to N.J.A.C. 7:26C-6.4(c)2 as this is a separate statutory criterion for invalidation and not necessarily subsidiary to a general non-protectiveness finding. (18)

262. COMMENT: Certain rule provisions in the Rule Proposal clearly demonstrate that an RAO will not be equivalent to a no further action letter, including the new requirement that an LSRP must rescind his or her RAO in certain circumstances. Moreover, the Department has delineated 12 events or occurrences that would, by definition, render a remedial action “not protective of the public health and safety and the environment,” and many of these events and occurrences are administrative in nature, vague and ambiguous, and may have no impact on the protectiveness of the remedy.

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These new provisions directly contradict the provisions of SRRA, and thus must be deleted. N.J.S.A. 58:10C-22 provides that “the department shall invalidate a response action outcome issued by a licensed site remediation professional . . .” (emphasis added). Accordingly, it is the Department, and not an LSRP, who must determine if an RAO should be invalidated. Similarly, an RAO shall only be invalidated “if the department determines that the remedial action is not protective of public health, safety or the environment or if a presumptive remedy was not implemented” Thus, it is this finding, and not the 12 criteria in the rule proposal, that must be established before an RAO can be invalidated. (3)

263. COMMENT: SRRA requires that the Department invalidate an RAO if and when it is not protective. See N.J.S.A. 58:10C-22. However, the proposed rule would require the LSRP to “rescind” his or her RAO, without any determination by the Department. N.J.S.A. 58:10C-22 was the subject of much debate and discussion during the drafting of the SRRA. An essential compromise was struck that balanced the roles of the LSRP and the Department. LSRPs would issue RAOs when a remediation was determined to be complete and the Department would invalidate RAOs only when it “determines that the remedial action was no longer protective.” The Department’s proposed approach upsets this statutory balance. (6)

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264. COMMENT: In order for the new SRP paradigm to succeed, RAOs must only be invalidated in the rarest of circumstances. These new provisions, however, open the door to the rescission or invalidation of an RAO becoming common place. These provisions nullify the ability of a responsible party, or a third party, to rely upon an RAO as a valid determination that a site has been appropriately investigated and/or remediated. As a result, these inappropriate provisions do not comport with the language and intent of SRRA and must be deleted from the Rule Proposal. (3)

265. COMMENT: The new rules significantly lower the bar and standards for invalidation of response action outcomes (RAOs) and, as a result, jeopardize the effectiveness of the LSRP program to clean up contaminated sites. Proposed N.J.A.C. 7:26C-6.4 eliminates any requirement that the Department review a specific RAO and determine that it is not protective of public health and safety and the environment before the RAO is invalidated. The proposal replaces the analysis required by SRRA with a regulation that would deem a site cleanup not protective under a dozen circumstances and then compel an LSRP to invalidate his or her own RAO. This possibility of invalidating an RAO has no time limit. The proposed rule has the potential to seriously undermine the finality and reliability of RAOs in the business marketplace and, thus, to reduce the effectiveness of the LSRP program to return contaminated sites to more productive use.

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The Department should not adopt the proposed rule but, rather, should retain the responsibility to invalidate RAOs pursuant to SRRA. (12)

266. COMMENT: Establishing a requirement at N.J.A.C. 7:26C-6.4(b) that an LSRP must rescind an RAO undermines the ability to rely on final remediation documents, and will create concern for subsequent purchasers and lending institutions. (6)

RESPONSE to COMMENTS 257 through 266: The purpose in setting forth with specificity at N.J.A.C. 7:26C-6.4 circumstances in which a remedial action is not protective of the public health and safety and the environment is to provide transparency in the Department's decision-making on the issue of whether the remedial action is protective of public health and safety and the environment, as well as to provide predictability to the regulated community as to how the Department will evaluate an RAO or how it expects the LSRP to invalidate an RAO under the various circumstances described in this section. In addition, one of the ways in which the Department has sought to ensure that an RAO is equivalent to a no further action letter is to ensure that the same level of scrutiny and the same standards apply to an LSRP's issuance of an RAO as to the Department's no further action letter. It is in this section that the Department has sought to articulate for both the regulated community and LSRPS alike, the scrutiny and standards that the Department has historically applied when evaluating

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its own no further action letters. The Legislature's placement on the Department of the ultimate responsibility to ensure that all remedial actions at contaminated sites are protective of public health and safety and the environment demand that the Department now apply this same scrutiny and standards to RAOs issue by LSRPs.

The phrase "protective of public health and safety and the environment" is broad. The Department drafted the standards in this section keeping mind the direction from the Appellate Court that "due process requires that 'administrators must do what they can to structure and confine their discretionary powers through safeguards, standards, principles and rules.'" East Cape May Associates v. DEP, 343 N.J. Super. 110, 131 (2001) (references omitted). The Court also stated that, "Regulations are also necessary to prescribe legal standards that are not otherwise expressly provided for by the enabling statute." Ibid. Finally, the Court left "it to the agency to frame the appropriate regulations, applying its expertise . . . , and employing its own staff, resources and experience." Id. at 132.

Accordingly, the Department has identified several specific circumstances in which the remedial action may be unprotective of public health and safety and the environment. The Department has promulgated these standards, as directed by the Appellate Division, and to provide the transparency and predictability previously referenced. None of these

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requirements preclude an LSRP from using his or her professional judgment to determine that a remediation is complete.

N.J.A.C. 7:26C-6.4 does not eliminate the requirement that the Department review a specific RAO and determine that it is not protective of public health and safety and the environment before the RAO is invalidated. The Department will not limit its review to the RAO itself, but to all relevant circumstances surrounding the RAO. This scope of this review is supported by the statutory requirement for the LSRP to submit to the Department, at the same time he or she files the RAO, a copy of all records concerning remediation of the contaminated site. See, N.J.S.A. 58:10C-20.

The rules do not provide that the Department will invalidate an RAO because the wrong number of electronic copies of documents was submitted to the Department, or because other minor, ministerial and non-substantive requirements were violated, or merely because the Department might have conducted the remediation differently. Rather, the Department has determined that each of the circumstances in which the Department will invalidate an RAO are reasonably related to the statutory requirement that the remedial action must be protective of public health and safety and the environment. However, where the LSRP discovers that the RAO was not prepared in accordance with the

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ARRCS rues because it contains administrative errors, the LSRP is required to withdraw the RAO, amend it to ameliorate the administrative errors, and issue the amended RAO.

New N.J.A.C. 7:26C-6.4(a)6 provides that the Department may invalidate an RAO when the remediation was not conducted in accordance with the remediation standards. A remedial action that does not meet the remediation standards would not be protective.

New N.J.A.C. 7:26C-6.4(a)7 provides that the Department may invalidate an RAO when the conclusions in the final remediation document are not supported by environmental data as required by this chapter. An example of this circumstance would be when the environmental data indicate that delineation pursuant to the Technical Requirements has not been completed, but the RAO states that contamination is fully delineated; any final remedy based on this conclusion would not be protective, as contamination likely extends beyond the area subject to the remedial action. Another example would be as above, where environmental data indicate soil contamination remains at concentrations that create cancer risks greater than the one-in-one million standard, and a deed notice is not filed or a classification exception area is not established; the conclusions in the final remediation document are not supported by environmental data and therefore the remedy is not considered protective.

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New N.J.A.C. 7:26C-6.4(a)8 provides that the Department may invalidate an RAO when the scope of the final remediation document is not consistent with the scope of the actual remediation. An example of this circumstance would be when the final remediation document is for the entire site, yet the remediation only encompassed a portion of the site or some but not all impacted media; the final remediation document is not consistent with the scope of the actual remediation, and therefore the remedy is not considered protective.

New N.J.A.C. 7:26C-6.4(a)9 provides that the Department may invalidate an RAO when mistakes or errors in the final remediation document may result in detrimental reliance on the final remediation document by a third party. It is incumbent upon an LSRP to issue a correct and proper RAO that can be used by, for example, other LSRPs who may be conducting work at the same site sometime in the future and by subsequent owners who want to know that the remedial action is protective before purchasing the site. An RAO that contains errors will be invalidated so that the errors may be corrected and the RAO reissued.

New N.J.A.C. 7:26C-6.4(a)10 provides that the Department may invalidate an RAO when the remediation was not conducted pursuant to N.J.A.C. 7:26C-6.2(c), (f), or (g), as applicable. N.J.A.C. 7:26C-6.2(c), (f), and (g) set forth the requirements for properly

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conducting a remediation. N.J.A.C. 7:26C-6.2(c) requires that the site or area of concern has been remediated pursuant to the hierarchy in N.J.A.C. 7:26C-1.2(a); N.J.A.C. 7:26C-6.2(f) requires that the contaminants at the site or area of concern meet all of applicable remediation standards; and N.J.A.C. 7:26C-6.2(g) requires that all contaminated soil has been remediated and all groundwater has been remediated. If these provisions are not followed, the remedy cannot be considered protective.

New N.J.A.C. 7:26C-6.4(a)11 provides that the Department may invalidate an RAO when a presumptive remedy or alternative presumptive remedy was not implemented when required. This requirement is expressly mandated by SRRA at N.J.S.A. 58:10C-22.

267. COMMENT: N.J.A.C. 7:26C-6.4(a) provides that the Department may rescind an RAO if the RAO is not “protective of public health or the environment.” New N.J.A.C. 7:26C-6.4(a)9 states that one of the grounds for rescission is because “mistakes or errors in the RAO may result in detrimental reliance by a third party.” This new ground replaced the former “no longer protective” criteria. The Department appears to be distancing itself from reviewing sites over time, and instead, lists items that would trigger an audit or project review. (27)

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268. COMMENT: The proposed rule identifies a dozen generic circumstances in which an RAO must be invalidated. The twelve circumstances do not on their face demonstrate a remedial action is not protective, nor do they necessitate any such determination. Indeed, by proposing to adopt a general rule, not only has the Department abdicated its role as the auditor of the RAO, but it also would eliminate any need to make a specific determination that “the remedial action is no longer protective.” This will seriously undercut the finality and reliability of RAOs. (6, 11)

RESPONSE to COMMENTS 267 and 268: SRRA requires the Department to invalidate an RAO when it is not protective of public health and safety and the environment. The Department takes this responsibility very seriously, and is not “distancing” itself or abdicating its role, as opined by the commenters. Rather, by listing circumstances that the Department believes cause a remediation to not be protective of public health and safety and the environment, the Department is putting persons responsible for conducting the remediation on notice of how seriously the Department is taking this statutory mandate.

269. COMMENT: An RAO should not be invalidated pursuant to N.J.A.C. 7:26C-6.4(a)5, for a failure to comply with a remedial action permit, because this failure may not render the remedy not protective. (6)

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RESPONSE: The Department agrees with the commenter that if the remedy remains protective, the RAO should not be invalidated. However, if the permittee fails to perform, for example, permit mandated monitoring, it would not be possible to ascertain whether the remedy remains protective. Accordingly, both the LSRP and the Department may invalidate an RAO for failure to comply with a remedial action permit, and further remedial actions as either the LSRP or the Department deems necessary or appropriate to ensure the protectiveness of the remedy should be implemented.

270. COMMENT: An RAO should not be invalidated pursuant to N.J.A.C. 7:26C-6.4(a)2, when a standard has decreased by an order of magnitude, because a remedy can still be protective of a site even if the standard decreases and the remaining concentrations are an order of magnitude greater than the revised standard, such as in the situation where the remedy involves an engineering control such as a cap. The RAO should only be invalidated if the remedy is no longer protective. (6)

RESPONSE: Under N.J.A.C. 7:26C-6.4(a)2, the Department retains its discretion to invalidate a final remediation document where the Department amends a remediation standard by an order of magnitude and the person responsible for conducting the remediation fails to conduct further remediation. The Department will only invalidate the

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final remediation document when it determines that the remedial action is no longer protective, a fact-sensitive issue.

271. COMMENT: N.J.A.C. 7:26C-6.4(b) requires that a LSRP must rescind his or her RAO when he or she makes certain specified determinations that the remedy is not protective or renders the property unusable for future redevelopment or recreational use. There is no statutory authority for the LSRP to make these determinations and they should not be required to do so for the reasons discussed below.

SRRA identifies only the Department as having the authority to invalidate a RAO. N.J.S.A. 58:10C-22. By granting the LSRP the authority to “rescind” a RAO based on the identical findings that the Department would have to make to “invalidate” an RAO, the Department has proposed a regulation that is inconsistent with what the Legislature intended by only granting the Department this invalidation authority. The semantic distinction between “invalidate” and “rescind” is a distinction without a difference.

The Legislature recognized that the person conducting the remediation was entitled to rely upon the finality of the RAO once issued, just as it does now with a Department-issued no further action letter, subject only to its invalidation by the Department in those extreme circumstances where the Department determines that the remedy is not

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protective of public health and safety and the environment pursuant to N.J.S.A. 58:10C-22. Moreover, by requiring that the LSRP must rescind an RAO upon finding it is not protective (the regulation provides that the LSRP “shall rescind his or her response action outcome when he or she determines that . . .”), the Department would require LSRPs to constantly re-evaluate all of the work that they had done to issue the RAO in the first place, an unfair burden to place on the LSRP which undermines the finality and certainty afforded to the RAO by the statute.

Nor is there any authority for the Department to require that LSRPs withdraw and reissue RAOs if the LSRP determines that the RAO was not prepared in accordance with the ARRCs rules. Again, the Legislature saw fit to only grant the Department the authority to invalidate an RAO, which would include the subsidiary and lesser authority to require that it be withdrawn and reissued. The basis for invalidating a RAO under the SRRA is that it is not protective of public health and safety and the environment, not for errors in its preparation. (18)

272. COMMENT: N.J.A.C. 7:26C-6.4(b) obligates the LSRP to rescind its own RAO. It is of critical importance that the invalidation of an RAO be permitted only in the narrowest of circumstances and only by the Department as mandated by the Act. The Act

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does not authorize an LSRP to rescind an RAO and this rule should therefore be deleted.
(6, 26)

RESPONSE to COMMENTS 271 and 272: SRRA at N.J.S.A. 58:10C-16a provides, “A licensed site remediation professional’s highest priority in the performance of professional services shall be the protection of public health and safety and the environment.” This provision mirrors N.J.S.A. 58:10C-22, which gives the Department the authority to invalidate an RAO if the RAO is not protective of public health and safety and the environment. Accordingly, if an LSRP becomes aware that the RAO he or she issued is no longer protective of public health and safety and the environment, it is incumbent upon that LSRP to rescind the RAO. N.J.A.C. 7:26C-6.4(b) is within the Department’s broad authority pursuant to N.J.S.A. 58:10C-29 to promulgate rules establishing the responsibilities of persons responsible for conducting a remediation and LSRPs in the remediation of contaminated sites.

273. COMMENT: N.J.A.C. 7:26C-6.4(b)2 requires the LSRP to withdraw the RAO and reissue a corrected or revised RAO based on errors, omissions or determination by the Department that the RAO is noncompliant. The rules should set forth the protocol that the LSRP should use to review an RAO, including but not limited to triggers, reasons, and third party review. (27)

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RESPONSE: The Department declines to amend the rule as requested because the reasons for revising an RAO are too numerous and site specific as a practical matter to be included in the rules. SRRA requires the LSRP to use best professional judgment, and the Department is relying on the LSRP to do just that.

274. COMMENT: The rules should include a process for challenging the invalidation of an RAO. (29)

RESPONSE: SRRA contains no provision granting a right to a hearing on the issue of the invalidation of an RAO. The person responsible for conducting the remediation will have an opportunity for a hearing when required by statute or the Federal or State constitution.

275. COMMENT: Since the LSRP gives himself an RAO, there is really no mechanism through which the Department can determine what is happening on the site until it is too late. Having general audits will not provide enough oversight. The LSRP should be required to have insurance or to establish an escrow account to protect the site's future owner if more contamination is later found. Under these rules, innocent

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landowners and taxpayers will be paying to clean up more sites, instead of the original polluter. (36)

RESPONSE: The remedial action outcome is issued by the LSRP to person responsible for conducting the remediation with a copy to the Department. LSRP does not give it to “himself,” as posited by the commenter.

If additional contamination is found in the future, and if the new owner is not liable for the contamination, then the Department may order the person responsible for conducting the remediation, not the current owner, to perform all additional remediation necessary at the site to ensure that the remediation is protective of public health and safety and the environment.

Additionally, it is important to understand the different roles of the Department and the SRPL Board. The Department inspects and reviews documents prepared by LSRPs on behalf of persons responsible for conducting the remediation. The Department’s enforcement authority is directed to persons responsible for conducting the remediation. The SRPL Board is charged with conducting audits of LSRPs (see N.J.S.A. 58:10C-24) and enforcing the LSRP’s obligations under applicable provisions of SRRA, such as, for example, the code of professional conduct governing LSRP set forth in N.J.S.A. 58:10C-

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16. See N.J.S.A. 58:10C-17. The Department may recommend to the SRPL Board investigation of an LSRP to consider the suspension or revocation of an LSRP's license or other enforcement action by the Board against an LSRP based upon the results of a Department review of LSRP documents pursuant to N.J.S.A. 58:10C-21 or an audit performed by the Department pursuant to N.J.S.A. 58:10C-24 or -25. Whether or not an LSRP should maintain insurance as suggested by the commenter is a topic for the Board, and not the LSRP.

For a remedial action that includes an engineering control, the person responsible for conducting the remediation is required to post financial assurance in an amount that is sufficient to ensure that the engineering control can be maintained in perpetuity. The reason for this requirement is to ensure that neither future property owners nor taxpayers are saddled with the cost of maintaining the engineering control.

276. COMMENT: The rules inappropriately remove the Department from any role in determining the validity of LSRP certifications, and in revoking false certifications, instead relying on LSRP's to revoke their own false certifications. It is implausible and naive to expect the LSRP to do so. (42)

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RESPONSE: The Department interprets this comment as a comment on N.J.A.C. 7:26C-6.4(b), which governs when an LSRP must invalidate a response action outcome.

The rule does not remove the Department from its role in reviewing and determining the validity of an RAO or of the validity of the LSRP's certification. On the contrary, this rule provision adds an additional layer of protection in that, while the Department will review RAOs and invalidate RAOs for a remedial action that is not protective, the LSRP who issued the RAO is also required to review and rescind his or her RAO if he or she determines that the remedial action is not protective, or that its implementation by the person responsible for conducting the remediation will render the property unusable future redevelopment or recreational use.

277. COMMENT: When an LSRP certifies a site as clean through a remedial action outcome (RAO), it's over. This amounts to an abdication of the Department's responsibility under SRRA to review the RAO and make a final determination as to whether a site is fully cleaned up. Additionally, this would undermine the finality of the RAO and would erode confidence in the RAO. (42)

RESPONSE: The Legislature specifically provides in SRRA at N.J.S.A. 58:10C-14d that the LSRP must issue a response action outcome to the person responsible for conducting the remediation upon completion of the remediation, when, in the opinion of the LSRP,

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the site has been remediated so that it is in compliance with all applicable statutes, rules and regulations. Accordingly, authority for the LSRP to issue an RAO rests with the Legislature and the Legislature, through SRRA, has given that authority to the LSRP.

However, SRRA at N.J.S.A. 58:10C-21 requires the Department to inspect all documents and information submitted by an LSRP upon receipt, including RAOs, and further enumerates those circumstances under which the Department may undertake a more in depth review and those circumstances under which it must conduct that review or review the performance of the remediation.

Moreover, N.J.S.A. 58:10C-25 provides that the Department may audit all RAOs for three years following their filing with the Department and, in cases where undiscovered contamination is found at sites for which RAOs were filed or where the SRPL Board is investigating an LSRP or its license has been suspended or revoked, N.J.S.A. 58:10C-25 provides that the Department may continue thereafter to audit the RAOs. The Department views these provisions, as well as N.J.S.A. 58:10C-22 authorizing the Department to invalidate RAOs in the circumstances set forth therein, as providing the safeguards about which the commenter is concerned.

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278. COMMENT: Particularly at the outset of the program, the finality and reliability of an RAO must be unquestioned and supported, not undermined. Indeed, the Department has indicated through public announcements and presentations that, as with an NFA, “invalidation of an RAO should be a rare and unusual circumstance.” However, if the Department’s proposed rule is adopted, it will be far too easy to question the finality and reliability of an RAO, and RAOs will be invalidated far too often. (6)

RESPONSE: The Department disagrees with the contention that “the finality and reliability of an RAO must be unquestioned and supported, not undermined.” It is the Department’s responsibility to inspect and review all documents submitted. This is not to say that the Department will purposely be looking for reasons to invalidate or otherwise undermine an RAO. In fact, the affirmative purpose of Department review is to confirm that information provided supports the LSRP’s finding that the remedial action is protective of public health and safety and the environment. However, the Department will not blindly accept every RAO that is filed. That said, in the first two years of the LSRP program, over 1,000 RAOs have been issued, and none have been invalidated by the Department.

The Department’s authority to review and invalidate an RAO is not open ended. Rather, SRRA at N.J.S.A. 58:10C-25 provides that the Department may not review a response

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action outcome more than three years after the date the LSRP filed the RAO with the Department, unless undiscovered contamination is found on a site for which an RAO has been filed, the Board conducts an investigation of the LSRP, or the LSRP who issued the RAO has had his or her license suspended or revoked by the Board.

279. COMMENT: Consider how easy it will be to raise questions about a remedial action in view of the list of items at proposed section N.J.A.C. 7:26C-6.4(b). The new provision is likely to be used by adversaries and unfairly places an LSRP and the person responsible for conducting remediation of a contaminated site in the position of having to continually defend an RAO. This could be accomplished through a well-timed complaint to the licensing board against the LSRP or questions raised by project objectors or adversaries to transactions or litigation. These complaints and questions will create significant difficulties for LSRPs and their clients if the Department adopts its approach to invalidating RAOs. (6)

RESPONSE: N.J.A.C. 7:26C-6.4(b) implements the legislative policies in two statutes. Pursuant to N.J.S.A. 58:10B-12, the Department may disapprove the selection of a remedial action which will render the property unusable for future redevelopment or for recreational use. N.J.S.A. 58:10c-22 provides that the Department shall invalidate a response action outcome if a presumptive remedy was not implemented as required by

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N.J.S.A. 58:10B-12 unless the Department determines that the remedial action is equally protective. Thus, the commenter's concern might more appropriately be addressed to the Legislature than to the Department's rulemaking in this proceeding.

That said, since the inception of the LSRP program in November 2009, the Department has not invalidated a single RAO. In fact, several have been withdrawn by the LSRP who issued the RAO, after the LSRP determined that one or more of the factors listed at N.J.A.C. 7:26C-6.4(b) were applicable. Additionally, to date, the SRPL Board has not received any complaints regarding the protectiveness of an RAO.

280. COMMENT: The rule that would require an LSRP to invalidate his or her RAO has no time limitation. Thus, at any point in the future, an LSRP could be compelled to invalidate his or her RAO. This is untenable and unfair for LSRPs who may retire or cease practicing in the State and to their former clients. These problems are avoided if the Department serves as the party responsible to invalidate an RAO that is not protective.

(6)

RESPONSE: It is not the intent of the Department for LSRPs to constantly re-evaluate RAOs they have issued to determine whether the remedy is still protective. This applies especially to LSRPs who have retired or are no longer practicing in the State. However,

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if at some time in the future the LSRP becomes aware of information that indicates that a remedy is no longer protective and the RAO should therefore be rescinded, it is that person's responsibility to do so pursuant to N.J.A.C. 7:26C-6.4(b). See N.J.S.A. 58:10C-16a, which states, "A licensed site remediation professional's highest priority in the performance of professional services shall be the protection of public health and safety and the environment."

In situations where the LSRP is retired or no longer practicing and the Department becomes aware of the need to invalidate an RAO, the Department will do so pursuant to N.J.A.C. 7:26C-6.4(c).

281. COMMENT: The LSRP cannot be responsible for monitoring the protectiveness of a response action outcome in perpetuity. N.J.A.C. 7:26C-6.4(b)1 does not account for a person responsible for conducting the remediation dismissing an LSRP or if the LSRP is no longer contracted for the oversight and maintenance of the remedy, which is managed pursuant to a remedial action permit. The rules governing remedial action permits should be clear that it is the person responsible for conducting the remediation who is ultimately responsible for maintaining compliance with the conditions of the permit, and not the individual LSRP. (6)

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RESPONSE: The Department agrees that it is the responsibility of the person responsible for conducting the remediation and the statutory permittees, rather than the LSRP, to maintain compliance with the conditions of the permit and ensure the protectiveness of the remedy, and the rules so provide. However, if the LSRP becomes aware that a remedy is no longer protective of public health and safety and the environment, it is incumbent upon that LSRP, through the code of conduct set forth in SRRA at N.J.S.A. 58:10C-16a and pursuant to N.J.A.C. 7:6.4(b), to rescind the RAO.

282. COMMENT: N.J.A.C. 7:26C-6.4(b)2 requires that the LSRP rescind a response action outcome if the remedial action will render the property unusable; this requirement and the requirement established in the Technical Requirements that the LSRP shall not submit a remedial action workplan that contains a remedy that renders the property unusable should be eliminated.

The Department has not issued guidance through the stakeholder process, to clarify this requirement. There may be extreme circumstances where an interim remedy that renders a portion of a property as unusable may be the most appropriate remedy and be consistent with other legislative and regulatory mandates, such as the creation of a self implementing low occupancy area because of the remaining polychlorinated biphenyls under Toxic Substances Control Act regulations (see 40 CFR 761.61(a)4) and guidance

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(see USEPA, Polychlorinated Biphenyl (PCB) Site Revitalization Guidance Under the Toxic Substances Control Act (TSCA), November 2005, and NJDEP, Coordination of NJDEP and USEPA PCB Remediation Policies, March 14, 2011, www.nj.gov/dep/srp/guidance/pcbremediation/). While the commenter supports the long-term goals of not rendering a property unusable within the context of the municipal planning approval process, the protectiveness of such a remedy is not questioned, and the response action outcome should not be rescinded. Whether the site is unusable does not relate to whether a remedy is protective. SRRA allows the Department to disapprove a remedial action that renders a site unusable, but the new rules unreasonably extend this statutory right. (6)

283. COMMENT: N.J.A.C. 7:26C-6.4(c)2ii requires invalidation of a response action outcome (RAO) in the event that a remedial action will render a property unusable for future redevelopment or recreational use. This is not one of the statutory criteria for invalidating an RAO pursuant to N.J.S.A. 58:10C-22. Moreover, the statutory provision which addresses this issue, N.J.S.A. 58:10B-12g(1), provides that the Department “may disapprove the selection of a remedial action for a site on which the proposed remedial action will render the property unusable for future redevelopment or for recreational use.” Thus, an unusability finding gives the Department the discretion to disapprove the remedy, but does not require its disapproval as would be the case under the new

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invalidation provisions. Further, the statute appears to contemplate that any action on unusability would be taken as part of the Department's normal inspection and review of LSRP submissions, which would be the appropriate time for such disapproval, not after the RAO has been issued, which is when an invalidation would take place. To do otherwise would undercut that notion of finality, except for the limited invalidation circumstances set forth in N.J.S.A. 58:10C-22 (i.e. where the remedy is non-protective), that is implicit in the statutory scheme for issuing and relying upon RAOs. (18)

RESPONSE to COMMENTS 282 and 283: The concept of a remedy that renders a property unusable is entirely separate and distinct from the concept of whether a remedy is protective. The Legislature authorized the Department through the Brownfield Act to exercise its discretion to disapprove the selection of a remedial action for a site on which the proposed remedial action will render the property unusable for future redevelopment or for recreational use. See N.J.S.A. 58:10B-12g(1). The Department has determined to exercise that discretion by stating in the rules that implementing such a remedy is not appropriate. Since an RAO is the ultimate result of remediation, and since the person responsible for conducting the remediation must conduct the remediation without Department supervision unless otherwise directed by the Department, it is necessary for the rules to clearly state that the Department will exercise its discretion to disapprove the selection of a remedial action for a site on which the proposed remedial action will render

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the property unusable for future redevelopment or for recreational use by invalidating an RAO, irrespective of whether the remedy would ultimately be protective under SRRA.

284. COMMENT: N.J.A.C. 7:26C-6.4(e) requires a LSRP to withdraw and reissue a RAO upon a finding by the LSRP that the RAO was not prepared in accordance N.J.A.C. 7:26C-6. There is no statutory authority for the LSRP to make these determinations and they should not be required to do so. (18)

RESPONSE: Authority for the requirement in N.J.A.C. 7:26C-6.4(e) to prepare an RAO in accordance with N.J.A.C. 7:26C-6 is firmly grounded in SRRA, which enables the Department to adopt “rules and regulations establishing a program that provides for the responsibilities of persons responsible for conducting a remediation and licensed site remediation professionals in the remediation of sites pursuant to the provisions of P.L.2009. c. 60 (c.58:10C-1 et seq.)”

285. COMMENT: The allowable time period during which to amend the RAO at N.J.A.C. 7:26C-6.4(e) should be changed from 14 to 30 days. Recognizing that site information may be archived for projects that have already received an RAO, this change will provide a more reasonable time for the LSRP to complete the necessary actions. Furthermore, the LSRP should not be required to reissue the RAO if he/she is no longer

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retained by the remediating party. The obligation should be on the person responsible for conducting the remediation to retain an LSRP to perform this function, not on the LSRP to complete it. (6)

286. COMMENT: N.J.A.C. 7:26C-6.4(e) requires an LSRP who issued a RAO that the Department determined is administratively incomplete 14 days to amend the RAO by correcting all administrative errors and reissue the amended RAO. Fourteen days is a short timeframe for reissuance, considering that the re-issued document will require additional responsible party and counsel review, and signatures and notarizing. Sixty days is a more appropriate timeframe, with the possibility for extensions. (7)

RESPONSE to COMMENTS 285 and 286: The Department agrees that 14 days may not be enough time to correct and reissue an RAO that was not prepared in accordance with this chapter because it contains administrative errors. Since the correction of an administrative error does not affect the protectiveness of the remedy, and since the focus of this requirement is to ensure that all RAOs are administratively complete, the Department is, on adoption, changing this timeframe at N.J.A.C. 7:26C-6.4(e) from 14 to 30 days. Notwithstanding this amendment, where administrative errors may be corrected in a shorter period of time, the LSRP should make every effort to do so.

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287. COMMENT: N.J.A.C. 7:26C-6.4(e) has only two numbered subparagraphs (1 and 2). However, page 129, first full paragraph of the Summary refers to “6.4(e)1 through 3.” Does (e)3 exist or not? (20)

RESPONSE: There is no N.J.A.C. 7:26C-6.4(e)3. The reference to N.J.A.C. 7:26C-6.4(e)1 through 3 in the summary of amendments to Subchapter 6 noted by the commenter is incorrect. However, N.J.A.C. 7:26C-6.4(e)1 and 2 are correctly referenced and described several paragraphs later in the summary. The rule text itself is correct.

ARRCS Subchapter 7 Remedial Action Permits

288. COMMENT: N.J.A.C. 7:26C-7 was moved from the existing and proposed Technical Requirements without the consultation or concurrence of the stakeholder workgroup that discussed the proposed Technical Requirements in detail over many months, and this revision should have been part of the stakeholder process. (6)

RESPONSE: Contrary to the commenter’s assertion, the rules concerning remedial action permits were developed by the Department in consultation with a working group that was comprised of representatives from the regulated, consulting and legal communities.

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289. COMMENT: The rules should contain a mechanism by which a person conducting a remediation as a volunteer who is a named permittee may remove that person's name from the remedial action permit if that person is no longer conducting remediation and is not otherwise obligated to be named as a permittee. (26)

RESPONSE: The commenter does not explain what is meant by "a volunteer," a broad term that can involve many different scenarios, such as persons with statutory liability for remediation, persons claiming an innocent purchaser defense to liability under the Spill Act, relatives or friends of a property owner who is temporarily incapacitated and unable to carry out compliance with permit conditions, to name just a few. Accordingly, the Department cannot fully evaluate and respond to the suggestion that the rules should include an appropriate mechanism for addressing that which the commenter has in mind.

The only context in which the commenter's "volunteer" scenario would make sense is if the volunteer is not a liable person pursuant to ISRA, UST, or the Spill Act. For a more general discussion of this scenario relative to the phase of remediation that precede a remedial action permit, see the Department's responses to comments above.

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In the commenter's scenario, the person conducted the remediation to a standard that does not provide for the unrestricted use of the property, thus requiring a remedial action permit. If the "volunteer" somehow becomes a permittee under the remedial action permit, the "volunteer" in the commenter's scenario may avail him or herself of N.J.A.C. 7:26C-7.11, which provides for the transfer of a remedial action permit to another party who agrees to take on the responsibilities set forth under the permit. Alternatively, the remediating party may further remediate the contamination to an unrestricted use standard and thereby obviate the need for the permit altogether. A critical point of the Department's rules with regard to remedial action permits is that someone must at all times be responsible for compliance with the terms and conditions of the permit. In the commenter's scenario, it is unclear whether that would be the case once the volunteer's name was removed from the permit. As a result, the Department cannot respond further to this comment.

290. COMMENT: N.J.A.C. 7:26C-7.2(a)2ii should allow the use of 11" x 17" paper as well as 8.5" x 11" paper for maps. Although the rule allows for the use of multiple 8.5" x 11" pages if necessary, this is not always practical. (27)

RESPONSE: The Department has found that in order for it to preserve the integrity of the permit file, it must require that deed maps be submitted on 8.5" x 11" paper. Maps

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drawn on larger paper present storage issues and it is difficult to keep them with the master file.

291. COMMENT: Requiring at N.J.A.C. 7:26C-7.2(b) that copies of deed notices used on public roadway properties be sent to utility companies, local, county and State Department of Transportation (DOT) road departments, and to other agencies including the Department, municipality, health department(s), gas, electric, water, sewer, cable and other utilities that service the property or have a license or easement to cross the property creates a hardship and additional cost for the remediating party. To comply with this requirement, the person responsible for conducting the remediation will be required to conduct a title search to be sure that anyone who has access to the property is notified. (6)

RESPONSE: The requirement to provide a copy of the notice prepared in lieu of the deed notice to the listed governmental entities only applies to those situations where State or Federal entities or the U.S. Department of Defense are occupying the property or where a roadway is owned by a local, county or State entity. The reason for this requirement is that, in these limited circumstances, a deed to which the traditional deed notice may attach may not exist. The purpose of the deed notice and the notice in lieu of deed notice is to inform and advise the existing and subsequent land owners of the environmental conditions that exist on the property. The fact that there may not be a

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deed to which a deed notice may attach does not negate the importance of informing public agencies and local governments of the environmental condition that exists on the property.

The Department does not agree that the requirement to notify these agencies at the permitting stage presents any additional hardship or will cause the person responsible for conducting the remediation to incur additional costs at the permitting stage of the remediation. Where contamination has migrated off site, the rules that govern conducting the remedial investigation require the person to determine the nature and extent of that offsite contamination. In order to do so, the person would have to research which agencies own or control properties impacted by the person's contamination prior to conducting the remedial investigation so that the person could approach those agencies for permission to access those properties. Accordingly, this information should already be in the person's possession prior to the permit application phase, and no further research should be required to comply with the notification requirements of N.J.A.C. 7:26C-7.2.

292. COMMENT: N.J.A.C. 7:26C-7.3(c)1v should be revised to, "The location(s) of all area(s) of concern from which the ground water contamination emanates from; and" (27)

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RESPONSE: The Department believes that the rule text, which requires maps showing the location of all areas of concern that caused the ground water contamination, sufficiently addresses the commenters concern that there be a causal connection between the AOC and the ground water contamination.

293. COMMENT: N.J.A.C. 7:26C-7.5(a) lists the types of remedial actions for which the person responsible for conducting the remediation must apply for a remedial action permit, including at N.J.A.C. 7:26C-7.5(a)3, when the remedial action includes “any other institutional control or engineering control” and at N.J.A.C. 7:26C-7.5(a)4, when the remedial action includes “any obligations for monitoring, maintenance, and evaluation of a remedial action.” It is unclear from the rules to what types of remedial actions these two provisions pertain. (2)

RESPONSE: An institutional control is required for any remedial action that will not result in the remediation of all contaminants in all media to the unrestricted use standards, and an engineering control is required for any remedial action that requires a physical mechanism to ensure protectiveness, such as, to prevent contact with the residual contamination. The most common institutional controls are deed notices (for soils) and classification exception areas (for ground water). However, as defined in the Technical

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Requirements, institutional controls may include, without limitation, structure, land, and natural resource use restrictions, well restriction areas, ground water classification exception areas, deed notices, and declarations of environmental restrictions. Deed notices and classification exception areas are covered by N.J.A.C. 7:26C-7.5(a)1 and 2, respectively, thus the language at N.J.A.C. 7:26C-7.5(a)3 “any other institutional . . . control.” There are numerous engineering controls that can be implemented as part of a remedial action; accordingly, it would be impossible to list in the rules all of the types of engineering that a person responsible for conducting the remediation may choose to implement at a given site. It is for this reason that N.J.A.C. 7:26C-7.5(a)3 includes “any other . . . engineering control.”

The ARRCs rules, at N.J.A.C. 7:26C-1.4, include in the list of persons who are required to comply with ARRCs each person who has executed or is otherwise subject to a legally binding document that governs the remediation of sites. Included are documents that were effective prior to November 4, 2009, and which may contain a site specific obligation for monitoring, maintaining and evaluating a remedial action. It would be unrealistic for the Department to attempt to list the obligations of these documents as a part of the rules. Accordingly, N.J.A.C. 7:26C-7.5(a)4 is broadly worded to capture the remedial actions contemplated in those types of documents.

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294. COMMENT: The prescriptive requirements outlining information that must be submitted for a remedial action permit in N.J.A.C. 7:26C-7.5(b) through (d) represent a “one size fits all” approach to site remediation. These document submission and remedial design components should be outlined in guidance and the requirements at N.J.A.C. 7:26C-7.5 should be modified to require submission of “information necessary to verify the ongoing effectiveness of the remedy, consistent with applicable Department guidance.” (6)

RESPONSE: The requirements in N.J.A.C. 7:26C-7.5(b) through (d) are not new. They are generally recodified from the former Technical Requirements at N.J.A.C. 7:26C-7.3. The Department has determined that the listed categories of information are essential to its ability to develop the remedial action permit. Accordingly, it would not be appropriate to list this information in technical guidance because submission of this information is not at the discretion of the LSRP.

295. COMMENT: N.J.A.C. 7:26C-7.5(b) and (c) require that applications for both soil and groundwater remedial action permits include every no further action letter the Department issued for the site or an area of concern prior to May 7, 2012. Since applications for remedial action permits will be related to current site conditions, the purpose for requiring inclusion of copies of every previously issued NFA with the

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application is unclear. The Department should only be interested in NFAs that are germane to the current site conditions and to the remedial action permit application being submitted. Accordingly, this provision should be revised to appropriately limit the scope of NFAs that must be submitted with a remedial action permit application. (6, 11, 27)

RESPONSE: The no further action letters issued by the Department for the site or an area of concern prior to May 7, 2012 contain information that may be relevant to existing site conditions and the remediation at hand. The Department agrees that the permit will be related to current site conditions, but does not agree that only current site conditions are relevant. For example, prior remediation should be taken into account to ensure that the remedy proposed for the current situation does not render preexisting remedies unprotective.

296. COMMENT: The Department should add “down gradient or otherwise impacted” prior to the word “property” at N.J.A.C. 7:26C-7.5(c)1ix. (6)

RESPONSE: N.J.A.C. 7:26C-7.5(c)1ix requires the person responsible for conducting the remediation to submit, along with the application for a ground water remedial action permit for monitored natural attenuation, information concerning the use of the property abutting the site. This would include all property, not just those properties that are down

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gradient or otherwise impacted by the contamination at the site. It is important to include the use of all abutting properties because these properties could become impacted through, for example, the installation of utility lines that might act as a conduit for contamination migration.

297. COMMENT: N.J.A.C. 7:26C-7.5(c) includes new requirements for the placement of numerous monitoring wells as part of the monitoring requirement for groundwater remedial action permits and associated CEAs. These requirements are overly prescriptive and in many cases will be unnecessary. The appropriate number and location of wells to be included in the groundwater monitoring plan for a site should be determined by the LSRP based upon site-specific factors and their best professional judgment. (11)

298. COMMENT: N.J.A.C. 7:26C-7.5(c) incorporates much of what currently exists in the Technical Requirements at N.J.A.C. 7:26E-6.3(e), making this proposed rule no less prescriptive than the current rules. (2)

299. COMMENT: The groundwater monitoring plan required at N.J.A.C. 7:26C-7.5(c)4 should allow an LSRP to exercise professional judgment in the placement of the wells, since many sites will have overlap in the different plume areas. The setting of mandatory minimum well installation requirements is not necessary; the regulation

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should be performance based as stated in the paragraph preceding the list of the four types of well locations. (6)

RESPONSE to COMMENTS 297 through 299: The Department agrees with the commenters that the requirements at N.J.A.C. 7:26C-7.5(c)4i through iv, which require specific monitoring wells to be included in the ground water monitoring plan that is to accompany a permit application for a monitored natural attenuation remedy, should be modified in order to be consistent with the performance-based purpose/object/approach of the rules and to enable the LSRP to determine the appropriate site-specific monitoring plan components. During the remedial investigation phase of site remediation, the person responsible for conducting the remediation would already have gathered the data required in N.J.A.C. 7:26C-7.5(c)4i-iv to delineate the plume and document that monitored natural attenuation is an effective and appropriate ground water remedy. Accordingly, the Department, on adoption, is deleting N.J.A.C. 7:26C-7.5(c)4i-iv, and is replacing these provisions with the broad requirement that the ground water monitoring plan include a downgradient sentinel well and any other additional monitoring wells necessary to document the continued effectiveness of the monitored natural attenuation ground water remedy. The Department is also adding “monitored” and “remedy” to make this provision consistent with other rule provisions that refer to “the monitored natural attenuation remedy.”

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300. COMMENT: The biennial certification requirement of N.J.A.C. 7:26C-7.8(b)1 to assess future planning and/or zoning changes is unnecessary and should be eliminated. Only changes in land use can result in a change in the protectiveness of a remedial action; a change in zoning is a change in the permitted uses, not the actual use. Since a deed notice and remedial action permit are in place, these institutional controls provide notification of limitations to property owners. (6)

RESPONSE: The purpose of the biennial certification is to ensure that the engineering and institutional controls that are part of a remedial action at a contaminated site are being properly maintained and continue to be protective of public health and safety and of the environment. See N.J.S.A. 58:10B-13.2. The requirement to assess future planning and zoning changes allows the person responsible for conducting the remediation to foresee potential land use changes that could impact the protectiveness of the remedial action. This is particularly important because some land use changes are more subtle than others, and may only include a change of use or activity inside a building. One example of this is a planning or zoning change that allows for a change in the use of a building from office use to residential use. Unless the person responsible for conducting the remediation is aware that there has been a planning or zoning change that allows for a potential change in use, that person may not realize that the use of the

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building interior has changed. Such a change could impact the protectiveness of the engineering and institutional controls implemented at the site. It is appropriate, therefore, that the biennial certification requirement include the assessment of future planning and zoning changes in order to ensure the protectiveness of the remedial action. Pending changes, although they may not affect the protectiveness of the remedy now, may affect the protectiveness in the future. Evaluation of pending future uses helps to inform the person as to whether the remedy remains protective or whether additional remediation is necessary. The obligation to monitor the protectiveness of the remedy is ongoing, notwithstanding the fact that reporting is to be made biennially. This is particularly important where the person who is responsible for monitoring the protectiveness of the remedy is not the owner of the property.

301. COMMENT: N.J.A.C. 7:26C-7.8(b)1 requires the person responsible for conducting the remediation to determine the protectiveness of the remedy according to various cited statutes. The rules should also include citations to regulations that implement these statutory provisions. (6)

RESPONSE: N.J.A.C. 7:26C-7.8(b)1 cites to the various statutes because to cite to each rule provision with specificity would unnecessarily clutter the rule text. The administrative requirements implementing the statutory policies are codified in the

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ARRCS rules, N.J.A.C. 7:26C, the remediation standards are codified in the Remediation Standards, N.J.A.C. 7:26D, and the technical requirements are codified in the Technical Requirements, N.J.A.C. 7:26E.

302. COMMENT: N.J.A.C. 7:26C-7.9(f)1 should also refer to guidance that allows alternative techniques for compliance, such as the “10x allowance” presented in the remedial action guidance document. (6)

RESPONSE: The change suggested by the commenter is unnecessary and redundant. The ARRCS rules at N.J.A.C. 7:26C-1.2(a)3 require the person responsible for conducting the remediation to comply with Department guidance, or to document any deviations therefrom.

303. COMMENT: The commenter understands that soil remediation may proceed without Department approval, but that for ground water, a remediation permit must be obtained before installation of system. Should the person responsible for conducting the remediation stop remediation until the ground water permit is obtained? (27)

RESPONSE: There is an important distinction between the permits that must be obtained in connection with the construction of the ground water treatment system and

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the remedial action permit that must be obtained once the treatment system is functional and is being used as the final remedial action.

Up until the implementation of the remedial action, the person should conduct the remediation without Departmental approval unless specifically directed otherwise by the Department. If, after the conclusion of the remedial investigation, it is determined that the remedial action for ground water involves a treatment technology that requires a permit prior to the installation or implementing of that technology, N.J.A.C. 7:26E-5.7 (recodified on adoption as N.J.A.C. 7:26E-5.6) provides that the person shall apply for and obtain all required permits prior to initiating the activity requiring the permit. For example, if the remedial action for the ground water involves a pump and treat technology that results in a discharge to ground water, a New Jersey Pollutant Discharge Elimination System - Discharge to Ground Water (NJPDES DGW) permit must be obtained before the system may be activated. Obtaining this permit is entirely separate from the need to apply for and obtain the ground water remedial action permit. Note that the regulatory timeframes for the completion of the remedial action set forth in N.J.A.C. 7:26E-5.9 (recodified as N.J.A.C. 7:26E-5.8) and the mandatory timeframe for remedial action completion set forth in N.J.A.C. 7:26C-3.3(a)6 must be met unless an extension is granted. It is therefore incumbent upon the person to timely apply for any necessary permits in order to meet those timeframes.

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Once the person responsible for conducting the remediation has demonstrated that the ground water treatment system is operating and functional, and the person responsible for conducting the remediation determines that the system must remain in place as an engineering control, the person responsible for conducting the remediation must follow the procedures for applying for a remedial action permit set forth in the Technical Requirements at N.J.A.C. 7:26E-5 and the ARRCs rules at N.J.A.C. 7:26C-7, particularly the permit requirements at N.J.A.C. 7:26C-7.9. The person should not shut down the ground water treatment system while waiting for approval of the remedial action permit. Rather, the person should continue to implement the remedial action of ground water to protect the public health and safety and the environment.

See Remedial Action Permit for Ground Water Guidance, version 0.0 (February 24, 2011), www.state.nj.us/dep/srp/guidance for further information on this topic.

304. COMMENT: N.J.A.C. 7:26C-7.9(f) requires that the permittee conduct two rounds of ground water sampling that includes seasonal ground water fluctuations within 180 days after the anticipated CEA expiration date. Two rounds should not be required if the first round exceeds the Ground Water Quality Standards. In that event, the CEA needs to be revised. (7)

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RESPONSE: The Department agrees that if the results of the first ground water sample exceed the ground water remediation standards that the CEA needs to be revised. However, the Department declines to amend N.J.A.C. 7:26C-7.9(f)2 as suggested because these ground water samples are being collected to determine whether the original modeling is correct and whether the ground water contamination has decreased to or below the ground water remediation standards. If the first sample indicates that ground water is contaminated above the ground water remediation standards and therefore the original modeling was incorrect, collection of a second ground water sample will provide more data by which the model may be corrected as required by N.J.A.C. 7:26C-7.9(f)2i.

305. COMMENT: N.J.A.C. 7:26C-7.12 continues to include an obligation to apply for a modification of the remedial action permit whenever the municipality changes its tax map resulting in block and lot number changes. This is an unnecessary burden on the permittee and requires monitoring of an event that does not provide sufficient notice to the public to comply with this proposed rule. (2)

306. COMMENT: N.J.A.C. 7:26C-7.12(b)5 should be amended to clarify that the determination of the lot/block should be made prior to submission of each biennial

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certification form or sooner if permittee is made aware of a lot/block designation change that affects the remedial action permit. (6)

RESPONSE to COMMENTS 305 and 306: N.J.A.C. 7:26C-7.12(b)5 requires the permittee apply for a permit modification within 30 days after a determination that a municipality has revised the lot and block designations of the property. Every remedial action permit contains the site block and lot identifiers as well as the block and lot identifiers for contaminant plumes that extend off-site. Changes in block(s) and lot(s) require a permit modification because these site identifiers are of critical importance to the Department, other government agencies and the public in properly identifying the location of contamination and in determining whether the contamination has the potential to impact a receptor. Waiting to notify the Department of changes in block(s) and lots(s) until the biennial certification could result in significant amounts of time passing before the permit is updated, and this is not acceptable in view of the critical importance of these site identifiers.

307. COMMENT: The amendments and new rules put the burden for the cleanup and cost, both societal and financial, on the taxpayers. Taxpayers will be the ones stuck with the long-term consequences of maintaining the long term maintenance of all the engineering controls and containing the contamination which results from allowing the

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polluters to self-regulate. Polluters will choose to implement the cheapest, least protective remedies, and New Jersey families and taxpayers will pay the ultimate cost with their money and their lives. (33)

RESPONSE: The commenter provides no information to substantiate the broad claims set forth in the comment. The Legislature has provided the option to remediate contaminated sites using engineering and institutional controls. See N.J.S.A. 58:10B-12 and -13. The Legislature also put the responsibility for long term maintenance of engineering controls on the persons responsible for conducting the remediation, including subsequent property owners, not on the taxpayers. The ARRCs rules follow this legislative directive.

N.J.A.C. 7:26C-5 and -7. The effectiveness of a remedial action is not determined by its cost. If, through its inspection and review process, the Department determines that a remedy is not protective of public health, safety, or the environment, the Department is statutorily obligated to invalidate the response action outcome (RAO), and the person responsible for conducting the remediation will be required to implement a remedy that is protective of public health, safety, and the environment.

Moreover, it is essential for the Department to be able to track all remedial actions that involve engineering and institutional controls so that it can be sure that both historical remedies and remedies under the new paradigm remain protective. Accordingly,

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N.J.A.C. 7:26C-7.6(a) requires the person responsible for conducting the remediation to apply for a remedial action permit within two years after the last biennial certification was due to the Department, but in no case later than May 7, 2014. N.J.A.C. 7:26C-7.6(a) provides the regulated community with notice that the Department may issue such a permit, independent of the application schedule set forth in this rule if the Department determines that the person has failed to timely submit the biennial certification. In addition, if the Department takes an enforcement action against a person for failure to submit a biennial certification, the Department will require that that person include the application for the remedial action permit in correcting this violation.

Whether the permit is for an historical or newly installed engineering control, the permittee must establish and maintain financial assurance in an amount that is equal to or greater than the full cost to operate, maintain and inspect all engineering controls that are part of any remedial action over the life of the permit. See N.J.A.C. 7:26C-5.3(c). This provision ensures that only the permittee will be responsible for costs associated with complying with the permit, and not the taxpayers as the commenter opines.

ARRCS Subchapter 9 – Enforcement

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308. COMMENT: The Department must clarify that enforcement will not be used to impose a requirement that substitutes the Department's judgment for that of the LSRP. Those retaining LSRPs will not accept the program if they can be penalized when their LSRP's approach to a remediation (based on that LSRP's professional judgment) differs from the approach the Department prefers. Without a finding that the LSRP's approach is not protective of public health and safety and the environment, the Department must be willing to defer to the LSRP, or those retaining LSRPs will continue to insist upon Department concurrence at every step of the process. (6, 26)

309. COMMENT: The Department should confirm that the codification of over 250 specific base penalties is not intended as an indication that the Department will focus on alleged deficiencies regarding the conduct of remediation that have no impact upon the protection of public health and safety and the environment or the Department's review of an LSRP's submissions. The Department should confirm that the proposed base penalty for an alleged violation of N.J.A.C. 7:26E-1.1(c) would not apply to a situation where an LSRP is using that LSRP's professional judgment. (6, 26)

310. COMMENT: The Department should make an affirmative statement that it will employ a high degree of deference to LSRPs before pursuing enforcement actions based upon alleged failures to document the use of professional judgment. By their very nature,

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many judgment decisions are subject to more than one interpretation, and enforcement based upon an interpretation of an approach is contrary to the legislative intent, is a poor use of resources and will negatively impact the willingness of the person responsible for conducting the remediation to rely on LSRPs. (6, 26)

RESPONSE to COMMENTS 308 through 310: The basic tenet of SRRA is that LSRPs are to conduct and oversee remediation without Department oversight. The Department has and continues to implement this new legislative scheme through adopting new, performance based Technical Requirements and the publication of technical guidance. The rules contain objective standards for what has to be done, and the timeframes for complying. The technical guidance states how those rules may be achieved. Professional judgment may be exercised by the LSRP in utilizing the technical guidance or in explaining why it was inappropriate or unnecessary. The use of professional judgment is not a valid defense to an enforcement action against the person responsible for conducting the remediation. SRRA contains no provision that provides such a defense. The Department will be enforcing the rules against the person responsible for conducting the remediation and the rules contain the objective standards upon which the Department will enforce.

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311. COMMENT: The enforcement provisions of the ARRCs rules do not distinguish between the responsibilities of the LSRP and the responsibilities of the person responsible for conducting the remediation, and they do not differentiate the enforcement mechanisms resulting from violations of the LSRP's and person responsible for conducting the remediation's respective responsibilities. (15)

RESPONSE: The ARRCs rules at N.J.A.C. 7:26C-1.4 clearly set forth the persons to whom the ARRCs rules apply. The Legislature has charged the SRPL Board, except in certain limited circumstances, with regulating the conduct of LSRPs. For further information concerning the SRPL Board and its activities, go to www.nj.gov/l srpboard/. Accordingly, the Department does not foresee taking enforcement action against an LSRP pursuant to N.J.A.C. 7:26C- 9.

312. COMMENT: The proposed LSRP audit process represents a major conflict of interest. As a result, the process is creating a situation in which public policy decisions are influenced by the official's financial interests. The SRPL Board is composed almost entirely of those who either own or are principal employees of large and small remediation companies whose financial bottom lines are directly affected by any decisions made by the SRPL Board including the audit process. (33, 42)

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313. COMMENT: The process of random selection by LSRP number should be laid out in a step-by-step fashion and be made public to ensure an unbiased selection.

Someone who is not affiliated with the Department or LSRP program should be present at the selection process to ensure it is performed correctly and honestly. (33)

314. COMMENT: The lack of public involvement and transparency with the current process can be overcome by establishing a user-friendly website where the public can file complaints against potential threats to public health and safety and the environment resulting from a specific LSRP remediation. Then the names and numbers of LSRPs under “disciplinary review” can be accessible to the public through the website, easing the problem of transparency. One successful model that can easily be replicated is the “Confidential Crime Tip Reporting Form” on the U.S. Attorney General’s website. At a recent SRPL Board meeting, this subject was discussed. Yet, the Board’s opinion was that it is not their responsibility to make it easy for members of the public to file complaints. This mentality reinforces the lack of transparency and fundamental problems that exists in the very heart of the SRPL Board members. (33)

315. COMMENT: The LSRP disciplinary process must be strengthened to offer real penalties for violations. Currently, an LSRP that is audited receives a “satisfactory finding,” is then removed for three years from the list of LSRPs to be audited. Instead,

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they should be entered back into the pool, and have the possibility that they may be audited again at any time, in keeping with every other government auditing process. Allowing the LSRPs to be exempt from the audits gives them a window of unfettered action for three years that is absolutely unacceptable. In addition, any LSRP caught falsifying documents or other major violations must be removed immediately with no grace period, no appeal, and the Department must permanently remove them from the program. Major violations need major ramifications if this process is to have any semblance of effectiveness. (33)

316. COMMENT: Those representatives serving on the SRPL Board should be subject to the requirements and standards of the Department. They are to comply with a strict code of conduct established by statute and regulation and ensure the remediations are protective of human health, safety, and environment. They should be subject to random screening and if caught in violation of a regulation they must immediately be removed from the Board as well as from the LSRP program as a whole. There should be an independent review committee comprised of Department employees and representatives from the Attorney General's office to solely screen those who serve on the Board. The individual LSRPs should also be audited yearly while serving on the SRPL Board. (33)

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RESPONSE to COMMENTS 312 through 316: This set of comments is beyond the scope of this rulemaking because this rulemaking does not pertain to any rules proposed by the SRPL Board. Auditing of LSRP performance will be conducted by the SRPL Board pursuant to rules that it establishes. The SRPL Board is currently in the process of developing its rules. For more information about the SRPL Board, go to www.nj.gov/lsrcboard/. The Department has forwarded these comments to the SRPL Board for its consideration.

317. COMMENT: The extremely onerous and detailed penalty provisions will cause LSRPs to be overly conservative and inflexible in their decision-making and subject persons responsible for conducting remediations to unnecessarily rigorous penalty exposure. (18)

RESPONSE: The Department does not agree that its penalty provisions are overly detailed or onerous. In fact, as a part of this rulemaking, the Department made a concerted effort to scale back the level of detail previously included in the prior codified version of the violation table, because it determined that the level of specificity in that prior version is not necessary to effective enforcement. The Department believes that the new enforcement provisions strike a reasonable balance between clearly providing notice to the person responsible for conducting remediation concerning the violations for which

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they may be cited by the Department, including the applicable grace period and penalty amounts, and providing the tools the Department needs for an effective enforcement program.

318. COMMENT: The Rule Proposal contains enforcement provisions that are arbitrary, excessive and unreasonable. Governor Christie mandated, in Executive Order No. 2, that State agencies take a “common sense approach” to promulgating new regulations. A key component of Executive Order No. 2 provides that enforcement actions by State agencies must be focused on substantive violations that result in a material impact. In pertinent part, Executive Order No. 2 states:

"For immediate relief from regulatory burdens, State agencies shall ...take action to cultivate an approach to regulations that values performance-based outcomes and compliance, over the punitive imposition of penalties for technical violations that do not result in negative impacts to the public health, safety or environment."

Additionally, "[for] long-term relief from regulatory burdens, ...[i]n cases of regulatory noncompliance, an agency's enforcement response should be proportional to the circumstances and should take into consideration whether the agency contributed to the noncompliance. Before undertaking enforcement activity, and absent exceptional

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circumstances, the agency shall discuss the regulatory violation with the noncompliant individual or business in order to explore the possibility of resolving the matter without enforcement proceedings ...[and] ...[w]aive penalties, when appropriate, for first-time or isolated paperwork or procedural regulatory noncompliance.” Despite these clear mandates, however, the ARRCS contains over 100 pages of potential violations and substantial base penalties associated with the site remediation program. (3, 11, 15)

319. COMMENT: The proposed base penalties are inconsistent with the Governor Christie’s Executive Order No. 2, which requires that enforcement of regulations be focused upon “performance based outcomes and compliance over the punitive imposition of penalties for technical violations that do not result in negative impacts to the public health, safety or environment,” and which mandates that “an agency’s enforcement response should be proportional to the circumstances.” The application of blanket base penalties that focus on the rule being violated rather than on the nature of the circumstances giving rise to the penalty contravene the letter and intent of Executive Order No. 2. (6, 12, 15, 26)

320. COMMENT: The use of over 250 listed base penalties fails to meet the requirements of Executive Order No. 2 because it does not relate the penalty amount to the severity of the impact to public health and safety and the environment or to the

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seriousness of the conduct of the alleged violator. Furthermore, the overwhelming bulk of the proposed base penalties are duplicative and/or redundant. (6, 12)

321. COMMENT: The Department has failed to justify each of the penalty amounts based on impact to public health and safety and the environment or the functioning of the program. As proposed, the amounts are arbitrarily imposed, capriciously selected and unreasonably unrelated to impact to public health and safety and the environment. These proposed penalties should not be adopted. (6, 26)

RESPONSE to COMMENTS 318 through 321: The Department believes the enforcement provisions included in N.J.A.C. 7:26C-9 comport with Executive Order No. 2. The Department has substantially reduced the number of violations listed in the penalty table, when compared with the number of penalties listed in the prior-codified version of this table. Most of the eliminated violations were detailed requirements that are rarely the sole basis for an enforcement action. The Department's enforcement program has and will continue to focus on violations that impact or threaten, or have the potential to impact or threaten, public health and safety and the environment or to undermine the basic tenets of the new site remediation program under SRRA. The rules provide the Department with flexibility it needs to assess an appropriate penalty that is, as one commenter encourages, "proportional to the circumstances."

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322. COMMENT: The rules fail to provide any procedures associated with, or explanation for, how the Department intends to use ARRCS subchapter 9 to enforce the rules. Under the new LSRP paradigm, the Department will not be regularly reviewing documents submitted by LSRPs. Moreover, as directed by SRRA, in reviewing an LSRP's work at a site, the Department's sole determination should be whether a site has been investigated and/or remediated in a manner that is protective of public health and safety and the environment. Accordingly, it is unclear how, and pursuant to what authority, the Department may seek to take enforcement actions associated with an LSRP's submittals or other actions taken by the person responsible for conducting the remediation. (3, 11, 24)

RESPONSE: The Department believes that the enforcement provisions clearly identify the procedures the Department intends to use to enforce the rule. The Department will enforce against the person responsible for conducting the remediation; the SRPL Board is charged with monitoring the conduct of LSRPs. N.J.A.C. 7:26C-9 sets forth how the Department determines whether a person responsible for conducting the remediation should have a grace period during which to ameliorate a violation, and N.J.A.C. 7:26C-9.5 and 9.6 outlines the process the Department will employ for calculating and assessing civil administrative penalties.

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Contrary to the commenter's assertion, the Department will inspect all documents submitted by the LSRP on behalf of the person responsible for conducting the remediation and will conduct a further review as warranted. Moreover, the Department's review is not limited to whether a remediation is protective of public health and safety and the environment. Rather, the Department has the authority to enforce on any aspect of the regulatory requirements. See N.J.S.A. 58:10B-1.3.e.

323. COMMENT: A system of "checks and balances" should be established between the Department and the LSRPs to ensure that audit results are being filed honestly. One way to do this is by creating a system of on-site audits monitored by the Department that would verify questionnaire responses. This would include Department performing physical site inspections to audit the work performed by the LSRP, not just a paper process. There should be randomized sampling, quality assurance/quality control and laboratory audits to verify the LSRP work. Such a system of checks and balances should be required, and not used as a last resort to clarify any questions or concerns that may arise from the questionnaire or email correspondences. (33)

RESPONSE: As discussed above, conduct of the LSRP is governed by the SRPL Board. The Board will establish a process for auditing LSRPs. The Department is not tasked by

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SRRA to be involved in the Board's auditing process. The Department will support the Board if and when the Board so requests, as per any rules that the Board promulgates.

324. COMMENT: A more efficient auditing process is needed. Auditing should be performed by an independent auditor, who is not affiliated with the Department or the LSRP program. This process should undergo thorough auditing and meet the auditing standards of the Government Accountability Office. (33)

RESPONSE: The suggestion concerning which auditing standards are appropriate is beyond the scope of this rulemaking. Auditing standards are within the purview of the SRPL Board, and not the Department.

325. COMMENT: It should be clear that the person responsible for conducting the remediation will not be subject to penalties for the actions of an LSRP on which the person reasonably relied that result in the site being non-compliant. Persons responsible for conducting the remediation will need to rely on the advice of LSRPs concerning technical and regulatory requirements affecting the site remediation. The Department should adopt a "grace period" approach and categorize good-faith non-compliance as a minor violation, providing the party an opportunity to correct the violation. This "grace period" approach should similarly be applied when a person's good-faith reliance results

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in a violation of a timeframe. Instead of subjecting a person responsible for conducting the remediation to harsh penalties and direct oversight if the person fails to comply with a provision due to reasonable reliance on the LSRP, the Department should require the responsible person to fix the error, yet not impose harsh penalties on the person (15)

RESPONSE: The person responsible for conducting the remediation is subject to penalties for the actions of that person's LSRP. It is not a defense to a penalty that the person responsible for conducting the remediation reasonably relied on the work of an LSRP that resulted in the violation. The State's licensing of the contractors that the person responsible for conducting the remediation uses to remediate a contaminated site does not change who has the responsibility for that remediation, namely the person responsible for conducting the remediation.

The Department recognizes and encourages the person responsible for conducting remediation to rely on their LSRP. Regardless of the reason for the violation, if the error results in a minor violation, the person responsible for conducting remediation will be afforded a grace period within which to correct the violation without the imposition of penalties. The person responsible for conducting the remediation has the recourse of referring the LSRP to the SRPL Board or otherwise exercising his or her rights under law against the LSRP.

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326. COMMENT: In lieu of base penalties, the Department should utilize a penalty matrix that factors the intent of the alleged violator (seriousness of conduct) and the actual impact to public health and safety and the environment (severity of violation). (6, 26)

RESPONSE: Under the new rules, the Department will continue to utilize its current approach, which includes a table at N.J.A.C. 7:26C-9.5(b) listing base penalties. The Department previously considered and determined not to use a penalty matrix. The Department determined that the list of base penalties and explanation of the calculation process provide more clarity and predictability for those persons responsible for conducting remediation. Varying base penalties have been established to reflect the severity of the possible violations. The Department may adjust the base penalty using the penalty adjustment factors codified at N.J.A.C. 7:26C-9.6. These factors reflect the seriousness of conduct.

327. COMMENT: Any alleged failures by the person responsible for conducting the remediation or LSRP to provide documentation should be considered as minor under the Grace Period Law, except where that documentation is necessary for action necessary to address an immediate environmental concern. Any enforcement action based on the

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alleged failure to document the basis of the LSRP's use of professional judgment should be considered as a minor violation under the Grace Period Law. (6, 26)

328. COMMENT: A number of the proposed base penalties often equate two very different types of conduct: (1) a failure to submit documentation and (2) a failure to conduct required remediation. Such conduct should not be treated equally by the Department. The failure to document should be considered as a minor violation under the Grace Period Law. The following are examples of such proposed base penalties: N.J.A.C. 7:14B-9.5, 13.8(a), 16.9(a) and 16.10(d), 7:26B-3.2, 7:26E-1.5(d) and (e), and 7:26E-1.6(a)4 and (b), 1.10(a), 1.11(a)9, 1.12(a) and (c)-(e), and 7:26E-2.1(c)2 and 3. (6)

RESPONSE to COMMENTS 327 and 328: N.J.S.A. 13:1D-125-1 et seq., commonly known as the Grace Period Law, specifies the criteria for a violation to be considered as minor, and those criteria are codified at N.J.A.C. 7:26C-9. The Department has followed these criteria in determining which violations are to be designated as minor or non-minor.

The Department has reevaluated each of the rules to which the commenter cites and has determined that each of these violations is appropriately designated as non-minor. Since SRRA requires that remediation proceed without prior Department approval, the Department's effective management of the site remediation program relies upon the

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timely submittal of reports, documentation and related forms required in its rules. Failure to submit the documentation required to be submitted pursuant to each of the cited rules would substantively undermine the program, and thus threaten the Department's ability to ensure that the remediation is protective of the public health and safety and the environment.

329. COMMENT: The Department should clarify that when a specific base penalty applies to an alleged violation, the Department will not also impose another base penalty addressing a more general alleged violation. For example, a "failure to conduct additional remediation using the services of a [sic] LSRP" as required under N.J.A.C. 7:26C-1.4(e) (\$15,000)(non-minor) should not also be assessed for a "failure to comply" with this chapter in violation of N.J.A.C. 7:26C-1.4(a) (also \$15,000)(also non-minor). No redundant proposed base penalties should be adopted. (6, 26)

RESPONSE: Each of the requirements listed in the violations table in N.J.A.C. 7:26C-9 as a separate violation arises from a separate regulatory requirement. The listing of similar violations that arise from different rules is necessary in order for the Department to be able to penalize the person responsible for conducting the remediation as authorized by the Spill Act, ISRA, and UST Act. By deleting the remediation requirements from the UST rules and the ISRA rules and instead requiring the person responsible for

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conducting the remediation to comply with the ARRCs rules, the Department was able to eliminate much of the duplication that occurred in the prior version of the penalty table at N.J.A.C. 7:26C-9.5(b).

330. COMMENT: The Department has a broad range of powerful enforcement authorities without the use of base penalties. Under the series of authorizing statutes including SRRA and the Spill Act, the Department has broad authority to take a variety of enforcement actions that serve as a substantial deterrent to improper conduct, including the determination that direct oversight by the Department is warranted. The listing of over 250 specific base penalties provides no additional real deterrent value and the proposed base penalties should not be adopted except to the extent that certain violations cannot be remedied under the Grace Period Law. (6, 26)

RESPONSE: The Department's broad authority cited by the commenter includes the assessment of penalties. Use of Department direct oversight as a primary enforcement tool in lieu of penalties would undermine the new remediation paradigm under SRRA in that intensive Department resources would be required for numerous cases involving violations. The listing of base penalties historically has had a significant deterrent effect; the person is put on notice of the amount of the potential base penalty and the fact that under N.J.A.C. 7:26C-9.5 the base penalty amount may be enhanced by the number of

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days that the violation continues and due to other aggravating factors under N.J.A.C. 7:26C-9.6, -9.7 and -9.8.

331. COMMENT: No penalties should be assessed for any alleged failure to submit application information as the Department has the authority to simply deny the application or insist upon the submission of additional information. Examples of such proposed penalties include N.J.A.C. 7:14B-13.9(e) and 16.10(e), and 7:26C-7.2, 7.3 and 7.11. (6, 26)

RESPONSE: The Department has designated as non-minor some violations which, although they could be corrected within a grace period as the commenter points out, could bring the remediation of the site to a halt due to Department denial of an application or permit. The Department has designated these violations as non-minor because it has determined that they are violations which substantially undermine or impair the goals of the program. For example, N.J.A.C. 7:26C-7.2 outlines the procedure for proper filing of a deed notice. The use of deed notices is a key component of remediation. If deed notices are incorrectly prepared or improperly filed, the remedy may not be protective in the interim, which is a critical goal of SRP. A violation of N.J.A.C. 7:14B-13.9(e) is a non-minor violation because the Department relies on information

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from certified individuals to assure loans and grant are available to eligible applicants who are obligated to move their remediation forward.

332. COMMENT: There should be no base penalties for failure to submit a fee as, at most, the Department should require the submission of the fee due and a late fee. All alleged failures to remit a fee should be considered as “minor” violations under the Grace Period Law. Examples of such proposed penalties include N.J.A.C. 7:26B-8, 7:26C-2.3(a)4, 4.3(a), (g) and (h), 4.4(a) through (d), 4.6, 4.7(a) and 16.3(a). (6, 26)

RESPONSE: The Department has designated all fee related violations as non-minor because failure to pay required fees undermines the goals of the program. Without payment of applicable fees, the Department would be unable to administer the LSRP program. One of the purposes of a penalty rule is to provide deterrence to a future violation. Merely assessing a late fee to a fee a person already has not paid is not a significant incentive to achieving compliance.

333. COMMENT: Many of the enforcement provisions are duplicative and punitive. For example, failure to meet a mandatory timeframe could result in a \$20,000 penalty. However, failing to meet a mandatory timeframe will automatically put a site into direct oversight, which results in significant, negative consequences for the person responsible

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for conducting the remediation. These provisions should only address those violations that have the potential to result in a remediation that will not be protective of public health and the environment. (3, 11)

RESPONSE: The affirmative obligation to remediate a site at N.J.S.A. 58:10B-1.3 is the cornerstone of SRRA. Accordingly, the violation of this obligation impacts the core of the site remediation program. The Spill Act authorizes the assessment of penalties and SRRA sets forth the criteria for when the Department may place a remediation under direct oversight, both of which are deterrent measures, but neither measure is mutually exclusive. Accordingly, when, for example, a person misses a mandatory time frame, the Department has the authority to both assess penalties and place the remediation under direct Department oversight.

334. COMMENT: The Department is proposing to raise the base penalty amount assigned to a violation of a rule provision in the ARRCS rules at N.J.A.C. 7:26C-9.5 to reflect the importance of timely achieving the proposed new remediation goals. In addition, previous violations designated as minor are now re-assigned to the non-minor category. The rules cited at N.J.A.C. 7:26C-9.5 are generally performance based goals. The Department will be enforcing broader remediation goals; therefore, the Department is compensating for ceding partial control of the remediation process to LSRPs by

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drastically increasing the number of violations, reclassifying the majority (approximately 75 percent) of violations from minor (M) to non-minor (NM), and drastically increasing the corresponding base penalty amounts. The base penalty for M penalties has increased from \$4,000 to \$10,000, while the lowest penalty for NM penalties has increased from a minimum of \$8,000 to a minimum of \$10,000, with the majority in the \$15,000 to \$25,000 (statutory maximum) range. As discussed in the Summary section of the rule proposal, the Department is compensating for ceding partial control of the remediation process to LSRPs by drastically increasing the number of violations, reclassifying the majority (approximately 75%) of violations from minor (M) to non-minor (NM), and drastically increasing the corresponding base penalty amounts.

There is no corresponding correlation between penalty amount and protection of public health and safety and the environment. To pick one example, the base penalty for failure to submit proper UST certifications at N.J.A.C. 7:14B-1.7(a) will increase from \$4,000 to \$10,000. The Department has not provided justification for this two-and-a-half-times increase.

Furthermore, reclassifying many M penalties as NM means that violations that were formerly afforded grace periods are no longer afforded a grace period during which the person responsible for conducting the remediation may correct the violation. This section

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is one of the most significant portions of the proposal, given the significant impact that it will have upon small businesses in the State. The Department should seriously reconsider these proposed revisions. (3, 7, 11)

RESPONSE: The Department declines to reconsider the revisions to its penalty table at N.J.A.C. 7:26C-9.5(b). The principal reason that the penalty table contains proportionally more non-minor violations than previously has more to do with the elimination of minor violations previously included in the table than with the Department changing violations formerly designated as minor to non-minor. The prior table listed violations for 422 rule requirements and includes 203 minor and 219 non-minor violations. The newly adopted table includes violations for 258 rule requirements (an overall reduction of 39 percent), because many of the minor violations are eliminated. The elimination of these very detailed violations reflects the Department's intent to focus its enforcement on the achievement of broader remediation goals. It also addresses current and historical comments received concerning these rules, that they were overly detailed and redundant. Because most of the very specific prior violations have been removed from the current table, only 37 minor violations remain. The violations that are classified as non-minor, as explained in the proposal summary, are violations that the Department has determined will materially and substantially undermine or impair the fundamental goals of the site remediation program.

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By eliminating so many violations from the violations table in the previous rule (most of which were minor) the Department has streamlined the penalty assessment process by focusing on the more important provisions.

The Department has also determined to increase the penalty amounts because, since most of the violations are non-minor, this reinforces that a violation of a non-minor provision may have serious consequences.

335. COMMENT: The commenter understands the need to enforce the remediation of a site in accordance with New Jersey statutes and regulations. However, it appears inappropriate, arbitrarily punitive, and in conflict with the Department desire that an LSRP to use professional judgment, to enforce a non-minor penalty (or minor) on the party responsible for remediation for not completing a remediation in accordance with a document published as guidance, particularly if the deviation from the guidance does not result in a remedy that is not protective of public health and safety and the environment.

The Department should revise the list of violations that are proposed to be non-minor, along with the penalty for said violations, and revise the list to be consistent with the

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objective of furthering the success of the new paradigm established by SRRA to allow a LSRP to supervise site remediation using professional judgment. (24)

RESPONSE: SRRA provides that an LSRP is to use its professional judgment in limited circumstances. See N.J.S.A. 58:10C-14c(4), and many decisions by LSRPS will call for the exercise of professional judgment. However, exercises of professional judgment by LSRPS should not be confused with the obligation of the persons responsible for conducting the remediation to comply with the ARRCs rules and the Technical Requirements.

The Department will only assess penalties against the person responsible for conducting the remediation where there is a violation of applicable statutes or rules.

If the person responsible for conducting the remediation provides the requisite written rationale for not following the available Department technical guidance as required by N.J.A.C. 7:26C-1.2(a)3, there is no violation and thus no penalty to be assessed.

However, the failure of the person responsible for conducting the remediation to provide the required rationale for deviating from available Department technical guidance will result in a violation by the person responsible for conducting the remediation.

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ARRCS Subchapter 13 - Remediation of Unregulated Heating Oil Tanks (UHOTs)

336. COMMENT: N.J.A.C. 7:26C-13 should specify that the Department will issue NFAs as the final remediation document at UHOT sites. The Department needs to make it clear that the remedial action reports need to be submitted to the Department for review and for issuance of the no further action letter, regardless of whether an LSRP or a subsurface evaluator directed the remediation. (24)

337. COMMENT: Unregulated heating oil tanks (UHOT) cases are exempted from the requirement to hire an LSRP at N.J.A.C. 7:26C-1.4(d) and 2.1(a). However, the exemptions for UHOT cases from the ability to utilize an LSRP who may utilize their professional judgment contradicts SRRA, which states that, “Any person who remediates a discharge from an unregulated heating oil tank may hire a certified subsurface evaluator ***or*** a licensed site remediation professional to perform the remediation” (emphasis added).

LSRPs should be allowed to issue RAOs to remediated UHOT sites as with any other remediated sites or AOC. This is consistent with the law and the intent of the Legislature. It was not the legislative intent to create a new, and more restrictive rule for a single class of UHOT cases. If the market dictates that LSRPs are too expensive for the homeowner, for the insurance carrier, or the other responsible party, then so be it. But

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that is an option that should be available to the client and let the client decide whom they want to use. (6, 13)

338. COMMENT: The exemption of the UHOT cases from the receipt of a RAO issued by an LSRP is inappropriate and should be revised in the final rule. The proposed rule reads “The Department will issue a no further action letter to the person responsible for conducting the remediation when that person is remediating an unregulated heating oil tank.”

We recommend that this language be revised to read: “The Department will issue a no further action letter to the person responsible for conducting the remediation when that person is remediating an unregulated heating oil tank under the supervision of a certified Subsurface Evaluator under the UHOT regulations promulgated by the Department.”

This proposed revision would allow the Department to continue with the development of the UHOT regulations, but would also allow the LSRP to provide a RAO should the person responsible for conducting the remediation choose that option. (6)

339. COMMENT: Requiring that LSRPs adhere to an as yet unpublished, but what has been described as very prescriptive, rule for the remediation of UHOT contamination

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that does not allow the LSRP to utilize professional judgment to issue an RAO and, instead, requiring the submittal of a request for a no further action (NFA) letter under the Department's direct oversight for these cases is going backwards. By perpetuating the existence of two separate, but equal programs for performing remediation, the Department is creating confusion for the regulated public and restricting the person responsible for conducting the remediation's choice. (6)

340. COMMENT: It should be expected that the turnaround time for the Department to issue an NFA will be longer than an LSRP to issue an RAO for the UHOT cases. As such, another undesirable consequence of not allowing LSRPs to issue an RAO for UHOT cases is that this will delay the closure of "mixed sites" – those with both UHOT cases and other contaminated AOCs. A common example is brownfield sites where UHOTs are commonly encountered during redevelopment. By requiring the local government and/or redeveloper to obtain a UHOT NFA from NJDEP while all other AOCs can be addressed through an RAO is duplicative, results in additional costs, and will likely delay closure of the site pending Department action. These problems will be a disincentive to brownfield redevelopment. (6)

RESPONSE to COMMENTS 336 through 340: N.J.S.A. 58:10B-1.3d(1) exempts UHOT owners from the requirement to hire an LSRP. Accordingly, the ARRCS rules at

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N.J.A.C. 7:26C-1.4(d) exempt the UHOT owner from the requirement to hire an LSRP, to submit documents to the Department and to comply with the mandatory time frames in N.J.A.C. 7:26C-3.

N.J.A.C. 58:10B-1.3d(1) points to N.J.S.A. 58:10C-15, which provides that remediation of a UHOT discharge may be conducted by either an LSRP or a certified subsurface evaluator. N.J.A.C. 7:26C-13, which sets forth the procedures for the remediation of unregulated heating oil tank systems, provides that the person responsible for conducting the remediation of a discharge from an unregulated heating oil tank system shall hire either a subsurface evaluator or an LSRP to perform the remediation of the discharge. See N.J.A.C. 7:26C-13.2(a). Thus, in accordance with the statute, the rules allow for the use of either a subsurface evaluator or an LSRP to remediate a discharge from a UHOT.

While SRRA provides that an LSRP can issue an RAO, a certified subsurface evaluator has no equivalent authority under SRRA. Accordingly, UHOT owners who hire a subsurface evaluator must come to the Department for a no further action letter. To avoid the confusing situation where some UHOT owners will have RAOs while others will have Department-issued no further action letters, the Brownfield Act provides that the Department may continue to issue no further action letters for UHOTs (see N.J.S.A. 58:10B-13.1f(2)). It is for this reason that N.J.A.C. 7:26C-6.3 provides that the

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Department will issue a no further action letter to the person responsible for conducting the remediation when that person is remediating an unregulated heating oil tank.

Regardless of whether the UHOT owner hired a subsurface evaluator or an LSRP, remediation must proceed without Department oversight, unless otherwise directed by the Department.

N.J.A.C. 7:26C-13.4(b), which requires an LSRP to issue an RAO, is not consistent with N.J.A.C. 7:26C-6.3. Accordingly, on adoption, the Department is changing N.J.A.C. 7:26C-13.4(b) to require the LSRP to submit documentation to the Department so that the Department may issue a no further action letter to the person responsible for conducting the remediation when that person is remediating an unregulated heating oil tank. The Department is also adding a new (c), setting forth the address to which the documents are to be submitted.

341. COMMENT: Subchapter 13 of the UST rules (N.J.A.C. 7:14B) no longer allows subsurface evaluators to provide UST services – the provision of ARRCs at N.J.A.C. 7:26C-13.3(b)1 should be changed to match this exclusion. (6)

RESPONSE: Contrary to the commenter's assertion, N.J.A.C. 7:26C-13.3 contains the requirements for utilizing a subsurface evaluator in the remediation of a discharge from a

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UHOT. N.J.A.C. 7:26C-13.3(b)1 is consistent with this provision, and contains the certification that the subsurface evaluator must sign and that must accompany an application for a no further action letter.

342. COMMENT: The Department should not adopt the amendments to N.J.A.C. 7:26C-1.4(a)5, proposed to be recodified at N.J.A.C. 7:26C-1.4(d), because the amendments actually make the requirements for the UHOT owner more confused than before. Under the rules as currently codified, the UHOT owner is directed to comply with N.J.A.C. 7:26C-4 and 13. The rule as amended directs the UHOT owner to determine the applicability of the entire chapter, rather than explicitly referencing the applicable subchapters. This is an unnecessary burden to place on UHOT owners, who, as the Department pointed out in the summary describing this amendment, are “primarily associated with private residences.” (9)

RESPONSE: The Department agrees with the commenter. The Department will not adopt the changes to the text of recodified N.J.A.C. 7:26C-1.4(d) because, as the commenter notes, only subchapters 4 and 13 apply to the remediation of UHOTs. Accordingly, on adoption, the Department is modifying N.J.A.C. 7:26C-1.4(d) to provide that the person responsible for conducting the remediation is only required to comply with the requirements of N.J.A.C. 7:26C-4 and -13.

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ARRCS Subchapter 14 – Direct Department oversight

343. COMMENT: N.J.A.C. 7:26C-14 sets forth the compulsory and discretionary criteria for triggering direct oversight. However, it fails to also provide a mechanism and criteria for a person who is subject to direct oversight to challenge a determination by the Department that direct oversight applies. There is nothing in SRRA that would preclude such an approach and principles of fundamental fairness under legal due process strongly support its inclusion in the regulations. (18)

344. COMMENT: Both N.J.A.C. 7:26C-14.2(a) and (b) should include a mechanism by which a person responsible for conducting the remediation may challenge a Department determination regarding direct oversight and the process to undertake that challenge, including technical review and appeal to an administrative law judge. (3, 6, 39)

345. COMMENT: Although N.J.A.C. 7:26C-14.4 provides for adjustments to direct oversight, there is no discussion in the subchapter of an applicable appeal process for the person responsible for conducting the remediation to challenge the Department after

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receiving what they believe to have been an inappropriate notification from Department. While the Department's determination may have been based on technical issues, submission of an appeal through the technical review committee would not necessarily be allowed because the proposed rule is part of ARRCs and not the Technical Requirements.

The rule should be revised to provide the process for relief for the person responsible for conducting the remediation by allowing a technical review committee to be convened prior to a hearing by an administrative law judge. Likewise, a specific time period should be provided in the final regulation, such as thirty days, for the person responsible for conducting to provide appropriate notice to the Department, for example by certified mail, return receipt requested, that they are contesting the determination. During the time that the appeal process proceeds, the person responsible for conducting the remediation, should not be required to meet the requirements specified by the Department at N.J.A.C. 7:26C-14.2(b). (6, 11)

346. COMMENT: N.J.A.C. 7:26C-14.3 provides that the Department may, at its discretion take direct oversight of a portion, a condition or the entire remediation of a site or area of concern if several conditions occur such as when elevated concentrations of

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chromate have resulted in injury to sensitive natural resource. There should be a mechanism to appeal, in order to remove discretionary direct oversight. (7)

347. COMMENT: N.J.A.C. 7:26C-14.4 should be amended to provide a basis to challenge a Department determination as to which direct oversight requirements will be imposed. There are no stated criteria or procedures for a person responsible for conducting the remediation to petition to get out of direct oversight or to have certain requirements waived or modified. (6, 11)

RESPONSE to COMMENTS 343 through 347: The Department acknowledges that the ARRCs rules do not contain a mechanism for appealing or challenging a Department decision to place a site under direct oversight. SRRA does not contain a provision granting a right to a hearing to appeal or challenge a determination of the Department to place a site into direct oversight. Whether there will be an opportunity for the person responsible for conducting the remediation to have a hearing where the person can appeal or challenge a determination of the Department to place a site into direct oversight will depend on how the Department elects to implement and enforce the direct oversight provisions of N.J.S.A. 7:26C-27. Should the Department pursuant to the Spill Act direct the person responsible for conducting the remediation to perform its remediation obligations, there would be no right to a pre-enforcement hearing or appeal under the Spill Act, as established in relevant court decisions. Should the Department elect to

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enforce the remediation obligations of the person responsible for conducting the remediation by issuing an administrative order, that person would have an opportunity for a hearing as set forth in N.J.A.C 7:26C-9 et seq. Rules are in place giving the person an opportunity for a hearing if the Department issues an administrative order.

348. COMMENT: N.J.A.C. 7:26C-14.2 details the steps which the Department will take to place a site or area of concern under direct oversight. However, there is no discussion concerning the removal of sites or areas of concern from direct oversight. The Department needs to provide an “out” mechanism once the problem or violation has been addressed. (7, 18, 29)

349. COMMENT: As is the case with discretionary direct oversight, N.J.A.C. 7:26C-14.2(b) should provide that the Department may undertake direct oversight of only a portion or a condition of the remediation. As currently written, under this section, the Department must either take over all or none of the remediation. (6)

350. COMMENT: N.J.A.C. 7:26C-14.4 allows the Department to make adjustments in direct oversight, but this provision only contemplates relief from certain requirements of direct oversight and does not contemplate fully exiting direct oversight. (3, 18)

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351. COMMENT: If the direct oversight was as a result of the Department's review of only a portion of the site or a condition that existed, Department directed remediation should be limited to only that portion of the site. (6)

RESPONSE to COMMENTS 348 through 351: The commenters are misinterpreting Subchapter 14, concerning direct Department oversight, as not providing a mechanism by which the Department may determine that a part or all of a site should not be subject to direct Department oversight. N.J.A.C. 7:26C-14.2 provides when a person will be subject to direct oversight, not to what portion of the site direct oversight will apply. Moreover, N.J.A.C. 7:26C-14.3 specifies when the Department may undertake discretionary direct oversight of all or a portion of a site. Where only a portion of a site is placed under discretionary direct oversight, remediation on the remainder of the site should proceed under the supervision of the LSRP in accordance with the ARRCS rules. Finally, N.J.A.C. 7:26E-14.4 sets forth how the Department may make adjustments to direct oversight. When the Department makes a determination that a direct oversight requirement is no longer applicable for one of the two reasons stated at N.J.A.C. 7:26E-14.4, the person need not thereafter comply with that requirement. One example of the operation of N.J.A.C. 7:26E-14.4 would be in the situation when the Department determines that a portion of a site no longer needs to be remediated under the direct

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oversight of the Department, but rather, that remediation may continue under the supervision of an LSRP.

352. COMMENT: The proposed direct oversight program is overly aggressive and ambiguous. The intended purpose of the direct oversight program is to address those cases that involve gross non-compliance by the person responsible for conducting the remediation and those sites that are an emergent risk to public health and safety and the environment. The provisions as drafted go beyond intended purpose. (39)

353. COMMENT: Generally, Subchapter 14 is overly broad, vague, utilizes criteria that are either inappropriate or inapplicable, and in instances, goes beyond that which is authorized by SRRA. The intended purpose of this subchapter is to address those cases that involve gross non-compliance by the person responsible for conducting the remediation and sites where the nature of the contaminants or the extent of contamination constitute an emergent risk to public health and safety and the environment, thus requiring the Department to act to ensure proper and timely action to address the risk. The provisions as drafted go beyond this and in certain circumstances may result in further delay in implementing necessary actions, especially in light of the Department's limited resources. (6)

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354. COMMENT: Sites will be placed under direct oversight due to the nature of the site, access issues or the types of contamination present, and even after the best efforts of the person responsible for conducting the remediation, the remedial investigation of the Site may not be completed by the May 7, 2014 deadline. The rules contain no mechanism by which to negotiate with the Department and avoid having the Department take direct oversight of the entire site. (6, 39)

355. COMMENT: Many of the factors that the Department may consider in determining when a site will be subject to direct oversight (e.g., compliance history, priority ranking, natural resource settlements) are arbitrary, inappropriate or not adequately defined. (3, 39)

RESPONSE to COMMENTS 352 through 355: SRRA requires that the remedial investigation for specified sites must be completed by May 7, 2014.

The Department views placement of a site into direct oversight as a last resort given the severe consequences of such action under SRRA. SRRA and the Department's ARRCs rules afford ample opportunities to negotiate with the Department before triggering direct oversight. For example, should the person responsible for conducting the remediation be having a problem in meeting a mandatory remediation timeframe, that person can apply for an extension of the mandatory remediation timeframe as provided in N.J.A.C. 7:26C-3.3. N.J.A.C. 7:26C-3.5 sets forth the process for applying for mandatory remediation

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timeframe extensions and criteria for the Department's review of such applications. As to potential site access issues cited by the commenter as preventing compliance with mandatory remediation timeframes, N.J.A.C. 7:26C-3.5(d)1 specifically anticipates and addresses this difficulty. Furthermore, N.J.A.C. 7:26C-3.5(d)2 includes, as another possible basis for an extension, "other site specific circumstances that may warrant an extension, including but not limited to [the following specific provisions deleted here]."

However, mandatory direct oversight by the Department is triggered by the events set forth in N.J.S.A. 58:10C-27.a. Once those triggers occur, the statute leaves no further room for negotiating another result. In such a case, the person responsible for conducting the remediation has already demonstrated an inability to remediate according to SRRA and the ARRCS rules.

The Department does not agree that the direct oversight program in Subchapter 14 of the ARRCS rules is overly aggressive or that it extends beyond the intent or purposes of SRRA. The compulsory direct oversight program set forth in N.J.A.C. 7:26C-14.2 implements the mandatory direct oversight program established by the Legislature. See N.J.S.A. 58:10C-27a. The discretionary direct oversight program set forth in N.J.A.C. 7:26C-14.3 contains statutorily required standards and reasonable and appropriate criteria for the Department to consider when determining whether to exercise its discretionary authority to place a site into direct oversight. The standards enumerated in in N.J.A.C.

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7:26C-14.3(a) for evaluating whether to undertake direct oversight implement the conditions established by the Legislature in N.J.S.A. 58:10C-27b for the Department's exercise of discretionary direct oversight, conditions which pose serious risks to public health and safety or the environment. The criteria the Department has enumerated in N.J.A.C. 7:26C-14.3(b) for considering whether to place a site in direct oversight provide important decision-making flexibility to the Department by enabling it to take into account specific and relevant facts and circumstances, including mitigating circumstances, applicable to each site.

356. COMMENT: The sites that should be under direct Department oversight, such as sites containing contaminated groundwater or hazardous chemicals such as chromium, will be excluded under this rule. When SRRA was proposed, the commenter understood that the 300 to 500 most heavily contaminated sites in New Jersey would remain under Department jurisdiction. However, under the new rules, sites that formerly qualified for Department oversight if they had any groundwater contamination would now only qualify if there are five acres of groundwater contamination. Additionally, since qualification under the definition is determined by the applicant, the applicant will say every site has under five acres of groundwater contamination since there is no verification by the Department. (36)

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RESPONSE: The Department is unclear as to which definition the commenter references. Contrary to the commenter's assertion, SRRRA contains no mention of the number of sites that must be subject to direct Department oversight and no mention of the existence of ground water contamination as a trigger. The rules do not include a five acre groundwater contamination threshold to qualify for Department direct oversight, as the commenter indicates. Rather the Department at N.J.A.C. 7:26C-14.3(b) has set forth several criteria the Department will consider when evaluating whether to undertake direct oversight. One of these is whether the groundwater contamination is greater than five acres.

357. COMMENT: N.J.A.C. 7:26C-14.2 discusses public participation as it relates to Direct Oversight. However, RCRA/GPRA (and non GPRA RCRA facilities) require public participation for remedy selections and are not specifically subject to Direct Oversight. It should be clarified somewhere in the rules that RCRA corrective action facilities require public participation for remedy selections. (37)

RESPONSE: There is no need to provide the clarification requested by the commenter. Regardless of whether the site is a RCRA/GPRA site, the person responsible for conducting the remediation must conduct public participation. However, the rules provide at N.J.A.C. 7:26C-1.7(p) that as long as the RCRA/GPRA site is in compliance

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with CERCLA public participation requirements, the person need only comply with N.J.A.C. 7:26E-1.7(a) through (d).

358. COMMENT: N.J.A.C. 7:26C-14.2(a)(1) provides that a responsible party shall be subject to direct oversight if that person “has been the object of two enforcement actions concerning the remediation, during any five-year period after May 7, 2009.” At the outset, an “enforcement action” is not defined. Accordingly, it is not clear if this provision includes notices of deficiency or violation, or if it is limited to Administrative Orders. (11, 15, 39)

359. COMMENT: SRRA’s definition of enforcement action should be included at N.J.A.C. 7:26C-14.2(a) to insure that the Department activities, such as demand letters and NODs, are not included in the list of triggers. (6)

360. COMMENT: N.J.A.C. 7:26C-14.2(a)1 should require that the “enforcement action” actually resulted in an affirmative holding by an Administrative Court against, or an admission by, the responsible party that an Site Remediation Program violation had in fact occurred. It must be the Department's intention that only enforcement actions that have resulted in a finding in favor of the Department can be considered a trigger under

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this provision. Accordingly, this provision needs to be revised to clarify what types of “enforcement actions” are contemplated by this provision. (11)

361. COMMENT: N.J.A.C. 7:26C-14.3(b) sets forth certain criteria that the Department will consider when evaluating whether to exercise its discretion to place a site into direct oversight. One such criterion is the enforcement history of the responsible party. This provision will be problematic and unfair to responsible parties if the extent and nature of relevant enforcement actions is not properly defined. (11)

RESPONSE to COMMENTS 358 through 361: As provided in SRRA at N.J.S.A. 58:10C-27a, enforcement actions include administrative orders, notices of civil administrative penalty assessments, and court orders. Contrary to the commenter’s apparent assumption, the criteria established in N.J.A.C. 7:26C-14.3(b) for the Department to consider when evaluating whether to exercise discretionary direct oversight do not include the enforcement history of the person responsible for conducting the remediation. Rather, one of the triggering events set forth in N.J.A.C. 7:26C-14.2(a) for compulsory Department direct oversight is whether the person responsible for conducting the remediation has been the object of two enforcement actions concerning the remediation during a five year period after May 7, 2009. See N.J.S.A. 58:10C-27.

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362. COMMENT: N.J.A.C. 7:26C-14.2(a)(2) and (3) provide for direct oversight if a responsible party fails to meet a mandatory time frame or if a remedial investigation is not completed by May 7, 2014 at a site that was more than ten years old at the time SRRA was enacted. The May 7, 2014 deadline for sites that have been in the site remediation program for more than 10 years is inappropriate. The Department has not provided a clear definition of a remedial investigation, or guidance regarding when a remedial investigation can be deemed complete. Sites involve complex delineation issues that are often impeded by ongoing site operations. (11, 29)

363. COMMENT: The rules would require that all contamination be delineated to the Department's remediation standards before a remedial investigation can be deemed complete. This approach is not practical. Before a site is subjected to direct oversight, the Department needs to establish realistic mandatory timeframes for clearly defined phases of a site investigation and remediation, including the May 7, 2014 remedial investigation deadline established in SRRA. (11)

RESPONSE to COMMENTS 362 and 363: Contamination must be fully delineated before the remedial investigation is considered to be complete. The Department has established realistic mandatory timeframes for completion of the remediation phases at N.J.A.C. 7:26C-3.3(a). The trigger that relates to the May 7, 2014 remedial investigation

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deadline is established by SRRA and concerns only those sites where contamination was discovered ten years prior to the enactment of SRRA, and the contamination is not fully remediated within five years after the effective date of SRRA, May 7, 2009. For those sites the Legislature has determined that 15 years is adequate time for the completion of the remedial investigation. If the person responsible for conducting the remediation fails to meet this mandatory timeframe, the person must comply with the direct oversight requirements of N.J.A.C. 7:26C-14.1(b).

364. COMMENT: N.J.A.C. 7:26C-14.2(b) should be amended to allow the person responsible for conducting the remediation to have the ability to reduce the amount of the remediation trust fund upon submission of appropriate documentation as is allowed in other sections of ARRCs. Furthermore, the Department should have a deadline to respond to requests for disbursements from the remediation trust fund to allow the person responsible for conducting the remediation to complete the work within regulatory and mandatory timeframes. Experience with other Department programs utilizing remedial funding sources requiring Department authorization of payments commonly precludes the ability of the person responsible for conducting the remediation to pay their consultants and contractors on a timely basis; payments are typically approved months after submission of a certified invoice package, resulting in payments being actually made net 90 to 120 days after receipt of the invoice. By extending the payment times, the

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Department is imposing an undue penalty on the person responsible for conducting the remediation's consultants and contractors because of the additional time their accounts receivable have extended beyond industry norms and forcing an increase in the cost of the remediation or jeopardizing the financial health consultants' and contractors' business. (6)

RESPONSE: The person responsible for conducting the remediation who is subject to Department direct oversight is required by N.J.A.C. 7:26C-14.2(b)5 to maintain a remediation trust fund in the amount of the estimated cost of the remediation. As the estimated cost of the remaining remediation decreases, the person may request authorization to reduce the amount of the trust fund pursuant to N.J.A.C. 7:26C-5.11. Similarly, if the trust fund is being used to fund remediation, the trustee may disburse money from the trust fund upon written approval by the Department pursuant to N.J.A.C. 7:26C-5.4(a)4i. The Department strives to promptly process all disbursement requests, as it is aware that delay can impact remediation progress. However, the Department does not believe that it is necessary to specify a timeframe within which to process these requests. The person responsible for conducting the remediation is in direct oversight, and thus has already demonstrated an inability to remediate according to SRRA. The Department is obligated to closely examine all documents and submissions for cases in direct oversight, to ensure that the actions being taken are protective of human health and

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safety and the environment. The Department will only release funds when it has determined that the remediation meets these criteria.

365. COMMENT: The public participation plan requirements of N.J.A.C. 7:26C-14.2(b)9 should be stricken because the Department has no authority to require actions that are not part of the normal remediation process. There are no requirements for such a plan as part of the normal remediation process. The public notification provisions are all that should be required. If the purpose of this section is to insure the prompt implementation of protective remedial actions at sites that pose significant risks, then imposing these requirements will thwart that purpose by adding further delay to the process. (6)

RESPONSE: The statutory requirement for a person responsible for conducting the remediation to conduct a feasibility study is also “not part of the normal remediation process” but it, like the public participation plan, the feasibility study is a statutory requirement. N.J.A.C. 7:26C-14.2(b)9 implements SRRA at N.J.S.A. 58:10C-27c(7), which requires the person responsible for conducting the remediation to implement a public participation plan approved by the Department.

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366. COMMENT: N.J.A.C. 7:26C-14.3(a)2 is not well defined. It is unclear whether this criterion is looking at gross contamination or any contamination over standards.

Furthermore, it is not clear how the Department will determine if there is “more than one environmentally sensitive natural resource.” (6)

RESPONSE: N.J.A.C. 7:26C-14.3(a)2 provides that the Department may evaluate undertaking direct oversight of a portion, a condition, or the entire remediation of a contaminated site when the contamination at the site has injures more than one environmentally sensitive natural resource. The focus of this provision is on the injury to the resource, not whether contamination exists at or above standards.

The Department will determine if there is more than one environmentally sensitive natural resource at a site by applying the definition of that term at N.J.A.C. 7:26E-1.8.

An environmentally sensitive natural resource includes a geographic area which contains one or more significant natural or ecological resources, or an area or resource that is protected or managed pursuant to the Pinelands Protection Act and the Pinelands Comprehensive Management Plan.

367. COMMENT: N.J.A.C. 7:26C-14.3(a)1ii, which indicates that the Department may use its discretion to exercise direct oversight of any site where hexavalent chromium

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exceeds the current criteria, is contrary to SRRA at N.J.S.A. 58:10C-27(b)1. While SRRA provides for the discretionary direct oversight of hexavalent chromium sites, the Legislature did not choose to define chromium chemical production waste as any site where hexavalent chromium exceeds the unenforceable, voluntary criteria. The Department has not completed the peer review and finalization of the Chromium Workgroup Report started by previous administrations nor have health based standards been promulgated in N.J.A.C. 7:26D or N.J.A.C. 7:26B. Hexavalent chromium concentrations in soil exceeding the 20 mg/kg nonresidential scenario or 70 µg/L in groundwater are unenforceable, voluntary criteria. See Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313 (1984)). Rather, the legislative intent was to allow the Department to provide direct oversight of sites in Hudson County, where extremely high levels of hexavalent chromium associated with its manufacturing, chromate chemical production waste, also known as chromium ore processing residue (COPR), are often indicated by hexavalent chromium concentrations in excess of 1,000 mg/kg.

This provision should be revised to more clearly coincide with the legislative intent, as follows: “The contamination at the site includes chromate chemical production waste in Hudson County as mapped by the Department in the Geographical Information System data layer published at www.nj.gov/dep/gis/stateshp.html.” (6)

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368. COMMENT: The rules at N.J.A.C. 7:26C-14.3(a)3 and 14.3(b)2, concerning discretionary direct oversight of sites where sediment and surface water has been contaminated with polychlorinated biphenyls, mercury, arsenic or dioxins exceed the Department's authority as set forth in SRRA at N.J.S.A. 58:10C-27b(3), which provides that, "the site has contributed to sediments contaminated by polychlorinated biphenyl, mercury, arsenic, or dioxin in a surface water body." The definition of impacted sediments and surface water as described in the Ecological Screening Criteria have not been proposed and promulgated by the Site Remediation Program through a stakeholder or public comment process. As a result, the ecological screening levels, like voluntary chromium criteria discussed above, are not enforceable standards and cannot be used for determination of discretionary direct oversight. See Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313 (1984). (6)

369. COMMENT: The Surface Water Quality Standards, N.J.A.C. 7:9B have been promulgated separately by the Department, but have not considered the capabilities of environmental laboratories in developing the promulgated standards, unlike the Groundwater Quality Standards, N.J.A.C 7:9C or the Soil Remediation Standards at N.J.A.C 7:26D and its accompanying guidance. Therefore, requiring direct oversight of sites based on ecological criteria that have not been vetted through the public participation process, as have the soil and groundwater standards, should be deferred until

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such time as the Ecological Screening Criteria can be reviewed by stakeholders and formally proposed and adopted as regulated standards. (6)

370. COMMENT: It is unclear why the Department chose to specifically include consideration of pesticide soil contamination as a criterion in determining direct oversight. This level has not been promulgated as rule as part of the Remediation Standards, and therefore is not enforceable. Any soil exceedances should be considered in the context of whether the person responsible for conducting the remediation is addressing the risk. Further, the expansion of the legislative intent to include sites with specific numerical concentration of pesticides in soil, e.g., greater than 1 mg/kg, has not been documented by the Department to have scientific merit or constitute a public health threat of any significance. In addition, the term pesticide has not adequately defined herein, and could include an approved horticultural or agricultural use by an applicator licensed by the Department. Further, this condition would likely apply to historical pesticide applications that are not considered to have been a discharge under the Spill Compensation and Control Act. This provision should be deleted entirely. (6)

RESPONSE to COMMENTS 367 through 370: In accordance with the legislative direction at N.J.S.A. 58:10C-27.d, the Department in its rules at N.J.A.C. 7:26C-14.3(a), is providing guidelines establishing specific criteria the Department will consider in

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determining whether to exercise discretionary direct oversight, including specific contaminant levels and other criteria that will trigger Department concern and potential direct oversight under N.J.S.A. 58:10C-27.b. While the Department has included references here to specific chromium concentrations, its Ecological Screening Criteria, and pesticide concentrations, it has not done so for purposes of promulgating remediation standards, but rather to structure and confine its discretionary powers through the rules as safeguards, standards, and principles necessary to prescribe regulatory standards that SRRA does not otherwise expressly provide. The rules are well within the authority that SRRA grants the Department at N.J.S.A. 58:10C-27.b, and its broad rulemaking authority under N.J.S.A. 58:10C-29.

371. COMMENT: N.J.A.C. 7:26C-14.3(a)4, which requires the use of the priority ranking system as a direct oversight criterion, is inappropriate at this time. This system has been the subject of some controversy, is still being modified and there are many factors in determining why and how a site is ranked. Particularly given the current status of the remedial priority system (RPS), and until experience with its use can be developed, as long as the person responsible for conducting the remediation is compliant, site ranking should not be employed to require direct oversight. (6, 11)

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RESPONSE: SRRA, at N.J.S.A. 58:10C-27b, authorizes the Department to exercise its discretion to undertake direct oversight at the sites ranked as highest priority pursuant to the RPS system. The RPS system is nearing completion and when it is complete the Department anticipates implementing it, as SRRA directs.

372. COMMENT: At N.J.A.C. 7:26C-14.3(b)1iii, the Department lists factors to be considered for discretionary direct oversight, including a voluntary agreement to resolve natural resource damages (NRD) claims. The Department should not include NRD settlements in its determination as to whether direct oversight is required. Whether a person responsible for conducting the remediation has, or has not, entered into a voluntary agreement for potential NRD claims should not be listed as a criterion for the determination of discretionary direct oversight. While SRRA at N.J.S.A. 58:10C-27(d) requires the Department to issue specific guidelines under which a site may be subject to direct oversight, the Legislature did not include the use of NRD agreements, or the lack thereof, as a potential factor. (6, 11)

RESPONSE: N.J.S.A. 58:10C-27.b provides in part that the Department may undertake direct oversight of remediation of a contaminated site where the Department determines that more than one environmentally sensitive natural resource has been injured by the contamination. N.J.S.A. 58:10C-27.d directs the Department to provide guidelines

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establishing specific criteria the Department will consider in determining whether to exercise discretionary direct oversight pursuant to N.J.S.A. 58:10C-27.b One such criterion the Department has established is N.J.A.C. 7:26C-14.3(b)1iii, which provides that the Department will consider whether a person has entered into a voluntary agreement to resolve natural resource damages. N.J.A.C. 7:26C-14.3(b)1iii is within the Department's scope of authority under SRRA at N.J.S.A. 58:10C-27b, and its rulemaking authority under N.J.S.A. 58:10C-29. The Department has determined that this criterion is a reasonable indication of whether the person responsible for conducting the remediation can be expected to conduct remediation in an environmentally responsible manner, a relevant consideration in determining whether to exercise its direct oversight discretion pursuant to N.J.S.A. 58:10C-27.b, especially where it has determined that more than one environmentally sensitive natural resource has been injured. As provided in N.J.A.C. 7:26C-14.4, the Department may determine that certain direct oversight requirements established in its rules implementing N.J.S.A. 58:10C- 27 are not applicable to a specific case upon a finding that such an action would be in the public interest and protective of public health and safety. The Department will also consider other criteria listed in N.J.A.C. 7:26C-14.3(b)1, such as whether the person responsible for conducting the remediation is in compliance with all applicable statutes and rules, has implemented an interim response action necessary to contain or stabilize contaminants in all media, or has implemented green technology.

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373. COMMENT: N.J.A.C. 7:26C-14.3(c)1 and 14.4(b) require the Department to inform the person responsible for conducting the remediation in writing of its decision to place a remediation under direct oversight. The rules concerning compulsory direct oversight should also include a notification provision. Given the gravity of the direct oversight program, both the discretionary oversight rules and the compulsory oversight rules should be revised to clearly indicate that such notification be provided via certified mail, return receipt requested, to the person responsible for conducting the remediation.

(6)

RESPONSE: The person responsible for conducting the remediation is responsible to understand his or her compliance status and whether and when additional requirements apply. SRRA imposes an affirmative obligation to remediate on parties liable for remediation pursuant to the Spill Act, ISRA and the UST Act and such parties who meet the conditions at N.J.A.C. 7:26C-14.2(a) for compulsory Department direct oversight must affirmatively comply with the requirements listed at N.J.A.C. 7:26C-14.2(b) without the Department's prompting. SRRA did not condition a site being placed under compulsory direct oversight upon notice from the Department. Moreover, it is unrealistic to expect the Department, given its limited resources, to notify every party of every situation that may trigger direct oversight requirements at N.J.A.C. 7:26C-14.2(b). The

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Department included a notification provision at N.J.A.C. 7:26C-14.3(c)1 and 14.4(b) because these provisions involve a discretionary decision on the part of the Department. The person responsible for conducting the remediation would have no way of knowing about the Department's discretionary decision regarding direct oversight without such notification by the Department.

ARRCS Subchapter 16 – Linear Construction

374. COMMENT: Subchapter 16 of the ARRCS rules appears to be aimed at affording parties engaged in linear construction projects with assurance that any contamination that has been encountered has been managed in a legally acceptable manner, an objective that is welcomed by the commenters who frequently encounter these types of projects in connection with their work. (18)

RESPONSE: The Department acknowledges the comment in support of the rule. The purpose of N.J.A.C. 7:26C-16 is to specify the requirements for a person engaged in a linear construction project and the fees required for a person engaged in a linear construction project. As stated in the proposal summary, the rules provide a consistent approach to the proper management of contaminated soil and ground water encountered

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during linear construction projects to ensure the protection of public health and safety and the environment.

375. COMMENT: Does the person who controls a linear right-of-way, whose operations potentially may have impacted the soil quality on the right of way as well as slightly beyond the limits of the right of way, have liability under the Spill Act, and therefore an obligation to remediate the soil to the applicable Remediation Standards for soil beyond the limits of the right of way? If so, would this situation no longer be regulated as a “linear construction project” as proposed? (20)

RESPONSE: Any person who causes a discharge of a hazardous substances that is not in compliance with a Federal or State permit, or who is in any responsible for such hazardous substances, is liable for remediation under the Spill Act. See N.J.S.A. 58:10-23.11c. Pursuant to the Brownfield Act, as amended by SRRA at N.J.S.A. 58:10B-1.3, any such person now has an affirmative obligation to remediate such hazardous substances. Clearly, if the person conducting a linear construction project causes a discharge, the discharge must be remediated by that person pursuant to the ARRCs rules, N.J.A.C. 7:26C and the Technical Requirements, N.J.A.C. 7:26E. However, the application of the liability scheme of the Spill Act to each person and situation is highly fact sensitive and beyond the scope of this rulemaking.

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376. COMMENT: N.J.A.C. 7:26C-16 purports to apply to a person engaged in a linear construction project (LCP) without further identifying who such a person might be and without providing any mechanism for defining the endpoint of the remediation such as the issuance of a remedial action outcome (RAO). Rather it requires that the person engaged in the project must hire an LSRP and only requires the submission to the Department of a final report by the LSRP at the conclusion of the project without providing for the issuance of a RAO.

This approach leaves a number of questions unanswered. For example, did the Department intend to exclude a person who is required to remediate a site pursuant to proposed N.J.A.C. 7:26C-2.2 from performing a remediation pursuant to Subchapter 16? Is a person engaged in a linear construction project who conducts a remediation not considered to be a person responsible for conducting the remediation pursuant to N.J.A.C. 7:26C-1.3 (which includes any person remediating a site)? May such a person obtain a remedial action outcome (RAO) for remediating an LCP just like it may with respect to any other remediation project? If such a person may obtain an RAO for remediating an LCP, why shouldn't any party remediating an LCP be entitled to obtain an RAO? If an RAO is not available, there needs to be some mechanism to provide assurance to the party performing the remediation at an LCP that they have completed the

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activity in a manner that complies with the applicable regulatory requirements and will afford protection from further Department action. (18)

377. COMMENT: This new subchapter requires the person responsible for the construction, not responsible for the discharge, to hire an LSRP and notify the Department of the contamination. Although not a person responsible for conducting the remediation, the person responsible for the construction is required to pay "applicable fees" and issue a final report that describes the management of contamination encountered. (39)

378. COMMENT: Throughout the linear construction rules is the goal of management of contaminated media, not remediation of the contaminated media. While management of contaminated media is required to protect public health and safety and the environment, management of contaminated media in a linear construction project is not a remediation action and should not require an LSRP to be retained. Additionally, it is unclear as to the role of the LSRP with respect to a linear construction project as defined in the proposed rules because, as stated, a remediation action is not being accomplished. Therefore, the requirement that an LSRP be retained for a linear construction project should be deleted. (24)

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379. COMMENT: The commenter often encounters contaminated media along rights-of-way for which it is not the responsible party. In these situations, the commenter, who is not the party responsible for remediation, is already burdened with the cost and effort of the management of contaminated media such as for recycling, disposal and documentation of the management of contaminated media. The proposed subchapter adds the additional burden to the party engaged in linear construction for the payment of fees, notifying the Department concerning contaminated media management, and reporting of the management of contaminated media to those required by existing regulations pertaining to the management of solid waste. The payment of Site Remediation Program fees, the notification of the Site Remediation Program of contaminated media management, and the reporting to the Site Remediation Program should be deleted from the subchapter. (24)

RESPONSE to COMMENTS 376 through 379: The linear construction project (LCP) rules are designed to strike a balance between the need to install and update needed infrastructure throughout the State and the mandates of the State's various statutes that govern the remediation of contaminated sites so that they are protective of public health and safety and the environment.

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Linear construction cases were historically handled in the same way as any other responsible party cases and the prior version of the ARRCs rules contained no special provisions for the remediation of contamination encountered during linear construction projects. However, the Department has determined as a part of its stakeholder outreach that a more flexible regulatory scenario would lessen the burden on persons engaged in linear construction projects while still ensuring that contamination that is encountered is handled in a manner that is protective of public health and safety and the environment. New Subchapter 16 is designed to provide persons who are engaging in these projects, and who are not otherwise Spill Act liable parties, with the flexibility to deal with contamination in a way that is cost effective, yet protective.

The Department does intend to exclude a person who is required to remediate a site pursuant to proposed N.J.A.C. 7:26C-2.2 from performing a remediation pursuant to Subchapter 16 because that person is a person responsible for conducting the remediation. Similarly, a person engaged in a linear construction project who conducts a remediation is not considered to be a person responsible for conducting the remediation pursuant to N.J.A.C. 7:26C-1.3. Accordingly, a person engaged in a linear construction project is not entitled to obtain a remedial action outcome (RAO) for remediating an LCP. However, if the person who owns the property on which the project is being

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constructed conducts the remediation, that person may obtain an RAO from that person's LSRP.

380. COMMENT: The commenter's ongoing gas and electric utility work frequently involves construction activities necessary to ensure the integrity and safety of its customers. It is critical that when this work occurs that it be uninterrupted to ensure the reliability of the electric and gas systems, since the commenter's activities are necessary to protect the public health, safety and welfare, for the reliability of electric and gas systems, and to protect the public good. Adding more requirements which delay construction will negatively impact the reliability of our gas and electric systems, and the health, safety and welfare of the public good. (24)

RESPONSE: New N.J.A.C. 7:26C-16 actually streamlines the process rather than lengthens it, as the commenter opines. The new subchapter contains fewer requirements and provides additional flexibility to persons engaged in these projects.

381. COMMENT: The definition of "linear construction project" currently includes construction and development activities. This definition should be modified to clarify that it also applies to maintenance, replacement, and upgrading of existing infrastructure along existing linear projects. (24)

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RESPONSE: There is no need to amend the definition of linear construction project as suggested by the commenter. The definition already contemplates projects that “create, maintain or alter” the public or private roadway, railroad or utility line.

382. COMMENT: N.J.A.C. 7:26C-16.2 sets forth the requirements for a person “engaged” in a linear construction project. In another section, the proposal discusses parties “conducting” linear construction projects. “Persons engaged” and “persons conducting” should be defined terms so as to decrease the uncertainty with respect to responsibility. Construction firms, public and private owners and their representatives, consultants and craftworkers are actively working on linear construction projects around the State. Each of these parties are “engaged” at varying levels of the construction process. Defining to whom these terms apply would eliminate confusion with compliance and assist in defining responsibility. It should not be the Department’s intent to make contracted construction firms assume responsibility for the requirements set forth in N.J.A.C. 7:26C-16. (8)

383. COMMENT: New entities that are not persons responsible for conducting the remediation are now regulated under new N.J.A.C. 7:26C-16, including contractors conducting linear construction and quarries supplying clean fill. (39)

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RESPONSE to COMMENTS 382 and 383: The person responsible for conducting a linear construction project is responsible for the actions of its subcontractors. The Department does not construe the requirements set forth in N.J.A.C. 7:26C-16 to apply to construction firms contracted by persons conducting linear construction projects.

384. COMMENT: Communication to the owner of the property occurs pursuant to the controlling real estate document (i.e., the easement or the lease). The property owner would then be required to utilize the information provided by the constructing party as part of the remediation of the contamination that would be under the oversight of an LSRP or the Department. Consistent with N.J.A.C. 7:26E-8.2(b), if the property owner is any local, county, State or Federal government agency, and a deed is not associated with the property (e.g. roads), the constructing party would submit the above described information to the appropriate local, county, State, or Federal agency. (24)

RESPONSE: The Department agrees with the commenter.

385. COMMENT: This proposed rule establishing 200 cubic yards of material as a volumetric limit is arbitrary and should be deleted. Establishing such a volumetric limitation also places the burden of determining the amount of contaminated soil or fill

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required to be disposed during work and tracking the amount of contaminated soil or fill on the contracting party. While an estimate of the amount of contaminated fill or soil to be disposed during construction may be possible for projects crossing known contaminated properties, determining the amount of contaminated fill or soil that will be generated from properties not known to be contaminated will be difficult. The information on the chemical constituents of soil may not be known until waste characterization analytical data is received. (24)

386. COMMENT: Under the definition of a linear construction project (LCP) at N.J.A.C. 7:26C-1.3, no rationale is provided for the definition of a LCP as a project that, among other things, generates more than 200 cubic yards of contaminated soil or fill for disposal. Without seeing the guidance for LCPs it is difficult to assess and comment on whether 200 cubic yards is the appropriate threshold. (18, 20)

RESPONSE to COMMENTS 385 and 386: As mentioned above, the Department developed new N.J.A.C. 7:26C-16 in collaboration with a stakeholder committee. The stakeholder committee determined that the 200 cubic yards of contaminated soil or fill for disposal trigger strikes an appropriate balance between exempting small projects that are limited in scope and primarily involve the scheduled or emergency repair of utilities and larger linear construction projects that actually involve the construction of a utility line.

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If a linear construction project is projected to involve less than 200 cubic yards of contaminated soil, no reporting to the Department is necessary pursuant to this rule, beyond that otherwise required by law. If and when the scope of the project increases and causes greater than 200 cubic yards of contaminated soil to be generated, the rules require the person conducting the linear construction project time to notify the Department and to follow the requirements of N.J.A.C. 7:26C-16.

387. COMMENT: In the clean fill guidance, quarries supplying virgin fill for linear construction projects are now subject to certain regulatory requirements when providing fill to remediation sites. (39)

RESPONSE: The Department's technical guidance does not establish any regulatory requirements. The Department does not regulate quarries supplying clean fill. The person conducting a linear construction project who intends to use clean fill to cap contaminated soil should follow the Department's Alternative and Clean Fill Guidance, version 2.0 (December 29, 2011), www.nj.gov/dep/srp/guidance, to ensure that fill they are purchasing as "clean" is documented as such.

388. COMMENT: Even though Subchapter 16 does not provide a mechanism to obtain an RAO, in N.J.A.C. 7:26C-16.2(a)6 does require the person engaged in an LCP to

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comply with certain other requirements that apply to regular remediation projects which are eligible for an RAO, such as obtaining remedial action permits pursuant to N.J.A.C. 7:26-5.7. It is not clear whether the Department intended by this provision to also require compliance with the financial assurance and permitting fees applicable to remedial action permits in addition to the LCP fees which appear in subchapter 16. Further, it does not specify whether requirements such as deed notices apply (and how that would be implemented) or whether and how groundwater issues are to be addressed that are not directly impacted by the LCP itself. Finally, where another party is responsible for conducting the remediation of the site of which the linear construction project is a part, how will the remedial action permitting (including deed notices, if required) be coordinated with the obligations of the other party? Perhaps these issues are addressed in the guidance document that is referenced in the proposed regulation, however, that guidance document has not yet been made available.

These are only some questions raised by the proposed LCP regulations. It would seem that without further clarification, this section of the proposed regulations cannot be adequately commented upon and should be withdrawn for separate proposal with clarification of the above issues and release of the accompanying guidance document for public comment. (18)

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389. COMMENT: The Department should make available the technical guidance specific to linear construction projects that it states in the proposal summary has been developed. (8)

390. COMMENT: The linear construction project guidance document that will go hand in hand with the new requirements, and which has not been released as of the preparation of these comments, must be made public before comments on the rules can be effectively developed. (18)

RESPONSE to COMMENTS 388 through 390: The Department acknowledges that the technical guidance on the topic of linear construction was not available at the time the linear construction rules were proposed. However, this is not fatal to the adoption of these rules because whether guidance is available is not a prerequisite under the Administrative Procedure Act for the adoption of new rules.

Since the publication of the proposal, the Department has published technical guidance on this issue. The Linear Construction Technical Guidance, version 1.0 (January 27, 2012) www.state.nj.us/dep/srp/guidance, addresses the questions raised by the commenter. Deed restrictions and other permitting issues and the investigation of ground water impacts will generally be the responsibility of the person responsible for

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conducting the remediation. Note that the permits referenced at N.J.A.C. 7:26-16.1(b)6 do not include remedial action permits. However, the technical guidance recommends that one ground water sample be collected when a person conducting a linear construction removes an underground storage tank and that a discharge permit will be needed when dewatering excavations that have contaminated ground water. The logistics of conducting remediation along an LCP will be worked out between the person conducting the LCP and the responsible parties.

The Department believes it is appropriate to proceed with the adoption of Subchapter 16 regarding linear construction projects. In addition to the explanations provided in these responses to comments, the Department has provided a response to comments on the technical guidance to address commenters' concerns and held a training session on January 30, 2012, as well as an extended question and answer session on the day of that training. The Department will continue to work with stakeholders on the application of the LCP rules and guidance through additional speaking engagements and project specific meetings. The Department is confident that this new approach to LCPs will benefit the persons conducting these projects, New Jersey's much needed infrastructure and public health and safety and the environment.

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391. COMMENT: At N.J.A.C. 7:26C-16.2(a)7, the Department should clarify under what circumstances it would require the submission of the final report sooner than 60 days. The 60 day timeframe for submission of the final report after completion of the project is too short for large linear construction projects that transect numerous contaminated sites. (27)

RESPONSE: The Department agrees with the commenter that 60 days is too short a timeframe for the submission of a final report, and on adoption, is changing this timeframe for this reporting requirement to 180 days after the linear construction project is completed. As described in the proposal summary, the majority of parties conducting linear construction projects are not Spill Act responsible parties, but, nevertheless, these parties have requested that a consistent approach to these projects, and the proper management of contaminated soil and ground water encountered during linear construction, be made a part of these rules. The purpose of the report is to describe the management of contamination encountered during the linear construction project. By extending the timeframe for submitting that report from 60 to 180 days, the party submitting the report will have more time to fully document its management of any encountered contamination, thereby fulfilling the underlying purpose of the linear construction subchapter.

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392. COMMENT: N.J.A.C. 7:26C-16.3 sets notification fees at \$450 and additional fees based on the number of contaminated properties, ranging from \$1,000 to \$5,000. These fees are not commensurate with the oversight role the Department will play. After completing costly consultations, remediations, and removal of the contaminants, thousands of dollars in project “final report fees” seems unjustified. In addition, these fees appear inconsistent with the Christie Administration’s approach to common-sense rulemaking, and further add to the cost of doing business in New Jersey. (8)

RESPONSE: The Department will inspect and review every LSRP submittal including linear construction project reports. The fees are estimated based on the anticipated size and complexity of the reports that will be submitted. The Department will be able to re-evaluate these fees after a period of time and will adjust the fees as necessary to cover the Department’s costs for such oversight.

393. COMMENT: The fee included at N.J.A.C. 7:26C-16.3(a)2 is based upon the number of contaminated sites crossed by the linear project. What is the criteria for determining the number of contaminated sites? Would the use of the known contaminated sites list or NJ-Geo Web/-MapNJ interactive mapping on the Department's GIS alone be acceptable? Would Open Public Records Act (OPRA) reviews also be required? (27)

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RESPONSE: The fees are based on the number of contaminated sites encountered during the linear construction project. Fees are to be determined at the end of the project, at which time the linear construction entity will count the number of sites that the entity anticipated encountering based on their pre-project planning, plus any sites that were not anticipated but were encountered during construction of the project. The Department is not dictating the nature or scope of pre-project planning. Linear construction entities design their own project-specific procedures based on factors that are essential to the design of their projects and they also develop their own project schedules.

Technical Requirements - Subchapter 1: General Information

394. COMMENT: The Department should be commended for the vast improvement to the Technical Requirements. (29)

RESPONSE: The Department acknowledges the commenter's support of the rules.

N.J.A.C. 7:26E-1.6 General Reporting Requirements

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395. COMMENT: N.J.A.C. 7:26E-1.6 should specify the number of copies of documents to be submitted (per ARRCs requirements). (6)

RESPONSE: The suggested change is unnecessary. N.J.A.C. 7:26E-1.6(a)1 requires the person responsible for conducting the remediation to make all submissions in accordance with the ARRCs rules at N.J.A.C. 7:26C-1.6. The ARRCs rules at N.J.A.C. 7:26C-1.6(b) set forth with specificity the number of copies of the various deliverables that are to be submitted.

396. COMMENT: N.J.A.C. 7:26E-1.6(b) appears overly prescriptive; the contents of reports should simply reference the new preliminary assessment/site investigation/remedial investigation guidance documents, and other stated requirements (such as providing the rationale for deviation from technical guidance) as already specified in N.J.A.C. 7:26C-1.2(a)3. (6)

397. COMMENT: The requirements listed in N.J.A.C. 7:26E-1.6(a)5i, ii and iii refer to specific data (that may change from time to time) and reporting specifications. These belong in guidance or on a form. (6)

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RESPONSE to COMMENTS 396 and 397: The Department believes it is important to set forth with specificity in the rules as mandatory and enforceable provisions the minimum information that should be included in each remedial phase workplan and report because the reports submitted with each phase of the remediation should be consistent with each other. Additionally, the data contained in these reports are needed by the Department, subsequent property owners and LSRPs who may be called upon to work on the property in the future to evaluate all prior work on the property or area of concern. The location information and reporting specifications are required to locate the sampling points using geographical information system (GIS) software.

398. COMMENT: The requirements for data presentation contained in N.J.A.C. 7:26E-1.6(b)8 remain overly prescriptive. These requirements should be made less prescriptive so that the LSRP can work as efficiently as possible without, for example, creating ground water contour maps for each synoptic water level round when numerous rounds portray the same pattern and a simple tabulation of data would suffice. A comparison of the overly prescriptive nature of the requirements of N.J.A.C. 7:26E-1.6(b)8, with the nature of the arguably more important topic of data usability review addressed in N.J.A.C. 7:26E-1.6(b)9, clearly illustrates that these overly prescriptive data presentation requirements are not necessary and should be deleted. (11)

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RESPONSE: The Department does not consider the requirements at N.J.A.C. 7:26E-1.6(b)8 to be overly prescriptive. The Department uses the required maps and figures listed at N.J.A.C. 7:26E-1.6(b)8 to conceptualize the nature and extent of contamination, migration pathways, and impacts to receptors. Moreover, the effort required to generate the listed maps and figures is minimal. As a matter of course, the LSRP should be constructing ground water contour evaluations as part of each ground water sampling event as part of verifying ground water flow direction. Contour mapping is not an overly burdensome requirement, given that it is a necessary tool in the analysis of data collected during ground water monitoring events.

N.J.A.C. 7:26E-1.8 Definitions

399. COMMENT: The definition of “clean fill” at N.J.A.C. 7:26E-1.8 specifies that clean fill must not contain free liquids. Effectively, this prohibits the hydraulic placement of fill. For certain projects, this would create hardship and unnecessary cost. The definition should be amended to allow for hydraulic placement of fill. (6)

RESPONSE: The prohibition of free liquids is based on the same prohibition in the Solid Waste rules. That said, hydraulic placement of fill may be acceptable as long as the remedial action is designed to address dewatering and the collection and treatment of any

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contaminated liquids from that material. Such a use would, however, require a variance pursuant to N.J.A.C. 7:26E-1.7. See Section 3.9 of the Alternative and Clean Fill Guidance for SRP Sites, version 2.0, (December 29, 2011), which addresses the use of material containing free liquids, www.state.nj.us/dep/srp/guidance.

400. COMMENT: In item 2 of the definition of engineered response action, it appears that the intent was to indicate that source remediation and removal will eliminate an immediate environmental concern (IEC) condition and, therefore, source removal would be an acceptable “engineered response action.” If so, then all types of IECs should be listed in this definition. Also, the definition should include a reference specific to IECs such as, “an IEC means an active engineered system that is designed and implemented to remediate an IEC condition by reducing the risk from contamination to humans to or below acceptable standards” (6, 11)

401. COMMENT: N.J.A.C. 7:26E-1.11(a)6ii(1), which requires an engineered response action, is too prescriptive. The definition of engineered response action calls for an “active” system. This requirement is based on conservative assumptions that may not be appropriate in all situations. The rule should allow for use of other mitigation techniques if their effectiveness can be demonstrated empirically. (27)

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RESPONSE to COMMENTS 400 and 401: The Department agrees with the commenter's suggestion to incorporate a reference to IEC in the definition of "engineered response action" because the term is only associated with an IEC. Therefore, the Department is modifying the definition upon adoption to specify that the contamination to be addressed is from an IEC.

However, since the primary goal of an engineered response action is to reduce the risk of human exposure to contamination to acceptable standards, remediating the source of a direct contact IEC is a mechanism to reduce the risk of human exposure to contamination and, as such, its inclusion in the definition is superfluous. Consequently, on adoption, the Department is deleting from the definition item 2. The Department is also deleting item 1 because exposure to contaminants is already expressed in the body of the definition, which the Department is further rewording to clarify that the purpose of the engineered response action is to reduce the risk of human exposure to contamination. Last the Department agrees that other mitigation techniques may be acceptable if their effectiveness can be demonstrated and so is deleting the modifier "active" as applied to "engineered system."

402. COMMENT: The definition of "free phase" includes solids. It is not clear how a solid constitutes a "free phase." (6)

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RESPONSE: The term “free phase” is not defined in the rule. The Department believes that the commenter is referring to the definition of free product. A solid that is not dissolved in soil pore water or ground water is a separate phase. For example, chromate ore processing residue is a solid that is considered a free product that must be treated or removed where practicable.

403. COMMENT: There are no promulgated acute health effect standards for soil IECs for the direct contact pathway. The Department should develop, via proper rulemaking procedures, site-specific acute levels based on a “reasonable likelihood” of exposure causing an acute reaction. (6, 7, 11)

404. COMMENT: The Department’s statement that “an acute health exposure means that an adverse human health impact could result from an exposure of less than two weeks to a contaminant” has no technical basis. Since there are no promulgated acute standards or definitions of “acute,” the implication to develop site-specific acute numbers when “there is reasonable likelihood” of acute human health reaction is too ambiguous and not consistent with the fundamental definition of “acute.” The term “acute” is defined by the USEPA IRIS as “one dose or multiple doses of short duration spanning less than or equal to 24 hours.” Using the Department’s unique and technically unjustified

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definition of acute will made derivation of these IEC action levels problematic at best and a remediation obstacle at least, as the existing toxicological data are based on the widely accepted definitions and not on the one in the new rules. This definition should be amended to reflect nationally accepted designations. (6, 11)

RESPONSE to COMMENT: 403 and 404: “Acute” is defined within the definition of “immediate environmental concern” as part of the term “acute health exposure,” which the commenters quote in their comments. The term “acute exposure” does not have a universal or “nationally accepted” definition. While USEPA IRIS may define acute exposure as a period up to 24 hours, the Agency for Toxic Substances and Disease Registry (ATSDR) has developed acute MRLs (Minimal Risk Levels) (available at: <http://www.atsdr.cdc.gov/mrls/index.asp>) based on a 1-14 day exposure. The Department’s use of 14 days to define an acute exposure, therefore, is not unique. The commenters’ criticisms that the Department’s decisions use 14 days as the exposure duration for an acute exposure is “technically unjustified” and “has no technical basis” is misplaced. The development of standards that are protective of the public health and safety as the Legislature has required, see, e.g., N.J.S.A. 58:10B-12, includes the application of inputs from both the technical and policy perspectives. The duration of acute exposure is a policy call the Department made in order to meet this legislative mandate, which is similar to the policy call that the Legislature made in the Brownfield

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Act that cleanup standards should be based upon a risk of one in one million, N.J.S.A. 58:10B-12c.

The commenters are correct that currently there are no promulgated or defined acute soil remediation standards. However, historically, the Department has developed acute soil remediation criteria on a site-by-site basis, as needed, as provided in the Brownfield Act at N.J.S.A. 58:10B-12a. Pursuant to the Technical Requirements, the person responsible for conducting the remediation is required to sample the soil at a particular site, if necessary. If contaminants are present, it is incumbent upon the LSRP to use his or her professional judgment to determine whether the concentrations are representative of acute levels.

A direct contact IEC is defined at N.J.A.C. 7:26E-1.8 as “contamination in surface soil such that dermal contact, ingestion, or inhalation of the contamination could result in an acute human health exposure.”

The Department acknowledges that that soil standards for acute exposure to specific contaminants have not been promulgated. It is the intent of the Department to develop health-based soil criteria for contaminants based on acute exposure. In the meantime,

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resources such as the following are available to aid both the Department and the LSRP in site-specific criteria development:

1. The Agency for Toxic Substances and Disease Registry (ATSDR) acute and intermediate MRLs (Minimal Risk Levels), (available at: <http://www.atsdr.cdc.gov/mrls/index.asp>) the former defined as applicable to 1-14 day exposures and the latter defined as applicable to 15-364 day exposures. The MRLs are parallel in derivation and intent with the USEPA Reference Dose (RfD). The difference is that RfDs address only chronic exposure, while MRLs address acute and intermediate, as well as chronic, exposures. MRLs are derived on the basis of a comprehensive review of the scientific literature for each chemical and the application of standard risk assessment procedures (LOAEL/NOAEL determination, uncertainty factor adjustments). MRL derivations and justifications are peer-reviewed.

2. The United States Environmental Protection Agency (USEPA) 1 and 10-day Drinking Water Health Advisory values (available at: http://water.epa.gov/action/advisories/drinking/drinking_index.cfm; <http://water.epa.gov/action/advisories/drinking/upload/dwstandards2011.pdf>).

Although the values in this Advisory are specifically intended for drinking water

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exposures, they are also applicable to direct contact soil exposures since both are based on the ingestion route.

In addition, as a part of the decision making process, the LSRP may consult with the Department concerning whether contamination exists at levels that would present an acute exposure risk.

405. COMMENT: The definition of “immediate environmental concern” in the Technical Requirements at N.J.A.C. 7:26E-1.8 now includes contamination that has migrated into an occupied or confined space, producing a toxic or harmful atmosphere, resulting in an “unacceptable human health exposure,” which is based on an evaluation of site specific conditions and the toxicity of the contaminant present. An acute health exposure means that an adverse human impact could result from an exposure to a contaminant of less than two weeks. “The potential for exposure is based on site-specific conditions, and therefore, the person responsible for conducting the remediation shall evaluate the reasonable likelihood of exposure.” This additional text is unnecessary and exceeds the Department’s authority, since these conditions are already addressed by OSHA or the Department’s vapor intrusion technical guidance. (7)

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RESPONSE: The Department disagrees. The portion of the definition of IEC to which the commenter refers is within the description of what constitutes an “unacceptable human health exposure.” The Department included the quoted text as an acknowledgement that evaluating whether an IEC exists can be qualitative and is always site specific. Including the concept of “reasonableness” ensures that the person responsible for conducting the remediation will not need to explore every last exposure pathway, but rather, only pathways of reasonable exposure.

The inclusion of the concept of reasonableness is not *ultra vires*. The definition of IEC is based on the exposure of receptors to a discharge, and the Brownfield Act requires that discharges of hazardous substances be remediated.

The Department disagrees that the quoted sentence should be deleted simply because the concept may be covered in OSHA. Not all discharges occur at sites that are subject to OSHA. However, in those situations where a contaminant plume is impacting a facility that utilizes the same chemicals as the contaminants in the plume, the Department acknowledges that OSHA permissible exposure limits (PELs) should be applied, and has so stated in the Department’s Vapor Intrusion Technical Guidance.

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406. COMMENT: The IEC definition refers to “surface soil” but should be changed to be consistent with the Department’s IEC Technical Guidance, which makes more specific reference to contamination in the top six inches of soil for direct contact IECs. (6, 11)

RESPONSE: A specific depth was not attached to “surface soil” in the definition of immediate environmental concern so that the rules may provide the flexibility necessary in assessing a potential direct contact immediate environmental concern.

While the commenters correctly note that the Department IEC Technical Guidance refers to contamination in the top six inches for direct contact IECs, it also states, “When an area used by sensitive receptors is contaminated (for example a school, residence or daycare facility), the investigator should evaluate the upper two feet of the soil column to determine if an IEC condition exists.” Accordingly, a depth of six inches is not uniformly applicable.

407. COMMENT: As defined in N.J.A.C. 7:26E-1.8, a “limited restricted use remedial action” and a “restricted use remedial action” are remedial actions to be used only when remediating contaminated soil. However, since a limited restricted use and a restricted use remedial action can also be issued for a site with a ground water CEA, these definitions should be revised to also include ground water remedies. (11)

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RESPONSE: The Department agrees with the commenter and, on adoption, is modifying these two definitions to comport with the definitions of these terms in the Brownfield Act, N.J.S.A. 58:10B-1. Accordingly, in both definitions, reference to soil is removed. In addition, for the same reasons, the Department is also deleting the phrase “for soil” from the definition of “unrestricted use remedial action.”

408. COMMENT: The definition of “remedial action” states that, “A remedial action continues as long as an engineering control or an institutional control is needed to protect the public health and safety and the environment, and until all unrestricted use remediation standards are met.” While this definition is appropriate at a high conceptual level, in practice it expands the period of remediation to include the operation and maintenance phase of a project. The definition should be amended so that “remediation” is completed at the end of the construction phase with the operation and maintenance period recognized as a distinct and separate, and then the subsequent “operation and maintenance” is recognized as a standalone activity. This will be a critical consideration when evaluating compliance with regulatory and mandatory timeframes. (6)

RESPONSE: The definition of remedial action in the Technical Requirements tracks the definition of this term in SRRA and is also identical to the definition of this term that has

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long appeared in the Brownfield Act. Those definitions state that a remedial action includes “other engineering or treatment measures.” Where a remedial action includes an engineering control, the person responsible for conducting the remediation must obtain a permit as a part of the remedial action, and that permit will specify operation and maintenance requirements. Long term operation and maintenance is a necessary part of ensuring that any remedy that includes an engineering control remains protective over the duration of the control. Accordingly, operation and maintenance, while occurring at the end of the remediation, are an integral part of the remedy.

Whether one meets the regulatory and mandatory timeframes set forth in the rule has nothing to do with long term operation and maintenance of an engineering control. The timeframes apply to those phases of the remediation that lead up to obtaining a permit. Once the permit is in place, the LSRP may issue the response action outcome. At that point, the remedial action phase of the remediation is complete, and the person must then comply with the terms and conditions of the permit. The only timeframe that applies post permit is the biennial certification requirement.

409. COMMENT: The definition of “tentatively identified compounds” or “TICs” requires that alkane compounds attributed to a petroleum product be summed, treated as one product and reported as total alkanes. This requirement is unnecessary since the

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Department has not established any standards for total alkanes. TIC concentrations are estimated, not quantified. Furthermore, the grouping of TICs contradicts the requirement in the Ground Water Quality Standards, N.J.A.C. 7:9C, which sets forth standards for individual TICs. This is inconsistent with the revisions to N.J.A.C. 7:26E-2.1(c), which reduces the requirements to identify and quantify TICs. Finally, it is not always possible to identify TICs as petroleum based or non-petroleum based. (7)

RESPONSE: The purpose of including TICs attributed to total alkanes is to identify and distinguish those compounds associated with petroleum product contamination from non-petroleum product contamination. Due to the conventional methods by which TICs are reported, without such a distinction, many TICs that are not from a petroleum product, even though these products may be more toxic than petroleum product constituents, may not be reported. It is therefore essential that non-alkanes TICs not be excluded. Once the distinction between alkane and non-alkane TICs is made, the total alkane TICs are summed and treated as a single TIC entity in the same manner as an individual TIC compound. For the purposes of determining if there is an exceedance of a ground water remediation standard, the total alkanes attributed to a petroleum product would be summed and treated as a single "compound." The Department's experience has been that if petroleum contamination is present at a site, then TICs are frequently petroleum based.

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410. COMMENT: The definition of “vapor concern” should be linked to a site-related discharge by amending the definition to read (additions underlined), “Vapor concern” means a condition where contamination in indoor air traceable to a site-related discharge exists at a level greater than the Department's vapor intrusion indoor air screening level but...” (6)

411. COMMENT: N.J.A.C. 7:26E-1.11(a)2ii and iii, (a)8, and all of 1.15 should be qualified so that they only apply to a site-related discharge. (6, 11)

RESPONSE to COMMENTS 410 and 411: Modifying the definition of vapor concern or any of the cited rules as suggested by the commenters is not necessary because the rule at N.J.A.C. 7:26E-1.15(e) states that action concerning a vapor concern is only required when the vapor concern is related to a discharge.

412. COMMENT: A definition of “hot spot” must be added, as the concept appears in guidance. (6)

RESPONSE: The phrase “hot spot” is not used in N.J.A.C. 7:26E. It is appropriate to include definitions in the rules of only those terms that are used in the rules.

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N.J.A.C. 7:26E-1.9 Green and sustainable practices

413. COMMENT: The Technical Requirements at N.J.A.C. 7:26E-1.9 encourage the use of green and sustainable practices during the remediation of contaminated sites. As a practical matter, contaminated sites will be remediated using the most appropriate and cost effective practices, regardless of whether they are green or sustainable. (7)

RESPONSE: The Department understands that contaminated sites will be remediated using the most appropriate and cost effective practices; however, if a green and sustainable practice exists that provides the same results for approximately the same costs, the Department encourages its use.

N.J.A.C. 7:26E-1.10 Ongoing source control and implementation of interim remedial measures

414. COMMENT: The concepts “interim remedial measures” and “remedial measures” are not defined. Given the specific requirements for IECs, the inclusion of the requirement at N.J.A.C. 7:26E-1.10 within the Technical Requirements is no longer needed. A definition for an “interim response action” has been added to the Technical Requirements, but it is specifically associated with the IEC process. In the context of a

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non-IEC, N.J.A.C. 7:26E-1.10 is simply a restatement of the obligation of the person responsible for conducting the remediation to remediate under the Spill Act and SRRA.

(6, 11)

RESPONSE: “Interim remedial measure” should not be confused with “interim response action.” An interim response action is associated with addressing an IEC. As defined in the Technical Requirements, an “interim response action” is linked to the term “engineered response action,” which is only used in connection with IECs.

An interim remedial measure is a measure taken to address conditions that do not rise to the level of an IEC. Pursuant to N.J.A.C. 7:26E-1.10(a)1, an interim remedial measure is to be implemented when it is “necessary to remove, contain, or stabilize a source of contamination to prevent contaminant migration and to protect the public health and safety and the environment.” Adding a definition of “interim remedial measure” is unnecessary in view of the clear statement as to when such a measure should be implemented at N.J.A.C. 7:26E-1.10(a)1, and would unnecessarily remove the flexibility contemplated by N.J.A.C. 7:26E-1.10(a)1 that the person responsible for conducting the remediation should use judgment and common sense to identify these types of conditions. However, where interim remedial measures are necessary to address LNAPL, the person

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responsible for conducting the remediation must follow the requirements of N.J.A.C. 7:26E-1.10(b) and (c).

415. COMMENT: N.J.A.C. 7:26E-1.10(c)2 includes requirements for controlling ongoing sources and implementing interim remedial measures (IRMs). It requires that an LNAPL IRM be implemented to reduce contaminant mass to the extent practicable. The goal of an IRM is to reduce the risk posed by the release to an acceptable level until a final remedy can be put in place. The requirement to reduce contaminant mass goes beyond the goal of an IRM and is inconsistent with the remedial action provisions of N.J.A.C. 7:26E-5.1(e). Under N.J.A.C. 7:26E-5.1(e), containment of LNAPL may be an acceptable remedial option. Therefore, the words “reduce contaminant mass to the extent practicable” should be deleted. (23)

RESPONSE: The Department disagrees that the reduction of contaminant mass is beyond the goal of an interim remedial measure. In both N.J.A.C. 7:26E-1.10(c) and 5.1(e), the person responsible for conducting the remediation is required to treat or remove LNAPL to the extent practicable. Therefore, the provisions are not inconsistent, as both require treatment or removal of free product as the primary remedial action. Containment is only acceptable as a secondary measure when treatment or removal of free product is not practicable.

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416. COMMENT: The requirement at N.J.A.C. 7:26E-1.10(c)2 to complete the activities associated with the implementation of an LNAPL interim remedial measure within one year after the LNAPL is discovered is onerous and not always necessary or achievable, particularly for large, complex sites. It should be up to the LSRP to determine the appropriate timeframe. (7)

RESPONSE: N.J.A.C. 7:26E-1.10(c)2 does not require that the activities associated with the implementation of an LNAPL interim remedial measure be completed within one year after the LNAPL is discovered. Rather, the rule requires that these activities be initiated within that timeframe, and the Department believes that one year is reasonable. Additionally, since SRRA at N.J.S.A. 58:10C-28 requires the Department to establish a timeframe for interim remedial measures, allowing the LSRP to set this timeframe would be in violation of the statute. However, if the person responsible for conducting the remediation finds that he or she will be unable to meet this timeframe, that person may request a timeframe extension pursuant to N.J.A.C. 7:26C-3.2.

N.J.A.C. 7:26E-1.11 Immediate environmental concern (IEC) requirements

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417. COMMENT: The rules improperly expand the ability to use classification exception areas (CEAs) and allow the LSRP to determine how large a CEA should be. Given the waiver provisions, LSRPs can declare virtually all contaminated groundwater areas as a CEA, which would mean that the ground water would not be required to be remediated. Instead natural attenuation would be used on site, allowing toxic chemicals to remain in the ground water until they dilute to a lower level, which could result in vapor intrusion in homes or the plume moving and impacting other drinking water supplies. (36)

RESPONSE: Contrary to the commenter's assertion, an LSRP may not establish a CEA or unilaterally determine its size. Rather, a CEA must be approved and issued by the Department. Furthermore, a CEA is required whenever the New Jersey Ground Water Quality Standards are exceeded, and must remain in place for the duration. Before the Department will approve a monitored natural attenuation remedial action, the person responsible for conducting the remediation must evaluate whether the contamination could result in vapor intrusion in homes or the plume moving and impacting other drinking water supplies. If either is the case, additional remediation is required.

While the Technical Requirements at N.J.A.C. 7:26E-1.7 do allow a person responsible for conducting the remediation to apply for a variance from a technical requirement,

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N.J.A.C. 7:26E-1.7(b)6 specifically provides that the person responsible for conducting the remediation shall not vary from any provision that requires prior Department approval. Accordingly, contrary to the commenter's assertion, the requirement to obtain Department approval for the establishment of a CEA may not be the subject of an application for a variance.

418. COMMENT: The IEC definition and requirements at N.J.A.C. 7:26E-1.11 do not clearly state, but seem to imply, that the IEC is related to a contaminant source from the site being investigated and that a complete pathway exists. The Department should clarify the IEC definition and requirements to avoid confusion over the party responsible for notification versus the party charged with performance of IEC response actions and reporting requirements. It is the person responsible for conducting the remediation who must address IEC requirements, but only if the condition is related to the contaminated site for which the person is responsible. However, if the IEC is related to background or other sources, the person is only required to notify and provide data to the Department, the local health department and the property owner. (6, 11, 23)

RESPONSE: The Department disagrees that the definition of IEC should be limited to conditions that are only related to a discharge originating from the site under investigation, as is suggested by the commenters. The definition tracks the definition of

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IEC in SRRA at N.J.S.A. 58:10C-2. An IEC exists when any of the conditions listed in the definition are present, regardless of the source of the contamination.

A person must comply with the rules concerning an IEC if that person is a responsible person as listed in the ARRCs rules at N.J.A.C. 7:26C-1.4, to which the Technical Requirements at N.J.A.C. 7:26E-1.3 cross reference. Where a person discovers an IEC but N.J.A.C. 7:26C-1.4 does not apply to that person, that person is not liable for addressing the IEC. Accordingly, there is no need to amend the definition as suggested.

For persons to whom the rules apply, the operative word from a timing standpoint is “immediate.” That is, a condition has been identified that requires immediate attention to “prevent contaminant migration and to protect the public health and safety and the environment.” See N.J.A.C. 7:26E-1.10(a)1. IEC cases are priority remedial cases that involve exposure to contaminants that present risks to public health. For that reason, it is critically important that the person who discovers the IEC immediately notify the Department.

The Department recognizes that during the course of an investigation, a person responsible for conducting the remediation may discover contamination that is not attributable to the site or that is likely to be related to a contaminant source for which the

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person conducting the remediation is not responsible. As provided in the Immediate Environmental Concern (IEC) Technical Guidance Document DRAFT, version 1.0 (August 2011), www.state.nj.us/dep/srp/guidance, the person responsible for conducting the remediation should use best professional judgment, supported by site-specific data, to determine if the contamination is related to another contaminated site. If contamination is determined not to be related to the site being investigated, the person identifying the IEC is required to report the unrelated IEC to the Department's hotline, submit a form (located at www.state.nj.us/dep/srp/srra/forms) within the specified regulatory timeframe (14 days) as per N.J.A.C. 7:26E-1.11(b)3, and include justification and documentation supporting their determination of its origin from an unknown source.

The IEC Technical Guidance also provides that after the Department reviews the claim with the supporting information, the Department will inform the person reporting the IEC of its decision regarding the source of contamination. The person responsible for conducting the remediation is to proceed with the IEC procedures outlined in the IEC Technical Guidance document until the Department has provided a conclusion regarding the IEC source claim. If the Department concurs that the contamination is not related to the site, the person responsible for conducting the remediation is not responsible for conducting any further action for the IEC.

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Note that the person may be eligible to make a claim against the Spill Compensation and Control Act Fund for reimbursement of funds expended in addressing an IEC for which the person is not liable. If the IEC is determined to be from an unknown source, the Department will address the impacted receptors using public funds.

If a portion of the contamination is related to the site and is creating an IEC, the person responsible for conducting the remediation is required to continue to address the IEC pursuant to N.J.A.C. 7:26E-1.11. If there is a comingled plume from more than one site, the persons responsible for conducting the remediation from each site may elect to negotiate between or among themselves what portions each will address. If those persons cannot resolve how to divide the responsibility and address the IEC, all such persons will be in violation of the Technical Requirements and subject to penalties and other enforcement actions. In addition, the Department will address the receptors using public funds and will commence enforcement and seek cost recovery and treble damages.

419. COMMENT: N.J.A.C. 7:26E-1.11(a)1 should be clarified as to whether the person responsible for conducting the remediation is required to call both the case manager and the Department's hotline if the case still has a case manager. (27)

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RESPONSE: N.J.A.C. 7:26E-1.11(a)1, which sets forth the requirements that apply to a person responsible for conducting the remediation who has identified an IEC, clearly indicates that the person responsible for conducting the remediation must contact both the hotline and the case manager if one has been assigned.

420. COMMENT: In the Technical Requirements at N.J.A.C. 7:26E-1.11(a)5, the phrase “and agreed to by the LSRP” should be added to the end of the sentence that ends with “on a schedule established by the IEC case manager.” The LSRP should also have the opportunity to agree to the type and content of the updates. (7)

RESPONSE: The Department disagrees with the commenter’s suggestion. N.J.A.C. 7:26E-1.11(a)5 requires that the person responsible for conducting the remediation provide routine updates to the Department on the progress of addressing the IEC on a schedule set by the Department’s IEC case manager. Since the IEC portion of the case is being overseen by a Department case manager, it is within the Department’s purview to have that case manager establish the schedule for updates.

421. COMMENT: Defining exceedance of rapid action levels (RALs) as vapor intrusion IECs makes them de-facto remediation standards without their having been subjected to an appropriate peer review, the stakeholder review process or the

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requirements of the Administrative Procedure Act. Accordingly, until such time as the RALs are properly promulgated as standards, the RALs should not be enforceable under the ARRCs or Technical Requirements. Additionally, SRRA does not provide a specific basis for developing indoor air levels/standards for an IEC, and therefore, these must be developed through proper rulemaking. (6, 11, 15)

RESPONSE: Contrary to the commenter's assertion, rapid action levels (RALs) have undergone appropriate peer and stakeholder review. The Department's October 1995 Vapor Intrusion Guidance, as amended in 2006 and 2007, contains the Department's guidelines for evaluating and remediating conditions where toxic vapors exist indoors as a result of a discharge of a hazardous substance. This guidance included the publication of RALs. These guidelines were developed in consultation with multiple external stakeholders, including environmental consultants, the laboratory community, the USEPA, the Site Remediation Industry Network (SRIN), and the Technical Regulations Advisory Committee (TRAC). As such, the concept and development of RALs has undergone considerable stakeholder and peer review.

Additionally, prior to amending the Technical Requirements in 2011 (see 43 N.J.R. 389), vapor intrusion IECs were defined as conditions where the Department's indoor air screening levels were exceeded. As a result of concerns raised by the regulated and

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environmental consulting communities concerning the appropriateness of using the Department's indoor air screening levels as the trigger for vapor intrusion IECs, a stakeholder process was initiated in 2010 to discuss this issue. As a result of this stakeholder process, which included representatives of the commenters, it was recommended to the Department that the trigger for a vapor intrusion IEC be changed from the Department's indoor air screening levels to the Department's RALs. This amendment to the Technical Requirements was proposed in 2010 (see 42 N.J.R. 2297) and adopted in 2011 (see 43 N.J.R. 389). Accordingly, the use of RALs to define a vapor intrusion IEC was adopted in accordance with the Administrative Procedure Act.

422. COMMENT: The reference to rapid action level values in the vapor intrusion guidance document is inappropriate, as these values are based on cancer risk (i.e., long term) exposure, not on acute (i.e., short term) exposure, which would be consistent with the definition of an IEC pursuant to SRRA, which defines "immediate environmental concern" as, "(1) confirmed contamination in a well used for potable purposes at concentrations at or above the ground water remediation standards; (2) confirmed contamination that has migrated into an occupied structure or confined space producing a toxic or harmful atmosphere resulting in an unacceptable human health exposure (note – which is not defined); (3) confirmed contamination at the site of a nature that either dermal contact, ingestion, or inhalation of the contamination could result in an acute

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human health exposure; or (4) any other condition that poses an immediate threat to the environment or to the public health and safety.” “Acute” and “immediate” are terms that should describe the same set of conditions. The term “acute” is defined by the United States Environmental Protection Agency (USEPA) Integrated Risk Information System (IRIS) as “one dose or multiple doses of short duration spanning less than or equal to 24 hours.” Therefore, as defined by SRRA, an IEC must have the documented potential to produce negative short-term effects (within 24 hours). (6, 11, 15)

423. COMMENT: The Department is proposing to use non-promulgated rapid action levels, which are largely based on the equally non-promulgated indoor air screening levels (IASLs) as standards to be met without fail. However, vapor intrusion IECs should be based on toxicity values, established and vetted data and/or exposure assumptions that reflect acute short-term exposures/conditions. As included in the Department’s Vapor Intrusion Technical Guidance, the RALs are the result of arbitrarily increasing the IASLs by a factor of ten in most instances. The IASLs are cancer-risk based, intended to be protective over a lifetime of exposure, not to be factored into acute exposure limits by applying a random multiplier. IECs, by definition, are not long-term conditions and do not represent conditions that persist over a lifetime. The RALs are simply an arbitrary upward adjustment of the residential-based IASLs, which assume continuous, long-term residential exposure over a period of 30 years. (6, 11)

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RESPONSE to COMMENTS 422 and 423: The definition of an “immediate environmental concern” in SRRA describes four conditions, joined by the conjunction “or.” For an immediate environmental concern to exist, any of the four conditions must be satisfied, but not necessarily all of them. RALs are used to define the second condition of an “immediate environmental concern,” namely, “. . . confirmed contamination that has migrated into an occupied or confined space producing a toxic or harmful atmosphere resulting in an unacceptable human health exposure, or producing an oxygen-deficient atmosphere, or resulting in demonstrated physical damage to essential underground services” There is no reference in this portion of the SRRA definition to acute exposure conditions. Rather, the definition uses the phrase “resulting in an unacceptable human health exposure.” The infiltration of vapors at concentrations above the rapid action levels represents an “unacceptable human health exposure” pursuant to the second condition in the statutory definition of “immediate environmental concern.” As such, exceedances of the rapid action levels are the appropriate criteria for the Department to use when setting vapor intrusion pathway immediate environmental concern investigation triggers.

“Acute” and “immediate” do not, as the commenters suggests, describe identical conditions. The definition of “immediate environmental concern” in SRRA does not

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equate “acute” with “immediate.” For example, there is no reference in the second condition of the SRRA definition to acute exposure conditions. Rather, the definition uses the phrase “resulting in an unacceptable human health exposure.” In addition, the first condition of the SRRA definition is “confirmed contamination in a well used for potable purposes at concentrations at or above the ground water remediation standards.” The ground water remediation standards are not based on acute exposure standards. However, the third condition of the SRRA definition is “... confirmed contamination at the site of a nature that either [sic] dermal contact, ingestion, or inhalation of contamination could result in an acute human health exposure” Clearly the definition of “immediate environmental condition”, as contained in SRRA, does not equate “acute” with “immediate.”

Additionally, it is not necessary that a condition have the documented potential to produce negative short-term effects (within 24 hours) before it meets the definition of an IEC. As noted in the paragraph above, the SRRA definition of “immediate environmental concern” does not equate an acute exposure with an immediate environmental concern. Moreover, neither “acute” nor “acute exposure” have universally accepted definitions. While USEPA IRIS may define acute exposure as a period up to 24 hours, the Agency for Toxic Substances and Disease Registry (ATSDR) has developed acute Minimal Risk

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Levels (MRLs) based on a 1 to 14 day exposure. See

<http://www.atsdr.cdc.gov/mrls/index.asp>.

424. COMMENT: The rapid action levels (RALs) and the indoor air screening levels (IASLs) are based on a residential exposure scenario. Therefore, at a minimum, an IEC for vapor intrusion should only apply to sensitive receptors such as residences, day-care centers and primary and secondary schools. For all other structures (i.e., commercial/industrial), the Department should develop and properly promulgate specific standards in light of the exposures and receptors. (6, 11, 15)

RESPONSE: Contrary to the commenters' assertion, indoor air screening levels (IASLs) are not based solely on a residential exposure scenario. The current listing of IASLs on the Department's web site (available since March 2007) contains both residential and non-residential exposure values (see www.nj.gov/dep/srp/guidance/vaporintrusion/vig_tables.pdf). It was never the intent of the Department to restrict vapor intrusion IECs to sensitive receptors, but rather to apply them equally to all people.

However, the commenters are correct that current rapid action levels (RALs) are only based on a residential exposure scenario. The Department is in the process of developing

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RALs for a non-residential exposure scenario. In the interim, the person responsible for conducting the remediation can request a technical consultation with the Department in order to develop a rapid action level for nonresidential scenarios.

425. COMMENT: N.J.A.C. 7:2E-1.11(a)(4) requires the submittal of full laboratory data deliverables for all IECs. However, reduced laboratory deliverables will, in most instances, be the only deliverables available for a direct contact IEC, making this requirement unattainable. This provision should be amended to provide for the submittal of full or reduced deliverables, as available. (11)

RESPONSE: The Department agrees that in many instances direct contact IECs will be initially identified based on data supplied in a reduced laboratory deliverable. However, if a direct contact IEC is identified, the laboratory can be contacted and asked to provide the results in a full laboratory deliverable package. Accordingly, if a direct contact IEC is present, the person responsible for conducting remediation is required to request a full deliverable package from the analytical laboratory.

426. COMMENT: The requirement at N.J.A.C. 7:26E-1.11(a)6i(2) to sample any wells within 500 feet is arbitrary and may not be necessary. The rule assumes that little or no site-specific information is available. This assumption is not appropriate when

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sufficient information about site-specific conditions is available. The rule should allow the LSRP to exercise professional judgment based on actual site conditions. (27)

427. COMMENT: N.J.A.C. 7:26E-1.11(a)6ii(2), which requires sampling of all buildings located within 100 feet of an impacted building, is arbitrary. The rule assumes that little or no site-specific information is available. This assumption is not appropriate when sufficient information about site-specific conditions is available. There should be an allowance in the rule for judgment by the LSRP based on actual site conditions. (23, 27)

RESPONSE to COMMENTS 426 and 427: The distance requirements in N.J.A.C. 7:26E-1.11(a)6i(2) and 6ii(2) are reasonable under most circumstances. If, based on actual site conditions, an LSRP and the person responsible for conducting remediation believe a different distance is appropriate, the Technical Requirements, at N.J.A.C. 7:26E-1.7, establish a procedure for varying from this requirement.

428. COMMENT: The intent of the language in N.J.A.C. 7:26E-1.11(a)6ii(2) is not clear. The requirement to “identify any additional buildings at risk and conduct additional vapor intrusion investigations pursuant to N.J.A.C. 7:26E-1.15” implies that it is permissible to conduct a site-specific determination regarding which buildings require

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investigation, but the rule should so state with specificity. For example, if the site-related contaminant is petroleum, then only those buildings within 30 feet of the previously identified impacted building would require vapor intrusion investigation.

Additionally, the 100-foot distance for the evaluation of non-petroleum contaminants appears to be arbitrary and the technical basis for this requirement should be provided by the Department. (6, 11)

429. COMMENT: N.J.A.C. 7:26E-1.11(a)6ii(2) requires the person responsible for conducting the remediation to identify and sample all buildings within 100 feet of the building impacted by a vapor intrusion IEC. What is the technical justification for the requirement to sample all buildings within 100 feet? As with all vapor intrusion investigations, there should be a phased approach where the investigator can evaluate groundwater and soil gas, and determine based on additional data what other locations may be required to be sampled. There should be an allowance in the rule for judgment by the LSRP based on actual site conditions. Further, vapor intrusion investigations for petroleum related releases are only required for structures within 30 feet of the groundwater screening levels. (7, 27)

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RESPONSE to COMMENTS 428 and 429: The USEPA first developed the 100-foot distance criterion for the Draft Guidance for Evaluating the Vapor Intrusion to Indoor Air Pathway from Groundwater and Soils (2002, Office of Solid Waste and Emergency Response, Washington, DC. USEPA530-F-02-052). The criterion was based in part on studies conducted by David Folkes (EnviroGroup Limited) from empirical data at several Colorado sites. Other considerations included common levels of uncertainty in the contouring of groundwater plumes and lateral diffusion through the unsaturated zone (Todd McAlary, Geosyntec, personal communication). Subsequent scientific studies have supported the 100-foot distance criterion (Lowell, P.S. and B. Eklund. 2004. "VOC Emission Fluxes as a Function of Lateral Distance from the Source," Environmental Progress 23(1):52-58; Folkes, D., J.P. Kurtz, and C. Sanpawanitchakit. 2007. Vapor Intrusion as a Function of Lateral Distance from a Groundwater Plume Boundary. Proceedings of the Air & Waste Management Association Vapor Intrusion Conference, Providence, RI).

The 100-foot critical distance criterion for investigating the vapor intrusion pathway does not consider the aerobic biodegradation of petroleum hydrocarbons (PHC). Therefore, the Department employs a 30-foot critical distance criterion for dissolved PHCs. Since the 100-foot critical distance criterion was considered overly conservative for dissolved PHCs, the Department employed a 30-foot critical distance criterion. Lilian Abreu's

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2009 modeling study (“Simulated Soil Vapor Intrusion Attenuation Factors Including Biodegradation for Petroleum Hydrocarbons,” Groundwater Monitoring & Remediation, 29(1):105-107) supported this criterion. In addition to the USEPA, numerous states have adopted similar distance criteria, including New Hampshire, Delaware, Pennsylvania, California and Kansas. Finally, the ASTM evaluated critical distance criteria as part of its Standard Guide for Vapor Encroachment Screening on Property Involved in Real Estate Transactions (ASTM E2600-10). They concluded that the 100- and 30-foot critical distance criteria were appropriate and included them in ASTM E2600-10.

Once an IEC has been observed, regardless of contaminant type, the Department believes the 100 foot distance is appropriate in determining if adjacent structures are impacted. If, based on actual site conditions, an LSRP and the person responsible for conducting remediation believe that a different distance is appropriate, N.J.S.A. 7:26E-1.7 establishes a procedure for varying from this provision of the rules.

The Department agrees, however, that the phrase “identify any additional buildings at risk” in N.J.A.C. 7:26E-1.11(a)6ii(2) is not clear. On adoption, the Department is replacing the phrase “at risk” with the phrase, “whose air may be impacted.”

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430. COMMENT: The requirement at N.J.A.C. 7:26E-1.11(a)6iii to, “identify and sample all areas of concern and evaluate for direct contact threats to nearby humans” is overly broad and unnecessary. If the intent is to delineate the extent of the direct contact IEC area, then the language should simply state this. The phrase “direct contract threats to nearby humans” is not defined and is vague. The requirement to identify and sample “all areas of concern” is overly prescriptive as it is likely that the source of the direct contact IEC will be a single release or area of concern. (6, 11)

RESPONSE: The Department agrees with the commenter. As proposed, the Department intended that the requirements for soil IECs (direct contact) and ground water IECs to be parallel. However, unlike ground water contamination and contamination from vapors, each of which can have a widespread impact, the impact from a soil IEC is limited to the area of soil that is contaminated, and the existence of other direct contact IECs that are a result of the discharge to soil would be unlikely. Additionally, when delineation is complete and the engineering control is put in place for the direct contact IEC, the contact pathway is eliminated, making the search for other direct contact IECs unnecessary. Accordingly, on adoption, the Department is deleting N.J.A.C. 7:26E-1.11(a)6iii(2) and making N.J.A.C. 7:26E-1.11(a)6iii(1) part of N.J.A.C. 7:26E-1.11(a)6iii.

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431. COMMENT: N.J.A.C. 7:26E-1.11(a)8 should specify what constitutes initiation of source control, and whether extensions of regulatory and mandatory timeframes will be granted for sites where source remediation is complicated by factors such as bedrock or off-site migration. (27)

RESPONSE: Source control is the process of treating or removing contaminants and/or controlling contaminant migration which has caused an IEC. N.J.A.C. 7:26E-1.11(a)8 requires this process be initiated within one year after identifying any IEC. The ARRCs rules provide for extensions of regulatory and mandatory time frames at N.J.A.C. 7:26C-3.2 and 3.3.

432. COMMENT: It may not be possible for the person responsible for conducting the remediation to address offsite source areas and limited access areas within the one year time frame prescribed by N.J.A.C 7:26E-1.11(a)8. In addition, the requirement to complete the remedial investigation in a shorter time period is unnecessary and will not result in any additional benefit to human health or the environment since the potential risks associated with the IEC have already been addressed and the source stabilized. Accordingly, this portion of the requirements should be deleted. (7, 11)

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RESPONSE: The Department agrees with the commenter. Establishing a deadline for the completion of the remedial investigation to address offsite source areas and limited access areas associated with an immediate environmental concern that is shorter than the deadline for completion of the remedial investigation of conditions that are not of an immediate environmental concern focused on the immediacy of the situation. However, once source control and receptor controls are in place and the person responsible for conducting the remediation has investigated whether other potential receptors exist that may be impacted from the contamination, as is required by the other provisions of N.J.A.C. 7:26E-1.11, the risk has been ameliorated. Accordingly, it is not necessary to require that the remedial investigation to address offsite source areas and limited access areas associated with an immediate environmental concern proceed on a schedule separate from the preparation of the remedial investigation for the rest of the site. Accordingly, the Department is, on adoption, deleting N.J.A.C 7:26E-1.11(a)8ix since the IEC has been addressed and source control initiated, and therefore the regulatory timeframes established at N.J.A.C. 7:26E-4.10 are adequate.

N.J.A.C. 7:26E-1.12 Receptor evaluation – general and reporting requirements

433. COMMENT: The requirement at N.J.A.C. 7:26E-1.12 that the receptor evaluation be updated when the known concentration or extent of contamination in any

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medium increases is unclear, impractical and unnecessary. In particular, given the variability of ground water data, minor fluctuations routinely occur at most sites and such relative increases provide no information regarding whether or not a site poses any enhanced risk or concern. (6)

434. COMMENT: N.J.A.C. 7:26E-1.12(d) requires that the person responsible for conducting the remediation shall update the receptor evaluation when the known concentration or extent of contamination in any medium increases. This provision is impractical and unnecessary. It should only be required if a receptor is impacted. (11)

435. COMMENT: N.J.A.C. 7:26E-1.12(d) requires that the person responsible for conducting the remediation update the receptor evaluation when: 1) the known concentration or extent of contamination in any medium increases; 2) a new AOC is identified; 3) a new receptor is identified; or 4) a new exposure pathway is identified. This section should be revised to require that the receptor evaluation should be updated only if the LSRP determines an update is necessary. (7)

RESPONSE to COMMENTS 433 through 435: The Department believes the requirement to update the receptor evaluation based on the conditions identified in N.J.A.C. 7:26E-1.12(d)1-4 is appropriate. When the conditions identified in N.J.A.C. 7:26E-1.12(d)1-4

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occur, receptors may be impacted by the contamination. Without conducting this evaluation, it is not possible to identify if proximate receptors may have been impacted. These updates are required to be submitted when the reports specified at N.J.A.C. 7:26E-1.12(e)1-3 are submitted.

N.J.A.C. 7:26E-1.13 Receptor evaluation – land use

436. COMMENT: N.J.A.C. 7:26E-1.13(a)3 through 4 should not require a map if no sensitive receptors or proposed changes to land use are identified within 200 feet of the property boundary. (27)

437. COMMENT: N.J.A.C. 7:26E-1.13 requires the evaluation of land use within 200 feet of the property boundary. However, the rules do not indicate what this information is to be used for, or the goals associated with obtaining this information. This requirement should be limited to properties with known soil originating from a contaminated site, or sites within the vapor intrusion trigger radius based on known groundwater impacts, rather than all properties within 200 feet of the site boundary. (11)

RESPONSE to COMMENTS 436 and 437: The purpose of the information, including the map, is to assist both the LSRP and the Department in determining whether potential

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IECs exist, as well as the appropriateness of potential remedial actions. The Department believes that identification of land use surrounding a site is a critical function in evaluation of receptors for all sites, without regard to the type of contaminant or media contaminated.

N.J.A.C. 7:26E-1.14 Receptor evaluation – Ground Water

438. COMMENT: N.J.A.C. 7:26E-1.14(a)1 should specify whether the well search must be completed within 90 days, and provide for circumstances where there are delays in obtaining records that are not within the control of the person responsible for conducting the remediation. (27)

RESPONSE: N.J.A.C. 7:26E-1.14(a)1 requires that the well search must be conducted within 90 days after ground water contamination is detected. If additional time is needed, the person responsible for conducting the remediation may apply for an extension of this regulatory timeframe by following the ARRCs rules at N.J.A.C. 7:26C-3.2.

439. COMMENT: N.J.A.C. 7:26E-1.14(a)1ii contains the requirement to conduct a door-to-door survey to determine the existence of any unpermitted potable or irrigation

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wells under various circumstances. The phrase “door-to-door” is unnecessary and vague and should be deleted. (7)

RESPONSE: “Door-to-door” is a commonly used phrase, meaning physically visiting at each house or business or property in the specified area to inquire about wells. A door-to-door survey is important to determine whether there are any unpermitted potable or irrigation wells that may have been impacted by the ground water contaminants under investigation.

440. COMMENT: N.J.A.C. 7:26E-1.14(a)1iii, which requires the submission of data concerning the construction of each well identified in the door-to-door survey (i.e., typically, unpermitted wells) should be modified to include “the construction of each well, if reasonably available.” Further, the requirement to sample irrigation wells “that may be utilized for potable purposes” is unduly burdensome and improperly attempts to require responsible parties to sample wells that were not permitted for potable purposes and that cannot be properly categorized by the LSRP. (6, 11)

RESPONSE: The Department believes the requirement to present the construction details of each well identified is a reasonable requirement. Well construction information should be available, either from the Department or from the well owner. In those circumstances

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when this information is not available, the person responsible for conducting the remediation would note that the information is not available. N.J.A.C. 7:26E-1.14(a)2iii sets forth the requirement to sample an irrigation well that may be utilized for potable purposes. The rule purposefully states “may be” because, even though a well is classified as an irrigation well, if the well is being utilized for potable purposes as determined by the door-to-door survey, the risk to the people using that source for potable purposes must be evaluated.

441. COMMENT: The notification requirements of N.J.A.C. 7:26E-1.14(a)2i concerning scheduled dates for conducting potable well sampling should only be required for the first round of sampling. (7)

RESPONSE: The notification required at N.J.A.C. 7:26E-1.14(a)2i is specific to the first time the person contacts property owners or tenants for the purpose of gaining access to conduct sampling. If contamination is detected in a well in exceedance of the applicable standard(s), the person responsible for conducting the remediation is required to follow all requirements at N.J.A.C. 7:26E-1.11, including any additional notification requirements. If contamination is not detected in a well in exceedance of the applicable standard(s), then additional sampling of that well would not be required, and therefore no additional notification would be required.

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442. COMMENT: N.J.A.C. 7:26E-1.14(a)2ii and iv assume that little or no site-specific information is available. This assumption is not appropriate when sufficient information about site-specific conditions is available. There should be an allowance in the rule for judgment by the LSRP based on actual site conditions. (27)

RESPONSE: The sampling requirements set forth in N.J.A.C. 7:26E-1.14(a)2ii and iv are necessary to allow accurate determination of whether the contamination has impacted nearby potable wells. If, based on actual site conditions, an LSRP and the person responsible for conducting remediation believe that different procedures are more appropriate, the LSRP and person responsible for conducting the remediation should apply for a variance from this requirement pursuant to N.J.A.C. 7:26E-1.7.

443. COMMENT: N.J.A.C. 7:26E-1.14(a)3 should specify when the requirement to update the well search ends. (27)

RESPONSE: There is no need to state at N.J.A.C. 7:26E-1.14(a)3 when the requirement to update a well search ends. N.J.A.C. 7:26E-1.12(e), which includes the general and reporting requirements for receptor evaluations, specifies when updated receptor evaluations are required to be submitted, and provides at N.J.A.C. 7:26E-1.12(e)3 that the

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last update to the receptor evaluation should be made prior to obtaining a remedial action permit. The person responsible for conducting remediation must submit the updated well search with the remedial action report.

444. COMMENT: The requirement at N.J.A.C. 7:26E-1.14(b) to establish an IEC should not be triggered if the person confirms that the irrigation well is only used for irrigation. (7)

RESPONSE: The commenter is correct. The requirements at N.J.A.C. 7:26E-1.14(b) pertain to potable wells and irrigation wells that may be utilized for potable purposes. If it is determined that an irrigation well is not utilized for potable purposes, then an IEC designation would not be necessary.

N.J.A.C. 7:26E-1.15 Receptor evaluation - vapor intrusion

445. COMMENT: The level of detail throughout N.J.A.C. 7:26E-1.15 is overly prescriptive. N.J.A.C. 7:26E-1.15 should simply refer to the Vapor Intrusion Guidance (VIG) as the source of information on assessing vapor intrusion sites and situations. This approach will allow LSRPs to utilize professional judgment regarding completion of vapor intrusion investigations. The level of prescriptiveness in this section is inconsistent

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with the approach for the completion of investigatory work in other subchapters of the Technical Requirements. (6, 11)

RESPONSE: None of the provisions of N.J.A.C. 7:26E-1.15 prescribe “how” the vapor intrusion investigation is to be conducted. Rather, N.J.A.C. 7:26E-1.15(a) sets forth when the person responsible for conducting the remediation is required to evaluate the vapor intrusion pathway, (b) requires that structures at risk must be identified and sets forth factors that may affect the level of risk, and (c) requires that the evaluation be conducted. The remaining subsections specify the reporting requirements and action requirements, based on the results of the sampling events. Each of these requirements is an essential component of a vapor intrusion investigation.

446. COMMENT: The requirement that ALL of the information listed at N.J.A.C. 7:26E-1.15 shall be obtained within 60 days is unreasonable. For example, simply identifying the depth of the invert and construction specification of subsurface utilities in areas of the State that have been developed for over 100 years and where record drawings do not exist may be impossible without significant excavation work to uncover the utilities to obtain the mandated information.

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This requirement should provide that the remediating party “will attempt to obtain” the above-listed information from readily available information sources, to allow the remediating party and the LSRP who is providing case oversight to focus resources on the investigation of potential vapor intrusion pathways through the exercise of professional judgment, based on reasonably available information. (24)

RESPONSE: The Department disagrees that N.J.A.C. 7:26E-1.15 is unreasonable. The Department believes all of the requirements are necessary for the determination of whether a potential vapor intrusion pathway is complete. Where information is not available, the person responsible for conducting the remediation should note that information is not available and document the actions taken to obtain the required information. If the person responsible for conducting the remediation so documents, the person will not be in violation of the rule or subject to enforcement.

447. COMMENT: N.J.A.C. 7:26E-1.15(a)1 and 2 should specify which compounds and light non-aqueous phase liquids (LNAPLs) the Department considers to be petroleum-related. (27)

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RESPONSE: It is unnecessary to so specify at N.J.A.C. 7:26E-1.15 because the ARRCs rules define “petroleum” by cross-referencing the definition of that term in the UST rules, and the UST rules at N.J.A.C. 7:14B-1.6 define “petroleum” with specificity.

448. COMMENT: The 30-foot and 100-foot distances for the vapor intrusion evaluation set required by N.J.A.C. 7:26E-1.15(a)1 are arbitrary and the technical basis should be provided by the Department. (6, 11)

RESPONSE: Please see the response to comments 426 and 427, and 428 and 429 for a discussion of the basis for these requirements.

449. COMMENT: N.J.A.C. 7:26E-1.15(a)2ii requires the person responsible for conducting the remediation to conduct a receptor evaluation of the vapor intrusion pathway pursuant to this section when free product is identified within 30 feet of a building and it is petroleum hydrocarbon based. Heavily weathered petroleum hydrocarbons associated with heavy oils pose a significantly lower vapor intrusion risk than a fresh spill of lighter petroleum materials. The rule should be revised to allow for professional judgment concerning the 30-foot trigger, based on the type of petroleum product. If the product is weathered or has a lower volatile organic content than typical gasoline, a greater trigger distance should be allowed. (23)

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RESPONSE: Including the requirement to investigate the vapor intrusion pathway when free product is within 30 feet of a building and is petroleum-based is merely a trigger for conducting an investigation. If, based on actual site conditions, an LSRP and the person responsible for conducting remediation believe that a different distance is appropriate, they may apply for a variance from this technical requirement by following the procedures set forth at N.J.A.C. 7:26E-1.7.

450. COMMENT: N.J.A.C. 7:26E-1.15(a)3ii makes the laboratory detection limits for VOCs in water samples the trigger for a vapor intrusion investigation. Is this the Department's intent? If so, the Department should provide scientific justification. (27)

451. COMMENT: At N.J.A.C. 7:26E-1.15(a)3ii, concentration above the Department's ground water screening levels should be substituted for any detection of ground water containing "any volatile contaminant." (6, 11)

RESPONSE to COMMENTS 450 and 451: Pursuant to N.J.A.C. 7:26E-1.15(a)3ii, the trigger for a vapor intrusion investigation in situations where water contaminated with free product and/or volatile organic compounds is immediately accessible to persons is set at the laboratory detection limits for volatile organic compounds in water samples.

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The use of the ground water screening level is inappropriate in these circumstances since the ground water screening level considers partitioning from ground water, diffusing through soil and advection as part of the development of the screening level. In these situations, there is no diffusion through soil or advection, as the water is already present in a basement or exposed sump.

452. COMMENT: At N.J.A.C. 7:26E-1.15(a)3iv, the Department should specify what “any other information” could entail, given the highly specific conditions already listed within this section of the rule and those listed within the vapor intrusion guidance. (6, 11)

RESPONSE: The LSRP should use professional judgment to determine if there is additional information that would trigger a vapor intrusion investigation.

453. COMMENT: The requirement to obtain specific building construction details at N.J.A.C. 7:26E-1.15(b)2 should be pushed back to the sample collection timeframe so this information can be obtained during pre-sampling building walkthroughs. Obtaining specific information about building construction (i.e., slab construction, basement, crawlspace, etc.) is more difficult than determining building use and footprint area. Specific building construction information is not essential for determining whether a

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building should be sampled and what sampling priority it should have. This information is more useful for sample collection and data interpretation. (27)

RESPONSE: The structures identified in N.J.A.C. 7:26E-1.15(b)2 are the structures that are required to be sampled. Pursuant N.J.A.C. 7:26E-1.15(c), specific building construction details are necessary to trigger the requirement to sample within 150 days. The Department believes that it is prudent to collect the information required at N.J.A.C. 7:26E-1.15(b)2 as soon as possible in order to properly plan sampling activities. Obtaining such information at a later date could result in delays in sample collection, especially if there are unique building conditions that would require the use of specialized sampling techniques.

454. COMMENT: The information required in N.J.A.C. 7:26E-1.15(b)3 may not be readily available, particularly for older communities and developments. The rule should specify the level of effort the Department intends for this task, such as whether a public information request will suffice or whether geophysical surveys or test pits will be required if records are incomplete. (27)

RESPONSE: The person responsible for conducting the remediation and the LSRP are responsible for making a good faith effort to obtain the information required at N.J.A.C.

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7:26E-1.15(b)3. Where information is not available, the person should document that information is not available and document the actions taken to obtain the required information. An LSRP may use professional judgment to determine the need for geophysical or invasive investigation techniques where there is a potential migration pathway.

455. COMMENT: N.J.A.C. 7:26E-1.15(c), concerning determining “if the vapor intrusion pathway is complete for each building being investigated,” should state that the person responsible for conducting the remediation should perform a vapor intrusion investigation in accordance with the Department’s vapor intrusion technical guidance. (7)

RESPONSE: The rules at N.J.A.C. 7:26E-1.15(c) establish the remedial goal of evaluating whether the vapor intrusion pathway is complete, and require the collection of an appropriate number of samples in appropriate locations and the assessment of these data, including a comparison of the analytical results to the Department’s screening levels. How this investigation should be conducted is detailed in guidance. It is not necessary to cross reference the Vapor Intrusion Technical Guidance in the rules because N.J.A.C. 7:26C-1.2(a)3 requires the person to follow the SRRA’s statutory hierarchy, which includes the requirement to either follow the Department’s technical guidance or

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provide in the appropriate report a written rationale concerning why the technical guidance issued by the Department is inappropriate or unnecessary.

456. COMMENT: The requirement to notify the Department prior to initiation of the vapor intrusion sampling at N.J.A.C. 7:26E-1.15(c)1 is unnecessary and burdensome. The requirement to notify the Department if an IEC is identified within 14 days to 30 days after receiving the vapor intrusion data, depending on the results, should suffice. (6, 11)

RESPONSE: N.J.A.C. 7:26E-1.15(c)1 requires that, at the time the person responsible for conducting the remediation contacts property owners and occupants for the purpose of gaining access to conduct sampling, but no later than seven days prior to the scheduled sampling, the Department is to be notified of the proposed sampling activities. The sampling notification requirement allows the Department the opportunity to conduct field inspections of the proposed sampling activities if it chooses to do so. In addition, Department notification is necessary to enable the Department to have the information it needs to be able to address any public inquiries regarding sampling activities. If the Department were notified only when an IEC is observed or when the analytical results are submitted, the Department would not have enough information to adequately respond to any inquiries regarding sampling activities.

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457. COMMENT: N.J.A.C. 7:26E-1.15(c)2 through 4 provide requirements that are exactly appropriate for this section of the rule. They present general, goal-oriented requirements that allow reasonable flexibility to achieve compliance and the use of professional judgment by the LSRP. (6, 11)

RESPONSE: The Department acknowledges the commenters' support of the rule.

458. COMMENT: Negotiation of access terms for off-site properties, as is required at N.J.A.C. 7:26E-1.15(c)2, frequently takes a long period of time, particularly for commercial or industrial facilities that may use contaminants of concern. Is denial of access an acceptable justification for not meeting the timeframe required in this rule provision? (27)

RESPONSE: While a delay in obtaining access is not an acceptable justification for not meeting a mandatory timeframe, it may be a rationale to support a request for an extension of a mandatory timeframe. The details for such an extension are provided at N.J.A.C. 7:26C-3.5(d).

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459. COMMENT: The determination required by N.J.A.C. 7:26E-1.15(c)4 is often not possible without multiple rounds of sampling. The Department should consider changing the rule to allow the person responsible for conducting the remediation to present information that is known at the end of this timeframe. (27)

RESPONSE: The Department recognizes that compliance with N.J.A.C. 7:26E-1.15(c)4 may require additional sampling; however, the person responsible for conducting the remediation must complete that evaluation within 150 days after determining the need to conduct a vapor intrusion investigation pursuant to N.J.A.C. 7:26E-1.15(a). The ARRCS rules at N.J.A.C 7:26C-3.2 set forth the procedure for obtaining an extension of a regulatory time frame, and these procedures may be used when additional time is needed to complete the evaluation of the vapor intrusion pathway.

460. COMMENT: N.J.A.C. 7:26E-1.15(d) should provide that data that was collected for a single phase of investigation over a period of time be presented in one, comprehensive report. This will be more efficient for the person responsible for conducting the remediation and for the Department. (27)

RESPONSE: It is important that the person responsible for conducting the remediation reports sampling data associated with a vapor intrusion receptor evaluation in the time

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frame specified at N.J.A.C. 7:26E-1.15(d) for at least two reasons. First, it is important that the owner and occupants of the building be notified of the results. Second, it ensures that the Department conducts a timely data review of the submitted laboratory data in the event that additional action is necessary.

461. COMMENT: The requirement at N.J.A.C. 7:26E-1.15(h) should be part of the requirements at N.J.A.C. 7:26E-1.15(g) (for example, as sub-item 4). (6)

RESPONSE: The Department disagrees that N.J.A.C. 7:26E-1.15(h) should be folded into N.J.A.C. 7:26E-1.15(g) as N.J.A.C. 7:26E-1.15(g)4. N.J.A.C. 7:26E-1.15(h) and N.J.A.C. 7:26E-1.15(g) are distinct requirements, based upon different time frames. N.J.A.C. 7:26E-1.15(g) requires immediate verbal notification to the Department and the Department of Health and Human Services of any indoor air results that exceed the Department of Health and Senior Services notification levels. N.J.A.C. 7:26E-1.15(h) sets forth a 14-day reporting period for submission to the Department of Health and Human Services of the data packages, including all maps and figures related to the indoor and ambient air sampling events.

N.J.A.C. 7:26E-1.16 - Receptor evaluation – ecological

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462. COMMENT: N.J.A.C. 7:26E-1.16 should be modified to be consistent with the objectives set forth in the Department's Ecological Evaluation Technical Guidance Document, including identifying: (1) the presence of environmentally sensitive natural resources (ESNRs) on, adjacent to, or potentially impacted by the site; (2) the presence of contaminants of potential ecological concern at the site or area of concern and in the ESNRs (e.g., contaminants with concentrations in excess of aquatic Surface Water Quality Standards or ecological screening criteria; and (3) the presence of a contaminant migration pathway (historic or current) from the site to the ESNR or evidence of contaminated material having been placed directly into an ESNR (emphasis added). The subsequent investigation for ecological receptors would then focus on identified concerns or pathways. (6)

RESPONSE: The Ecological Evaluation Technical Guidance Document, version 1.1, (August 30, 2011), www.nj.gov/dep/srp/guidance and the rules are consistent with each other. The two provisions that concern ecological evaluations are N.J.A.C. 7:26E-1.16 and N.J.A.C. 7:26E-4.8. The objectives set forth in the Ecological Evaluation Technical Guidance Document echo these requirements. The Department recognizes that although the ecological evaluation is initiated during the site investigation (SI), data from contaminant migration pathways and environmentally sensitive natural resources (ESNRs) are not always available to enable the completion of the ecological evaluation

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during the SI stage; data collected during the SI may signal the need for a Remedial Investigation (RI) to delineate the nature and extent of contaminants in contaminant migration pathways and ESNRs. N.J.A.C. 7:26E-1.16 allows some timing flexibility for completing the ecological evaluation in that, while the ecological evaluation must be initiated during the SI, it can be completed during a supplemental SI or during the RI. Taken together, N.J.A.C. 7:26E-1.16 and N.J.A.C. 7:26E-4.8 and the Ecological Evaluation Technical Guidance are consistent.

463. COMMENT: N.J.A.C. 7:26E-1.16(a)1ii and (b) are overly conservative. The mere presence of a sensitive eco-receptor adjacent to a site does not necessarily warrant a remedial investigation. Some sites may be tens or hundreds of acres in area. A creek may border one side and an area of concern (AOC) whose area is small relative to the site and may be situated on the far opposite side could reasonably not have any pathway for contamination from the AOC to the receptor. As written, the requirement mandates a remedial investigation or an application for a variance under N.J.A.C. 7:26E-1.7. If the LSRP is called upon to use professional judgment for all the other remedial investigation elements, then the LSRP should also be able to use professional judgment in this case.

(20)

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RESPONSE: N.J.A.C. 7:26E-1.16 does not require a remedial investigation based on the “mere presence” of a sensitive ecological receptor adjacent to a site/AOC or property, nor do the rules call upon the LSRP to use professional judgment “for all other remediation investigation elements” as posited by the commenter. Rather, N.J.A.C. 7:26E-1.16(b) requires that both an environmentally sensitive natural resource (ESNR) and contaminant concentrations above ecological screening criteria (ESC) must be present at the site or AOC before a remedial investigation of ecological receptors is to be conducted. As per the Ecological Evaluation Technical Guidance Document (Version 1.1, issued August 30, 2011), if a remedial investigation is conducted and sampling data do not indicate the presence of a contaminant migration pathway to the ESNR, and direct discharge of site contaminants to an ESNR is ruled out, then an ecological risk assessment is not required. The size of a site or AOC relative to the size of the property is not relevant, since the need for a remedial investigation is determined quantitatively, based on environmental data. The commenter is referred to the N.J.A.C. 7:26E-1.8 for the definitions of “area of concern” and “contaminated site.”

464. COMMENT: N.J.A.C. 7:26E-1.16(a)1ii refers to environmentally sensitive natural resources other than ground water that are “adjacent to the site or area of concern.” “Adjacent” is too broad a term. The provision should be revised to state, “. . . are adjacent to the AOC such that present or historic field conditions reasonably suggest

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that the environmentally sensitive natural resources receive or received contaminants from surface runoff, ground water flow, direct discharges, or erosion.” (27)

RESPONSE: N.J.A.C. 7:26E-1.16(a)1i through iii require documentation of the presence of environmentally sensitive natural resources (ESNRs) that could be impacted by site or AOC contamination. N.J.A.C. 7:26E-1.16(a)2 requires documentation of whether contamination at the site or AOC exceeds ecological screening criteria (ESC). The suggestions by the commenter to amend the rule language to state that the ESNR received current or historical contaminants from the site suggested are already a part of the rule in that the rule requires that these conditions be verified quantitatively as a part of the ecological receptor evaluation and the ecological risk assessment (see N.J.A.C. 7:26E-4.8). Accordingly, the suggested amendments are not necessary.

465. COMMENT: N.J.A.C. 7:26E-1.16(a)1iii, which provides, “May be, have been, or are impacted by contamination from the site or area of concern,” is too subjective and vague. This provision should be amended to read “...from the site or area of concern based upon a review of site conditions and existing data, if available.” (27)

RESPONSE: N.J.A.C. 7:26E-1.16(a)1i through iii requires documentation of the presence of environmentally sensitive natural resources (ESNRs) that could be impacted

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by a site or area of concern (AOC) contamination. N.J.A.C. 7:26E-1.16(a)2 requires documentation of whether contamination at the site or AOC exceeds ecological screening criteria (ESC). The rule language proposed by the commenter is already included in the rule, as part of the ecological risk assessment (ERA) (see N.J.A.C. 7:26E-4.8). N.J.A.C. 7:26E-1.16(a)1iii is not subjective or vague because it emphasizes that an impacted ESNR may be remotely located. For example, contaminated groundwater may discharge to a surface water body or wetland at some distance from the site.

466. COMMENT: N.J.A.C. 7:26E-1.16(a)2 requires that an ecological receptor evaluation be conducted “if any contaminant concentration at the site or area of concern exceeds any ecological screening criterion or aquatic surface water quality standard.” Exceedance of “any ecological screening criterion” should be amended to include “appropriate or applicable” after “any,” because several ecological screening criteria were developed using specific test organisms and may not apply to particular environmentally sensitive natural resources. This comment also applies to N.J.A.C. 7:26E-1.16(b) and (c), where the phrase “...any ecological screening criterion . . .” should be preceded by the phrase “applicable or appropriate.” (27)

RESPONSE: Pursuant to N.J.A.C. 7:26E-1.5(b), a person responsible for conducting remediation is required to apply any available and appropriate technical guidance

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concerning site remediation as issued by the Department pursuant to N.J.A.C. 7:26C-1.2(a)3, or to document any deviations there from. The Department's guidance can be found on the Department's website at www.nj.gov/dep/srp/srra/guidance. According to the Ecological Evaluation Technical Guidance, version 1.1 (August 30, 2011), section 5.4, generally, the most conservative ecological screening criteria (ESC) are used. However, the person may choose to use a different value based on site conditions. The person is always required to provide a rationale for using ESC other than the most conservative value presented.

Technical Requirements - Subchapter 2: Quality Assurance for Sampling and Laboratory Analysis

Comparing NJDEP Method LLTO-15 and USEPA TO-15 Generally

467. COMMENT: N.J.A.C. 7:26E-2.1(a)7 calls for the use of NJDEP Method LLTO-15. NJDEP Method LLTO-15 is essentially identical to USEPA TO-15. The Department should standardize on USEPA TO-15 to take advantage of the nation-wide experience surrounding the use of the method. (6, 34)

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468. COMMENT: No procedural modifications have been made to NJDEP Method LLTO-15 that differentiates it from USEPA TO-15 or increases its sensitivity. Because the methods are identical, the application of the term “low level” to the New Jersey method has caused confusion among the regulated community leading them to believe that there is a sensitivity difference, which is not the case. Adopting these rule changes with references to NJDEP Method LLTO-15 will have numerous negative impacts including the following:

- Causing confusion among data users, the regulated community and laboratories regarding data comparability between methods,
- Increasing production and data validation costs without any improvement in data quality or data usability,
- Forcing laboratories to obtain and maintain costly accreditations for a redundant method,
- Failing to resolve any existing need, while adding expense and creating comparability confusion. (4, 34)

469. COMMENT: The rules concerning the analytical testing protocol for ambient air provide a choice between using USEPA Method TO-15 and NJDEP Method LLTO-15. Offering a choice between ambient air methods clearly indicates their equivalency and

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their ability to produce identical data, leading to questions regarding the need for a New Jersey version of an existing, identical USEPA method. References to NJDEP Method LLTO-15 should be eliminated from the rules. The objectives of NJDEP Method LLTO-15 can easily be accomplished by adding a few prescriptive requirements for USEPA TO-15 to N.J.A.C. 7:26E. This can also be accomplished through a directive that provides laboratory guidance on achieving the data quality objectives established by the Department. (4, 34)

RESPONSE to COMMENTS 467 through 469: N.J.A.C. 7:26E-2.1(a)7 requires that canister-based collection techniques be used when air samples are analyzed using NJDEP Method LLTO-15 or USEPA Method TO-15. N.J.A.C. 7:26E Appendix A paragraph I(b) describes the laboratory data deliverable formats for data analyzed using either of these methods. The Department agrees that air samples can be accurately analyzed using either method.

A laboratory may choose to use either method when analyzing air samples. The main reason that the rules allow for the use of either NJDEP Method LLTO-15 or USEPA Method TO-15 is that some laboratories are only certified for NJDEP Method LLTO-15, while other laboratories are only certified for USEPA Method TO-15. Laboratories that are able to meet any applicable remediation screening level and that meet the deliverable

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requirements (per N.J.A.C. 7:26E) using USEPA Method TO-15 may use that method and are not required to obtain certification in NJDEP Method LLTO-15. Laboratories already having certification in NJDEP Method LLTO-15 would be able to maintain their certification and to continue to do work in the program without having to obtain another certification. It would be unfair to require laboratories that are certified in only one of these two methods to apply for additional certification. The Department anticipates that it will conduct stakeholder outreach to determine what, if any, methods of sample analysis should be revised, and will then consider whether standardizing to one method would be appropriate.

A second reason that the rule allows for the use of either NJDEP Method LLTO-15 or USEPA Method TO-15 is that there needs to be a reference available that can be used to define the deliverables content. Currently, deliverables for potable water are defined in the Professional Laboratory Analytical Services contract for potable water issued by the New Jersey Department of Treasury, Division of Purchase and Property. That contract requires that full deliverable formats for organic compounds to be in the format as required by the Department's rules in effect as of the date of sample analysis by the laboratory or as required by the USEPA methods. Similarly, a Professional Laboratory Analytical Services contract for Air exists in which deliverables are defined for users of the contract. However, if the option to use NJDEP Method LLTO-15 was deleted from

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the rule, in order to define the deliverables, it would be necessary to either reference the Professional Laboratory Analytical Services contract for Air (as is currently done for potable water to define the required deliverables) or include the deliverable requirements as an appendix to the rule. Either of those two options offers less flexibility than referencing NJDEP Method LLTO-15. If the Department moves toward USEPA TO-15, the Department would still make NJDEP Method LLTO-15 available as a reference guide for the deliverables.

NJDEP Method LLTO-15 and USEPA Method TO-15

470. COMMENT: The Department has made extensive claims about the attributes of the modifications to NJDEP LL TO-15. However, a closer look indicates that these requirements are either already incorporated into the USEPA method or are application-specific requirements that should be enumerated individually in regulation. Because the underlying scientific methodology and procedural mechanics were not changed, these additional items become administrative in nature. Accordingly, it is unnecessary to reference or require a new method to convey administrative requirements for a specific program.

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In 2000, the State of Colorado faced a similar situation, which they addressed by issuing *Guidance for Analysis of Indoor Air Samples - April 2000*; Colorado Department of Public Health and Environment, Hazardous Materials and Waste Management Division, Denver, Colorado. The Department should undertake this same approach. This ensures that the additional specifications that are important to the Department are employed for ambient air analysis in New Jersey while eliminating the need for laboratories to hold accreditation for two versions of the same analytical procedure. Specifying the additional program requirements in regulation and/or issuing guidance documents detailing the New Jersey method specifications that can be performed within the framework of USEPA Method TO-15 will result in the same level of protection to human health and the environmental at the lowest cost to the regulated community without promoting data comparability confusion. (4, 34)

471. COMMENT: USEPA Method TO-15 requires that “when available, standard mixtures of target gases in high pressure cylinders must be certified traceable to a NIST Standard Reference Material (SRM) or to a NIST/EPA approved Certified Reference Material (CRM).” NJDEP Method LLTO-15 Section N.2 contains an essentially identical requirement, and is therefore just a restatement of standard laboratory documentation procedures. (4, 34)

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RESPONSE to COMMENTS 470 and 471: The Technical Requirements at N.J.A.C. 7:26E-2 do not require laboratories to hold a certification for both NJDEP Method LLTO-15 and USEPA Method TO-15. The Department acknowledges that these two methods for analyzing air samples share the same analytical procedures. Moreover, the Department did not propose and is not adopting any changes to NJDEP Method LLTO15. Rather, it is setting forth for the first time with specificity the data deliverables that are required to be submitted to the Department when each method is used to test air samples.

Importantly, however, the deliverables requirements in Appendix A specifically set forth which deliverables are required to be submitted, depending on the method that the laboratory chooses to use to analyze air samples. Where certain listed deliverables are required if the laboratory chooses to run NJDEP Method LLTO15, those deliverables are not required if the laboratory runs USEPA Method TO15. In this way, the Department is not forcing one set of deliverables that pertain to one method on the other method. Said differently, a laboratory is not required to submit a deliverable under one method for which there is no requirement under the other method.

The upshot is that a laboratory may choose to run either method so long as it certified for it, and must submit deliverables that are applicable to that method.

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472. COMMENT: USEPA's guidance on using USEPA Method TO-15 where low level detection limits are needed (see Daughtrey, E.H., Jr., Oliver, K.D.; Jacumin, H.H., Jr., McClenny, W.A. *Supplement to USEPA Compendium Method TO-15 - Reduction of method Detection Limits to Meet Vapor Intrusion Monitoring Needs*, 2003) indicates that the 30 day holding time that the Department requires is reasonable. However, USEPA has expressed that there is still a need for concern even with a 30 day holding time when samples have very low humidity or contain co-collected reactive species. Thus, while the Department has selected a 30 day holding time, this is not a change in the method; it is just an administrative requirement well within the framework of the USEPA method. (4, 34)

473. COMMENT: The instrument tuning requirements are included within the scope of USEPA Method TO-15. NJDEP Method LLTO-15 employs an identical check at an increased frequency, but this additional check is redundant and unnecessary for GC/MS Tuning and Instrument Performance Check Requirements. (4, 34)

474. COMMENT: The GC/MS Analysis Techniques in NJDEP Method LLTO-15 are identical to those included within the scope of USEPA TO-15. (4, 34)

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475. COMMENT: The NJDEP and USEPA analytical testing protocols for ambient air are procedurally and technically identical, producing identical data with identical levels of quality. However, the USEPA version is written in a performance-based format that provides the user with the flexibility to select procedural steps that are consistent with the projects' measurement quality objectives. (4, 34)

476. COMMENT: The additional requirements that have been incorporated into NJDEP Method LLTO-15, an LCS spike at RL concentrations and calibration to 0.2 ppbv, can easily be accommodated within the scope of USEPA TO-15. The majority of accredited TO-15 laboratories in New Jersey have been calibrating USEPA TO-15 to 0.2 ppbv for many years to accommodate the New Jersey indoor air criteria without any difficulty.

The rules should require that TO-15 be calibrated to 0.2 ppbv for all New Jersey air analysis. This can easily be accommodated within the framework of USEPA TO-15.

Additionally, a laboratory control sample (LCS) should be required to be performed at 0.2 ppbv. However, experimental data should be employed to develop the accuracy acceptance criteria rather than use an arbitrary range of 70 – 130 percent. (4, 34)

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477. COMMENT: The Department should allow method detection limit (MDL) reporting. The current version of NJDEP Method LLTO-15 will not demonstrate compliance to the New Jersey indoor air criteria if MDL reporting is not allowed. Converting the reporting limit of 0.2 ppbv specified in NJDEP Method LLTO-15 to $\mu\text{g}/\text{m}^3$ actually results in a value that exceeds the New Jersey vapor intrusion criteria. (4, 34)

478. COMMENT: NJDEP Method LLTO-15 specifies reporting limits for a number of compounds. However, it does not employ method detection limits for data reporting, although a copy of the laboratory's MDL study is required for every final report, which is unnecessary. The reporting limit specified is easily within the framework of USEPA TO-15. (4, 34)

479. COMMENT: NJDEP Method LLTO-15 includes an additional Low Level Laboratory control Sample (LCS) at the method reporting limit. It also specifies performance requirements, which are arbitrary. The ability for a laboratory to achieve the performance specification is academic since the methodology and the procedures are unchanged. Therefore this additional check constitutes an administrative modification. (4, 34)

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480. COMMENT: The target compound list should be codified in the rules or included in a separate guidance document without referencing NJDEP Method LLTO-15.

(4, 34)

RESPONSE to COMMENTS 472 through 480: As discussed above, the Department is not adopting any amendments to either NJDEP Method LLTO-15 or USEPA Method TO-15 themselves. Accordingly, any comments concerning the technical aspects of these analytical methods are beyond the scope of this rulemaking. The Department anticipates that it will conduct stakeholder outreach to determine what, if any, methods of sample analysis should be revised, and will then consider whether standardizing to one method would be appropriate.

Other comments on Subchapter 2

481. COMMENT: N.J.A.C. 7:26E-2.1(a)3 requires that the person responsible for conducting the remediation ensure that all sampling and laboratory analysis, “Derive the reporting limit for a compound analyzed by a particular method from the lowest concentration standard used in the calibration of the method as adjusted by sample specific preparation and analysis factors (for example, sample dilutions and percent solids).” The commenter uses a Low Level Check standard for metals and not a

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calibration point, and wonders if this is acceptable. Using a reporting level standard for metals analysis is not recommended by the manufacturer and causes problems with the instrument. (10)

RESPONSE: The Department agrees that the use of a lowest concentration standard to define the reporting limit is not appropriate for inorganic compounds such as metals. As stated in the proposal summary, the purpose of new N.J.A.C. 7:26E-2.1(a)3 is to require that the reporting limit for an analyzed compound be derived from the lowest concentration standard used in the calibration of the method, to ensure that the calibration curve contains a point equal to the laboratory's reporting limit, so the laboratory can accurately report results at the reporting limit. Accordingly, on adoption, the Department is modifying this provision to clarify that, when organic compounds are being analyzed, the reporting limit must be derived from the lowest level concentration standard, but when inorganic compounds are being analyzed, the reporting limit is to be derived from the lowest level limit quantitation check sample which is then confirmed using the lowest calibration point or from a low level calibration check standard for each type of matrix, each type of preparation used and for each instrument.

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482. COMMENT: N.J.A.C. 7:26E-2.1(a)6, 7, 8, 9, and 10 list specific analytical methods but these methods change over time. References to specific methods should be replaced with “current NJDEP-approved methods” or similar language. (6)

RESPONSE: The Department agrees that N.J.A.C. 7:26E-2.1(a)6, 9 and 10i each contemplate the use of the most up to date version of the method, while N.J.A.C. 7:26E-2.1(a)7, 8i and 10ii do not. Accordingly, for consistency, the Department is modifying N.J.A.C. 7:26E-2.1(a)7 and 8i on adoption so that they are consistent with N.J.A.C. 7:26E-2.1(a)6, 9 and 10i in this regard. The Department is not amending N.J.A.C. 7:26E-2.1(a)10ii, as 10i already requires the person responsible for conducting the remediation to use the USEPA SW-846 Method 3060A “as amended and supplemented.”

483. COMMENT: New N.J.A.C. 7:26E-2.1(a)7 requires that canister-based collection techniques be used for the analysis of air samples under either NJDEP Method LLTO-15 or USEPA Method TO-15. While USEPA Method TO-15 permits the user to employ canister sizes that are appropriate for the desired sensitivity, NJDEP Method LLTO-15 specifies only six liter size canisters for the collection of indoor air samples. If the situation requires the highest possible sensitivity, then the use of six liter canisters is appropriate. However, in the new rule, the Department agrees that smaller size canisters may be appropriate for other situations. It is more appropriate for the Department to limit

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the specification to the lower limit of measurement needed. The engineering contractor or the laboratory should be able to assume the responsibility for selecting the appropriate size canister. (4, 34)

484. COMMENT: The requirement to demonstrate that all sampling canisters are clean and free of any contamination before samples are collected is a requirement of USEPA Method TO-15. Contamination-free means that the concentration of any potential contaminant is below the specified reporting limit. Therefore, the specifications of NJDEP Method LLTO-15 are not a change in the technical requirements of USEPA Method TO-15.

Requiring laboratories to employ two methods for the same analysis will require that canisters either be certified twice, once by USEPA TO-15 and once by NJ LL TO-15, or alternatively, the maintenance of two completely separate canister inventories, one for each method. This is caused by the need to maintain an on-hand inventory of canisters that have been certified by the analytical method that matches the sample analysis method. Certification occurs in advance of a client's canister request to assure an available inventory when orders are placed. This will unnecessarily increase costs for NJDEP Method LLTO-15 without a corresponding increase in data quality. (4, 34)

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RESPONSE to COMMENTS 483 and 484: The Department agrees that both the USEPA Method TO-15 and NJDEP Method LLTO-15 methods specify canister-based sample collection.

The Department agrees that procedures that unnecessarily increase costs without a true benefit should be modified. Therefore, upon such time the Department begins the stakeholder process concerning potential revisions to NJDEP Method LLTO-15, consideration will be given to modifying the method to revise the clean canister certification procedures such that the need to certify canisters are clean by separate procedures and to maintain two separate canister inventories would be eliminated.

In the meantime, however, and as discussed at length above, a laboratory has the option of using either USEPA Method TO-15 or NJDEP Method LLTO-15, depending on for which method the laboratory is certified. Accordingly, it is not necessary for the laboratory to maintain a separate canister inventory to use in a method for which it is not certified.

485. COMMENT: N.J.A.C. 7:26E-2.1(a)10 requires that when aqueous and non-aqueous samples are taken for hexavalent chromium analysis, pH and Eh are to be measured on both aqueous and non-aqueous samples and that the data be plotted in the

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full deliverable as per the graph in USEPA SW-846 Method 3060A. However, N.J.A.C. 7:26E-APPENDIX A - Laboratory data deliverables formats, paragraph I.(e), where the full deliverables for hexavalent chromium are detailed, section 18 requires that the Eh and pH graph include data for only non-aqueous samples. The 3060A prep is for non-aqueous samples only. These two provisions should be reconciled. (10)

RESPONSE: The Department agrees that these provisions should be consistent and therefore, on adoption, is deleting “aqueous” from N.J.A.C. 7: 26E-2.1(a)10.

486. COMMENT: The methodology concerning hexavalent chromium at N.J.A.C. 7:26E-2.1(a)10 should be incorporated into the applicable analytical method standard operating procedures (SOP) and removed from the rule. (6)

RESPONSE: It is important that samples taken for hexavalent chromium analysis be analyzed following the two requirements at N.J.A.C. 7:26E-2.1(a)10 to ensure that the analysis for this highly toxic compound is done properly. The requirement must be in the rule to ensure that it is enforceable. A failure to use the proper method is a non-minor violation and carries a penalty of \$15,000 pursuant to the violations table in the ARRCs rules at N.J.A.C. 7:26C-9.5(b).

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487. COMMENT: The limitation on the number and general use of field screening samples at N.J.A.C. 7:26E-2.1(b)1(ii)2 is arbitrary. A basis for the listed number of samples must be provided. In addition, the use of statistical sampling program design methods should be allowed. (6)

RESPONSE: The Department has determined at N.J.A.C. 7:26E-2.1(b)1 to limit the use of field screening samples because field screening methods are only semi-quantitative. They do not include methods by which it can be determined definitively that an area is clean or the nature of a particular compound.

However, the rule provides that where 10 or more samples are required for initial characterization sampling at an area of concern, field sampling methods may be used to document that up to 50 percent of sampling points within the area of concern are not contaminated. The Department has determined that results derived from the analysis of 10 or more samples are sufficient in quantity that scientifically defensible conclusions can be reached as to half of the samples. However, the remaining 50 percent of the samples must go through laboratory analysis to ensure that these conclusions are accurate concerning the remaining parts of the contaminated area of concern.

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The Department acknowledges that a 50 percent confirmation rate using laboratory analysis may not always be necessary and thus specific information such as accuracy of a particular field method could be justification for a confirmation rate of less than of less than 50 percent. In addition, site specific information, such as a highly reliable and accurate field analytical instrument, could be justification for using field methods to verify contaminant identity or clean zones without the need for further laboratory analysis. In those circumstances, the person responsible for conducting the remediation may always take advantage of the variance procedures set forth at N.J.A.C. 7:26E-1.7. Additionally, the use of a statistical sampling program design method is not precluded, provided the variance provision at N.J.A.C. 7:26E-1.7 is utilized.

488. COMMENT: The Technical Requirements at N.J.A.C. 7:26E-2.1(c)2 require that initial potable water samples be analyzed for the compound list specified in the analytical method utilized plus tentatively identified compounds (TICs). The requirement to analyze off-site samples for compounds which are not an on-site contaminant of concern may result in detection of contaminants from other known or unknown sources and result in a guilty until proven innocent predicament for the person responsible for conducting the remediation. Analysis should be limited to known contaminants of concern originating from the site. (7)

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489. COMMENT: The Technical Requirements at N.J.A.C. 7:26E-2.1(c)3 requires that vapor intrusion samples be analyzed for the compound list specified in NJDEP Method LLTO-15. It also requires that, when vapor intrusion samples are collected due to the presence of contamination from non-gasoline or light distillate sources, analysis is to include naphthalene and 2-methyl naphthalene. The requirement to analyze off-site samples for compounds that are not an on-site contaminant of concern may result in detection of contaminants from other known or unknown sources and result in a guilty until proven innocent predicament for the person responsible for conducting the remediation. (7)

490. COMMENT: N.J.A.C. 7:26E-2.1(e) states that if tentatively identified compounds or unknown compound are detected, the TIC or unknown compounds shall be evaluated. It is not clear what is meant or required by the term “be evaluated” since any additional detection of TICs may involve an entirely different suite of compounds. (6)

RESPONSE to COMMENTS 488 through 490: N.J.A.C. 7:26E-2.1(c)2 and N.J.A.C. 7:26E-2.1(c)3 address the initial analysis of potable water and indoor air using specific analytical methods. These methods specify a list of targeted analytes that will be detected by the analytical method even if only a limited suite of analytes are requested for

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analysis. As such, the presence of analytes other than those requested will be identified upon full review of the data deliverable package prepared by the laboratory. As potable water and vapor intrusion cases have sensitive receptors, regardless of the origin of the contaminant, there is an obligation to have the information available such that the exposure to all contaminants is addressed. Upon completion of the one-time additional analyses, as per N.J.A.C. 7:26E-2.1(c)4, samples may thereafter be analyzed for only the site specific contaminants. A person responsible for conducting remediation would not be responsible to remediate contamination from any compounds identified in the initial analysis that are not site related.

However, pursuant to the Technical Requirements at N.J.A.C. 7:26E-1.12(c), the person responsible for conducting the remediation must evaluate TICs that are present. The process of evaluating TICs will vary from site to site. The required level of effort involved with the process will be determined by the data quality objectives associated with the remediation of the site, the number of variables that need to be considered as to how the presence of a TIC affects the remediation process (such as the presence of other target contaminants, the matrix, the proposed remedy and the intended future use of the site), and the professional judgment of the person responsible for remediating the site. If a TIC is confidently identified and has been determined to influence the remediation, then

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it is possible that samples may be required to undergo analysis for an additional suite of compounds.

In most cases, a TIC identification is a product of a laboratory initiated library search in which a mass spectrum of an unknown compound is compared (using a search algorithm that is part of the analytical instrument software) against tens of thousands of spectra stored in a “library,” and a subsequent reporting of a “best fit” identities. Seldom are exact identities determined for TICs. However, not having an exact identity may be acceptable as the remedy used to address the targeted compounds will frequently, by association, address the TICs. As an example, it may be observed that if the TICs in a soil sample are identified as “substituted aliphatics” or “C3-benzenes” and the sample is known to be contaminated with a petroleum product, further identification would not be necessary as the remedy chosen based on the target analytes would also be the appropriate remedy for the TICs by default. As another example, unidentified TICs can still be used in a remedial process. In particular, if ground water has been impacted and the TIC identities are not established, then one could still use the TICs as unknowns as the person conducting the remediation would then default to the interim generic numbers listed in the Ground Water Quality Remediation Standards.

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Alternately, there may be situations where TIC identification would require a higher level of effort. As an example, TICs identified simply as “unknowns” would require additional scrutiny should the total concentration of the TICs be deemed significant and unrestricted use be the ultimate proposed use of the site.

491. COMMENT: It is not clear why the analysis for lead in water samples was removed from 7:26E-2 - Table 2-1 the table for leaded gasoline and aviation gasoline.

(6)

RESPONSE: Data gathered by the Department related to leaded gasoline discharges has revealed the presence of lead and/or lead scavengers, such as 1,2-dibromoethane and 1,2-Dichloroethane, in soil; however, lead has not been identified in ground water. Therefore, it is no longer necessary to require lead sampling in ground water associated with a release of leaded gasoline or aviation gasoline.

492. COMMENT: N.J.A.C. 7:26E-2.2 discusses the contents of the Quality Assurance Project Plan (QAPP). These requirements should be moved to guidance. The rules should only require that a QAPP be prepared and followed. (6)

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RESPONSE: The Department believes that an effective QAPP must contain the components identified in the rule. The data concerning types, quantities and locations of contaminants in the media at a site form the basis for all decisions concerning how to best remediate a site to a level that is protective of human health and the environment.

Quality data is fundamental to quality decision making. The purpose of the QAPP is to ensure that data are collected that are meaningful and of such quality and quantity as to adequately inform decisions regarding the direction of the remediation at a site. This requirement is of such importance that N.J.A.C. 7:26E-1.7(b)5 provides that the person responsible for conducting the remediation may not apply for a variance from the technical requirements concerning compliance with a QAPP, and the ARRCS rules at N.J.A.C. 7:26C-9.4(b) provide that a failure to prepare and follow a QAPP is a non-minor violation with a \$15,000 penalty. Accordingly, it would be inappropriate to place QAPP requirements in guidance because these requirements would thereafter not be enforceable.

493. COMMENT: The Technical Requirements at N.J.A.C. 7:26E-2.2(b)4 includes a very detailed contact list, including the health and safety coordinator. The health and safety coordinator should not be included. Health and safety is not a quality assurance/quality control (QA/QC) function. It is an OSHA function, which the

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Department has no statutory authority to enforce, and is inconsistent with the dropping of the requirement to submit a health and safety plan from existing N.J.A.C. 7:26E-1.10. (7)

RESPONSE: While the Department agrees the preparation of the health and safety plan is an OSHA function, the identification of a health and safety coordinator is part of the overall quality assurance process as they frequently are involved in the sampling aspects addressed in QAPPs. In addition, if the Department wants to conduct a field inspection of the site, it is important to contact the health and safety officer to determine what level of health and safety protection is necessary and if there are any special health and safety concerns at the site. Therefore the requirement to identify the health and safety coordinator is not removed from the rule

494. COMMENT: The Department should accept standardized correspondence from the selected laboratory detailing sampling methodologies and standard operating procedures as a way to satisfy the requirement set forth at N.J.A.C. 7:26E-2.2(b)6. (6)

RESPONSE: N.J.A.C. 7:26E-2.2(b)6 requires that a quality assurance project plan (QAPP) include a detailed description of sampling methodologies for each matrix tested along with standard operating procedures references. It is the person responsible for conducting the remediation who must prepare a QAPP, not the analytical laboratory. The

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QAPP should contain enough information so that a person reading the QAPP knows what sampling techniques (with associated quality assurance and quality control protocols) are being used for each environmental matrix, such as a brief description of the sampling technique with a reference to a more comprehensive standard operating procedure or similar document.

The requirement is written in terms that are broad enough such that the author of the QAPP is able to provide flexibility in how this material is presented. Accordingly, standardized correspondence from a laboratory could be acceptable to the Department. If the format of the correspondence is a reference to a method or a procedure and but does not include the actual method/procedure, the reference would be allowed, but only if the complete documents would be available to the Department upon request.

495. COMMENT: The Department should accept instrument manuals that describe many of the items listed in N.J.A.C. 7:26E-2.2(b)9 to meet this requirement but clarification should be provided. (6)

RESPONSE: N.J.A.C. 7:26E-2.2(b)9 requires that the quality assurance project plan include a reference to a standard operating procedure that describes the operation of all field instrumentation being utilized. The requirement is written in terms that are broad

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enough to provide flexibility in how this material is presented. Where appropriate, instrument manuals that describe the items listed in N.J.A.C. 7:26E-2.2(b)9 would be acceptable to the Department assuming all the items in the section are addressed and followed by the personnel using the instrumentation..

496. COMMENT: The Technical Requirements at N.J.A.C. 7:26E-2.2(b)16 requires the person responsible for conducting the remediation to include quality assurance and quality control (QA/QC) requirements for analysis in the quality assurance project plan (QAPP). The QAPP should not specify laboratory method procedures, including laboratory QA/QC, since the certified laboratory is responsible to comply with laboratory methods and protocols. (7)

RESPONSE: QA/QC requirements could either be included or referenced to laboratory procedures. It is, however, necessary to have the QA/QC requirements available for review by interested parties, because the information will be used by users of data to determine if data quality objectives are met.

497. COMMENT: N.J.A.C. 7:26E-2.2(b)18 and N.J.A.C. 7:26E-2.2(b)20 require the person responsible for conducting the remediation to include documentation of the procedure for review of laboratory data, and a detailed description of laboratory quality

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assurance and quality control (QA/QC) procedures, respectively, in the quality assurance project plan for all sample and data collection. The Department requires a description of the QA/QC procedures utilized by the laboratory performing the analysis. It should be sufficient to simply identify the laboratory, as is required. (7)

RESPONSE: Identifying the laboratory with a subsequent inclusion of a reference to or a title of a laboratory document or standard operating procedure could fulfill the requirements of this section. However, the information contained in the referenced/titled document must be readily available and submitted to the Department for review upon request.

498. COMMENT: A detailed description of the laboratories' quality assurance/quality control procedures is required pursuant to N.J.A.C. 7:26E-2.2(b)20. This is duplicative of N.J.A.C. 7:18, as are many of the requirements in subchapter 2.2, and should be removed. (6)

RESPONSE: Although some of the requirements of Subchapter 2 are duplicative of the requirements also codified at N.J.A.C. 7:18, it is important that they also be included in the Technical Requirements so that all necessary information is readily available and in

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one location to any party involved in establishing data quality objectives and ultimately making data usability decisions.

Appendix A – Laboratory data deliverables formats

499. COMMENT: The reporting format prescribed for all air analysis, regardless of whether USEPA Method TO-15 or NJ Method LLTO-15 is used, is excessively rigid and includes additional items that do not contribute to product quality. The rigid format requires manual assembly of the package, and this will drive up the cost of production, which will be passed on to data users. Conducting validation of these unwieldy reports adds additional costs to the validation process, adding further costs that the data user must bear without any improvement to data quality or usability. Imposing requirements that increase costs without a corresponding increase in sensitivity, data quality or usability is unsupportable in the current economic climate. (4, 34)

RESPONSE: Data reporting requirements are set forth at N.J.A.C. 7:26E Appendix A. The Department expressly prescribes data reporting requirements in order to facilitate the Department's review and validation of the data. Additionally, the Department anticipates that requiring the use of the format in Appendix A of N.J.A.C. 7:26E will actually expedite the validation process. Having a large number of different formats may make

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the validation process more difficult, more time consuming and more expensive.

However, the Department is aware of and sensitive to the existing economic climate that the laboratories and their clients endure. It should be noted that flexibility in the laboratory data deliverable format is currently allowed for those laboratories that are certified under NJDEP Method LLTO-15 as noted in section 4.1 of the Appendix to NJDEP Method LLTO-15 (see www.nj.gov/dep/srp/guidance/vaporintrusion/newmethod2007/llto15.pdf). Similarly, laboratories submitting data from USEPA Method TO-15 have been given flexibility in that, during the validation process, as long as all necessary information is provided, deviations are not required to be rectified. Upon such time NJDEP LL TO-15 is revised, consideration will be given to modifying the language associated with the data deliverables format such that greater flexibility is recognized.

500. COMMENT: The rules should specify report content rather than format for air analysis, similar to the manner in which all other data is reported for full deliverables packages. (4, 34)

RESPONSE: N.J.A.C. 7:26E Appendix A paragraph I(b)1 includes the requirements for what is to be reported when air sampling is necessary, including both content and format.

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501. COMMENT: N.J.A.C. 7:26E Appendix A discusses laboratory data deliverables formats. These details should be in guidance and not regulations. (6)

RESPONSE: The Department believes it is important that the reporting of analytical results by laboratories be done on a consistent and uniform basis. The information required in the deliverables formats is needed by the Department to determine if samples were properly handled before and after being delivered to the laboratory, as well as whether the samples were properly analyzed by the laboratory. This is especially important in the review of analyses of drinking water samples, indoor air samples, samples being analyzed for hexavalent chromium and samples being analyzed for dioxins. Without a standardized reporting format, quality assurance/quality control information needed for data review could be missing. Laboratories would have to be contacted for this missing information, a process that is both time and labor consuming for laboratories, and financially inefficient for the person responsible for conducting the remediation.

Technical Requirements - Subchapter 3: Preliminary Assessment and Site Investigation

502. COMMENT: The Department should not have amended N.J.A.C. 7:26E-3.1(a) to add the phrase “contaminants are or were present at a site or have migrated or are

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migrating from a site.” It is generally not possible through the preliminary assessment to determine if contaminants are present or if they are migrating from a site. The presence of contaminants could only be identified in the course of conducting a preliminary assessment if historical data were available or if the LSRP observed impacts during a site inspection. The Department has misinterpreted what it means to do a preliminary assessment, based on the definition of preliminary assessment in SRRA that states that a “Preliminary assessment” means the first phase in the process of identifying areas of concern” (6)

RESPONSE: The definition of a preliminary assessment at N.J.A.C. 7:26E-1.8 states that it is the first phase in the process of identifying areas of concern. The definition is consistent with the definition of the term in both the Brownfield Act (N.J.S.A. 58:10B) and the Site Remediation Reform Act (N.J.S.A. 58:10C). The statement of purpose at N.J.A.C. 7:26E-3.1(a) follows from that definition because determining whether the contaminants are present or are migrating from a site is the first step in determining whether further remediation is necessary. Definitive answers to these questions will be obtained through analyses of data collected during the site investigation and remedial investigation phases.

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503. COMMENT: N.J.A.C. 7:26E-3.1 should include a cross-reference to the preliminary assessment report guidance document. (27)

RESPONSE: It is unnecessary and redundant to cross-reference the preliminary assessment report guidance document in this specific section. The general remediation requirements at N.J.A.C. 7:26E-1.5(b) require the person responsible for conducting the remediation to apply any available and appropriate technical guidance.

504. COMMENT: N.J.A.C. 7:26E-3.1(b)3 and 4 are misleading. Completion of a preliminary assessment report does not suffice for Department of Health and Senior Services (DHSS) requirements concerning childcare center Indoor Environmental Health Assessments. There are other regulatory requirements including a review of adjacent businesses (see N.J.A.C. 8:50-3.1(a)4-6), and an evaluation for the presence of asbestos-containing materials and radon (see N.J.A.C 8:50-3.1(a)7i and 13; and 7viii and 15, respectively), to name a few. (27)

RESPONSE: The Department disagrees that N.J.A.C. 7:26E-3.1(b)3 and 4 are misleading. While each of these rule provisions requires that the person responsible for conducting the remediation conduct a preliminary assessment when that person is remediating a site or portion of a site for use as a child care center or conducting an

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evaluation of a child care center, respectively, the rules do not indicate that a preliminary assessment is the only requirement that must be met concerning these sites. Moreover, it would be unnecessarily redundant for the Department's rules to repeat the requirements set forth in the DHSS rules. It is incumbent upon the person responsible for conducting the remediation to ensure that the person meets all applicable requirements, not just those of the Department.

505. COMMENT: The document review requirements at N.J.A.C. 7:26E-3.1(c)1 are too encompassing and burdensome. The requirement for a "review of all documents" should instead indicate "review of reasonably ascertainable documents," and examples of which types of documents are "reasonably likely" to contain information should be provided.

The sentence structure is poorly worded and unclear, particularly the second half of the sentence. A suggested alternative is provided as follows (additions underlined, deletions bracketed):

"A diligent search from the time the site was naturally vegetated to the present, including [an investigation of all] a review of reasonably ascertainable documents that are reasonably likely to contain information related to the site[, which documents are in the

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persons' possession, custody or control, or in the possession, custody or control of any other person from whom the person conducting the search has a legal right to obtain such documents] - such as Sanborn fire insurance maps, city directories, and historic aerial photographs - and that the person conducting the search has a legal right to review." (27)

506. COMMENT: N.J.A.C. 7:26E- 3.1(c)1 should be amended to clarify that a preliminary assessment requires a review of all documents relating to environmental matters, since "all documents" is too broad. This would suggest that a person must review any document that relates to the site. It is recommended that the rule be revised as follows: "a review of all documents related to environmental matters that are reasonably likely to contain information related to the site." (6)

507. COMMENT: The Technical Requirements at N.J.A.C. 7:26E-3.1(c)1 require the person responsible for conducting the remediation to conduct a diligent search from the time the site was naturally vegetated to the present, including an investigation of all documents that are reasonably likely..." The Department should delete the word "all." (7)

RESPONSE TO COMMENTS 505 through 507: There is no need to amend the rule text as suggested by the commenters because the text already provides the limitations

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requested by the commenters. N.J.A.C. 7:26E-3.1(c)1 does not require a review of “all documents,” but instead limits the review to all documents that are reasonably likely to contain information related to the site. Additionally, the review is to include only those documents that are in the person’s possession, custody or control, or in the possession, custody or control of any other person from whom the person conducting the search has a legal right to obtain such documents.

Examples of documents that the person may wish to include in the document review are not needed in the rule as they are included in Preliminary Assessment Technical Guidance Document, version 1.0 (January 30, 2012), www.nj.gov/dep/srp/guidance, and pursuant to N.J.A.C. 7:26E-1.5(b), any person responsible for conducting the remediation must apply any available and appropriate technical guidance or include in the applicable report a rationale for why the guidance is inappropriate or unnecessary.

508. COMMENT: The requirement at N.J.A.C. 7:26E-3.1(c)2 to interview all employees/agents is too encompassing and burdensome because it can be interpreted to include any current and former employees/agents and any current and former employees/agents who may have knowledge. This provision should instead indicate that a sufficient number of employees need to be interviewed to obtain historical site

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information, because it is not reasonable to interview every current and former employee associated with the facility. (27)

RESPONSE: N.J.A.C. 7:26E-3.1(c)2 does not require that “every current and former employee associated with the facility” must be interviewed. Rather, N.J.A.C. 7:26E-3.1(c)2 limits the inquiry to current and former employees and agents whose duties include or included any responsibility for hazardous substances, hazardous wastes, or pollutants, and any other current and former employees or agents who may have knowledge or documents relevant to the inquiry.

509. COMMENT: If no potentially contaminated areas of concern are identified, N.J.A.C. 7:26E-3.1(e)1 requires that a preliminary assessment report be submitted within 90 days from submitting a general information notice that is required under the ISRA rules at N.J.A.C. 7:26B-3. This regulatory deadline should be changed from 90 days to one year, consistent with the ARRCs rules. (6)

RESPONSE: The Department acknowledges that the ARRCs rules at N.J.A.C. 7:26C-3.3(a)1 provide that the preliminary assessment and/or site investigation report are to be submitted within two years from the later of either March 1, 2010 or the occurrence of one of the listed triggering events. However, where no potentially contaminated areas of

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concern are identified during a preliminary assessment such that a site investigation is not needed, the Department believes that 90 days is sufficient time for preparing the preliminary assessment report. There is no reason for the person responsible for conducting the remediation or the Department to keep a case open beyond 90 days where no potentially contaminated areas of concern are identified, because no further work is necessary. If for some reason the person responsible for conducting the remediation requires additional time to submit the preliminary assessment report, the person may submit a regulatory timeframe extension request pursuant to the ARRCS rules at N.J.A.C. 7:26C-3.2.

510. COMMENT: The phrase “cover material” should be clarified or removed from N.J.A.C. 7:26E-3.2(a)2. Additionally, why is this not the same as “fill”? (6)

RESPONSE: The term “cover material” is a holdover from past Department practices when the Department differentiated between fill material, which was considered material that was used to raise grade, and cover material, which was used to cover existing soil or non-soil and which functioned as a cap. The Department agrees that using the term “cover material” is unnecessary because the rules do not differentiate between the use of material to raise grade versus function as a cap. Rather, the rules define alternative fill

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and clean fill. Accordingly, on adoption, the Department is deleting the phrase “cover material” from N.J.A.C. 7:26E-3.2(a)2.

511. COMMENT: N.J.A.C. 7:26E-3.2(a)4 requires “a summary of the data and information evaluated and all phases of work for each particular area of concern that shall be integrated into a single discussion of that area...” This sentence is unnecessarily convoluted. A more understandable version is “a summary of the data and information reviewed shall be compiled and presented by area of concern.” (6)

RESPONSE: The Department agrees that the requirement needs to be clarified and, on adoption, is revising N.J.A.C. 7:26E-3.2(a)4 to require that the preliminary assessment report must include a summary of the data and information reviewed, which shall be compiled and presented by area of concern.

512. COMMENT: N.J.A.C. 7:26E-3.3(d) should be modified to read as follows:

1. Conduct a comparison of all site data with all applicable remediation standards and criteria at the time of comparison;

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2. Identify areas of concern where historical or current site data indicate that contaminant concentrations exceed any applicable remediation standard or criterion;

(6)

RESPONSE: N.J.A.C. 7:26E-3.3 pertains to site investigations. It is at this point in the investigation, by going through the process of comparing all site data with all remediation standards, that it is possible to determine whether a remediation standard is applicable. Moreover, N.J.A.C. 7:26E-3.4(b) requires that if the concentration of any contaminant in the soil exceeds any soil remediation standard, then the person responsible for conducting the remediation shall conduct a remedial investigation of the soil pursuant to N.J.A.C. 7:26E-4.2. Additionally, N.J.A.C. 7:36E-3.5(b) contains the same requirement to remediate ground water. The comparison of site data with all remediation standards is the exercise that determines which standards are applicable. Accordingly, insertion of the word “applicable” might result in the premature elimination of standards that may actually be applicable.

This requirement should, however, be clarified. Accordingly, on adoption, the Department is deleting the extraneous “N.J.A.C.” from N.J.A.C. 7:26E-3.3(d) and substituting in N.J.A.C. 7:26E-3.3(d)1 the verb “Compare” for the phrase “Conduct a comparison of” at the beginning of the sentence.

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513. COMMENT: N.J.A.C. 7:26E-3.4(a) should be modified as follows (additions underlined, deletions in brackets):

(a) The person responsible for conducting the remediation who is subject to N.J.A.C. 7:26E-3.3(b) shall conduct a site investigation of soil by sampling the soil in each [potentially contaminated] area of concern [that includes soil] identified as potentially contaminated to determine if contaminants are present above any applicable soil remediation standard, and shall: ... (6)

514. COMMENT: N.J.A.C. 7:26E-3.4(b) should be modified as follows (additions underlined, deletions in brackets):

If the concentration of any contaminant in the soil sample exceeds any applicable soil remediation standard, then the person responsible for conducting the remediation shall conduct a remedial investigation of the soil pursuant to N.J.A.C. 7:26E-4.2. (6)

515. COMMENT: Concerning N.J.A.C. 7:26E-3.6(c)1-4, not all standards are applicable. Add the word “applicable” before “standard.” (20)

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RESPONSE to COMMENTS 513 through 515: The suggested changes to N.J.A.C. 7:26E-3.4 would destroy the focus of this provision, which is the site investigation of soil.

Adding the qualifier “applicable” to any of the provisions suggested by the commenters is inappropriate because at the site investigation stage of the remediation, to which all of N.J.A.C. 7:26E-3 applies, if the concentration of any contaminant in the soil exceeds any soil remediation standard, then the person responsible for conducting the remediation must move on to the next phase of remediation, which is to conduct a remedial investigation pursuant to N.J.A.C. 7:26E-4. Inserting the word “applicable” might result in the premature elimination of standards that may actually be applicable. The other suggested changes are semantic in nature, and do nothing to alter the intent of the requirements, and therefore will not be incorporated on adoption.

516. COMMENT: Reasonable clarification and closure for the impact to groundwater soil screening levels, especially for volatile compounds and especially for the petroleum industry, are needed. In situations where there are very low concentrations of contamination remaining in soil above the ground water table, it does not seem logical that the case cannot be closed, regardless of the buffer between the contamination and the ground water table. (31)

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RESPONSE: The impact to ground water soil remediation standards are not part of this rulemaking, and therefore the comment is beyond the scope of this rulemaking.

However, the Department notes that the existing guidance regarding the impact to ground water pathway includes multiple means of documenting that contaminants remaining in soil above the screening levels will not impact ground water in the future. The guidance describes how to determine a site-specific standard that may be greater than the screening level. In those instances, the LSRP can close the case using the site-specific standard.

517. COMMENT: N.J.A.C. 7:26E-3.4(a)2 should be modified as follows (additions underlined, deletions in brackets):

2. Use appropriate sample collection methods, but composite soil sampling shall not [use composite soil sampling as a part of the] be used for site investigation sample collection; ... (6)

RESPONSE: The Department agrees that these changes will add clarity to the rule text and is modifying the rule on adoption accordingly.

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518. COMMENT: The phrase “may have been” and the phrase “has been” at N.J.A.C. 7:26E-3.5 suggests that, if ground water was contaminated in the past, it must be sampled currently, regardless of whether subsequent remediation/sampling confirmed that historic concentrations are below the remediation standards. If the intent is to determine if ground water “may have been” impacted in the past in a specific area of concern, but was not previously investigated, then the rule text should be amended to reflect that intent.

(6)

RESPONSE: The intent of N.J.A.C. 7:26E-3.5(a) is to require that the evaluation of all potentially contaminated areas of concern include an evaluation of all data, including data that indicate that ground water was contaminated by a discharge at an AOC and was subsequently remediated to the remediation standards. This analysis will help identify those previously remediated AOCs where no ground water sampling would therefore be required unless the evaluation indicated that there was a potential for subsequent discharges of contaminants to ground water.

Consistent with this intent and to avoid confusion, N.J.A.C. 7:26E-3.5(a) is reworded on adoption, with no change in meaning.

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519. COMMENT: N.J.A.C. 7:26E-3.6 should be amended as follows (additions underlined, deletions in brackets):

(a) If surface water is or may [have been or may] be impacted by the site, the person responsible for conducting the remediation who is subject to N.J.A.C. 3.3(b) shall determine if there is any evidence that contamination from the site has reached the surface water.

(b) If there is evidence that contamination from the site has reached [the] surface water, then the person responsible for conducting the remediation shall conduct a site investigation of surface water and sediment to determine if there is any exceedance of any applicable aquatic or human health based surface water quality standard, ecological screening criterion, or residential direct contact soil remediation standard and shall:

1. Collect a sufficient number of surface water and sediment samples to evaluate for the presence of contamination, biasing the sampling to the suspected locations of potential greatest contamination, both horizontally and vertically; . . .

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N.J.A.C. 7:26E-3.6(b) is very similar to N.J.A.C. 7:26E-3.6(a) and, for clarity, these two sections should be combined into one statement/requirement. (6)

RESPONSE: N.J.A.C. 7:26E-3.6(a) and (b) should not be combined as suggested by the commenter. These provisions present an “if this, then that” requirement that does not require further clarification. Adding “applicable” is also inappropriate, for the reasons discussed in prior responses concerning requirements for the site investigation of other contaminated media.

The Department does agree with the commenter regarding clarifying N.J.A.C. 7:26E-3.6(a). The existing phrase “may have been or may be” contemplates the potential for contamination, but the text would be clearer if that phrase were deleted and the text reworded to state that if there is a potential that surface water has been impacted by the site, the person responsible for conducting the remediation who is subject to N.J.A.C. 7:26E-3.3(b) shall determine if there is any evidence that contamination from the site has reached the surface water. N.J.A.C. 7:26E-3.6(a) is modified on adoption accordingly.

520. COMMENT: Clarification is needed regarding the phrase “evidence of human exposure” as it appears at N.J.A.C. 7:26E-3.6(c)4. (6)

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RESPONSE: Evidence of human exposure is self-explanatory. An example would be a situation where there is evidence that humans came into direct contact with sediments such as while swimming, or walking in or playing in sediments.

521. COMMENT: N.J.A.C. 7:26E-3.6(a) through (c) concern conducting site investigations in surface water and sediment if contamination has or may have impacted these media (short of there being an actual observed spill, presumably the likelihood of impacting surface water or sediment would be based on documented site contaminants proximate to the water body). While inferring surface water and sediment impacts from a site may be obvious in some cases, it may not be in others, especially on sites located along urbanized waterways. (27)

RESPONSE: In the scenario posited by the commenter, both N.J.A.C. 7:26E-3.6 and N.J.A.C. 7:26E-3.11 (recodified on adoption as N.J.A.C. 7:26E-3.10) would apply. N.J.A.C. 7:26E-3.10 addresses determining background contribution to surface water and sediment. In addition, the Department in conjunction with interested parties has developed the Ecological Evaluation Technical Guidance Document, version 1.1 (August 30, 2011), www.nj.gov/dep/srp/guidance, which provides guidance regarding how to determine background influence to surface water and sediment.

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522. COMMENT: N.J.A.C. 7:26E-3.6(c)1 is of particular concern. This requires that a remedial investigation for surface water and sediment be conducted if “any” ecological screening or surface water quality standard is exceeded. The use of “any” is problematic. Large areas of sediment in industrialized waterways may contain a variety of organic and inorganic constituents, such as semi-volatile compounds, particularly polyaromatic hydrocarbons (PAHs), lead, zinc, and others, that are also often found in extensive areas of historic fill in formerly submerged areas, and at numerous industrial sites. Attributing contamination in adjacent surface waters and sediments to a particular site along a waterway where significant industrial activities occur warrants qualification. Further, the frequency of samples exceeding “any” criterion or standard should be subject to statistical analysis to determine whether an aquatic contaminant is site-related, and this option should be specified in the revised rules. A remedial investigation should not be required where one or few samples among numerous samples marginally exceed a criterion. (23, 27)

RESPONSE: The Department recognizes that situations such as those described by the commenter may and often do occur. It is for that reason that the Department has built into the rules other provisions of which the person responsible for conducting the remediation may avail him or herself, including N.J.A.C. 7:26E-3.11 (recodified on adoption as N.J.A.C. 7:26E-3.10), by which background contribution to surface water

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and sediment can be determined and addressed. In addition, the Department, in conjunction with interested parties, has developed the Ecological Evaluation Technical Guidance Document, version 1.1 (August 30, 2011), www.nj.gov/dep/srp/guidance that includes guidance regarding how to determine background influence to surface water and sediment.

523. COMMENT: The requirement at N.J.A.C. 7:26E-3.7(a)1 to conduct a site investigation of a building interior in order to determine whether contaminants inside the building have the potential to migrate to the environment outside the building, should be codified in the rules concerning preliminary assessments because it is in that phase, and not at the site investigation phase (i.e., evaluating the presence of potential areas of concern), occurs. Alternatively, this requirement should be deleted and moved to guidance.

The requirement at N.J.A.C. 7:26E-3.7(a)2 should be deleted in its entirety because determining whether contaminants outside the building have the potential to migrate into the building is addressed in other sections of the rule, such as the vapor intrusion evaluation and remedial investigation phases. (6)

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RESPONSE: The Department disagrees. The site investigation requirements at N.J.A.C. 7:26E-3.7 are triggered when contaminants have the potential to migrate into or from a structure, and this may include situations that do not trigger a vapor intrusion investigation. For example, chromate ore processing waste has been used as backfill against foundations, and hexavalent chromium has subsequently “wicked” through concrete or cinder block and crystallized on basement walls.

Placing these requirements at the preliminary assessment stage is inappropriate because investigation of building interiors involves collecting samples, and sampling does not occur until the remediation has advanced to the site investigation phase.

The Department declines to remove the investigative requirement from the rule since the evaluation of these pathways is a requirement when the migration potential exists.

Additionally, it would not be appropriate to put this remediation requirement in guidance because it is a fundamental goal of remediation.

524. COMMENT: N.J.A.C. 7:26E-3.7 requires that an investigation of building interiors must be done at all sites that are subject to N.J.A.C. 7:26E-3.3(b). However, if a site investigation involves an underground storage tank system pursuant to N.J.A.C. 7:26E-3.3(b)(2), or any other area of concern-specific site investigation that does not

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impact buildings, the remedial party should be exempt from a requirement to investigate building interiors. (11)

525. COMMENT: The Technical Requirements at N.J.A.C. 7:26E-3.7 require that a person responsible for conducting any site investigation pursuant to N.J.A.C. 7:26E-3.3(b) also must conduct a site investigation of a building interior in order to determine whether contaminants inside the building have the potential to migrate to the environment outside of the building or contaminants outside of the building have the potential to migrate into the building. This requirement, as written, is highly problematic. The pathway for potential contaminant migration into or from a building interior does not exist at the vast majority of sites. For example, the list at N.J.A.C. 7:26E-3.3(b) includes owners and operators of UST systems. The only potential pathway for contaminant intrusion from a UST system is through the vapor intrusion pathway, and the Department already has extensive requirements in place for vapor intrusion investigations. There is no potential for contaminant migration from a building interior to a UST system. Yet this provision seems to require that every UST owner and operator conduct a site investigation of site building interiors. The Department needs to reconsider and refine this requirement to avoid codifying an unnecessary and unrealistic requirement. (7)

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RESPONSE to COMMENTS 524 and 525: The key to determining whether to conduct an investigation of building interiors as required pursuant to N.J.A.C. 7:26E-3.7 is that these requirements are only triggered when contaminants have the potential to migrate into or from a structure. If the potential does not exist, N.J.A.C 7:26E-3.7 is not applicable.

526. COMMENT: At N.J.A.C. 7:26E-3.7(b), the word “additional” should be removed from the phrase “additional remedial investigation.” (6)

RESPONSE: The Department agrees with the commenter. Subchapter 3 pertains to the site investigation, and Subchapter 4 pertains to the remedial investigation; therefore, because no remedial investigation has yet been conducted, it is inappropriate to use the term “additional” in describing the next actions to be performed. On adoption, the Department is substituting the word “a” for the word “additional” in N.J.A.C. 7:26E-3.7(b).

527. COMMENT: The specific procedures set forth in N.J.A.C. 7:26E-3.8 regarding how to conduct a natural background investigation should be removed from the regulation and moved to guidance. Moreover, in the technical guidance document on this issue, the phrase “any hazardous substance, hazardous waste, or pollutant that may be

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naturally occurring” should be defined to clarify what the Department intends to cover in this area. (11)

RESPONSE: The rules set the framework, objectives, and requirements for acceptable background investigations, and therefore are inappropriate for inclusion only in technical guidance. The rule does not specify how to conduct the investigation; that is covered in technical guidance. If the person responsible for conducting the remediation follows the steps set forth in N.J.A.C. 7:26E-3.8 and the technical guidance, the person will be able to determine whether a contaminant is naturally occurring.

Since this determination is site specific in nature, it would not be prudent to clutter the rule with examples or to attempt to define “naturally occurring” in the rules. The Department’s Soil - SI/RI/RA Technical Guidance, version 1.0 (February 21, 2012), www.nj.gov/dep/srp/guidance/ contains examples to which the commenter is directed.

In addition, in order to comport the rule with the Brownfield Act at N.J.S.A. 58:10B-12, the Department is modifying N.J.A.C. 7:26E-3.8 on adoption to replace the phrase “hazardous substance, hazardous waste, or pollutant” with the word “contaminant” throughout the section.

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528. COMMENT: N.J.A.C. 7:26E-3.8(a)2, (c)2, and 3.9(a)2ii(3) are overly prescriptive. Many sites are too small in area for a natural gradient to be discernible sufficiently to be demonstrated. The wording should be revised to say, “Evaluating the distribution of the hazardous substance, hazardous waste, or pollutant in the [soil / groundwater] for indications of a discharge, and ...” (20)

RESPONSE: N.J.A.C. 7:26E-3.8(a)2, (c)2, and 3.9(a)2ii each require the person responsible for conducting the remediation to demonstrate that the distribution of hazardous substances, hazardous waste or pollutant or contaminant does not follow a concentration gradient indicative of a discharge. The size of the site has no bearing on the ability to demonstrate that a discharge-related gradient does or does not exist. The rules contemplate offsite sampling where necessary.

529. COMMENT: The specific procedures set forth in N.J.A.C. 7:26E-3.9, 10 and 11 regarding how to conduct a site investigation in certain circumstances should be removed from the regulation and moved to guidance. (11)

RESPONSE: The Department disagrees. The rules set forth the framework, objectives, and requirements for conducting investigations to determine off-site sources of contamination in soil, ground water, sediment and surface water. The rules do not specify

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how to conduct the investigation, as that is covered in the Historic Fill and Diffuse Anthropogenic Pollutants Technical Guidance, version 1.0 (October 24, 2011), www.nj.gov/dep/srp/guidance/. As discussed in response to comments 530 through 534 below, the Department is not adopting the requirements at N.J.A.C. 7:26E-3.9 regarding diffuse anthropogenic pollutants.

530. COMMENT: The technical basis and background for regulating diffuse anthropogenic pollutants and requiring the person responsible for conducting the remediation to remediate diffuse anthropogenic pollutants on their property pursuant to N.J.A.C. 7:26E-3.9 has not been provided for comment. Therefore, this provision should be deleted, or at a minimum, the requirements should be no more stringent than for remediation of historic fill. (20)

531. COMMENT: Concerning N.J.A.C. 7:26E-3.9, if the Department believes diffuse anthropogenic pollutants contamination is serious enough to warrant remediation at a site which may be bordered by residential property, then would this requirement apply if contamination from diffuse anthropogenic pollutants were found to be present during the remediation of an unregulated heating oil tank on an adjacent residential property? (20)

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532. COMMENT: At N.J.A.C. 7:26E-3.9(a)(3) and 5.5, it is unclear whether the person responsible for conducting the remediation has an obligation to delineate contamination from diffuse anthropogenic pollutants off-site. (20)

533. COMMENT: N.J.A.C. 7:26E-5.5 should require that diffuse anthropogenic pollutants (DAP) in soil be identified as a baseline condition, and not a condition that requires remedial action. By the very nature of DAP, the risks associated with DAP exposure will continue to exist in the site surroundings, and thus there will be no appreciable risk reduction benefit associated with the expenses incurred in remediating DAP at a given site. Additionally, it not appropriate or equitable to require an entity to expend resources addressing DAP when that entity has no responsibility for the presence of DAP at a site. For each contaminated site where DAP is remediated, innumerable sites not subject to these requirements will remain contaminated with DAP and this situation will result in the reintroduction of DAP at the sites where remediation has been undertaken. (11)

534. COMMENT: N.J.A.C. 7:26E-5.5, concerning determination of diffuse anthropogenic contaminants in soil, should allow for the use of previously conducted studies applicable to the site. The prescribed method of determining the impacts of anthropogenic sources would preclude a remediating party from utilizing any of the

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Department's own investigations of anthropogenic pollutants in the State as a basis for evaluating the need for and objectives of the remediation. Such published studies are a valuable and reliable source of data concerning anthropogenic pollutants as these pollutants are typically not limited to a single site or small area, but are typically found in broad areas of the State and are typically documented in published scientific research performed by government agencies, colleges and universities. The Department should include the use of published scientific research to document the presence of diffuse anthropogenic pollutants in soil and such studies and materials should be identified as a valid resource at N.J.A.C. 7:26C-1.2(a)3. (24)

RESPONSE to COMMENTS 530 through 534: The Department agrees that the rule could be more clear regarding several issues raised by the commenters, including whether offsite delineation of DAP is required, whether DAP should be considered a baseline condition, and whether information from published scientific research to document the presence of diffuse anthropogenic pollutants in soil and whether such studies and materials should be identified as valid technical guidance. Therefore, the Department is not adopting the provisions at N.J.A.C. 7:26E-3.9 and 5.5 regarding the site investigation and remedial action requirements, respectively, for diffuse anthropogenic pollutants. In the situation regarding an unregulated heating oil tank (UHOT), DAP would not be a

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factor because the UHOT owner is only responsible for remediating the contamination from the UHOT.

535. COMMENT: The requirement of N.J.A.C. 7:26E-3.10(a)3 to conduct a preliminary assessment in all instances to determine whether a source of the contaminant exists on site is onerous and not necessary in many instances. For example, if sufficient ground water data are collected to establish that non-petroleum related compounds are present at the up-gradient property boundary and the scope of the investigation is only an area of concern-driven matter (such as a regulated underground storage tank with no evidence of a release or a discharge), then the completion of a preliminary assessment would be not be a necessary prerequisite to issuing a response action outcome for the area of concern. This also applies to N.J.A.C. 7:26E-3.11(a)2. (6)

RESPONSE: Pursuant to SRRA, a person has an affirmative obligation to remediate all discharges for which they are responsible. If a person is remediating an AOC and discovers contamination not associated with that AOC, there is an affirmative obligation to remediate this newly discovered contamination unless that person can demonstrate that the contamination is not from a discharge on his or her site.

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N.J.A.C. 7:26E-3.10 (recodified on adoption as N.J.A.C. 7:26E-3.9), which pertains to soil and ground water, and 3.11 (recodified on adoption as N.J.A.C. 7:26E-3.10), which pertains to sediments and soil, give the person responsible for conducting the remediation the option of determining whether the source of the contamination originates off-site. By following these requirements, the person can demonstrate that he or she is not responsible for remediating contamination that originates off-site. Both of these rule provisions require that the person responsible for conducting the remediation conduct a preliminary assessment because it is only by conducting a preliminary assessment that one can determine whether any area of concern is present that may be contributing to the contamination on site. It would not be possible to demonstrate that contamination is not site related without performing this evaluation.

536. COMMENT: N.J.A.C. 7:26E-3.13(b) requires the collection of ground water samples for the option at N.J.A.C. 7:26E-3.13(b)2. However, a ground water investigation should only be required if the historic fill is present within two feet of the water table. (6)

RESPONSE: Pursuant to N.J.A.C. 7:26E-3.5, a ground water sample is not required where there is no potential for ground water to be impacted by the historic fill. The

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Ground Water - SI/RI/RA Technical Guidance Document (not yet posted on the Department's website) will outline considerations for making that determination.

N.J.A.C. 7:26E-3.13(b) (recodified on adoption as N.J.A.C. 7:26E-3.12(b)) provides the person responsible for conducting the remediation with two options. First, the person may assume that both the soil and ground water are contaminated, at which point the person would be required to conduct a remedial investigation (see N.J.A.C. 7:26E-3.12(b)1) and sample ground water pursuant to N.J.A.C. 7:26E-3.5 to determine if there is groundwater contamination (see N.J.A.C. 7:26E-3.12(b)2). Second, since the definition of historic fill states that historic fill is contaminated, it is likely that ground water associated with historic fill is also contaminated. Therefore, ground water must be evaluated pursuant to N.J.A.C. 7:26E-3.5 to determine if it is contaminated. The details on how to conduct a ground water site investigation associated with historic fill have been moved from the Technical Requirements to the Historic Fill Material and Diffuse Anthropogenic Pollutants Technical Guidance, version 1.0 (October 20, 2011), (www.state.nj.us/dep/srp/guidance). As noted above, the intent of the rule is to describe the “what” - determine whether ground water is contaminated by historic fill, whereas the “how” - collect samples if historic fill is within two feet of the ground water table” is included in technical guidance.

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537. COMMENT: N.J.A.C. 7:26E-3.14(a)6ii requires that, for each area of concern, the site investigation report must include a detailed description, including dimensions of suspected and actual contamination, and the suspected source of the contamination. The phrase “suspected and actual contamination” is ambiguous. It should be replaced with “exceedances of any applicable remediation standard.” (6)

RESPONSE: The Department agrees with the commenter that the phrase “suspected and actual contamination” is ambiguous. However, the Department disagrees that only exceedances of standards should be discussed in the report and believes that all analytical results need to be discussed, as it is necessary to present all data to demonstrate that the area of concern is or is not contaminated. Accordingly, on adoption, the Department is replacing the phrase “suspected and actual contamination” with “results of all sampling data” in N.J.A.C. 7:26E-3.14(a)6ii(1) (recodified on adoption as N.J.A.C. 7:26E-3.13(a)6ii(1)) because requiring data results are tangible and specific.

Technical Requirements - Subchapter 4: Remedial Investigations

Use of remediation standards in remedial investigations

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538. COMMENT: The State should continue to require delineation to its existing strict standards. New Jersey's delineation standards are more strict than the delineation standards of other states because New Jersey is number one in the number of Superfund sites, cancer rates, and population density. If these strict standards should apply anywhere, they should apply in New Jersey. (33)

539. COMMENT: The Department should consider risk-based approaches to remediation rather than continuing to require the application of overly conservative remediation standards for all contaminated sites, regardless of the risk that such sites pose to human health or the environment.

A risk based approach to site remediation is a cornerstone of the Massachusetts Licensed Site Professionals ("LSP") program, after which the New Jersey program is primarily modeled. In Massachusetts, response actions are deemed complete when a condition of "no significant risk" of harm to health, safety, public welfare or the environment exists or has been achieved at a site where a release has occurred. Adopting procedures similar to Massachusetts without the underlying substantive risk based approach to remediations serves only to add a new layer of administrative requirements without fixing the issues that have historically plagued the effectiveness of New Jersey's Site Remediation Program. (3)

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540. COMMENT: The remedial investigation should not be tied to the environmental standards because to do so conflicts with and is contradictory to the reform contemplated by SRRA. Well established methods have been developed to illustrate the nature and extent of the risks posed from uninhibited contaminated media and for investigating remedial options. This remaining regulatory restriction in the investigation phase hampers creative solutions to effectively investigate, protect and enhance environmental quality, and also creates significant inefficiencies at large, complex sites.

A better approach would be to maintain realistic environmental standards for the final remedy and not pursue the unobtainable goal of removing all uncertainties to which sites must be secured, including the determination of risk. The new Technical Requirements should allow the LSRP the flexibility to determine how best to investigate and achieve those ultimate standards. (5)

541. COMMENT: Neither the Massachusetts nor Connecticut rules concerning delineation require delineation to specific standards. Instead, these states have adopted rules that focus on demonstrating attainment of a remedial standard. Attainment can be defined as the process by which compliance with the applicable remediation standards is

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demonstrated through the collection of post-remediation data and the statistical analysis of those data. (6)

RESPONSE to COMMENTS 538 through 541: The Spill Act prohibits the discharge of a hazardous substance and the Brownfield Act requires the remediation of a discharge and requires the Department to develop both the technical requirements for remediation and the remediation standards for soil, groundwater, and surface water quality necessary for the remediation of contamination.

The Remediation Standards, N.J.A.C. 7:26D, were developed to ensure that the potential for harm to public health and safety and to the environment is minimized to acceptable levels, taking into consideration the location, the surroundings, the intended use of the property, the potential exposure to the discharge, and the surrounding ambient conditions, whether naturally occurring or man-made. A person responsible for conducting the remediation must know the extent of the contamination to be able to select a remedy that is protective of public health, safety and the environment.

While the Legislature, through SRRA and related amendments to other environmental statutes, made sweeping changes in the way sites are to be remediated in New Jersey, it did not amend the Brownfield Act at N.J.S.A. 58:10B-12 concerning to what standards

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sites must be remediated. The Brownfield Act at N.J.S.A. 58:10B-1.2 still contains the Legislative declaration that “strict remediation standards are necessary to protect public health and safety and the environment” and that these standards “should be adopted based upon the risk posed by discharged hazardous substances.” The Department is not aware of statutes in Connecticut or Massachusetts that contain this mandate.

The New Jersey Supreme Court has affirmed the Department’s adoption of its remediation standards in In re Adoption of N.J.A.C. 7:26E-1.13, 871 A.2d 711, N.J. Super. (April 22, 2005), aff’d 186 N.J. 81 (February 28, 2006).

Even though the Massachusetts Contingency Plan provides that a remedial action may occur prior to full delineation, full delineation is still a prerequisite to the issuance of an response action outcome because the remedy must be protective to the standards and must ensure that receptors and potential future receptors are protected.

Accordingly, the rules being adopted with amendments and the new rules that are a part of this rulemaking must require that remediation be conducted to the Department’s standards.

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542. COMMENT: SRRA defines “remedial investigation” as “a process to determine the nature and extent of a discharge of a contaminant at a site or a discharge of a contaminant that has migrated or is migrating from the site and the problems presented by a discharge, and may include data collected, site characterization, sampling, monitoring, and the gathering of any other sufficient and relevant information necessary to determine the necessity for remedial action and to support the evaluation of remedial actions if necessary.”

N.J.A.C. 7:26E-4.1(a)1, which states that, “the purpose of a remedial investigation is to delineate the horizontal and vertical extent of contamination to the remediation standard, in each environmental medium at a contaminated site,” is not consistent with this definition. (6, 11, 21)

RESPONSE: The purpose statement at N.J.A.C. 7:26E-4.1(a)1 succinctly captures both the definition of “remedial investigation” in the Brownfield Act and in SRRA, and the charge to the Department in the Brownfield Act at N.J.S.A. 58:10B-12 to set remediation standards. Both the Brownfield Act and SRRA indicate that a remedial investigation is “a process to determine the nature and extent of a discharge of a contaminant . . . ,” and the Brownfield Act provides that the “remediation standards and other remediation requirements established pursuant to [N.J.S.A. 58:10B-12] and regulations adopted

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pursuant thereto shall apply to remediation activities” required under the listed environmental statutes.

Completing remedial investigation and beginning remedial action

543. COMMENT: Providing that the objective of the remedial investigation (RI) is to “delineate the horizontal and vertical extent of contamination to the remediation standard in each environmental medium at a contaminated site” does not allow for application of professional judgment in the RI phase and will impede the implementation and timely remediation of sites.

The goal of the RI should be to achieve characterization of the nature and extent of contamination to determine the necessity and scope of remedial action. The RI also should support the development and evaluation of remedial alternatives in the remedy selection process. Once an LSRP is ready to submit a Remedial Action Workplan, the RI phase should be complete. (6, 9, 11, 21, 29)

544. COMMENT: For existing cases, for which the requirements of SRRA will begin in May 2012, it is unclear where the project stands in the eyes of the Department. In many of these cases, the LSRP may believe that the remedial investigation report is

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complete, but the Department is responding that additional documentation is needed for occurrences that happened in the 1980s and 1990s that do not seem to have ever been part of the original case. (31)

545. COMMENT: The Technical Requirements at N.J.A.C. 7:26E-4.10 establish the remedial investigation regulatory timeframes for completing a remedial investigation and submitting a remedial investigation report, based upon the date of the release and the affected media. The Department has yet to define when a remedial investigation is complete. The Department should indicate that completion of the remedial investigation will be determined by the LSRP. It should also acknowledge that previously unknown information may be obtained during the remediation, and that such information will not invalidate prior completion of the remedial investigation. (7)

546. COMMENT: The regulatory and mandatory timeframes for completion of the RI cannot be met if unreasonable RI goals are established. Many sites will be subject to direct Department oversight for failing to complete the RI phase and satisfy related mandatory timeframes, thereby creating a major challenge to the goals established in SRRA and the resources of the Department. (6, 11, 21)

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RESPONSE to COMMENTS 543 through 546: The Department disagrees with the commenter's assertion that once an LSRP is ready to submit a remedial action workplan, the RI phase is complete. The remedial investigation is complete when the person responsible for conducting the remediation submits to the Department a report in which is demonstrated the complete delineation of the known contaminants from all discharges from either a specific area of concern or the entire site. To the extent the person responsible for conducting the remediation requires additional time to complete the remedial investigation, the person may seek an extension of the regulatory timeframe and the mandatory timeframe, as needed.

The Department acknowledges that the person responsible for conducting the remediation may discover additional areas of concern at any time. Those areas of concern may be handled separately from the remediation that is already under way. However, the person responsible for conducting the remediation must also remediate that newly discovered contamination.

Timing of delineation to the standards

547. COMMENT: If delineation to the standards cannot be achieved in all media and establishment of institutional controls is selected as a component of the remedy, a

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statement to the effect that “actual delineation results and fate and transport modeling may be used to support establishing the extent of the required institutional control,” should either be codified in the rules or set forth in guidance to ensure that required institutional controls are established. (6, 11, 21)

548. COMMENT: In situations where treatment technologies are applied or natural remediation processes are relied upon for remediation, it is not necessary to determine the full extent of contamination, particularly at low levels, in order to design an effective remedy. Demonstrating attainment of the applicable remediation standard following remedial actions is a more appropriate approach than requiring strict delineation during the remedial investigation phase. In other situations, it may not be practicable to delineate low levels of contaminants in every horizontal and vertical direction. For those cases, protection of human health and the environment can be ensured when the extent can be reliably predicted and there is no demonstrated threat to receptors. (6)

RESPONSE to COMMENTS 547 and 548: It is not possible to select a remedy that is protective without understanding the full extent of contamination. That does not mean a remedial action cannot be designed to address, for example, a single area of concern or source area.

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The commenters should not confuse remedy selection with delineation. The analysis concerning delineation is separate and distinct from the analysis that is used to select the appropriate remedy. The purpose of delineation is to determine the vertical and horizontal extent of the contamination and to determine how to protect the public health and safety and the environment, now and in the future, from prior discharges at the site or area of concern.

While the delineation to standards helps the person responsible for conducting the remediation to determine what is the most appropriate remedy, it is not required that the chosen remedy include remediation to an unrestricted use standard in all cases. Rather, depending upon the site and its future uses, the person may choose to leave some contamination behind, and implement engineering and institutional controls to ensure the protectiveness of the remedy. Accordingly, the suggest amendment concerning transport modeling is not necessary to ensure that an engineering or institutional control is in place.

The rules concerning conducting the remedial investigation do not prohibit starting a remedial action prior to fully delineating the horizontal and vertical extent of the known contaminants. In fact, in numerous locations throughout the rule, the Department requires a bias for action to address conditions such as IEC source areas, free and residual product, and conditions that necessitate the implementation of an interim response action

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prior to full delineation. Furthermore, N.J.A.C. 7:26E-4.2(c) provides that the remedial action of soil may be conducted concurrent with the remedial investigation.

549. COMMENT: In many cases, the approach to completing the remedial investigation can consist of scientific methodologies other than prescriptive delineation. One example of this is the conceptual site model (CSM). As defined by ASTM in the “Standard Guide for Developing Conceptual Site Models for Contaminated Sites E 1689 – 95 (Reapproved 2008),” the CSM is “a written or pictorial representation of an environmental system and the biological, physical, and chemical processes that determine the transport of contaminants from sources through environmental media to environmental receptors within the system.” Many states have promoted the use of the CSM as the scientific methodology to ensure that the RI process is complete by identifying the source, migration pathways and receptors associated with a release of hazardous substances. (6)

RESPONSE: The Department agrees that a conceptual site model is an appropriate remedial tool to aid in the completion of a remedial investigation. However, the model does not replace delineation, as the model must be verified through delineation to the remediation standard. Additional information on the use of conceptual site modeling is

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available in the Conceptual Site Model Technical Guidance Document, version 1.0 (December 16, 2011), www.nj.gov/dep/srp/guidance.

Other provisions of Subchapter 4

550. COMMENT: In the requirements for the remedial investigation of contaminated soil at N.J.A.C. 7:26E-4.2(a)1i, the Department should substitute “unsaturated” with “vadose” to be consistent with other Department documents. (7)

RESPONSE: The commenter did not specify the documents in which it believes the Department used the term “vadose.” Throughout the ARRCs rules and the Technical Requirements, the Department refers to the “unsaturated” zone when setting forth requirements for the remediation of soil.

551. COMMENT: N.J.A.C. 7:26E-4.2 provides the option to delineate soil contamination through post-remedial action sampling. However, the rules do not provide that if a person responsible for conducting the remediation proceeds with this option, the remedial investigation will be deemed complete in compliance with the regulatory and mandatory timeframes established for the remedial investigation. Accordingly, this provision should be revised to address this issue. (6, 11)

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RESPONSE: For the purposes of N.J.A.C. 7:26E-4.2(c), the soil remedial investigation is complete when post remedial action sampling indicates compliance with the soil remediation standards. This activity must be completed within the regulatory and mandatory timeframes for the remedial investigation as set forth in N.J.A.C. 7:26E-4.10 and N.J.A.C. 7:26C-3.3, respectively.

552. COMMENT: At N.J.A.C. 7:26E-4.3(a)1, the phrase “or water bearing zone” should be deleted, because this term is not defined. The use of the defined term “aquifer” is sufficient. (20)

RESPONSE: The Department disagrees. The term “aquifer” is as defined in the Ground Water Quality Standards, N.J.A.C. 7:9C, to which the Technical Requirements cross reference. The term “water bearing zone” is a generally utilized term that addresses all zones. An aquifer is a water bearing zone, but not all water bearing zones are aquifers. Examples of other water bearing zones include aquitards and perched water.

553. COMMENT: N.J.A.C. 7:26E-4.3(a)7 is problematic because it is premature to propose a CEA as part of the remedial investigation; the CEA is a remedial action.

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Accordingly, the requirement to establish the CEA should be included in the submission of the remedial action workplan. (6, 11, 27)

RESPONSE: N.J.A.C. 7:26E-4.3(a)7 requires that a CEA be proposed as a part of the remedial investigation report concerning the remedial investigation of ground water. A CEA is not a remedial action. A CEA is an institutional control that is instituted as a part of a remedial action and becomes a component of a remedial action. Establishing the CEA at the completion of the of the RI when the extent of the contaminant plume in ground water is known, ensures that the institutional control is put in place at the earliest instance that the person responsible for conducting the remediation knows with certainty the extent of the contaminated water plume. Remediation of that plume will necessarily follow, pursuant to the requirements for a remedial action for ground water contamination at N.J.A.C. 7:26E-5. Proposing the CEA with the RI report puts potential users of that groundwater on notice of the exceedance of the ground water quality standards as soon as actual data are available that show the nature and extent of the contamination in ground water. If additional information relative to the CEA becomes available as the remedial action is developed and implemented, the person responsible for conducting the remediation is required to update the CEA to ensure that it reflects what is known about the ground water and its remediation.

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554. COMMENT: The Technical Requirements at N.J.A.C. 7:26E-4.5(a)2 add new requirements concerning conducting a remedial investigation of building interiors. For contamination that is migrating from the building to the outside, the extent of the contamination migrating from the building must be delineated. For contamination that is migrating into the building, all data necessary to remediate the contamination must be obtained. As with the similar site investigation requirement in N.J.A.C. 7:26E-3.7, this requirement, as written, is highly problematic. The pathway for potential contaminant migration into or from a building interior does not exist at the vast majority of sites. For example, the list of potential responsible parties includes owners and operators of UST systems. The only potential pathway for contaminant intrusion from an UST system is through the vapor intrusion pathway, and the Department already has extensive requirements in place for vapor intrusion investigations. There is no potential for contaminant migration from a building interior to a UST system. Yet this provision seems to require that every UST owner and operator conduct a site investigation of site building interiors. The Department needs to reconsider and refine this requirement. (7)

RESPONSE: The Department disagrees. The investigation requirements within N.J.A.C. 7:26E-4.5 would not be triggered unless contaminants were identified as part of the site investigation as having the potential to migrate into or from a structure.

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555. COMMENT: The “hold point” for ecological remediation at N.J.A.C. 7:26E-4.8(c)3 is unnecessary. The Department says there are “many factors,” but does not say what they are. The Department should identify those factors in technical guidance and allow the person responsible for conducting the remediation to proceed when all the applicable pieces are in place. Ecological remediation should not be regulated using a sort of “double standard” than the other media. (20)

RESPONSE: N.J.A.C. 7:26E-4.8(c)3 prohibits the person responsible for conducting the remediation from implementing any remedial action without the Department’s prior written approval of the final remediation goal if the final remediation goal is something other than the ecological screening criterion. The circumstances that trigger the requirement to obtain prior Departmental approval are when contaminant concentrations in the contaminant migration pathway or environmentally sensitive natural resource exceed any ecological screening criterion or any aquatic surface water quality standard.

The Ecological Evaluation Technical Guidance Document, version 1.1 (August 30, 2011), www.state.nj.us/dep/srp/guidance is available to help the person responsible for conducting the remediation to develop a site-specific final remediation goal.

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A contaminated site exposes both humans and ecological receptors. Ecological risk assessment is a bona fide component of site remediation. Each site-specific, risk-based remediation goal for ecological receptors must be appropriate for all potentially impacted feeding guilds. The designation "feeding guilds" refers to broad groups of related ecological receptors such as piscivorous birds or omnivorous mammals that represent the variety of species potentially exposed to contaminants at an affected property. In the Department's experience, persons responsible for conducting the remediation have often neglected an entire feeding guild, or have failed to appropriately analyze key flora and fauna within a guild. The result has been an incomplete analysis and the proposal of cleanup goals that are not protective of these ecological receptors. Accordingly, Department approval is essential to ensuring that these analyses properly capture all feeding guilds and that the remediation is designed to be protective of them.

556. COMMENT: At N.J.A.C. 7:26E-4.8(d), the Department should add the word "applicable" before "standard." (20)

RESPONSE: It is not necessary to add the word "applicable" as suggested by the commenter. The standards that are applicable are those for each contaminant of concern. The word "applicable" would be redundant.

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557. COMMENT: At N.J.A.C. 7:26E-4.9(c)1ii, the term “unconsolidated” as applied to the defined term “aquifer” is not defined. It is unclear whether unconfined, confined, or bedrock aquifers are addressed by this term. (20)

RESPONSE: No rule is codified at N.J.A.C. 7:26E-4.9(c)1ii; the Department assumes that the commenter is referring to N.J.A.C. 7:26E-4.10(c)1ii, which actually references “consolidated” aquifers. The terms “consolidated” and “bedrock” are synonymous, and therefore no change is required.

558. COMMENT: The rules should specify that subsequent releases in the same area of concern reset the remedial investigation timeframes for the previous release.

These timeframes are inappropriate for large, complex sites. Timeframes are not necessary to be defined, but should be established by the LSRP based on site conditions and risks to receptors. (7)

RESPONSE: When in the course of addressing an AOC a previously undiscovered AOC is identified, the person responsible for conducting the remediation must conduct a site investigation and a remedial investigation of that previously undiscovered AOC as a distinct and separate investigation from the original AOC under investigation, and new

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regulatory and mandatory timeframes apply to the investigation of the newly identified AOC.

Subsequent discharges in the same area of concern do not reset regulatory and mandatory timeframes for the remediation of prior discharges. Subsequent discharges must be remediated in accordance with the regulatory and mandatory timeframes that are triggered by that subsequent discharge.

559. COMMENT: N.J.A.C. 7:26E-4.10(c) and (d) provide one time, one year extensions of the regulatory timeframe for completing remedial investigation in certain prescribed scenarios. The rule should be clarified to indicate that these extensions are in addition to the extensions provided under N.J.A.C. 7:26C-3.2(c). (26)

560. COMMENT: The Technical Requirements at N.J.A.C. 7:26E-4.10(c) provide for a one time, one year extension of the regulatory timeframe, based upon a limited number of site conditions concerning off-site access or challenging geophysical conditions. Limiting this extension to one year does not take into account the fact that issues with access or challenging geophysical conditions may take longer than one year to resolve. This section should be reworded to allow for different extension periods based on site specific scenarios. (7)

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RESPONSE to COMMENTS 559 and 560: The commenters' concerns about needing more time to complete the remediation under circumstances where a person responsible for conducting the remediation encounters difficulty in gaining access are addressed in SRRA and in the ARRCs rules. SRRA at N.J.S.A. 58:10C-28d sets forth the circumstances under which the Department may grant an extension of a mandatory remediation timeframe. Included on that list is a delay in obtaining access to property and other site-specific circumstances that warrant an extension, as determined by the Department. The Department codified the mandatory timeframes in subchapter 3 of the ARRCs rules, N.J.A.C. 7:26C-3, and included in that subchapter the procedures for requesting an extension of a mandatory timeframe. See N.J.A.C. 7:26C-3.5. The inability to gain access is a criterion for requesting an extension of a mandatory timeframe.

Regulatory timeframes are codified in the Technical Requirements for each step in the remediation process. The purpose of the regulatory timeframes set forth in the Technical Requirements is to help the person responsible for conducting the remediation meet the mandatory timeframes set forth in the ARRCs rules. The mandatory timeframes for the completion of the remedial investigation are set forth in the ARRCs rules at N.J.A.C.

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7:26C-3.3(a), and the regulatory timeframes for this task are set forth in the Technical Requirements at N.J.A.C. 7:26E-4.10.

The provisions at N.J.A.C. 7:26E-4.10(c) and (d) (recodified on adoption as N.J.A.C. 7:26E-4.10(b) and (c)) are not extensions of a regulatory timeframes; rather, they provide a mechanism for lengthening timeframes pursuant to N.J.S.A. 58:10C-28(b).

Accordingly, the Department is replacing “extended” and similar phrases with “lengthened” and similar phrases throughout N.J.A.C. 7:26E-4.10.

The Department is also replacing “discharges” with “a discharge” at recodified N.J.A.C. 7:26E-4.10(a)3ii to be consistent with other uses of this term in the Technical Requirements.

The Department is deleting “applicable” before “regulatory timeframe” and adding “established pursuant to (a) above” thereafter at recodified N.J.A.C. 7:26E-4.10(b) to add specificity to the rule. The Department is also adding “without prior Department approval” in regards to lengthening the regulatory timeframe in order to comport these requirements with the intent of SRRA.

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The Department agrees that it is not obvious to what the phrase “one time, one year” at N.J.A.C. 7:26E-4.10(c) (recodified on adoption as N.J.A.C. 7:26E-4.10(b)) applies.

Therefore, the Department is changing the rule text to characterize the groups set forth at N.J.A.C. 7:26E-4.10(b)1i through iii as “complexity factor groups that exist at the contaminated site” and that the regulatory timeframe may be lengthened by one year for each group, to a maximum of three years.

At N.J.A.C. 7:26E-4.10(b)2, the Department is deleting the phrase “A one-time, one year extension of” and adding the phrase “lengthened by one year” to comport these requirements with the changes to (b)1. The Department is also reorganizing the provision for clarity, with no change in the meaning.

Technical Requirements Subchapter 5 – Remedial Action

561. COMMENT: N.J.A.C. 7:26E-5.1(b)2 provides that the person responsible for conducting the remediation must implement a remedial action when “the concentration of any contaminant exceeds any aquatic surface water quality standard or an ecological screening criterion.” This provision should be qualified as “...exceeds any applicable surface water quality standard...” Further, this should only apply when there is a surface water body or ecological sensitive receptor impacted by site contaminants of concern. (7)

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RESPONSE: It is not necessary to add the word “applicable” as suggested by the commenter. The standards that are applicable are those for each contaminant of concern. Adding the word “applicable” would be redundant. The requirements of N.J.A.C. 7:26E-5.1(b)2 only apply when a surface water body or ecological sensitive receptor is impacted by site contaminants of concern.

562. COMMENT: The use of the phrase “causing a licensed remediation professional to submit a final remediation document” in N.J.A.C. 7:26E-5.1(c) is not appropriate and implies potential undue influence on the LSRP by the person responsible for conducting the remediation. This language should be revised to: “Submittal of a final remedial remediation document by a licensed site remediation professional....” (6)

RESPONSE: The Department agrees the use of the term “causing” is awkward. However, the proposed change is syntactically incorrect. On adoption, the Department is substituting “ensuring that” for “causing,” (with change of “submit” to “submits”). The commenter’s concern about “undue influence” is unfounded because it is the obligation of the person responsible for conducting the remediation to make sure that the LSRP supervising the remediation performs in a manner such that the person can meet the rule requirements.

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563. COMMENT: N.J.A.C 7:26E-5.1(e) should not prohibit the use of monitored natural attenuation of free and residual product. Rather, the LSRP should be allowed to use best professional judgment, with technical justification, to determine whether or not natural attenuation of LNAPL would be appropriate on a site-specific basis, including whether it is technically impracticable to treat or remove free or residual product. (6, 7, 11, 14)

564. COMMENT: N.J.A.C. 7:26E-5.1(e) is contrary to the Brownfield Act, because it does not allow the person responsible for conducting the remediation to determine whether free or residual product poses a threat or risk to public health or the environment or to specific receptors, based on site-specific risk and factors such as the characteristics and composition of the product, soil and geologic conditions, and groundwater conditions. (14, 23)

565. COMMENT: The Interstate Technology and Regulatory Council, a coalition of state environmental regulators, industry, and stakeholders of which the Department is an active member, has determined that monitored natural attenuation, termed "natural source zone depletion" in its report, "Evaluating Natural Source Zone Depletion at Sites with LNAPL," (April 2009), is an appropriate potential remedial alternative for nonaqueous

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phase liquids and residual product. The Department should follow the lead of the ITRC.

(14)

RESPONSE to COMMENTS 563 through 565: N.J.A.C. 7:26E-5.1(e) limits remedy selection for the remediation of free and residual product to treatment and removal, and, in those situations in which it may not be practicable to remove or treat all free or residual product, containment.

The Brownfield Act at N.J.S.A. 58:10B-12(b) concerns the development of remediation standards by the Department, and at N.J.S.A. 58:10B-12g, addresses remedial action selection criteria. At N.J.S.A. 58:10B-1.3a, the Brownfield Act also requires the remediation of a discharge of a hazardous substance, and does not qualify this obligation with the notion of risk. The Department's primary concern is the current or future impact to ground water from free and residual product. Accordingly, the rule requires the person responsible for conducting the remediation to remove free and residual product unless it is technically impracticable to do so, at which point, it must be contained.

The Department has consistently required treatment or removal, and then containment, because free and residual product is considered a long term source of ground water contamination that, if left in place, increases the time ground water, an important natural

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resource, will be contaminated. The Department is concerned that residual product present in the subsurface can act as an ongoing, long-term source of possible ground water contamination, as changes in the physical and chemical nature of the subsurface environment could cause adsorbed product to desorb.

Unlike other states, New Jersey considers natural resources such as ground water to be receptors that must be protected from contamination. As the Legislature declared in the Water Pollution Control Act, N.J.S.A 58:10A-2, "It is the policy of the State to restore, enhance and maintain the chemical, physical, and biological integrity of its waters, to protect public health, to safeguard fish and aquatic life and scenic and ecological values, and to enhance the domestic municipal, recreational, industrial and other users of water."

As stated in the disclaimer of the ITRC document "Evaluating Natural Source Zone Depletion at Sites with LNAPL," (April 2009), it is not appropriate to use the ITRC methods unilaterally. Given the statutory and regulatory framework described above, the Department has not concurred with the ITRC document.

Monitored natural attenuation is generally not an effective remedial action for free or residual product contamination because complete source removal cannot be achieved using this method. Source removal is paramount to implementing an effective

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groundwater remedial action because, as long as source material remains, additional dissolved phase contamination will be produced, making it impossible to achieve the applicable groundwater remediation standard in a timely manner.

In situations where the source material is removed or contained, generally accepted and peer reviewed scientific methodologies may be used to remediate ground water that is located outside the source area or area of containment to the applicable ground water remediation standards. However, since the ground water within the containment area cannot be remediated to achieve the applicable groundwater remediation standards, the ground water within the containment area will require a classification exception area and biennial certifications in perpetuity.

As the Department stated in response to comments when it first adopted, in 2003, the requirement to treat, remove and contain free and residual product, the intent of this requirement is two-fold

[R]emediate free and residual product which is already impacting ground water, and remediate free and residual product prior to ground water actually being impacted. The Department believes that this is an appropriate response to address the potential threats that this contamination poses to the public

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health and safety and the environment. The Department is aware that investigations for, and removal of, free and residual product, especially dense, non-aqueous phase liquid, may be expensive and time consuming. However, the Department also views the estimated cost of remediation of product . . . as also being indicative of the volume of product that is currently impacting or may in the future impact ground water. The Department believes that these requirements are a means of reducing future economic impacts to the person responsible for conducting the remediation. The overall costs of a remediation project will be lessened substantially by remediating product before ground water is impacted. In addition, it fulfills the Department's mandate to maintain the quality of the waters of the State.

35 N.J.R. 795 (Feb 3, 2003).

566. COMMENT: N.J.A.C. 7:26E-5.1(e) should not require containment of free or residual product if containment is not practicable because this position is inconsistent with the Department's past position that the Department would determine when containment is impracticable on a case-by-case, site-specific basis. See 29 N.J.R. 2278(b) (May 19, 1997); 35 N.J.R. 795 (Feb 3, 2003). The "practicability" of removal, treatment or containment at a contaminated site should be determined using relevant guidance,

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including guidance on technical impracticability issued by the U.S. Environmental Protection Agency, see 29, N.J.R. 2397, 35 N.J.R. 795 and N.J.S.A 58: 10B-12. (14)

567. COMMENT: N.J.A.C. 7:26E-5.1(e) does not specify whether and how an LSRP would determine the practicability of the treatment, removal or containment of product on a site-specific, case-by-case basis as the Department does under the current rule. See, for example N.J.A.C. 7:26E-6.1(d) as discussed in 35 N.J.R. 795. (14)

RESPONSE to COMMENTS 566 and 567: The Department acknowledges that, before the enactment of SRRA, the Department was charged with evaluating the efficacy of a particular remedial action, and that it oversaw the remediation of all sites in New Jersey. However, with the passage of SRRA, it is now the responsibility of the person responsible for conducting the remediation to continuously conduct remediation with the supervision of an LSRP. Accordingly, some of the decisions that had been the Department's are now within the purview of the person responsible for conducting the remediation and his or her LSRP.

As discussed at length elsewhere in these responses to comments, the LSRP is to utilize the hierarchy of documents set forth at N.J.A.C. 7:26C-1.2(a)3, including certain

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Department and Federal guidance documents, to help inform the course of the remediation.

568. COMMENT: N.J.A.C. 7:26E-5.1(e) should be revised to recognize that when active remediation has reached its effective limit, and the conditions specified in Attachment 2 of the Issuance of Response Action Outcomes (RAO), version 1.4 (May 25, 2011) www.nj.gov/dep/srp/guidance/, are met, natural attenuation of residual product may represent the only remaining viable option. (6)

RESPONSE: Attachment 2 from the Issuance of Response Action Outcomes (RAO), version 1.4 (May 25, 2011) www.nj.gov/dep/srp/guidance/ is not applicable to the remediation of free and residual product when any product remains that must be contained because that attachment only applies where the LSRP can demonstrate that all sources of ground water contamination have been identified and remediated. As discussed at length in prior responses to comments, monitored natural attenuation is never appropriate for the remediation of free and residual product.

569. COMMENT: N.J.A.C. 7:26E-5.1(e) exceeds federal standards, which apply a risk-based framework to determine the need for remedial action with respect to free or residual product contamination. (14)

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RESPONSE: As stated in the Federal Standards Analysis of the rule proposal, the implementing regulations for the Federal laws listed above provide only generic procedural requirements on how to investigate and remediate contaminated sites. For example, the National Contingency Plan (NCP), 40 CFR 300, the implementing regulations for CERCLA, provides possible options for conducting the remedial investigation, but the NCP does not detail the minimum steps that must be taken before an area of concern can be considered to have been adequately evaluated.

570. COMMENT: At N.J.A.C. 7:26E-5.1(f), the Department should clarify its authority to supersede an EPA-approved corrective measures study work plan if it disagrees with any individual component or the document in its entirety for a RCRA regulated facility. (6)

RESPONSE: N.J.A.C. 7:26E-5.1(f) does not provide that the Department may supersede an EPA-approved corrective measures study work plan prepared pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq. EPA does not approve these work plans prior to consulting with the Department. The Department has the opportunity to review these work plans, and to coordinate its comments with EPA. Irrespective of

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whether the Department concurs with the work plan, once approved by EPA, the Department does not have the authority to supersede the work plan.

571. COMMENT: N.J.A.C. 7:26E-5.1(f)1 should be clarified to specify that a corrective measures study workplan or a remedial action workplan needs to be submitted for both EPA and Department-lead GPRA facilities. (37)

RESPONSE: The Department agrees with the commenter. As described in the proposal summary, a RCRA/GPRA site is a site that is being remediated to satisfy the obligations of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 et seq., and is on the Government Performance and Results Act (GPRA) 2020 list of priority sites (see 40 U.S.C. §§ 11101 et seq. for the GPRA; for more information on RCRA/GPRA sites, see <http://www.epa.gov/osw/hazard/correctiveaction/facility/index.htm>). The fact that a site is a RCRA/GPRA 2020 universe site does not obviate the need for the person responsible for conducting the remediation to implement a remedial action, regardless of whether the Department or the EPA is the lead agency.

The rules concerning remedial action do not carve out an exception to this requirement for DEP-lead RCRA/GPRA 2020 sites. In fact the Department and EPA agree that it is

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appropriate for the Department to maintain traditional oversight for these cases because they are EPA priority sites.

The remedial action workplan is an integral part of the remedial action, and with regard to the need to submit this document to the Department, it does not matter whether the EPA or the Department is the lead. Accordingly, the Department, on adoption, is deleting the phrase that makes N.J.A.C. 7:26E-5.1(f)1 applicable only to USEPA-lead sites.

The Department is making a similar change at N.J.A.C. 7:26E-4.1(d), which requires submittal of a remedial investigation workplan for these same types of cases.

572. COMMENT: The Department has not provided a technical basis for requiring at N.J.A.C. 7:26E-5.2(b) that the maximum contaminant concentration in the alternative fill imported to a site must be less than the 75th percentile of the contaminant concentrations at the receiving area of concern. This requirement is too restrictive and the LSRP should be allowed to use professional judgment regarding this issue. It is reasonable to allow alternative fill concentrations that are less than or equal to the highest contaminant concentrations in the receiving area of concern, thereby not creating a new or additional

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threat to human health or the environment; however, this determination should be left to the LSRP. (3, 6, 11)

RESPONSE: The Department is charged in the Brownfield Act at N.J.S.A. 58:10B-12 with setting the standards for remediation, and cannot delegate this authority to the LSRP. The role of the LSRP is to determine, using professional judgment, how to meet those standards, following the rules and guidance. The technical basis for the selection of the 75th percentile is discussed in both Appendix A (Determining the 75th Percentile) and C (SRP Policy Statement) in the Alternative and Clean Fill Guidance for SRP Sites, version 2.0 (December 29, 2011), www.state.nj.us/dep/srp/guidance. This guidance provides flexibility for the use of compliance options other than the 75th percentile, as long as a variance is obtained pursuant to N.J.A.C. 7:26E-1.7.

573. COMMENT: In implementing N.J.A.C. 7:26E-5.2(d), the Department should create and post on its website a standard acceptable documentation form required to be used by providers of clean fill material as their certification of the fill material quality. This form would not be a duplication of the laboratory data report form, but would list all the regulated substances for which the provider must test and would include a space to state the representative or maximum concentration of the material in the fill being provided. (20)

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RESPONSE: The Department will consider this suggestion for inclusion of a generic form in future versions of the Alternative and Clean Fill Guidance for SRP Sites. The Department is in the process of determining whether such a form would be appropriate for use at contaminated sites.

574. COMMENT: The requirement at N.J.A.C. 7:26E-5.2(g) to prepare and submit a “fill use plan” for clean fill is unclear and unnecessary. If the proper certification of the clean fill source can be provided, then this is all that should be required, consistent with current requirements for the use and importation of certified clean fill to a site. (6)

575. COMMENT: The Technical Requirements at N.J.A.C. 7:26E-5.2(g) require that the person responsible for conducting the remediation prepare and submit a fill use plan to the Department whenever alternative fill or clean fill is proposed as part of remedial action. This should be changed to: “A fill use plan must be included in the remedial action work plan if alternative fill is proposed as part of remedial action.” (7)

RESPONSE to COMMENTS 574 and 575: A fill use plan is necessary to document that the fill meets the criteria for use as clean fill as specified in the Technical Requirements and the Alternative and Clean Fill Guidance for SRP Sites, version 2.0 (December 29,

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2011), www.state.nj.us/dep/srp/guidance because the clean fill is a component of the selected remedial action. The clean fill plan will provide documentation on the volume, soil description, specific locations of where the fill will be used on the property, as well as other information which would allow any interested party or reviewer to find the details on the use of the clean fill as a component of the remedial action. It is important to verify that the fill is actually “clean” because the Spill Act at N.J.S.A. 58:10-23.11c prohibits the discharge of hazardous substances, and defines a “discharge” as “any intentional or unintentional action or omission resulting in the ...dumping of hazardous substances ...onto the lands of the State ...” See N.J.S.A. 58:10-23.11b.

576. COMMENT: N.J.A.C. 7:26E-5.3(a)2 – Table 5-1, setting forth presumptive remedies, should provide the performance goal of the remediation system, not the construction specifications. (6)

RESPONSE: The Brownfield Act at N.J.S.A 58:10B-12g(10), requires the Department, by rule or regulation, to establish presumptive remedies, the use of which shall be required on any site or area of concern to be used for residential purposes, as a child care center, as a public school or private school, or as a charter school. Pursuant to N.J.S.A 58:10B-12g(10), the performance goal of the presumptive remedy is to allow use of the property by these sensitive populations. In order that these remedies may be

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implemented, the rule must contain detailed construction specifications. Alternative remedies may be proposed, but they must be submitted to the Department for approval prior to implementation.

577. COMMENT: N.J.A.C. 7:26E-5.3-Table 5.1 requires the use of vapor intrusion mitigation measures as part of the presumptive remedy requirements for the new construction of residences, schools or child care facilities regardless of whether volatile organic contaminants or other specific vapor concerns have been previously identified. This requirement is arbitrary, is not supported by any technical or scientific basis or rationale, and should be removed unless the specific concern for vapor mitigation measures has been identified as part of the remedial process. (6, 7)

578. COMMENT: N.J.A.C. 7:26E-5.3(f) and (g) should only be triggered when there is an environmental condition warranting such action. Many developers are voluntarily conducting vapor intrusion investigations and installing vapor barriers in situations where they are not legally required, but this decision to use prophylactic measures must be left to private parties. (26)

RESPONSE to COMMENTS 577 and 578: The Department agrees that the requirements at N.J.A.C. 7:26E-5.3(f) and (g) should not be adopted as proposed, and is deleting them

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on adoption. These requirements exceed the Department's authority to establish the technical requirements to remediate a contaminated site to ensure that the remediation is protective of public health and safety and of the environment. Prophylactic installation of vapor barriers in situations where there are no vapor intrusion concerns exceeds the Department's authority to regulate the remediation of contaminated sites.

Notwithstanding these changes to the rules on adoption, the Department does believe that the installation of a vapor barrier and passive subsurface depressurization system for new construction and/or conducting a vapor intrusion investigation an existing structure being converted to a Residential Type I or II structure, school, child care center, represent proactive, conservative and inexpensive approaches to protect the sensitive receptors from potential offsite migration of contaminated ground water. Based on discussions with interested parties during development of the rule and guidance documents, the installation of a vapor barrier and passive subsurface depressurization system is becoming standard construction practice for new construction. As one of the commenters notes, many developers are already voluntarily installing vapor barriers in situations where they are not legally required.

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579. COMMENT: If an LSRP is overseeing the remediation, why does N.J.A.C. 7:26E-5.6(a) require the submittal of a remedial action workplan 60 days prior to implementation? (27)

580. COMMENT: The Technical Requirements at N.J.A.C. 7:26E-5.6(a) require the person responsible for conducting the remediation to submit the remedial action workplan to the Department 60 days prior to implementation. However, if a final remediation document for unrestricted use is filed within one year after the earliest applicable requirement to remediate, a remedial action workplan for the area of concern is not required. The requirement to submit a remedial action workplan at least 60 days prior to implementation is unnecessary, restrictive and counter to the intent of having a LSRP oversee remediation activities. Some remedial actions can (and occasionally must) be completed within 60 days and there is no reason to hold up remedial activities to allow 60 days to pass before the remedy can be implemented. (7)

RESPONSE to COMMENTS 579 and 580: A successful remedial action requires preparation of a remedial action workplan (RAW), preparation for implementation of that RAW and ultimately implementation of the RAW. Based on past experience, the Department anticipates the preparation for implementation of the RAW can exceed 60 days. The requirement to submit the RAW 60 days prior to the implementation of the

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remedial action allows the Department the opportunity to inspect and review the proposed RAW prior to implementation for all sites where the remediation is more complex or where remediation may include the use of non-permanent remedies. However, if the remedial action results in an unrestricted use RAO, an RAW is not required, but only if the remedial action is completed within one year.

581. COMMENT: N.J.A.C. 7:26E-5.6(b)7 should not require that the perimeter air monitoring and action plan be submitted as a part of the remedial action work plan. Rather, the perimeter air monitoring and action plan is better suited as a component of the health and safety plan or as a condition of an air quality permit. (20)

RESPONSE: The commenter is confusing the purpose of the health and safety plan with the purpose of the perimeter air monitoring and action plan. The health and safety plan is for the protection of the workers conducting the remedial action at the site. As such, the inclusion of this plan in the remedial action workplan is not appropriate. The air monitoring and action plan, if applicable, is required for protection of public health and safety of the people in the vicinity of the site. As such, its inclusion in the remedial action workplan is appropriate.

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582. COMMENT: N.J.A.C. 7:26E-5.7 should be amended to clarify that, while there are alternatives to hazardous waste permits for site remediations, there is no exemption in RCRA from the requirement to obtain a permit for management of hazardous waste. (37)

RESPONSE: The Department agrees that there is no exception from any Federal permitting requirement, including the requirement to obtain any hazardous waste management permits that may be required pursuant to RCRA. N.J.A.C. 7:26E-5.7 (recodified on adoption as N.J.A.C. 7:26E-5.6) provides an exemption from the State permitting requirements pursuant to the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., and the Hazardous Waste rules, N.J.A.C. 7:26G, for hazardous waste treatment, storage, or disposal. However, the Department understands that, as worded, N.J.A.C. 7:26E-5.6 could be misinterpreted to imply an exception from Federal permitting requirements, which interpretation would be inconsistent with Federal law and subsequent policies adopted by USEPA. Accordingly, on adoption, the Department is deleting the indicated phrase from N.J.A.C. 7:26E-5.6(a). Because the remaining rule text requires that all applicable permits be obtained, this change does not modify the intent of this subsection.

583. COMMENT: N.J.A.C. 7:26E-5.8 requires that a copy of the remedial action permit application be provided within the remedial action report. However, N.J.A.C.

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7:26C-7.6 calls for the submittal of the remedial action report to demonstrate that the remedial action is protective. Accordingly, it is unclear when a remedial action permit application can be submitted, and accordingly when the LSRP may issue the response action outcome (RAO). The rules should require that a remedial action report and a remedial action permit application be submitted following the completion of all active remediation activities and the construction of any engineering controls (e.g. caps, groundwater containment systems, etc.) that will be the subject of a remedial action report. This approach will allow for the issuance of an RAO upon approval of the remedial action report, and the terms and conditions of the remedial action permit will insure that the engineering control used as part of the remedy will be effective. In addition, this approach will enable more sites to complete remediation and obtain an RAO within the timeframes that have been proposed by the Department. (11)

RESPONSE: N.J.A.C. 7:26C-7.6(b) provides that the person should apply for a remedial action permit when the person wishes to implement a remedy that will not immediately achieve the standards and when the remedial action is working. It does not require, as the commenter asserts, that the remedial action report demonstrate that the remedial action is protective.

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That said, the Department agrees that requiring documentation that the remedial action is both effective in protecting public health and safety and the environment and is in compliance with the remediation standards is not appropriate in all instances. Rather, there are instances where the remedial action will involve a long term solution prior to achieving the remediation standards. In those instances where the standards have not yet been met but the remedial action is working, the person responsible for conducting the remediation is required to obtain a remedial action permit before the RAO may be issued.

Accordingly, on adoption, the Department is modifying N.J.A.C. 7:26E-5.8(b)6i (recodified on adoption as N.J.A.C. 7:26E-5.7(b)6i) to provide that either effectiveness of the remedial action or compliance with the remediation standards is necessary to document that each remedial action is effective in protecting the public health and safety and the environment.

584. COMMENT: The use of the phrase “causing a licensed remediation professional to submit a final remediation document” in N.J.A.C. 7:26E-5.9(a)3 is not properly worded and implies potential undue influence on the LSRP. This language should be revised to read: “Submittal of a final remedial remediation document by a licensed site remediation professional...” (6)

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RESPONSE: The Department agrees the use of the term “causing” is awkward.

However, the proposed change is syntactically incorrect. On adoption, at N.J.A.C. 7:26E-5.9(a)3 (recodified as N.J.A.C. 7:26E-5.8(a)3), the Department is substituting “ensuring that” for “causing,” (with change of “submit” to “submits”). The commenter’s concern about “undue influence” is unfounded because it is the obligation of the person responsible for conducting the remediation to make sure that the LSRP supervising the remediation performs in a manner such that the person can meet the rule requirements.

585. COMMENT: N.J.A.C. 7:26E-5.9(b) requires that remediation of a discharge that resulted in contamination of soil must be completed within three years. All other remediation must be completed within five years. The proposed approach of applying an arbitrary regulatory timeframe for completion of the remedial action at all sites is not appropriate, achievable or technically defensible. The specified timeframes will likely result in a large number of sites placed in direct oversight regardless of all best efforts by the responsible party and LSRP to comply. This will be especially true for remediation of groundwater contamination, where it may take more than five years to install, permit and operate a remedial system, conduct post-remediation monitoring, to confirm contaminant reduction, then develop the post-remediation documents. (7)

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RESPONSE: The remedial action regulatory timeframes are appropriate, achievable and technically defensible for most sites. For those sites where extenuating circumstances would delay the completion of the remedial action, a self-certifying extension process is available in the ARRCs rules at N.J.A.C. 7:26C-3.2. The commenter is incorrect in stating that the regulatory time frame for the remedial action of ground water includes all of the actions listed in the comment. Rather, the regulatory timeframe describes the time by which the LSRP must issue an RAO for the site or AOC covered by the remedial action. The regulatory timeframe does not include any requirements included in a remedial action permit.

Impact Statements

586. COMMENT: The Department has neither performed a meaningful analysis of the impacts that these regulations will have on the citizens and economy of this State, nor has the Department provided a meaningful Federal Standards analysis, as required by the Administrative Procedure Act (APA). For example, by the Department's own admission, it does not have sufficient data to determine whether or how the proposed regulations will impact the cost of remediations. Nonetheless, the Department concludes, without any quantifiable support, that the Rule Proposal will expedite cleanups, reduce costs, and return sites to productive uses more quickly. A meaningful impact analysis would

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demonstrate that, in reality, the Rule Proposal will complicate remediations, and will create substantial economic burdens for the regulated community that are not justified by commensurate benefits to public health, safety or the environment. (3)

587. COMMENT: The economic impact analysis is too general and nonspecific. It would have been very constructive if the Department reached out to the appropriate government departments and got some actuarial data to inform the cost estimates. The analysis should have included a line-by-line discussion of the costs of each of the proposed amendments and new rules. (38)

RESPONSE to COMMENTS 586 and 587: The Economic Impact Statement and the Federal Standards Analysis that are a part of the Final Rules proposal meet the requirements of the APA and its implementing rules that concern the content of these statements, and which do not require a line-by-line analysis. See N.J.S.A. 58:14B-4(a)(2) concerning the requirement to include an economic impact statement, and N.J.A.C. 1:30-5.1(c)3, which requires only that the economic impact statement must describe “the expected costs, revenues, and other economic impact upon governmental bodies of the State, and particularly any segments of the public proposed to be regulated.” Where the Department does not have sufficient data to determine whether or how the proposed

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regulations will impact the cost of remediations, the Department may provide anecdotal information.

The economic impact statement in the Final Rule proposal discussed the anticipated remediation costs for remediating parties, and the anticipated impacts on affected groups including, the private sector (remediating parties, environmental consulting industry, developers/redevelopers and lending institutions) and the public sector (local governments, the Department and New Jersey residents).

When enacting SRRA, it may be presumed that the Legislature weighed whether the new site remediation paradigm would result in more or less complicated remediations and whether the economic burdens, to the extent there would be any, would be offset by commensurate benefits to public health, safety or the environment, and that the balanced weighed in favor of enactment. Comments concerning these issues are more appropriate for Legislative consideration. The APA requirements merely include, as state above, “the expected costs, revenues, and other economic impact upon governmental bodies of the State, and particularly any segments of the public proposed to be regulated.”

The Federal Standards Analysis in the Final Rule also complies with the APA requirements for this analysis. Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et

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seq. (as amended by 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. See also N.J.A.C. 1:30-5.1(c)4 for the implementing rules. The Department met these requirements in the Federal Standards Analysis in the Final Rule proposal. For each of the rules that the Department proposed to amend or repeal, the Department made a determination as to whether a Federal counterpart exists, whether the rules are more or less stringent than the Federal counterpart, and the general economic impact of the proposed new requirements. The Department acknowledged that in some cases, it is unable to determine whether the requirement that remediation is to be conducted using the services of an LSRP will increase or decrease the cost of the remediation because little meaningful information is available yet regarding the cost of using an LSRP. This is understandable for a program that is in its beginning stages. However, the Department is required to report to the Senate Environment and Energy Committee annually as to the status of implementation of the program. The December 16, 2010 report is posted on the Department's website at www.state.nj.us/dep/srp/srra/senate_hearing_20101209.pdf.

Stakeholder process

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588. COMMENT: The stakeholder process used by the Site Remediation Program should be used as a model throughout the Department. (6, 29)

589. COMMENT: The proposed rules do reflect important input from the unprecedented stakeholder process the Department led over the last 18 months or so. This has been reflected not only in this rule proposal, but in numerous guidance documents that are under development and also through the established LSRP Steering Committee. (6)

RESPONSE to COMMENTS 588 and 589: The Department appreciates the commenters' support of the Department's stakeholder process. As articulated elsewhere in the Department's response to comments, the Department continues to believe that working with a broad range of stakeholders is essential to making the transition from the old SRP paradigm to a new successful LSRP program. It has set up an extensive stakeholder process for general program issues, rules and guidance in the development of these rules and views this process as an ongoing one. Names of the stakeholder committees, DEP chairpersons, and goals of each of these stakeholder committees are provided at www.state.nj.us/dep/srp/srra/stakeholder/.

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590. COMMENT: The 16 stakeholder committees that have been putting together rules and guidance documents should include members of environmental or resident advocacy groups, health specialists, environmental justice representatives, and other experts who are not affiliated with the cleanup industry. The rules and guidance should not be implemented without input from these groups. (33, 42)

591. COMMENT: It is a direct conflict of interest to have the regulated community prepare recommendations for a program guarding health and safety of New Jersey families, especially when the income and profitability of the LSRPs is directly affected by this rule. (33, 42)

592. COMMENT: The proposal was developed with undue and improper influence by regulated entities, including lobbyists, LSRPs, and responsible parties. (42)

RESPONSE to COMMENTS 590 through 592: The Department has believed from the outset that working with a broad range of stakeholders is essential to making the transition from the old SRP paradigm to a new, more successful LSRP program. To that end, in January of 2010, then Assistant Commissioner Irene Kropp sent an email announcement to 122 recipients representing a wide array of interests including the Department, industry, consulting firms, law firms and environmental organizations. In

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that email, Assistant Commissioner Kropp announced that the Department was assembling four SRRA Teams to assist the Department in developing technical and administrative guidance documents, reconstructing the Technical Requirements, and developing measures to assess the success of the program, and requested that anyone interested in participating express that interest to the Department.

As a result of this initial outreach, and ongoing efforts to communicate with its varied constituents, the Department has been able to set up an extensive stakeholder process for general program issues, rules and guidance. Names of the stakeholder committees, DEP chairpersons, and goals of each of these stakeholder committees are provided at www.state.nj.us/dep/srp/srra/stakeholder/. Additionally, anyone may sign up to receive e-newsletters at www.state.nj.us/dep/srp/.

The various draft technical guidance documents are developed by technical guidance committees in a manner that is consistent with N.J.S.A. 58:10C-14c(3), which requires the Department to provide interested parties the opportunity to participate in the development and review of technical guidelines. The technical guidance committees consist of representatives from NJDEP, industry, consulting firms, law firms and environmental organizations. These committee members, as well as members of the Site Remediation Steering Committee, are charged with coordinating reviews of the

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documents with other members of their organizations. Other stakeholder groups commenting on the draft guidance documents include the New Jersey Environmental Federation, Chemistry Council of New Jersey, Environmental Business Council, Fuel Merchants Association of New Jersey, Sierra Club, New Jersey Builders Association, New Jersey Business and Industry Association, New Jersey Chamber of Commerce, and various responsible parties.

A person who is not a member of any of the above stakeholder groups and who wishes to comment on a particular technical guidance document may request a copy of the document and associated comment/review form from the Department's chairperson of the technical guidance committees at (609) 292-8427 or srra@dep.state.nj.us.

The Department has found that the stakeholder process used to develop rules and guidance has been overwhelmingly positive, and despite many challenges, the process is a significant improvement on how the Department operated in the past. Feedback is greatly appreciated because the Department has found that helps the Department to be more efficient and transparent.

593. COMMENT: The Department should have conducted public outreach on this proposal, including providing fact sheets and other explanatory FAQ-like documents for

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public consumption explaining this highly-technical rule to those who attended the public hearing. (33, 42)

594. COMMENT: The Department should provide a clear laymen's overview of the rule proposal so that hearing attendees will be properly educated and can understand its complexity. (33, 42)

RESPONSE to COMMENTS 593 and 594: The Department acknowledges that it did not provide FAQ sheets at the public hearing held on this proposal on September 13, 2010. The Department also acknowledges that implementing an entirely new program is a complicated process.

To help both Department constituents and staff understand the new program, the Department has devoted substantial resources to its Site Cleanups website, www.nj.gov/dep/srp/. As mentioned above, anyone who is interested in receiving SRRA e-news may subscribe to the SRRA listserv by submitting their email address through this website and clicking on the "subscribe" button. Additionally, this website contains a trove of information and is updated in real time. Included on this page is a link to the training page, www.nj.gov/dep/srp/srra/training/#, on which the Department lists training

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classes on a variety of topics, and on which is posted a valuable list of quick references and other guides.

595. COMMENT: The Department should extend the comment period on this proposal for an additional 90 days, due to the complexity of this 946-page rule, which will have a direct impact and drastically change the way in which matters are handled on over 25,000 known contaminated sites. (33, 36, 42)

596. COMMENT: Due to the complexity of this rulemaking, the sixty-day comment period does not allow enough time for analysis of the rule's impacts and development of comprehensive comments that address the issues in a form that will be useful to the Agency. (3, 24, 42)

597. COMMENT: The Department should host at least three additional public hearings, and those hearings should be held in the communities that will directly be affected by the changes in the Site Remediation program. The Department only hosted one hearing at 9 a.m. in Trenton on September 13, 2011, a time that was not convenient for persons who work during the day and who are not able to secure time away from work to attend. (33, 42)

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RESPONSE to COMMENTS 595 through 597: The Department determined not to extend the comment period on the Final Rules proposal. The Rules for Agency Rulemaking, which implement the Administrative Procedure Act, require a proposing agency to provide an additional 30-day period for the receipt of comments by interested parties where sufficient public interest is demonstrated in an extension of the comment period. See at N.J.A.C. 1:30-5.4. "Sufficient public interest" is to be determined by the proposing agency, based on definite standards adopted by that agency as a part of its rules of practice. The Department has codified at N.J.A.C. 7:1D-5.1(c) the criteria that the Department must balance in making a determination of sufficient public interest. The Department concludes after careful balancing of the three criteria set forth in the General Practice and Procedure rules at N.J.A.C. 7:1D-5.1(c) that there is insufficient public interest to warrant a comment period extension on the Final Rules proposal.

The first of the three criteria that the Department must consider when determining whether to extend the comment period is whether either the proposed rule is complex or involves significant amendments to a regulatory program; or the request to extend encompasses a broad range of interests. The Department agrees that the complexity of the Final Rules proposal might have balanced in favor of extending the comment period if the Final Rules proposal was only the first time that the public became aware of SRRA and the new site remediation paradigm. However, such is not the case.

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SRRA stipulates a three year phase-in period, beginning with the special adoption of interim rules in November 2009 and ending with the Final Rules proposal. The three year phase-in period, during which the Department engaged with myriad stakeholders including responsible parties, environmental consultants, environmental attorneys, members of environmental groups, lending institutions, and banking executives, has afforded both the public and the Department considerable time to understand SRRA and its implementation issues. The 60-day comment period on the Final Rules proposal represents only a fraction of the time that the public has had to study and understand these new rules, and the Department is committed to continuing its education and outreach initiatives regarding the new site remediation paradigm.

Additionally, the comment period extension request does not encompass a broad range of interests. The commenters include Edison Wetlands Association on behalf of its members and of several other environmental groups, NJPEER, Sierra Club and PSEG. The Department does not consider these commenters to encompass a broad range of interests as is required pursuant to N.J.A.C. 7:1D-5.1(c)1.

The second of the three criteria that the Department must consider when determining whether to extend the comment period is whether the extension of the comment period is

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likely to result in the Department receiving comments relevant to the proposed rule that raise issues or provide new information, data or findings that were not previously raised or provided during the development of the proposed rule or during the initial comment period. The Department concludes that an extension of the comment period is unlikely to result in the Department receiving such comments, and thus the second criterion that the Department must balance weighs in favor of not extending the comment period.

During the comment period on the Final Rules proposal, the Department received several hundred pages of comments from over sixty parties, including Edison Wetlands and PSEG. The public hearing was attended by approximately 60 people, representing a diverse segment of the community. Thirteen people testified at the hearing, two of whom represented Edison Wetlands. The comments received involve recurring themes and issues.

The third of the three criteria that the Department must consider when determining whether to extend the comment period is whether the delay in the rulemaking process resulting from an extension of the public comment period is not likely to result in an adverse impact(s) to the public health, safety or welfare or the environment. The Department concludes that a delay in the rulemaking process resulting from an extension of the public comment period would likely result in adverse impacts to the public health,

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safety or welfare or the environment, and therefore the third criterion balances in favor of not extending the comment period. SRRA requires that, no later May of 2012, every person responsible for conducting remediation must hire an LSRP and conduct the remediation in accordance with SRRA, without Department oversight unless otherwise directed. An extension of the comment period would likely result in a potential gap in the rules during which remediation will be proceeding without Department oversight, and also without the benefit of rules that provide the needed direction to ensure that sites can be effectively remediated without Department oversight. The confusion that would likely ensue may have an adverse impact on public health, safety and welfare, and on the environment. It is imperative that the Final Rules be in place by May 2012 to ensure that these rules provide clear direction concerning how to efficiently and effectively conduct the remediation, in such a way as to protect human health and the environment.

598. COMMENT: This rule is being rushed through before we adequately know how the SRPL Board is going to work and before procedures for audits and risk assessments are in place. The comment period for this rule should be extended to allow for a more robust public process. (33, 36)

RESPONSE: The Final Rule proposal regulates the persons responsible for conducting the remediation. As discussed above, the proposal process included extensive outreach to

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stakeholders representing the various interests to be affected by this rule. Many of the discussions included the interplay between the regulated community and the LSRPs.

SRRA at N.J.S.A. 58:10C-6 requires separate rules addressing the requirements for LSRP licensing and conduct. The SRPL Board is in the process of drafting these rules. SRRA provides many details concerning remediating a site under the LSRP paradigm, including a detailed list of description of the conduct of an LSRP at N.J.S.A. 58:10C-16. The Department agrees that the Board's rules will be an important addition to the package of rules. Until the Board rules are adopted, SRRA will serve to inform the regulated community of the roles and responsibilities of the SRPL Board and the LSRPs. In the interim, remediation is proceeding and must continue to proceed while the Board is drafting its rules, and the Final Rules are the rules that pertain to remediation.

599. COMMENT: The Department's pre-proposal rule development process, held in accordance with Executive Order 2, was improper, in violation of the express pre-proposal and negotiated rulemaking provisions of the Administrative Procedure Act, unfair, and contrary to the public interest. (42)

RESPONSE: The Department disagrees that the procedures it used for the proposal and adoption of the Final Rules contravenes the APA. The Department complied with the

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rulemaking provisions of the APA by timely publishing the Final Rules proposal, accepting comments for the requisite 60 days, and publishing this adoption document.

600. COMMENT: The linkage between political “pay-to-play” donations and access prompted a Star Ledger editorial about how one engineering firm dominated the process.
(42)

RESPONSE: Comments concerning the motivations behind the writing of a news article are beyond the scope of this rulemaking.

Agency Initiated Changes:

Summary of Agency Initiated Changes:

1. At N.J.A.C. 7:14B-7.2(b), the Department is correcting the cross reference to the Technical Requirements for Site Remediation from N.J.A.C. 7:26E-3.3(f) to N.J.A.C. 7:26E-3.14.
2. At the end of N.J.A.C. 7:14B-9.2(a)2ii, the Department is deleting “in accordance with N.J.A.C. 7:26E-6.3(b)”, because N.J.A.C. 7:26E-6.3(b) is no longer a part of the Technical Requirements.
3. Throughout N.J.A.C. 7:26C, the Department is deleting “condition” from the phrases “immediate environmental concern condition” and “IEC condition”

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because, by definition, an immediate environmental concern is a condition, and “condition” is redundant.

4. The Department has determined to not go forward with the amendment to the definition of “sanitary landfill” or “landfill” at N.J.A.C. 7:26C-1.3 and the addition of the term “sanitary” throughout N.J.A.C. 7:26C-1.4(c)2. On adoption, the Department will restore the definition at N.J.A.C. 7:26C-1.3 and will delete “sanitary” throughout N.J.A.C. 7:26C-1.4(c)2. The addition of “sanitary” has implications in other rules that the Department did not fully consider when it proposed these amendments. Adding “sanitary” would unnecessarily restrict landfills that are to be covered under the ARRCs rules to landfills regulated under the Solid Waste rules at N.J.A.C. 7:26.
5. The Department has reexamined the five day deadline at N.J.A.C. 7:26C-1.7(d) for submitting written notification on the Confirmed Discharge Notification Form, and has determined that this deadline is too short because it does not allow the Department enough processing time. Accordingly, the Department is amending N.J.A.C. 7:26C-1.7(d) to extend this deadline to 14 days. This form follows the telephone reporting of the discharge, which must occur immediately upon discovery of the discharge and so lengthening the form submittal deadline does not create any environmental risk.

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6. At N.J.A.C. 7:26C-1.7(g)1, the Department is adding the phrase “, and the list of recipients required at (h) below and (l) below” to make this provision consistent with the requirement at (g)2. As the Department described in the proposal summary, a list of recipients is to be sent to the Department with all notifications.
7. At N.J.A.C. 7:26C-1.7(h)2iii, the Department is adding the phrase “, and one copy of the fact sheet required in (l)1 below and the display advertisement required in (l)3 below.” It is important that the municipalities receive the same information as the Department, so the Department is making this change to this provision to make it consistent with the document submittal requirements at (g).
8. It has come to the Department’s attention that persons responsible for conducting the remediation are failing to provide members of the news media with information concerning site remediation, even after the Department has directed them to do so. N.J.A.C. 7:26C-1.7(o) specifically requires the person to conduct additional public outreach if the Department determines that additional outreach is needed, including responding to public inquiries received by the Department and sent to the person by the Department. Accordingly, the Department is adding the modifying phrase “public inquiries” with the phrase “ including inquiries from the news media” to ensure that there is no doubt that persons responsible for conducting the remediation understand that when so directed by the Department, they are responsible for handling these inquiries. This is particularly important on

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sites where the person is conducting the remediation without direct Department oversight, because in those instances, the person, and not the Department is the entity who possesses the most up to date information regarding the remediation at that site.

9. At N.J.A.C. 7:26C-3.3(a)4, the Department is adding a cross reference to its website on which the form to which this provision refers may be found.
10. In Subchapter 4 of the ARRCS rules, which establishes fees and oversight costs, the Department is adding new N.J.A.C. 7:26C-4.1(b) to point persons conducting linear construction projects to the fees for such projects that are set forth in Subchapter 16 at N.J.A.C. 7:26C-16.3.
11. The Department is deleting from N.J.A.C. 7:26C-5.12, Disbursements from the remediation funding source and financial assurance, any references to “financial assurance.” Financial assurance is not meant to be utilized by the permittee in maintaining the engineering control (note that financial assurance must be established only for permits for engineering controls). Rather, financial assurance is only to be used by the Department in the event that the permittee is no longer able to meet its obligations under the permit to maintain the engineering control. To allow disbursements from financial assurance is inconsistent with N.J.A.C. 7:26C-5.3(c), which requires that financial assurance must be maintained for the

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life of a permit that involves an engineering control in an amount equal to or greater than the full cost of operation and maintenance under the permit.

12. In the violations table at N.J.A.C. 7:26C-9.5(b), the Department is clarifying the description of the violation of N.J.A.C. 7:26C-1.10(c). N.J.A.C. 7:26C-1.10(c) does not require, as is stated in the summary of this violation in the violations table, “completion of installation” of an interim remedial measure. Rather, it requires the “initiation of implementing” an interim remedial measure. The change comports this description with the rule.
13. In N.J.A.C. 7:26C Appendix D, the Department is updating the name of the Bureau of Water Allocation and Well Permitting in the paragraph of the Model Response Action Outcome (RAO) Document concerning Well Permitting.
14. In N.J.A.C. 7:26C Appendix D, the Department is deleting from the Model RAO Document the notice paragraph entitled Classification Exception Area Removal. This provision is inconsistent with the rule at N.J.A.C. 7:26C-7.3(e) through (g), which provides that only the Department may remove a classification exception area. Since the RAO is issued by the LSRP, the model RAO document should not contain statements that the LSRP is not authorized by the rules to make.
15. The Department is deleting the definition of oversight document from N.J.A.C. 7:26D-1.3 as this term is no longer used in ARRCS.

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16. The Department is deleting N.J.A.C. 7:26D-2.2(a)vii(6), which requires the person responsible for conducting the remediation to use the criteria in N.J.A.C. 7:26E-6.3(d)1i to determine when natural remediation is appropriate as a remedial action for ground water contamination because N.J.A.C. 7:26E-6.3(d)1i is no longer a part of the Technical Requirements.
17. The Department is updating cross-references throughout the rules, including cross-references in the following chapters: N.J.A.C. 7:14A, Pollution Discharge Elimination System Rules; N.J.A.C. 7:14B, Underground Storage Tanks rules; N.J.A.C. 7:26B, Industrial Site Recovery Act Rules; N.J.A.C. 7:26C, Administrative Requirements for the Remediation of Contaminated Sites; N.J.A.C. 7:26D, Remediation Standards; N.J.A.C. 7:26E, Technical Requirements for Site Remediation.

Federal Standards Analysis

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. (as amended by 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. Following are analyses for the rules for which amendments are being adopted and for the adopted new rules.

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The Discharge of Petroleum and Other Hazardous Substances (DPOHS) Rules, N.J.A.C. 7:1E are 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, Federal standards or Federal requirements. However, there are Federal standards or requirements to which a meaningful comparison can be made, and the Department has performed this comparison for rules in N.J.A.C. 7:1E being amended.

The effect of the DPOHS Rules that cross-reference the ARRCs rules is that the remediation of a discharge will have to be conducted according to the ARRCs rules, including the use of an LSRP as applicable. To the extent that the Federal regulations do not require the use of an LSRP, the addition of the requirement to comply with the ARRCs rules may be perceived as making the DPOHS rules more stringent than their Federal analogues.

As stated in the economic impact statement included in the proposal of these amendments, the Department does not yet have quantifiable data at this time to determine whether the requirement that remediation is to be conducted using the services of an LSRP will increase or decrease the cost of the remediation. Although the Interim Rules have been in effect since November 4, 2009, the Department has not collected enough

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meaningful data to determine the costs versus the benefits of the using a LSRP to remediate a site. As stated above, the Department has anecdotal information that the cost to remediate a site using the services of a LSRP is less than the cost to remediate a site prior to the implementation of the LSRP program.

Although there is a Federal Underground Storage Tank program pursuant to 42 U.S.C. §§ 6991 et seq., which regulates the operation, closure and upgrade of regulated underground storage tanks, there are no provisions in the Federal statute or regulations requiring a certification program for contractors performing services on underground storage tanks. The Federal rules at 40 CFR 280.20(e) encourage states to certify individuals to perform services on regulated underground storage tank systems.

N.J.A.C. 7:14B-1.8, which requires an owner or operator of an underground storage tank to conduct all site investigation and tank closure activities required in the UST rules in accordance with the ARRCs rules at N.J.A.C. 7:26C-2.4, including using the services of an LSRP, has no Federal counterpart. Accordingly, as discussed above in connection with the amendments to the DPOHS rules, to the extent that the Federal regulations do not require the use of an LSRP, the addition of the requirement to comply with the ARRCs rules may be perceived as making the UST rules more stringent than their Federal counterpart. However, as discussed above, the Department is unable at this

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time to determine whether the requirement that remediation is to be conducted using the services of an LSRP will increase or decrease the cost of the remediation because no meaningful information is yet available regarding the cost of using an LSRP.

The ISRA Rules, N.J.A.C. 7:26B, do not contain any standards or requirements that exceed those imposed by Federal law. ISRA was not enacted under the 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, standards or 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. The references to Federal law in these rules are not the type of references that require further analysis pursuant to Executive Order No. 27 (1994) 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 promotes the policy objectives outlined in Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. Therefore, the Department has determined that the amendments to the ISRA Rules do not contain any standards or requirements that

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exceed those imposed by Federal law, and no further analysis under Executive Order No. 27 (1994) or N.J.S.A. 52:14B-1 et seq. is required.

The ARRCS rules, N.J.A.C. 7:26C, do not implement, comply with or enable the State to participate in any program established under Federal law, standards or requirements. Of all the statutes that provide the basis for the promulgation of the ARRCS rules, the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., is the only one that contains references to the National Contingency Plan, 40 CFR Part 300 (NCP). The NCP contains the Federal technical requirements for addressing environmental contingencies. The NCP does not contain any provisions for administrative requirements for a person wanting to participate in the remediation of a contaminated site, with or without Department oversight. Therefore, there are no Federal provisions with which to compare the provisions of the ARRCS rules. However, the establishment of mandatory timeframes for the completion of certain remediation work is more stringent than equivalent Federal programs. Like the Federal remediation programs, the Department allowed the remediation of contaminated sites to be conducted on site specific schedules. The Department has found that this practice has allowed cleanups to be dragged out unnecessarily and has prolonged the remediation process. As described in the section concerning the DPOHS rules above, the Department is unable at this time to determine whether the requirement that remediation is to be conducted using

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the services of an LSRP will increase or decrease the cost of the remediation because little meaningful information is available yet regarding the cost of using an LSRP.

However, the Department believes that there will be an overall cost savings associated with the timeframes. When contamination is allowed to persist in the environment, it is more likely to migrate to ground water, surface water and to soil off the property being remediated, which often adds to the overall cost of remediation. If the remediation of contaminated sites is completed in a timelier manner, such sites can be put to better use and often may generate more taxes for local and state government.

Based on this analysis, the Department has determined that the adopted amendments and adopted new rules do not contain any standards or requirements that exceed those imposed by Federal law, and no further analysis under Executive Order No. 27 (1994) or N.J.S.A. 52:14B-1 et seq. is required.

“The new Technical Requirements, N.J.A.C. 7:26E, are promulgated under the authority of the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11a et seq., the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., and the Underground Storage of Hazardous Substances Act, N.J.S.A. 58:10A-21 et seq., and these State statutes all refer to or incorporate Federal law, Federal standards or Federal requirements. Thus, in accordance with

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N.J.S.A. 52:14B-22 through 24 and Executive Order No. 27 (1994), the Department has compared the new Technical Requirements with the Federal rules and associated guidance documents issued pursuant to the following Federal laws: the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §§9601 et seq., and the Resource Conservation and Recovery Act (RCRA) of 1980, 42 U.S.C. §§6901 and 6991 et seq.

The Department has determined that the repeal of the existing Technical Requirements and the adopted new Technical Requirements do not require any specific action that is more stringent than any requirement of comparable Federal rules. The implementing regulations for the Federal laws listed above provide only generic procedural requirements on how to investigate and remediate contaminated sites. For example, the National Contingency Plan (NCP), 40 CFR 300, the implementing regulations for CERCLA, provides possible options for conducting the remedial investigation, but the NCP does not detail the minimum steps that must be taken before an area of concern can be considered to have been adequately evaluated.

In the new Technical Requirements, the Department is establishing regulatory timeframes for the completion and submission of reports for the remedial investigation and the remedial action phases of site remediation. As discussed in the Federal Standards

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Analysis for the ARRCs rules above, the Department has determined that the rules that establish the LSRP program do not contain any standards or requirements that exceed those imposed by Federal law, and no further analysis under Executive Order No. 27 (1994) or N.J.S.A. 52:14B-1 et seq. is required. However, the Technical Requirements contain regulatory timeframes for the completion of certain remediation activities. As described in the ARRCs rule section of the Federal Standards Analysis above, the Department believes that the timeframes will result in a cost savings to the regulated community.”

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from the proposal indicated in brackets with asterisks *[thus]*).

CHAPTER 7:14A

POLLUTANT DISCHARGE ELIMINATION SYSTEM RULES

SUBCHAPTER 3. DETERMINATION OF PERMIT FEES

7:14A-3.1 Fee schedule for NJPDES permittees and applicants

(a) - (j) (No change from proposal.)

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(k) The fee for discharges to groundwater required for conducting remediation, as defined by N.J.A.C. 7:26E, of contaminated sites, and for any NJPDES discharge to groundwater permits issued by the Site Remediation Program, is calculated and billed through requirements specified in N.J.A.C. 7:26C-~~*[4.5]**4.4*~~.

(l) - (m) (No change from proposal.)

SUBCHAPTER 7. REQUIREMENTS FOR DISCHARGES TO GROUND WATER (DGW)

7:14A-7.5 Authorization of discharges to ground water by permit-by- rule

(a) Any person responsible for any of the following discharges to ground water is deemed to have a permit-by-rule:

1. - 3. (No change from proposal.)

4. Discharges to ground water from activities associated with the installation, development and sampling of monitoring wells in accordance with a NJPDES permit or, for activities not included in a NJPDES permit, in accordance with the Technical Requirements for Site Remediation, including, but not limited to, the requirements of N.J.A.C. 7:26E-~~*[3.7(c)2]**3.5*~~ and ~~*[6.4(d)3]**1.5(h)*~~; and

5. (No change from proposal.)

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(b) Any person responsible for the discharges to ground water listed in (b)3i through vii below is deemed to have a permit-by-rule if the discharge occurs when:

1. - 2. (No change from proposal.)

3. The following ground water discharges are authorized by permit-by-rule under this subsection:

i. - vi. (No change from proposal.)

vii. Discharges to ground water, including those listed in (b)3i through vi above, that occur during the course of a site remediation when the person responsible for conducting the remediation submits a proposal in accordance with the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, including the requirements of N.J.A.C. 7:26E-*[7.2]**5.7*.

(c) (No change from proposal.)

SUBCHAPTER 8. ADDITIONAL REQUIREMENTS FOR UNDERGROUND INJECTION CONTROL (UIC) PROGRAM

7:14A-8.7 Prohibition and elimination of underground injection of hazardous and radioactive wastes

(a) (No change from proposal.)

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(b) The Department may, at its discretion, authorize the construction and/or operation of a Class IV or Class I well to inject ground water that has been treated and is being reinjected into the same formation from which it was drawn. The Department's implementation of this injection activity shall be pursuant to provisions for cleanup of releases under CERCLA, or RCRA, as described in 40 C.F.R. 144.13(c), or when conducted under Department oversight pursuant to the Underground Storage Tanks rules at N.J.A.C. 7:14B, the Industrial Site Recovery Act (N.J.S.A. 13:1K 6 et seq., as amended), or the *[Procedures for Department Oversight of the Remediation of Contaminated Sites]****Administrative Requirements for the Remediation of Contaminated Sites***at N.J.A.C. 7:26C. These injection activities shall generally be conducted to alleviate a situation posing a substantial danger to public health or safety or when necessitated by public health or environmental considerations (for example, when injection wells are used as a component of a ground water remediation program).

(c) Abandonment and closure of any injection well that is injecting, or has ever injected, hazardous wastes (including Class IV and Class I injection wells) shall be performed in compliance with all applicable Department regulations for remediation of contaminated sites including the *[Procedures for Department Oversight of the Remediation of Contaminated Sites]****Administrative Requirements for the Remediation of Contaminated Sites*** (N.J.A.C. 7:26C).

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SUBCHAPTER 22. TREATMENT WORKS APPROVALS, SEWER BANS, SEWER BAN EXEMPTIONS

7:14A-22.4 Activities for which a treatment works approval is not required

(a) A treatment works approval from the Department is not required for the following activities:

1. - 12. (No change from proposal.)

13. Building, installing, operating or modifying a treatment works for a groundwater recovery and reinjection system which is performed under the authority of the *[Procedures for Department Oversight of the Remediation of Contaminated Sites]****Administrative Requirements for the Remediation of Contaminated Sites***, N.J.A.C. 7:26C.

(b) - (e) (No change from proposal.)

CHAPTER 14B

UNDERGROUND STORAGE TANKS

SUBCHAPTER 7. RELEASE REPORTING REQUIREMENTS

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7:14B-7.2 Investigating a suspected release

(a) The owner or operator shall confirm or disprove a suspected release by conducting an investigation in accordance with all of the applicable following procedures:

1. - 5. (No change from proposal.)

6. *[Retain a licensed site remediation professional to collect a soil and/or groundwater sample(s), as necessary, in the immediate area of]* ***Determine whether there are*** any photoionization detector *[registering a reading]* ***readings*** above 50 ***meter*** units ***in soil or ground water***.

(b) If the investigation conducted in accordance with (a) above is inconclusive in confirming or disproving a suspected release, the owner or operator shall, in accordance with the schedule in the Technical Requirements for Site Remediation, N.J.A.C. 7:26E-3.3(f), conduct and complete a site investigation designed to confirm or disprove a suspected discharge in accordance with the Technical Requirements for Site Remediation rules, ***N.J.A.C*7:26E-3.3**. If a discharge is confirmed, the owner or operator shall initiate action pursuant to N.J.A.C. 7:14B-7.3. The owner or operator shall keep documentation of an investigation in accordance with this section that disproves a suspected discharge at the facility and make it available for inspection by the Department for the operational life of the underground storage tank system.

7:14B-7.3 Confirmed discharges

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(a) Any person, including, but not limited to, the owner or operator, ***an*** individual certified pursuant to N.J.A.C. 7:14B-13 hired to install, remove or test an underground storage tank system, or ***a*** licensed site remediation professional ***[or his or her representative]*** performing remediation, shall, upon confirming a discharge, immediately report the discharge to the appropriate local health agency in accordance with local requirements, and to the Department's Environmental Action Hotline 877-927-6337. Discharges may be confirmed on the basis of the following:

1. – 5. (No change from proposal.)

(b) – (f) (No change from proposal.)

7:14B-7.4 Unknown sources

If the owner or operator has information indicating that a facility may be the source of a discharge, the owner or operator shall perform an unknown source investigation. The owner or operator shall prepare an unknown source investigation report following the format presented in the Technical Requirements for Site Remediation at N.J.A.C. 7:26E-***[3.14]**3.13(a)2 through 4 and 6ii***, and submit the report and a form available from the Department at www.nj.gov/dep/srp/srra/forms within 90 days after the receipt of information indicating the facility may be the source of a discharge.

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SUBCHAPTER 9. OUT-OF-SERVICE UNDERGROUND STORAGE TANK SYSTEMS AND CLOSURE OF UNDERGROUND STORAGE TANK SYSTEMS

7:14B-9.2 Closure requirements for underground storage tank systems

(a) The owner or operator who intends to close the underground storage tank system shall:

1. (No change from proposal.)

2. At least 14 calendar days prior to the anticipated closure date, notify the Department of the intent to close the underground storage tank by logging on to the NJDEP Online service via either the myNewJersey Portal at [*\[http://\]*www.nj.gov](http://www.nj.gov) or directly from [*\[http://\]*njdeponline.com](http://njdeponline.com), selecting the underground storage tank notice of intent to close in the Service Selection section of the My Workspace screen, and completing and submitting the form. This notification shall include the following information:

i. (No change from proposal.)

ii. A statement as to whether the tank system is being removed or abandoned in place*[in accordance with N.J.A.C. 7:26E-6.3(b)]*;

iii. - v. (No change from proposal.)

3. - 4. (No change from proposal.)

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5. If any contamination is detected above any applicable remediation standard, conduct the remediation pursuant to the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C, ***except as provided in N.J.S.A. 58:10B-13e***.

(b) The owner or operator who intends to close an underground storage tank containing hazardous substances which are not hazardous wastes or an underground storage tank containing hazardous waste which is exempt from the requirements of the New Jersey Hazardous Waste Regulations, N.J.A.C. 7:26G, shall implement a closure plan which consists of a site investigation set forth at N.J.A.C. 7:26E-3.3*[(b)]* and a tank decommissioning plan which includes the procedures pursuant to (d) through (f) below, as applicable. The owner or operator shall keep the closure plan at the facility and make it available for inspection by the Department, the local construction code enforcement official, or a county or municipal health official.

(c) (No change from proposal.)

(d) The owner or operator shall close an underground storage tank pursuant to the American Petroleum *[Institute's "Practice for the Abandonment or Removal of Used Underground Service Tanks"]* ***Institute Recommended Practice 1604, "Closure of Underground Petroleum Storage Tanks"***, in publication at the time the tank is to be closed (available from the American Petroleum Institute, 1220 L Street Northwest, Washington, DC 20005) and shall:

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1. *[Drain the associated piping, pump out the tank, clean the system thoroughly and plug all of the openings in the tank except for one vent hole;

2. Unless the tank is to be closed in place pursuant to (e) below, excavate the soil around the tank and remove and secure the tank;

3.]* Examine the secured tank for holes and call the Department Hotline at 1-877 WARNDP or (877) 927-6337 if any holes are discovered and/or a discharge has been confirmed pursuant to N.J.A.C. 7:14B-7.3, unless the discharge from the tank was previously reported to the Department;

[4. Prepare the tank for disposal by labeling the tank regarding its site of origin, ultimate destination site and the substance(s) that were stored in it during its use as a storage tank;] and

*[5.]***2.*** Remove the tank from the site according to all applicable laws and regulations.

7:14B-9.5 Reporting and recordkeeping requirements

(a) The owner or operator shall prepare a site investigation report in accordance with the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C-2.3, and the Technical Requirements for Site Remediation at N.J.A.C. 7:26E-
*[3.14]***3.13***, accompanied by the appropriate fees required pursuant to the N.J.A.C. 7:14B-3.5 and the Administrative Requirements for the Remediation of Contaminated

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Sites rules at N.J.A.C. 7:26C-4, as applicable, and within the timeframes set forth in the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C-3.3.

(b) The owner or operator shall submit a site investigation report and a form found on the Department's website at www.nj.gov/dep/srp/srra/forms, pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E-*[3.14]****3.13***, within the mandatory timeframes set forth in the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C-3.3, which shall include the name and address for both the owner and the operator, the underground storage tank Facility Identification Number, the specific tank number(s) for the underground storage tanks systems being closed, and all applicable case numbers or tank closure approval numbers. The site investigation report shall be accompanied by the appropriate fee pursuant to the Administrative Requirements for the Remediation of Contaminated Sites at N.J.A.C. 7:26C-4.

(c) (No change from proposal.)

CHAPTER 26B

INDUSTRIAL SITE RECOVERY ACT RULES

SUBCHAPTER 5. ALTERNATE COMPLIANCE OPTIONS

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7:26B-5.3 Regulated underground storage tank waiver

(a) – (d) (No change from proposal.)

(e) The owner or operator:

1. (No change from proposal.)

2. Shall remediate the industrial establishment in accordance with this chapter and the ***Administrative*** Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C, if the Department disapproves the regulated underground storage tank waiver application.

7:26B-5.4 Remediation in progress waiver

(a) (No change from proposal.)

(b) The Department's approval of a remediation in progress waiver application authorizes the owner or operator to close operations or transfer ownership or operations of the industrial establishment ***without the submittal of a remediation certification,*** prior to the issuance of a final remediation document, or prior to a licensed site remediation professional's certification of a remedial action workplan ***[and without the submittal of a remediation certification]*.**

(c) To apply for a remediation in progress waiver, the owner or operator shall submit a completed ISRA Alternate Compliance Option Application, available on the

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Department's website at www.nj.gov/dep/srp/srra/forms, certified in accordance with N.J.A.C. 7:26B-1.6, to the Department at the address provided at N.J.A.C. 7:26B-1.5, which includes the following:

1. (No change from proposal.)
2. A preliminary assessment report and, as applicable, a site investigation report

that demonstrates that:

- i. (No change from proposal.)
- ii. Any discharged hazardous substance or hazardous waste that occurred at the industrial establishment during the owner's or operator's ownership or operation has been remediated, *[provided that]* ***and*** the owner or operator includes identification of the spill incident number(s) and a copy of the final remediation document for the remediation of the discharge(s).

(d) The owner or operator:

1. (No change from proposal.)
2. Shall remediate the industrial establishment in accordance with this chapter

and the ***Administrative*** Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C, if the Department disapproves the remediation in progress waiver application.

7:26B-5.9 De minimis quantity exemption

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(a) – (d) (No change from proposal.)

(e) The owner or operator of the subject industrial establishment that satisfies the criteria established in (b) above may apply for a de minimis quantity exemption by submitting:

1. A completed de minimis quantity exemption application form available from the Department on its website at www.nj.gov/dep/srp/srra/forms, certified in accordance with N.J.A.C. 7:26C-1.6, to the Department at the address provided on the form, that includes information that identifies the owner or operator and the industrial establishment, describes the quantities and nature of the hazardous substances or hazardous waste generated, manufactured, refined, transported, treated, stored, handled or disposed of at the industrial establishment, and includes a certification that that*, **to the best of the owner or operator’s knowledge**,* the industrial establishment is not contaminated above any standard set forth in the Remediation Standards, N.J.A.C. 7:26D; and

2. (No change from proposal.)

(f) The owner or operator:

1. (No change from proposal.)

2. Shall remediate the industrial establishment in accordance with this chapter and the ***Administrative*** Requirements for the Remediation of Contaminated Sites,

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N.J.A.C. 7:26C, ***or withdraw the general information notice pursuant to N.J.A.C. 7:26B-3.2(c),*** if the Department disapproves the application.

CHAPTER 26C

ADMINISTRATIVE REQUIREMENTS FOR THE REMEDIATION OF CONTAMINATED SITES

SUBCHAPTER 1. GENERAL INFORMATION

7:26C-1.2 General requirements

(a) The person responsible for conducting the remediation shall conduct the remediation in accordance with the following:

1. – 2. (No change from proposal.)
3. By applying any available and appropriate technical guidance concerning site remediation as issued by the Department. The Department's technical guidance can be found on the Department's website, www.nj.gov/dep/srp/srra/guidance. When there is no specific technical guidance issued by the Department or in the judgment of a licensed site remediation professional the guidance issued by the Department is inappropriate or unnecessary to meet the remediation requirements of (a)1 and 2 above, the *[person responsible for conducting the remediation]* ***licensed site remediation professional***

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may use the following additional guidance, provided that the person includes in the appropriate report a written rationale concerning why the technical guidance issued by the Department is inappropriate or unnecessary to meet the remediation requirements of (a)1 and 2 above, and justifies the ***[acceptability]**use*** of the guidance or methods that were utilized:

7:26C-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meaning unless the context clearly indicates otherwise:

* * *

"Sanitary landfill" or "landfill" means a ***[sanitary landfill as defined in the Solid Waste rules at N.J.A.C. 7:26-1.4]* ***solid waste facility, at which solid waste is deposited on or into the land as fill for the purpose of permanent disposal or storage for a period of time exceeding six months, except that the term sanitary landfill shall not include any waste facility approved for disposal of hazardous waste regulated pursuant to N.J.A.C. 7:26G. A facility is a sanitary landfill regardless of when solid waste was deposited or whether the facility was properly registered, permitted, approved or otherwise authorized to conduct such activity, by the Department or other State agency*****.

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7:26C-1.4 Applicability and exemptions

(a) - (c) (No change from proposal.)

(c) The requirements of this chapter do not apply to any person who is:

1. (No change from proposal.)

2. Remediating a *[sanitary]* landfill, unless:

i. The *[sanitary]* landfill or any portion thereof is slated for redevelopment that includes structures intended for human occupancy;

ii. When *[sanitary]* landfill remediation activities are funded, in whole or part, by the Hazardous Discharge Site Remediation Fund pursuant to the Brownfield and Contaminated Site Remediation Act at N.J.S.A. 58:10B-4 through 9, a Brownfield Redevelopment agreement pursuant to the Brownfield and Contaminated Site Remediation Act at N.J.S.A. 58:10B-27 through 31, or the Municipal Landfill Closure and Remediation Reimbursement Program pursuant to the Solid Waste Management Act at N.J.S.A. 13:1E-116.1 through 116.7; or

iii. (No change.)

(d) The person responsible for conducting the remediation of a discharge from an unregulated heating oil tank *[is exempt from the requirements at N.J.A.C. 7:26C-2.3 to use the services of a licensed site remediation professional or to submit documents to the Department and is not subject to the mandatory timeframes in N.J.A.C. 7:26C-3]* ***, is only required to comply with the requirements of N.J.A.C. 7:26C-4 and 13*.**

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(e) - (f) (No change from proposal.)

7:26C-1.7 Notification and public outreach

(a) – (c) (No change from proposal.)

(d) The person responsible for conducting the remediation shall notify the Department in writing, on the Confirmed Discharge Notification form available from the Department, within [five] **fourteen** days after the occurrence of any of the following events:

1. - 2. (No change from proposal.)

(e) - (f) (No change from proposal.)

(g) To document compliance with this section, the person responsible for conducting the remediation shall submit one copy of each of the following in the subsequent applicable remedial phase report:

1. The notification letter and any updates*, **and the list of recipients required at (h) below and (l) below***;

2. - 4. (No change from proposal.)

(h) The person responsible for conducting the remediation shall:

1. (No change from proposal.)

2. Within 14 days prior to commencing field activities associated with the remedial action, provide notification to any local property owners and tenants who reside

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within 200 feet of the contaminated site, and to the government entities noted in (h)2iii below. The notification shall summarize site conditions and describe the activities that are to take place to remediate the site and shall either be in the form of written correspondence or the posting of a sign visible to the public, which shall be located on the boundaries of the contaminated site. The person responsible for conducting the remediation shall also:

- i. – ii. (No change from proposal.)
- iii. Submit one copy of the notification letter and list of recipients required in (h)2i above or a photograph of the notification sign required in (h)2ii above*, **and one copy of the fact sheet required in (I)1 below and the display advertisement required in (I)3 below*** to the local government entities as follows:

(1) - (2) (No change from proposal.)

(i) – (n) (No change from proposal.)

(o) The person responsible for conducting the remediation shall conduct additional public outreach based on the needs expressed by the community if the Department determines that:

1. Additional outreach is needed due to site-specific circumstances. This shall include responding to public inquiries *, **including inquiries from the news media***, either received by the person responsible for conducting the remediation directly, or

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receive by the Department and sent to the person responsible for conducting the remediation; or

2. (No change from proposal.)
- (p) – (q) (No change from proposal.)

SUBCHAPTER 2. OBLIGATIONS OF THE PERSON RESPONSIBLE FOR CONDUCTING THE REMEDIAITON OF A CONTAMINATED SITE

7:26C-2.2 Criteria for determining when a person is required to remediate a site

(a) Unless exempted pursuant to N.J.A.C. 7:26C-1.4(c) or (d), a person shall remediate a site in accordance with this chapter where:

1. (No change from proposal.)
2. The owner or operator of a regulated underground storage tank:
 - i. (No change from proposal.)
 - ii. Undertakes closure of a regulated underground storage tank pursuant to N.J.A.C. 7:14B-*[8.1(a)6]****8.1(b)6***, 9.1(d) and 9.2(a)1; or
 - iii. (No change from proposal.)
3. – 7. (No change from proposal.)

7:26C-2.3 Requirements for the person responsible for conducting the remediation

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(a) Upon the occurrence of any of the events listed in 2.2(a) above, the person who is responsible for conducting the remediation at a site pursuant to N.J.A.C. 7:26C-1.4(a) shall:

1. (No change from proposal.)

2. Notify the Department, on a form found on the Department's website at www.nj.gov/dep/srp/srra/forms, of the name and license information of the licensed site remediation professional hired to conduct or oversee the remediation and the scope of the remediation, including the number of contaminated areas of concern and impacted media known at the time the form is submitted and determined pursuant to N.J.A.C. 7:26C-~~[4.3(b)2]~~**4.2**, within 45 days after:

i. If the earliest of the events listed at N.J.A.C. 7:26C-2.2(a) occurred prior to November 4, 2009*, **May 7, 2012***;

ii. – iv. (No change from proposal.)

3. Conduct the remediation:

i. Without prior Department approval, except:

(1) – (2) (No change from proposal.)

(3) If the remediation is being conducted pursuant to (a)1*[i,]* ii or iii above *, **or the site is being remediated partially or solely to satisfy the obligations under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq. and is a priority site under the Government**

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Performance and Results Act, 40 U.S.C. §§ 11101 et seq., regardless of whether the U.S. Environmental Protection Agency or the Department is the lead agency for the remediation; or*

(4) If the site is suspected or known to be contaminated with anthropogenic radionuclide contamination of any media; *[or

(5) For an immediate environmental concern, for the implementation of an engineered response action pursuant to N.J.A.C. 7:26E-1.11(a)6;]*

4. – 9. (No change from proposal.)

(b) (No change from proposal.)

***7:26C-2.5 Record retention**

(a) The person responsible for conducting the remediation shall maintain and preserve all data, documents and information concerning remediation of a contaminated site, including, but not limited to, technical records and contractual documents, and raw sampling and monitoring data, whether or not the data and information, including technical records and contractual documents, were developed by the licensed site remediation professional or that person's divisions, employees, agents, accountants, contractors, or attorneys, that relate in any way to the contamination at the site.

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(b) Upon the receipt of a written request from the Department, the person responsible for conducting the remediation shall submit to the Department all data and information, including technical records and contractual documents concerning contamination at the site, including raw sampling and monitoring data, whether or not such data and information were developed as part of the remediation. The person responsible for conducting the remediation may reserve its right to assert a privilege regarding such documents, except that no claim of confidentiality or privilege may be asserted with respect to any data related to site conditions, sampling or monitoring.

(c) The person responsible for conducting the remediation shall submit one electronic copy of all records referenced in (a) above, to the Department at the time of the issuance of a final remediation document.*

SUBCHAPTER 3. REMEDIATION TIMEFRAMES AND EXTENSION REQUESTS

7:26C-3.3 Mandatory remediation timeframes

(a) The person responsible for conducting the remediation who meets the criteria in N.J.A.C. 7:26C-1.4(a)1 through 5 shall:

1. - 3. (No change from proposal.)

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4. Complete a remedial investigation for the delineation of light non-aqueous phase liquid (LNAPL), initiate implementation of an LNAPL interim remedial measure, initiate monitoring, and submit an LNAPL interim remedial measure report with a form ***available from the Department's website at www.nj.gov/dep/srp/srra/forms***, pursuant to the Technical Requirements for Site Remediation rules, at N.J.A.C. 7:26E-1.10, within two years from the later of the following dates:

i. - ii. (No change from proposal.)

5. Complete the remedial investigation of the ***[entire]* *contaminated*** site and submit the remedial investigation report, with a form found on the Department's website at www.nj.gov/dep/srp/srra/forms, as described at N.J.A.C. 7:26E-1.6(a)1, by the date which is two years after the date of the regulatory timeframes established pursuant to the Technical Requirements for Site Remediation at N.J.A.C. 7:26E-4.10; and

6. Complete the remedial action of the ***[entire]* *contaminated*** site and submit the remedial action report, with a form found on the Department's website at www.nj.gov/dep/srp/srra/forms, as described at N.J.A.C. 7:26E-1.6(a)1, by the date which is two years after the date of the regulatory timeframes established pursuant to the Technical Requirements for Site Remediation at N.J.A.C. 7:26E-***[5.9]**5.8***.

(b) - (d) (No change from proposal.)

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SUBCHAPTER 4. FEES AND OVERSIGHT COSTS

7:26C-4.1 Scope

(a) (No change from proposal.)

(b) The fees to be paid by a person conducting a linear construction project are set forth at N.J.A.C. 7:26C-16.3.

7:26C-4.2 Annual remediation fee formula

(a) (No change from proposal.)

(b) The Department shall calculate annual remediation fees for the upcoming State fiscal year as of the December 1 that precedes the upcoming State fiscal year as follows:

1. - 3. (No change from proposal.)

4. Using the base contaminated area of concern fee calculated in (b)3 above, the Department shall establish the contaminated area of concern fee for each of the four Categories described below as follows:

i. (No change from proposal.)

ii. Category 2: The fee for Category 2 is two times the base fee. This category applies where:

(1) (No change from proposal.)

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(2) The areas of concern are limited to any number of contaminated regulated underground storage tanks ***except a single regulated heating oil tank system,*** and there are no other contaminated areas of concern.

iii. – iv. (No change from proposal.)

5. – 6. (No change from proposal.)

(c) (No change from proposal.)

7:26C-4.3 Annual remediation fee

(a) Except as provided in (i) below, the person responsible for conducting the remediation that is subject to N.J.A.C. 7:26C-2.3 shall submit the applicable annual remediation fee to the Department pursuant to this section.

1. – 3. (No change from proposal.)

4. The person responsible for conducting the remediation who was conducting the remediation without a licensed site remediation professional prior to May 7, 2012 and who is continuing on or after that date to conduct the remediation using a licensed site remediation professional shall submit the annual remediation fee, and the appropriate form found on the Department's website at www.nj.gov/dep/srp/srra/forms, as follows:

i. – iii. (No change from proposal.)

iv. Where the columns in Table 4-1 specify the following:

(1) (No change from proposal.)

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(2) *[Column II specifies the assigned anniversary month and year;

[(3)]* Column *[III]**II* specifies the fee amount due that all persons responsible for conducting the remediation who meet the criteria in *[(a)4ii]**(a)4i* shall pay, calculated as the *[full annual remediation fee plus the]* pro rated percentage of the annual remediation fee based on the assigned anniversary month (for example, if the assigned anniversary month is September, the pro-rated percentage is 25 percent, June to September);

[(4)] *(3)* Column *[IV]**III* specifies the number of contaminated media at the site;

[(5)] *(4)* Columns *[V]**IV* through *[VIII]**VII* specify the specific dollar amount (rounded to the nearest dollar) the person responsible for conducting the remediation owes based on category and number of contaminated media at the site;

[(6)] *(5)* Column *[IX]**VIII* specifies the date that the second and subsequent annual remediation fee shall be due*[, where the year is the year specified in column II]*.

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Table 4-1

I. County of Origin of Site	*II. Assigned Anniversary Month	*III.* Fee Amount Due June 20, 2012	*IV.* Number of Contaminated Media	Initial Fee Amount By Category				Full Fee Due
				V. 0-1 Contaminated Areas of Concern Cat. 1	*VI.* 2-10 Contaminated Areas of Concern Cat. 2	*VII.* 11-20 Contaminated Areas of Concern Cat. 3	*VIII.* >21 Contaminated Areas of Concern Cat. 4	
1. Hudson, Middlesex, Monmouth	September 2012	*25% of* Full Annual Remediation Fee *[plus 25%]*	No Contaminated Media	\$ 113	\$ 225	\$ 1,250	\$ 2,375	September 1*, 2012 and each September 1 thereafter*
			1 Contaminated Media	\$ 463	\$ 575	\$ 1,600	\$ 2,725	
			2 Contaminated Media	\$ 813	\$ 925	\$ 1,950	\$ 3,075	
			3 Contaminated Media	\$ 1,163	\$ 1,275	\$ 2,300	\$ 3,425	
2. Atlantic, Hunterdon, Morris, Passaic, Union	December 2012	*50% of* Full Annual Remediation Fee *[plus 50%]*	No Contaminated Media	\$ 225	\$ 450	\$ 2,500	\$ 4,750	*[December]* *December* 1*, 2013 and each December 1 thereafter*
			1 Contaminated Media	\$ 925	\$ 1,150	\$ 3,200	\$ 5,450	
			2 Contaminated Media	\$ 1,625	\$ 1,850	\$ 3,900	\$ 6,150	
			3 Contaminated Media	\$ 2,325	\$ 2,550	\$ 4,600	\$ 6,850	
3. Cape May, Cumberland, Gloucester, Mercer, Ocean, Salem, Somerset, Sussex, Warren, Out-of-State	March 2013	*75% of* Full Annual Remediation Fee *[plus 75%]*	No Contaminated Media	\$ 338	\$ 675	\$ 3,750	\$ 7,125	March 1*, 2013 and each March 1 thereafter*
			1 Contaminated Media	\$ 1,388	\$ 1,725	\$ 4,800	\$ 8,175	
			2 Contaminated Media	\$ 2,438	\$ 2,775	\$ 5,850	\$ 9,225	
			3 Contaminated Media	\$ 3,488	\$ 3,825	\$ 6,900	\$ 10,275	
4. Bergen, Burlington, Camden, Essex	June 2013]*	*100% of* Full Annual Remediation Fee *[plus 100%]*	No Contaminated Media	\$ 450	\$ 900	\$ 5,000	\$ 9,500	June 1*, 2013 and each June 1 thereafter*
			1 Contaminated Media	\$ 1,850	\$ 2,300	\$ 6,400	\$ 10,900	
			2 Contaminated Media	\$ 3,250	\$ 3,700	\$ 7,800	\$ 12,300	
			3 Contaminated Media	\$ 4,650	\$ 5,100	\$ 9,200	\$ 13,700	

5. For each subsequent year, the person responsible for conducting the remediation shall pay an annual remediation fee in response to a Department invoice as follows:

- i. (No change from proposal.)
- ii. For a person paying the fee pursuant to (a)4 above, on the month and day

indicated in Column *IX.* of Table 4-1 above;

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6. – 7. (No change from proposal.)

(b) – (i) (No change from proposal.)

7:26C-4.6 Payment of remedial action permit fees

(a) Until the first day of the State fiscal year following the Department’s publication of the first Annual Site Remediation Reform Act Program Fee Calculation Report pursuant to N.J.A.C. 7:26C-4.2(c), the permittee shall submit to the Department the applicable remedial action permit activity fees pursuant to the following table.

Thereafter, the *[person responsible for conducting the remediation]* ***permittee*** shall pay the applicable remedial action permit activity fees as published in the Annual Site Remediation Reform Act Program Fee Calculation Report:

(b)

		Ground Water - Natural Attenuation	Ground Water - Active System
Remedial Action	Soil Remedial	<u>Remedial Action</u>	<u>Remedial Action</u>
<u>Permit Fees</u>	<u>Action Permit</u>	<u>Permit</u>	<u>Permit</u>
Remedial Action			
Permit			
Application Fee	\$600.00	\$800.00	\$1,000.00

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		Ground Water - Natural Attenuation	Ground Water - Active System
Remedial Action	Soil Remedial	<u>Remedial Action</u>	<u>Remedial Action</u>
<u>Permit Fees</u>	<u>Action Permit</u>	<u>Permit</u>	<u>Permit</u>
Remedial Action			
Permit			
Modification Fee	*[\$300.00]**\$400.00*	*[\$300.00]**\$600.00*	*[\$300.00]**\$800.00*
Remedial Action			
Permit Transfer			
Fee	*[\$400.00]**\$300.00*	*[\$600.00]**\$300.00*	*[\$800.00]**\$300.00*
Remedial Action			
Permit			
Termination Fee	\$600.00	\$800.00	\$1,000.00

7:26C-4.8 Oversight cost review

(a) The person responsible for conducting the remediation may contest an oversight cost the Department has assessed, pursuant to N.J.A.C. 7:26C-4.7, by submitting a written request to the Department pursuant to (c) and (d) below, within *[30]* ***45*** days after the billing date indicated on the oversight cost invoice that person received from the Department.

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(b) The Department shall deny an oversight cost review request if the request is based on the following:

1. – 3. (No change from proposal.)

4. Receipt of the request after the *[30-day]**45-day* period established in (a) above.

(c) – (h) (no change from proposal.)

(i) If the objector does not file a request for an oversight cost review within *[30]* *45* days after the billing date shown on the invoice for the Department's oversight cost, the full amount of the oversight costs shall be due and owing. If the invoice is not paid, the Department may take any action in accordance with N.J.A.C. 7:26C-4.9.

SUBCHAPTER 5. REMEDIATION FUNDING SOURCE AND FINANCIAL ASSURANCE

7:26C-5.12 Disbursements from the remediation funding source *[and financial assurance]*

(a) Except as provided in (b) below, a person who is required to establish and maintain a remediation funding source *[or financial assurance]* pursuant to this subchapter, and who has established a remediation trust fund, an environmental insurance policy, letter of credit or a line of credit, in satisfaction of the requirements of this

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subchapter, may submit to the provider, with a copy to the Department, no more frequently than once every three months, a written request to use the remediation funding source *[or financial assurance]* to pay for the actual cost of remediation. The request must include the following information:

1. – 3. (No change from proposal.)

(b) (No change from proposal.)

(c) If the disbursement request is submitted directly to the provider of the remediation funding source *[or financial assurance]* in accordance with (a) above, the person responsible for conducting the remediation and the licensed site remediation professional shall provide the Department with notice of the disbursement and the amount of the remaining remediation funding source *[or financial assurance]* within 30 days after disbursement on a form available on the Department's website at www.nj.gov/dep/srp/srra/forms.

SUBCHAPTER 6. FINAL REMEDIATION DOCUMENTS

7:26C-6.4 Modification, rescission and invalidation of a final remediation document

(a) – (d) (No change from proposal.)

(e) A licensed site remediation professional shall withdraw and reissue a response action outcome pursuant to 7:26C-6.2, upon a finding by the Department or by that

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licensed site remediation professional that the response action outcome was not prepared in accordance with this subchapter. When the finding that the response action outcome was not prepared in accordance with this chapter because it contains administrative errors, the licensed site remediation professional shall, within *[14]* ***30*** days:

1. – 2. (No change from proposal.)

SUBCHAPTER 7. DEED NOTICES, GROUND WATER CLASSIFICATION EXCEPTION AREAS AND REMEDIAL ACTION PERMITS

7:26C-7.5 Application for a remedial action permit

- (a) – (b) (No change from proposal.)

(c) The person responsible for conducting the remediation shall apply for a ground water remedial action permit for a monitored natural attenuation remedial action by submitting the following to the Department:

1. – 3. (No change from proposal.)
4. A ground water monitoring plan and schedule to monitor the characteristics and movement of contaminated ground water, to calibrate the model used to estimate the eventual extent of contaminated ground water, and to assess the effectiveness of the ***monitored*** natural attenuation ***remedy***, including ***[the following:]*** ***a**

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downgradient sentinel well, and any other additional monitoring wells necessary to document natural attenuation processes*;

- *[i. At least one area of concern monitoring well located at the source area;
- ii. At least one plume sampling point located downgradient of the source area but within the plume of contaminated ground water;
- iii. At least one plume fringe monitoring well located at the limit of the plume of contaminated ground water that was delineated to the ground water remediation standard applicable to the nearest downgradient receptor; and
- iv. At least one downgradient sentinel well located beyond the zone that was delineated to the ground water remediation standard applicable to the nearest downgradient receptor;]*

5. – 7. (No change from proposal.)

(d) (No change from proposal.)

7:26C-7.6 Remedial action permit application schedule

(a) (No change from proposal.)

(b) For all other situations not included in (a), above, the person responsible for conducting the remediation shall apply for a remedial action permit pursuant to N.J.A.C.

7:26C-7.4 according to the following schedule:

1. (No change from proposal.)

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2. For a natural attenuation ground water remedial action, when the person responsible for conducting the remediation is required to submit a remedial action report to the Department pursuant to N.J.A.C. 7:26E-[5.8]**5.7* that demonstrates that the natural attenuation remedial action is effective; and

3. For an active ground water remedial action, when the person responsible for conducting the remediation is required to submit a remedial action report to the Department pursuant to N.J.A.C. 7:26E-[5.8]**5.7* that demonstrates that an active ground water remedial action for the site or area of concern is operational and functioning as designed.

SUBCHAPTER 9. ENFORCEMENT

7:26C-9.5 Civil administrative penalty determination

(a) (No change from proposal.)

(b) The following summary of rules contained in the "Subchapter and Violation" column of the following tables is provided for informational purposes only. In the event that there is a conflict between the rule summary in the following tables and the corresponding rule provision, then the corresponding rule provision shall prevail. The "Citation" column lists the citation and shall be used to determine the specific rule to which the violation applies. In the "Type of Violation" column, "M" identifies a violation

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as minor and "NM" identifies a violation as non-minor. The length of the applicable grace period for a minor violation is indicated in the "Grace Period" column. The "Base Penalty" column indicates the applicable base penalty for each violation.

<u>Subchapter and Violation</u>	<u>Citation</u>	Type of <u>Violation</u>	Grace Period <u>Days</u>	Base <u>Penalty</u>
* * *				
<u>Administrative Requirements for the Remediation of Contaminated Sites N.J.A.C. 7:26C</u>				
1	General information			

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<p>Failure to conduct remediation in accordance with all applicable statutes, rules, *and* standards *[and guidance]* *, or to provide a written rationale and justification for deviation from technical guidance*.</p>	<p>7:26C-1.2(a)</p>	<p>NM</p>	<p>\$20,000</p>
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* * *

<p>Failure to immediately notify the Department of a discharge or IEC *[condition]*.</p>	<p>7:26C-1.7(a) and (b)</p>	<p>NM</p>	<p>\$25,000</p>
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Failure to immediately notify the Department upon the discovery of an IEC *[condition]*.	7:26E-1.11(a)1	NM	\$25,000
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Technical Requirements for Site Remediation

1 General Information

* * *

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Failure to complete the delineation of LNAPL, *[complete the installation]* initiate implementation* of LNAPL interim remedial measure, initiate operational monitoring and submit report within the required timeframe.	7:26E-1.10(c)	NM	\$25,000
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3	Preliminary Assessment and Site Investigation
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<p>*[Failure to support the conclusion that a contaminant found in soil is a diffuse anthropogenic pollutant.</p>	<p>7:26E-3.9(a)</p>	<p>NM</p>	<p>\$15,000</p>
<p>Failure to investigate areas of concern located in soil containing diffuse anthropogenic pollutants independently from the diffuse anthropogenic pollutants.</p>	<p>7:26E-3.9(b)</p>	<p>NM</p>	<p>\$15,000]*</p>

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<p>Failure to support the conclusion that contamination found in soil, ground water, surface water or sediment is due to migration to the site from an offsite source.</p>	<p>7:26E-[3.10]3.9* through [3.11]3.10*</p>	<p>NM</p>	<p>\$15,000</p>
<p>Failure to conduct a site investigation of any landfill suspected to be present at the site to determine whether a landfill is present.</p>	<p>7:26E-[3.12]3.11*</p>	<p>NM</p>	<p>\$15,000</p>
<p>Failure to conduct a site investigation when a historic fill is suspected to be present.</p>	<p>7:26E-[3.13]3.12*</p>	<p>NM</p>	<p>\$15,000</p>

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<p>Failure to submit a site investigation report that conforms to the requirements of N.J.A.C. 7:26E-[3.14]**3.13*.</p>	<p>7:26E-[3.14]**3.13*</p>	<p>NM</p>	<p>\$15,000</p>
<hr/>			
<p>Failure to submit a preliminary assessment report and site investigation report for a site being remediated pursuant to the Industrial Site Recovery Act, N.J.S.A. 13:1K- 6 et seq. within the required timeframe.</p>	<p>7:26E-[3.15]**3.14*(a)1 and (b)1</p>	<p>NM</p>	<p>\$15,000</p>

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Failure to submit a site investigation report for a site being remediated pursuant to the Underground Storage of Hazardous Substances Act, N.J.S.A. 58:10A-21 et seq. within the required timeframe.	7:26E-*[3.15]**3.14*(a)2	NM	\$15,000
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* * *

5	Remedial Action
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<p>Failure to submit a remedial action workplan prepared pursuant to N.J.A.C. *[5.6]**7:26E-5.5* or a corrective measures study workplan for approval when required.</p>	<p>7:26E-5.1(f)</p>	<p>NM</p>	<p>\$15,000</p>
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* * *

<p>*[Failure to implement a remedial action for soil contamination associated with diffuse anthropogenic pollutants.</p>	<p>7:26E-5.5</p>	<p>NM</p>	<p>\$15,000]*</p>
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<p>Failure to prepare and submit a remedial action workplan that complies with all listed requirements.</p>	<p>7:26E-*[5.6]**5.5*</p>	<p>NM</p>	<p>\$15,000</p>
<p>Failure to apply for and obtain all required permits and comply with public notice requirements, prior to initiating the activity requiring the permit.</p>	<p>7:26E-*[5.7]**5.6*</p>	<p>NM</p>	<p>\$15,000</p>
<p>Failure to submit a remedial action report that conforms to the requirements of N.J.A.C. 7:26E-*[5.8]**5.7*.</p>	<p>7:26E-*[5.8]**5.7*</p>	<p>NM</p>	<p>\$15,000</p>

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Failure to conduct a	7:26E-*[5.9]**5.8*	NM	\$15,000
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remedial action within
the required regulatory
timeframe

SUBCHAPTER 10. TECHNICAL ASSISTANCE GRANTS

7:26C-10.4 Pre-application process

(a) - (d) (No change from proposal.)

(e) If the Department does not receive an additional petition and Letter of Intent within the prescribed time period, the Department will advise the community group in writing that it has 60 days to file an application for a technical assistance grant pursuant to N.J.A.C. *[7:26E]**7:26C*-10.5.

(f) - (g) (No change from proposal.)

SUBCHAPTER 13. REMEDIATION OF UNREGULATED HEATING OIL TANK SYSTEMS

7:26C-13.3 Person responsible for conducting the remediation of an unregulated heating oil tank system using a certified subsurface evaluator

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(a) (No change from proposal.)

(b) The Department will issue a no further action letter to the person responsible for conducting the remediation in accordance with N.J.A.C. 7:26C-6, upon receipt and review of the following:

1. - 3. (No change from proposal.)

4. A Remedial Action Report prepared pursuant to the Technical Requirements for Site Remediation at N.J.A.C. 7:26E-~~[5.8]~~**5.7**.

(c) (No change from proposal.)

7:26C-13.4 Person responsible for conducting the remediation of an unregulated heating oil tank system using a licensed site remediation professional

(a) (No change from proposal.)

(b) ~~*[Upon a determination by the licensed site remediation professional that the discharge has been remediated in accordance with all applicable rules, standards and guidance, the licensed site remediation professional shall issue a response action outcome]*~~ ***The Department will issue a no further action letter to the person responsible for conducting the remediation,*** pursuant to N.J.A.C. 7:26C-6 ~~*[to the person responsible for conducting the remediation.]*~~ ***upon receipt and review of a certification by the licensed site remediation professional pursuant to N.J.A.C. 7:14B-1.7(e), and the submissions listed in N.J.A.C. 7:26C-13.3(b)2 through 4.**

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(c) All submissions required by this section shall be made to:

**New Jersey Department of Environmental Protection
Bureau of Case Assignment and Initial Notice
401 E. State St.
P.O. Box 434
Trenton, NJ 08625-0434***

7:26C-13.5 Special conditions

(a) The person responsible for conducting the remediation of the unregulated heating oil system shall comply with N.J.A.C. 7:26E-1.11 when the discharge from the unregulated heating oil tank system results in an immediate environmental concern *[condition]*.

(b) The person responsible for conducting the remediation shall obtain the appropriate Departmental approvals when:

1. The remedy includes a discharge to groundwater requiring a New Jersey Pollution Discharge Elimination System permit pursuant to N.J.A.C. 7:26E-
*[5.7]**5.6*;
2. - 3. (No change from proposal.)

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SUBCHAPTER 14. DIRECT OVERSIGHT

7:26C-14.2 Compulsory direct oversight

(a) (No change from proposal.)

(b) The person responsible for conducting the remediation that is in direct oversight as described in (a) above shall:

1. – 4. (No change from proposal.)

5. Establish a remediation trust fund pursuant to N.J.A.C. 7:26C-~~[5.4(g)]~~**5.4** in the amount of the estimated cost of the remediation, within 90 days after the applicable event in (a) above, and maintain a remediation trust fund in the amount of the estimated cost of the remediation;

6. – 10. (No change from proposal.)

SUBCHAPTER 16. LINEAR CONSTRUCTION PROJECTS

7:26C-16.2 Requirements for a person engaged in a linear construction project

(a) Any person who initiates a linear construction project shall:

1. – 5. (No change from proposal.)

6. Obtain and comply with all permits necessary for the linear construction project pursuant to N.J.A.C. 7:26C-7 and N.J.A.C. 7:26E-~~[5.7]~~**5.6**; and

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7. Provide the Department a final report that describes the management of contamination encountered during the linear construction project, within *[60]**180* days after completion of the project or upon request of the Department, whichever occurs sooner.

APPENDIX B - MODEL DEED NOTICE

DEED NOTICE

This shell document contains blanks and matter in brackets []. These blanks shall be replaced with the required site information prior to recording.

Matter bracketed [] is not intended for deletion, but rather is intended to be descriptive of the variable information that may be contained in the final document.

* * *

7B. EMERGENCIES. In the event of an emergency which presents, or may present, an unacceptable risk to the public health and safety, or to the environment, or immediate environmental concern, see N.J.S.A. 58:10C-2, any person may temporarily breach an engineering control provided that that person complies with each of the following:

* * *

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v. Notifies the Department of Environmental Protection when the emergency or immediate environmental concern *{condition}* has ended by calling the DEP Hotline at 1-877-WARNDEP or 1-877-927-6337; and

* * *

APPENDIX D

MODEL RESPONSE ACTION OUTCOME DOCUMENT

* * *

NOTICES

Well Decommissioning

[Select One: Pursuant to N.J.A.C. 7:9D-3, all wells installed as part of this remediation have been properly decommissioned by a New Jersey licensed well driller of the proper class in accordance with the procedures set forth in N.J.A.C. 7:9D and the well driller's well decommissioning report has been submitted to the Bureau of Water *[Systems]* ***Allocation*** and Well Permitting. OR Pursuant to N.J.A.C. 7:9D-3 any wells installed as part of this remediation that will no longer be used for remediation have been properly decommissioned. If any wells have been properly decommissioned, the well driller's well decommissioning report has been submitted to the Bureau of Water *[Systems]* ***Allocation*** and Well Permitting. Pursuant to N.J.S.A. 58:4A, any monitoring wells remaining onsite shall be properly decommissioned prior to the termination of the

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applicable remedial action permit. A New Jersey licensed well driller shall decommission the well(s) in accordance with the requirements of N.J.A.C. 7:9D-3 and submit the decommissioning report on your behalf to the Bureau of Water *[Systems]* ***Allocation*** and Well Permitting. More information about regulations regarding the maintenance and decommissioning of wells in New Jersey can be found at www.nj.gov/dep/watersupply. For a list of New Jersey licensed well drillers, click on the "reports" button in the left column and select "access the well permit reports." Questions can be emailed to wellpermitting@dep.state.nj.us.] [Select if applicable: Please note that [add count of wells to which this applies] well(s) could not be located or properly decommissioned. Contact has been made with the Bureau of Water *[Systems]* ***Allocation*** and Well Permitting regarding appropriate steps to document and conclude efforts in this regard.]

* * *

*[Classification Exception Area Removal

Based upon the improvement in ground water quality, it has been determined that the ground water classification exception area and well restriction area established in the Department's [Date of Letter] letter are no longer required for the referenced remediation. Removal of the classification exception area and well restriction area is based upon sampling conducted on [Dates of Sampling] at the above referenced location

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which demonstrated that ground water has met the Ground Water Quality Standards specified at N.J.A.C. 7:9C.]*

* * *

Ground Water Contamination not yet Investigated

This Response Action Outcome does not address the ground water contamination (specifically. [identify contaminants]) at this site. This contamination was reported to the Department and assigned the Department's Hotline incident number 00-00-00-0000-00. Pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E-4.3, a remedial investigation of ground water (including a background investigation pursuant to N.J.A.C. 7:26E-[3.10]****3.9*** if an offsite source is being claimed) is required. In order to identify any onsite areas of concern that may be contributing to the noted contamination a preliminary assessment and site investigation (as applicable), pursuant to N.J.A.C. 7:26E-3 should be conducted. [Select if Applicable This contamination is being addressed under Department Program Interest # .] Please note that you may have an affirmative obligation, pursuant to the Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1.3, to remediate the contamination (not otherwise determined to be from an offsite source) within specific regulatory and mandatory timeframes and within the statutory timeframe specified at N.J.S.A. 58:10C-27. Be advised that ground water contamination exists above the Ground Water Quality Standards (N.J.A.C. 7:9C-1.7) which may limit ground water use at this site. Also, any redevelopment on this site

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should take into consideration the potential for vapor intrusion from the ground water contamination.

* * *

Contamination Remains On-Site due to Off-site Contamination

Please be advised that contamination in the ground water at this site exists above the Ground Water Quality Standards (N.J.A.C. 7:9C-1.7) which may limit ground water use at this site. Based on completion of a preliminary assessment and site investigation (as applicable), pursuant to N.J.A.C. 7:26E-3, and completion of a background investigation pursuant to N.J.A.C. 7:26E-3.10, there is no onsite contribution to this contamination and I have confirmed the source of this contamination is from offsite. This aspect of the site was reported to the Department and assigned the Department's Hotline incident number 00-00- 00-0000-00. [Select if applicable: This ground water contamination is being addressed under Department Program Interest # ____.] Any redevelopment on this site should take into consideration the potential for vapor intrusion from the ground water contamination.

...

CHAPTER 26D

REMEDIATION STANDARDS

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SUBCHAPTER 1. GENERAL INFORMATION

7:26D-1.4 Applicability

(a) (No change from proposal.)

(b) The requirements of this chapter shall be applied pursuant to N.J.A.C. 7:26E-[1.3]**1.5*(c) regardless of whether remediation is conducted with Department oversight pursuant to N.J.A.C. 7:26C.

(c) (No change from proposal.)

7:26D-1.5 Definitions

...

["Oversight document" means any document defined as an oversight document pursuant to the Department Oversight of the Remediation of Contaminated Sites rules at N.J.A.C. 7:26C-1.3.]

...

SUBCHAPTER 2. MINIMUM GROUND WATER REMEDIATION STANDARDS

7:26D-2.2 Minimum ground water remediation standards

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(a) The minimum remediation standards to which ground water shall be remediated are:

1. - 3. (No change from proposal.)

4. For all ground water, regardless of classification, each of the following narrative ground water remediation standards, as applicable:

i. - iii. (No change from proposal.)

iv. The remediation requirements in N.J.A.C. 7:26E-1 through ***[8]**5*** in order to both:

(1) - (2) (No change from proposal.)

v. The free and residual product removal, treatment, or containment requirements of N.J.A.C. 7:26E-***[6.1(d)]**5.1(e)***;

vi. (No change from proposal.)

vii. The following factors, as applicable on a site-specific basis, for selecting an appropriate ground water remedial action:

(1) - (3) (No change from proposal.)

(4) The ambient ground water quality at the site and in the area surrounding the site resulting from both human activities and natural conditions; ***and***

(5) The physical and chemical characteristics of the contaminants of concern***[**; and

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(6) The criteria in N.J.A.C. 7:26E-6.3(d)1i, used to determine when natural remediation is appropriate as a remedial action for ground water contamination]*.

(b) (No change from proposal.)

SUBCHAPTER 3. MINIMUM SURFACE WATER REMEDIATION STANDARDS

7:26D-3.2 Minimum surface water remediation standards

(a) The minimum remediation standards for surface water are:

1. (No change from proposal.)

2. The following narrative surface water remediation standards:

i. - ii. (No change from proposal.)

iii. The remediation requirements in N.J.A.C. 7:26E-1 through *[8]**5* in order to both:

(1) - (2) (No change from proposal.)

iv. The free and residual product removal, treatment, or containment requirements of N.J.A.C. 7:26E-*[6.1(d)]**5.1(e)*; and

v. (No change from proposal.)

(b) (No change from proposal.)

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APPENDIX 4 - Methods for the Development of Alternative Ingestion-Dermal Soil Remediation Standards

...

B. Alternative Remediation Standard Options

Option I - Site Specific Default Values (Lead Site Contamination)

...

The Department does not require the remediation of a discharge to levels that are lower than natural background levels. See N.J.S.A. 58:10B-12(g)(4). The person responsible for conducting the remediation may conduct a site investigation to determine background levels in soil, pursuant to N.J.A.C. 7:26E-*[3.10]****3.8*** on a site specific basis.

...

APPENDIX 5 - Methods for the Development of Alternative Inhalation Soil Remediation Standards

...

B. Alternative Remediation Standard Options Option I. Volatile Phase Contaminants

1. For volatile phase contaminants, three parameters can be varied to develop an ARS.

These parameters are depth range of contamination, organic carbon content of the soil,

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and site size. These parameters are applicable to residential and non-residential scenarios as well as carcinogenic and noncarcinogenic health endpoints.

i. Depth Range of Contamination

(1) - (3) (No change from proposal.)

(4) The Department will not require the use of an institutional control pursuant to N.J.A.C. *[7:26E-8]**7:26C-7* for an ARS based on depth range of contamination when the depth range of contamination begins at the ground surface. The Department will require the use of an institutional control pursuant to N.J.A.C. *[7:26E-8]**7:26C-7* when an ARS is based on depth range of contamination that begins below the ground surface.

ii. Soil organic carbon content (foc):

(1) - (6) (No change from proposal.)

(7) The Department will not require the use of an institutional control pursuant to N.J.A.C. *[7:26E-8]**7:26C-7* for an ARS based on soil organic carbon content.

Option II. Particulate Phase Contaminants

1. For Residential Exposure

i. Vegetative Cover:

(1) - (3) (No change from proposal.)

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(4) The Department will require the use of an institutional control pursuant to N.J.A.C. *[7:26E-8]****7:26C-7*** for an ARS based on an actual amount of vegetative cover to ensure that the basis for the ARS is maintained.

...

CHAPTER 26E

TECHNICAL REQUIREMENTS FOR SITE REMEDIATION

SUBCHAPTER 1. GENERAL INFORMATION

7:26E-1.5 General remediation requirements

(a) (No change from proposal.)

(b) Any person conducting remediation pursuant to this chapter shall apply*, **pursuant to N.J.A.C. 7:26C-1.2(a)3***, any available and appropriate technical guidance concerning site remediation as issued by the Department *[pursuant to N.J.A.C. 7:26C-1.2(a)3]**, **or shall provide a written rationale and justification for any deviation from guidance***. The Department's **technical***guidance can be found on the Department's website at www.nj.gov/dep/srp/srra/guidance.

(c) The person responsible for conducting the remediation of a site shall remediate:

1. (No change from proposal.)

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2. To comply with the standards or criteria developed by the Department under N.J.S.A. 58:10B-12a for that site prior to June 2, 2008, provided:

i. (No change from proposal.)

ii. The remedial action workplan or a remedial action report meets the requirements of N.J.A.C. 7:26E-*[5.6]**5.5* or N.J.A.C. 7:26E-*[5.8]**5.7*, respectively, and is approved as written by a licensed site remediation professional; and

iii. (No change from proposal.)

(d) - (i) (No change from proposal.)

7:26E-1.6 General reporting requirements

(a) (No change from proposal.)

(b) The person responsible for conducting the remediation shall include, in each remedial phase workplan and report, the following information:

1. - 3. (No change from proposal.)

4. A list of:

i. All variances from the requirements of this chapter *[applied for]**submitted* pursuant to N.J.A.C. 7:26E-1.7; and

ii. (No change from proposal.)

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7:26E-1.8 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless context clearly indicates otherwise:

* * *

["Diffuse anthropogenic pollutants" or "DAP" means contamination from broadly distributed contaminants, often arising from multiple sources. DAP generally arises from atmospheric deposition, but may also contain contributions from random, non-attributable, non-point sources.]

* * *

“Engineered response action” means an *[active]* engineered system that is designed and implemented to reduce the risk *[from]* ***of human exposure to***contamination *[to humans]* ***from an IEC*** to or below acceptable standards *[by remediating:

1. Exposure to contaminants; or
2. The source of a direct contact IEC]*.

* * *

“Limited restricted use remedial action” means any remedial action *[for soil]* that requires the continued use of institutional controls but does not require the use of an engineering control in order to meet the established health risk or environmental standards.

* * *

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“Restricted use remedial action” means any remedial action *[for soil]* that requires the continued use of engineering and institutional controls in order to meet the established health risk or environmental standards.

* * *

“Unrestricted use remedial action” means any remedial action *[for soil]* that does not require the continued use of either engineering or institutional controls to meet the established health risk or environmental standards.

7:26E-1.11 Immediate environmental concern requirements

(a) The person responsible for conducting the remediation shall, upon the identification of any immediate environmental concern (IEC):

1. – 5. (No change from proposal.)
6. Within 60 days after identifying any IEC:
 - i. (No change from proposal.)
 - ii. For a vapor intrusion IEC:
 - (1) (No change from proposal.)
 - (2) Identify and sample all buildings within 100 feet of the impacted building, identify any additional buildings *[at risk]* ***whose air may be impacted*** and conduct additional vapor intrusion investigations pursuant to N.J.A.C. 7:26E-1.15;

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iii. For a direct contact IEC*[:

(1) Implement]* * **implement*** an engineered response action that prevents physical human contact with contaminants*[: and

(2) Identify and sample all areas of concern and evaluate for direct contact threats to nearby humans]*;

7. (No change from proposal.)

8. Within one year after identifying any IEC, identify all contaminant source areas contributing to the IEC, initiate control of all IEC contaminant source areas, and submit to the Department an IEC source control report that includes the following:

i. – vi. (No change from proposal.)

vii. A monitoring plan for any engineered response action; ***and***

viii. A monitoring plan for the wells or buildings located near the wells or buildings that are impacted by the IEC; *[and]*

[ix. A schedule for the completion of the remediation investigation and submission of the remedial investigation report, in light of the existence of the IEC , in a time period shorter than the timeframe allowed by N.J.A.C. 7:26E-4.10; and]

9. (No change from proposal.)

7:26E-1.12 Receptor evaluation - general and reporting requirements

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(a) - (d) (No change from proposal.)

(e) The person responsible for conducting the remediation shall submit an updated receptor evaluation on a form found on the Department's website at www.nj.gov/dep/srp/srra/forms with the following documents, as applicable:

1. - 2. (No change from proposal.)

3. A remedial action report, pursuant to N.J.A.C. 7:26E-*[5.8]****5.7**.*

(f) (No change from proposal.)

SUBCHAPTER 2. QUALITY ASSURANCE FOR SAMPLING AND LABORATORY ANALYSIS

7:26E-2.1 Quality assurance requirements

(a) The person responsible for conducting the remediation shall ensure that all sampling and laboratory analysis are conducted as follows:

1. - 2. (No change from proposal.)

3. Derive the reporting limit for *[a]* ***an organic*** compound analyzed by a particular method from the lowest concentration standard used in the calibration of the method as adjusted by sample specific preparation and analysis factors (for example, sample dilutions and percent solids) *, **and derive the reporting limit for an inorganic compound analyzed by a particular method from the lowest level check standard***.

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4. – 6. (No change from proposal.)

7. Use canister-based collection techniques for the analysis of air samples when analyzed by NJDEP Method LLTO-15, incorporated herein by reference, which can be found at on the Department's website at

[www.state.nj.us/dep/srp/guidance/vaporintrusion/newmethod2007/llto15.pdf]

www.nj.gov/dep/srp/guidance/vaporintrusion/newmethod2007/llto15.pdf or

USEPA Method TO-15 found on the USEPA's website at

www.epa.gov/ttn/amtic/airtox.html*, **as amended and/or supplemented**;

8. Collect non-aqueous samples to be analyzed for volatile organics using the following procedures:

i. USEPA Method 5035A found on the USEPA's website at

www.epa.gov/sam/method22.htm, incorporated herein by reference*, **as amended**

and/or supplemented*; or

ii. (No change from proposal.)

9. (No change from proposal.)

10. When *[aqueous and]* non-aqueous samples are taken for hexavalent chromium analysis:

i. - ii. (No change from proposal.)

11. – 15. (No change from proposal.)

(b) – (e) (No change from proposal.)

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SUBCHAPTER 3. PRELIMINARY ASSESSMENT AND SITE INVESTIGATION

7:26E-3.1 Preliminary assessment

(a) - (c) (No change from proposal.)

(d) If a potentially contaminated area of concern is identified during the preliminary assessment, the person responsible for conducting the remediation who is subject to (b) above shall conduct a site investigation pursuant to N.J.A.C. 7:26E-3.3 through ~~*[3.15]~~****3.14***.

(e) (No change from proposal.)

7:26E-3.2 Preliminary assessment report

(a) The person responsible for conducting the remediation to whom N.J.A.C. 7:26C-3.1(b) applies shall prepare a preliminary assessment report that includes:

1. (No change from proposal.)
2. Scaled site plans detailing lot and block numbers, property and leasehold boundaries, current and historic structures, areas where fill ~~*[or cover material]~~* has been brought on site, paved and unpaved areas, vegetated and unvegetated areas, all areas of concern and active and inactive wells;
3. (No change from proposal.)

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4. A summary of the data and information *[evaluated and all phases of work for each particular area of concern that shall be integrated into a single discussion of that area]* ***reviewed, which shall be compiled and presented by area of concern***;

5. – 6. (No change from proposal.)

7:26E-3.3 Site investigation

(a) – (b) (No change from proposal.)

(c) The person responsible for conducting the remediation to whom N.J.A.C. 7:26E-3.3(b) applies shall conduct a site investigation in accordance with this section and N.J.A.C. 7:26E-3.4 through *[3.15]****3.14***, as applicable.

(d) The person responsible for conducting the remediation who is subject to *[N.J.A.C.]* (b) above shall:

1. *[Conduct a comparison of]****Compare*** all site data with all remediation standards and criteria;

2. – 3. (No change from proposal.)

7:26E-3.4 Site investigation – soil

(a) The person responsible for conducting the remediation who is subject to N.J.A.C. 7:26E-3.3(b) shall conduct a site investigation of soil by sampling the soil in each

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potentially contaminated area of concern that includes soil to determine if any contaminants are present above any soil remediation standard, and shall:

1. (No change from proposal.)

2. Use appropriate sample collection methods, but ***composite soil sampling*** shall not ***[use composite soil sampling as a part of the]*** ***be used for*** site investigation sample collection;

3. (No change from proposal.)

(b) (No change from proposal.)

7:26E-3.5 Site investigation – ground water

(a) The person responsible for conducting the remediation who is subject to N.J.A.C. 7:26E-3.3(b) shall evaluate all potentially contaminated areas of concern to determine if ***[ground water may have been or may be contaminated above any ground water remediation standard. If there is a potential that ground water has been or is contaminated by the area of concern]*** ***there is the potential that ground water has been contaminated. At an area of concern where there is a potential that ground water has been contaminated***, the person responsible for conducting the remediation shall conduct ground water sampling as follows:

1. – 3. (No change from proposal.)

(b) (No change from proposal.)

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7:26E-3.6 Site investigation – surface water and sediment

(a) If ***there is a potential that*** surface water ***[may have been or may be]*** ***has been*** impacted by the site, the person responsible for conducting the remediation who is subject to N.J.A.C. 7:26E-3.3(b) shall determine if there is any evidence that contamination from the site has reached the surface water.

(b) – (c) (No change from proposal.)

7:26E-3.7 Site investigation – building interiors

(a) (No change from proposal.)

(b) If the concentration of any contaminant identified during this part of the site investigation exceeds any remediation standard outside the building, then the person responsible for conducting the remediation shall conduct ***[additional]**a*** remedial investigation necessary for the impacted media pursuant to N.J.A.C. 7:26E-4.

7:26E-3.8 Site investigation - natural background investigation of soil and ground water

(a) If during the site investigation, any ***[hazardous substance, hazardous waste, or pollutant]**contaminant*** that may be naturally occurring is found in soil at any area of concern in excess of a soil remediation standard, then the person responsible for conducting the remediation may investigate the extent to which the concentration of the

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*[hazardous substance, hazardous waste, or pollutant]****contaminant*** in soil may be due to natural background. This investigation shall be conducted by:

1. Collecting and analyzing a sufficient number of samples in appropriate locations of similar soil type on or near the site that have not been impacted by current or historical on-site or off-site activities to adequately determine that the concentration of the *[hazardous substance, hazardous waste, or pollutant]****contaminant*** in the soil may be due to natural background;

2. Demonstrating that the distribution of the *[hazardous substance, hazardous waste, or pollutant]****contaminant*** in the soil does not follow a concentration gradient indicative of a discharge; and

3. Demonstrating that the concentration of the *[hazardous substance, hazardous waste, or pollutant]****contaminant*** in the soil is within ranges reported in appropriate references for soil background levels for New Jersey, if available.

(b) (No change from proposal.)

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(c) If during the site investigation, a *[hazardous substance, hazardous waste, or pollutant]**contaminant* is found in ground water in excess of the ground water remediation standard, then the person responsible for conducting the remediation may investigate the extent to which the concentration of the *[hazardous substance, hazardous waste, or pollutant]**contaminant* in ground water may be due to natural background. This investigation shall be conducted by:

1. Collecting and analyzing a sufficient number of samples in appropriate locations, both horizontally and vertically, on or near the site, that have not been impacted by current or historical on-site or off-site activities to adequately determine the concentration of the *[hazardous substance, hazardous waste, or pollutant]**contaminant* in the ground water is due to natural background;

2. Demonstrating the distribution of the *[hazardous substance, hazardous waste, or pollutant]**contaminant* in the ground water does not follow a concentration gradient indicative of a discharge; and

3. Demonstrating the concentration of the *[hazardous substance, hazardous waste, or pollutant]**contaminant* in ground water is within ranges reported in

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appropriate references for ground water background levels for New Jersey, if available.

(d) (No change from proposal.)

(e) To the extent that the person responsible for conducting the remediation concludes the presence of a *[hazardous substance, hazardous waste, or pollutant]****contaminant*** in soil or ground water is due to natural background conditions, then no further remediation is necessary.

*[7:26E-3.9 Site investigation - diffuse anthropogenic pollutants in soil

(a) If during the site investigation, a contaminant is found in soil at an area of concern in excess of a soil remediation standard, then the person responsible for conducting the remediation may investigate the extent to which the contamination in the soil may be due to diffuse anthropogenic pollutants. This investigation shall be conducted by:

1. Establishing the extent to which the contaminant is a diffuse anthropogenic pollutant;

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2. Collecting and analyzing a sufficient number of samples in appropriate locations on or near the site that have not been impacted by current or historical on-site or off-site activities in order to:

i. Adequately characterize the contaminant concentration; and

ii. Demonstrate the contaminant's distribution in the soil does not follow a concentration gradient indicative of a discharge; and

3. Conducting a preliminary assessment pursuant to N.J.A.C. 7:26E-3.1 and if necessary, a site investigation pursuant to N.J.A.C. 7:26E-3.3 to determine whether a source of the contaminant observed exists on site.

(b) The person responsible for conducting the remediation shall investigate areas of concern located in soil containing diffuse anthropogenic pollutants independently from the diffuse anthropogenic pollutants.

(c) To the extent that the person responsible for conducting the remediation concludes that contamination is due solely to diffuse anthropogenic pollutants, then the person responsible for conducting the remediation shall implement a remedial action pursuant to N.J.A.C. 7:26E-5.5.]*

Recodify 7:26E-3.10 - 7:26E-3.13 as 7:26E-3.9 - 7:26E-3.12 (No change in text from proposal.)

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7:26E-~~[3.14]~~**3.13*** Site investigation report

(a) The person responsible for conducting the remediation who is subject to N.J.A.C.

7:26E-3.3(b) shall include the following in the site investigation report:

1. A presentation and discussion of all of the information identified or collected during the site investigation, pursuant to N.J.A.C. 7:26E-3.3 through ~~[3.13]~~**3.12**;
2. – 5. (No change from proposal.)
6. Findings and recommendations, including:
 - i. (No change from proposal.)
 - ii. A discussion of the following items by area of concern:
 - (1) A detailed description, including dimensions, ~~[suspected and actual contamination]~~***results of all sampling data***, and suspected source of the contamination; and”
 - (2) (No change from proposal.)

Recodify 7:26E-3.15 as 7:26E-3.14 (No change in text from proposal.)

SUBCHAPTER 4. REMEDIAL INVESTIGATIONS

7:26E-4.1 Remedial investigation requirements

(a) – (c) (No change from proposal.)

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(d) The person responsible for conducting the remediation shall prepare and submit to the Department a remedial investigation work plan for approval that describes all the action to be conducted to fulfill the purpose of (a) above and the requirements of (c) above when the remediation is being conducted:

1. Partially or solely to satisfy the obligations under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq. *[,]* ***and***, is a priority site under the Government Performance and Results Act, 40 U.S.C. §§ 11101 et seq., *[, and the U.S. Environmental Protection Agency is the lead agency for the remediation.]*;

2. – 3. (No change from proposal.)

7:26E-4.10 Remedial investigation regulatory timeframes

(a) *The person responsible for conducting the remediation shall complete the remedial investigation and submit a remedial investigation report by May 7, 2014 for a site where a discharge was discovered prior to May 7, 1999.

(b)* Except as provided in *(e)**(d)* below *or N.J.A.C. 7:26E-1.11(a)ix]*, or as *extended**lengthened* under *(b) and* (c) *and (d)* below, the person responsible for conducting the remediation shall complete the remedial investigation and submit to the Department a remedial investigation report prepared pursuant to N.J.A.C. 7:26E-4.9 by the earliest applicable regulatory timeframe as follows:

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1. The person responsible for conducting the remediation who is remediating the industrial establishment pursuant to the Industrial Site Recovery Act, N.J.S.A. 13:1K-6 et seq., and the Industrial Site Recovery Act rules, N.J.A.C. 7:26B, shall complete the remedial investigation and submit a remedial investigation report as follows:

i. For the remediation of an industrial establishment with only soil contamination:

(1) (No change from proposal.)

(2) Within three years after the earliest applicable requirement to submit a preliminary assessment and site investigation report pursuant to N.J.A.C. 7:26E-*[3.15]****3.14***(b)1 where the earliest applicable requirement to remediate pursuant to N.J.A.C. 7:26C-2.2 occurred on or after March 2, 2010;

ii. For the remediation of an industrial establishment with contaminants in soil and/or any other medium:

(1) (No change from proposal.)

(2) Within five years after the earliest applicable requirement to submit a preliminary assessment and site investigation report pursuant to N.J.A.C. 7:26E-*[3.15]****3.14***(b)1 where the earliest applicable requirement to remediate pursuant to N.J.A.C. 7:26C-2.2 occurred on or after March 2, 2010;

or

iii. (No change from proposal.)

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2. The person responsible for conducting the remediation who is remediating a discharge from the underground storage tank pursuant to the Underground Storage of Hazardous Substances Act, N.J.S.A. 58:10A-21 et seq., and Underground Storage Tank rules, N.J.A.C. 7:14B, shall complete the remedial investigation and submit a remedial investigation report as follows:

i. For the remediation of an UST discharge that only resulted in soil contamination:

(1) (No change from proposal.)

(2) Within three years after the earliest applicable requirement to submit a site investigation report pursuant to N.J.A.C. 7:26E-*[3.15]****3.14***(b)2 where the earliest requirement to remediate pursuant to N.J.A.C. 7:26C-2.2 occurred on or after March 2, 2010; and

ii. For the remediation of an UST discharge with contaminants in soil and/or any other medium:

(1) (No change from proposal.)

(2) Within five years after the earliest applicable requirement to submit a site investigation report pursuant to N.J.A.C. 7:26E-*[3.15]****3.14***(b)2 where the earliest applicable requirement to remediate pursuant to N.J.A.C. 7:26C-2.2 occurred on or after March 2, 2010; or

iii. (No change from proposal.)

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3. For all other ***[cases]**contaminated sites*** not included in ***[(a) or (b)1]**1*** and 2, above, the person responsible for conducting the remediation shall complete the remedial investigation and submit a remedial investigation report as follows:

i. (No change from proposal.)

ii. For the remediation of ***[discharges]**a discharge*** with contaminants in soil and/or any other medium:

(1) - (2) (No change from proposal.)

iii. (No change from proposal.)

[(c)**(b) The person responsible for conducting the remediation may ***[extend]*** ***lengthen*** the ***[applicable]*** regulatory timeframe ***established pursuant to (a) above,*** based on the site conditions associated with the site undergoing remediation ***without prior Department approval*** as follows:

1. ***[A one-time, one year extension of the regulatory timeframe for completing the]**For each of the following complexity factor groups that exist at the contaminated site, the regulatory timeframe for completing the*** remedial investigation and submitting a remedial investigation report ***[that is listed in (b)]*** ***established pursuant to (a)*** above, may be ***[sought for any of the following site conditions]*** ***lengthened by one year to a maximum of three years*:**

i. – iii. (No change from proposal.)

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2. *[A one-time, one year extension of]* ***When the person responsible for conducting the remediation seeks a final remediation document for an entire site that is not required to be remediated pursuant to the Industrial Site Recovery Act, N.J.S.A. 13:1K-6 et seq., and the Industrial Site Recovery Act Rules, N.J.A.C. 7:26B,*** the regulatory timeframe for completing the remedial investigation and submitting a remedial investigation report that is listed at (b)2 and 3 above, may be *[sought when the person responsible for conducting the remediation wants a final remediation document for the entire site and the site does not include an industrial establishment that the owner or operator is required to remediate pursuant to the Industrial Site Recovery Act, N.J.S.A. 13:1K-6 et seq., and the Industrial Site Recovery Act Rules, N.J.A.C. 7:26B]* ***lengthened by one year***.

*(d)**(c)* If the person responsible for conducting the remediation *[seeks to extend]* ***lengthens*** the submittal date for the remedial investigation report pursuant to *(c)* **(b)*** above, the person responsible for conducting the remediation shall notify the Department at least 30 days prior to the submittal date for the remedial investigation report established pursuant to *(b)* **(a)*** above, using a form available on the Department's website on www.nj.gov/dep/srp/srra/forms. Information to be supplied by filling out the form includes:

1. (No change from proposal.)
2. Reason *[for the extension request]****to lengthen the timeframe***;

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3. - 4. (No change from proposal.)

Recodify (e) – (f) as (d) - (e) (No change in text from proposal.)

SUBCHAPTER 5. REMEDIAL ACTION

7:26E-5.1 Remedial action requirements

(a) – (b) (No change from proposal.)

(c) The person responsible for conducting the remediation shall conduct the remedial action within the applicable regulatory timeframe listed in N.J.A.C. 7:26E-*[5.9]****5.8*** by:

1. (No change from proposal.)

2. Submitting a remedial action report for all remedial actions at the site to the Department pursuant to N.J.A.C. 7:26E-*[5.8]****5.7***; and

3. *[Causing]****Ensuring that*** a licensed site remediation professional *[to submit]****submits*** a final remediation document to the Department pursuant to the Administrative Requirements for the Remediation of Contaminated Sites, at N.J.A.C. 7:26C-6.2.

(d) – (e) (No change from proposal.)

(f) The person responsible for conducting the remediation shall submit a remedial action workplan prepared pursuant to N.J.A.C. 7:26E-*[5.6]****5.5*** or a corrective

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measures study work plan prepared pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq., to the Department for approval when the remediation is being conducted:

1. Partially or solely to satisfy the obligations under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq. *[,]* ***and*** is a priority site under the Government Performance and Results Act, 40 U.S.C. §§ 11101 et seq. *[, and the U.S. Environmental Protection Agency is the lead agency for the remediation.]* ;

2. – 3. (No change from proposal.)

7:26E-5.2 Specific remedial action requirements

(a) - (f) (No change from proposal.)

(g) The person responsible for conducting the remediation shall prepare a fill use plan whenever alternative fill or clean fill is proposed as part of a remedial action and shall submit the fill use plan to the Department as part of the remedial action workplan required pursuant to N.J.A.C. 7:26E-~~[5.6]~~**5.5**.

7:26E-5.3 Remedial action requirements for residences, schools, and child care centers

(a) - (b) (No change from proposal.)

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(c) When the person responsible for conducting the remediation determines not to use an unrestricted use remedial action or a presumptive remedy, the person responsible for conducting the remediation shall:

1. Propose an alternative remedy by preparing and submitting to the Department for approval a remedial action workplan pursuant to N.J.A.C. 7:26E-*[5.6]**5.5* that includes the following information:

i. - iii. (No change from proposal.)

2. (No change from proposal.)

(d) The person responsible for conducting the remediation shall submit a remedial action workplan pursuant to N.J.A.C. 7:26E-*[5.6]**5.5* and obtain the Department's written approval at any area of concern:

1. - 2. (No change from proposal.)(e) (No change from proposal.)

*(f) For all new construction where a Residential Type I or Residential Type II building, school, or child care center is planned at a site where remediation was initiated on or after May 7, 2010, the person responsible for conducting the remediation shall install a vapor barrier and passive subsurface depressurization system suitable for conversion to an active system as a part of the new construction.

(g) For any existing building where conversion to a Residential Type I or Residential Type II building, school, or child care center is planned on a site where remediation was initiated on or after May 7, 2010, the person responsible for conducting the remediation

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shall conduct, prior to the change in use, a vapor intrusion investigation pursuant to N.J.A.C. 7:26E-1.15(c).]*

Table 5-1
Presumptive Remedies for Soil Contamination at
Schools, Child Care Centers, and Residences

Contamination type	Subcategories/ Scenarios	Presumptive Remedy/ Remediation Goal	Remedial Action - Schools, Child Care Centers, and Type II Residential	Remedial Action - Type I Residential
Historic Fill*[, DAP]* and/or all other discharged contaminants not otherwise excluded in	Play Areas - Loose Fill Surface (e.g., mulch, sand, etc.)	Restricted Use	Option #1. <i>Barrier</i> - Minimum of one (1) foot clean loose fill material; <i>Buffer</i> - Minimum	Same engineering control requirement as Schools, Child Care Centers and Type II

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<p>N.J.A.C. 7:26E- 5.3</p>			<p>of one (1) foot clean loose fill material;</p> <p><i>Demarcation –</i> Geotextile fabric; and</p> <p><i>Inspection -</i> Quarterly.</p> <p>Option #2. <i>Barrier - Minimum</i> of two (2) feet clean loose fill material;</p> <p><i>Buffer - Minimum</i> of two (2) feet clean loose fill</p>	<p>Residential</p>
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			<p>material;</p> <p><i>Demarcation –</i></p> <p>Visible contamination boundary marker or geotextile fabric; and</p> <p><i>Inspection - Semi-annual.</i></p>	
<p>Historic Fill*[, DAP]* and/or all other discharged contaminants not otherwise excluded in N.J.A.C. 7:26E- 5.3</p>	<p>Play Areas - Unitary Material Surface (e.g., Tile, Rubber Mat, Artificial Turf)</p>	<p>Restricted Use</p>	<p>Option #1. <i>Barrier - Proposed</i> surface of unitary material and a minimum of six (6) inches crushed stone; <i>Buffer - Minimum</i></p>	<p>Same engineering control requirement as Schools, Child Care Centers and Type II Residential</p>

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			<p>of six (6) inches crushed stone;</p> <p><i>Demarcation –</i> Geotextile fabric; and</p> <p><i>Inspection –</i> Annual.</p> <p>Option #2. <i>Barrier - Proposed</i> surface of unitary material and a minimum of four (4) inches of concrete or asphalt;</p> <p><i>Buffer - Four (4)</i> inches of sub base;</p>	
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			<p><i>Demarcation –</i></p> <p>Visible contamination boundary marker; and</p> <p><i>Inspection -</i></p> <p>Annual.</p> <p>Option #3.</p> <p><i>Barrier - Proposed</i> surface of unitary material and a minimum of one (1) foot clean fill;</p> <p><i>Buffer - Minimum</i> of one (1) foot clean fill;</p>	
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			<p><i>Demarcation –</i></p> <p>Visible contamination boundary marker; and</p> <p><i>Inspection -</i></p> <p>Annual.</p>	
<p>Historic Fill*[, DAP]* and/or all other discharged contaminants not otherwise excluded in N.J.A.C. 7:26E- 5.3</p>	<p>Play Areas – Other Unpaved Playing Surfaces (e.g., athletic fields)</p>	<p>Restricted Use</p>	<p>Option #1.</p> <p><i>Barrier -</i></p> <p>Vegetative cover with a minimum of one (1) foot clean fill;</p> <p><i>Buffer -</i> Minimum of one (1) foot clean fill;</p>	<p>Same engineering control requirement as Schools, Child Care Centers and Type II Residential</p>

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			<p><i>Demarcation –</i> Geotextile fabric; and</p> <p><i>Inspection -</i> Annual.</p> <p>Option #2.</p> <p><i>Barrier -</i> Vegetative cover with a minimum of two (2) feet clean fill;</p> <p><i>Buffer - Minimum</i> of two (2) feet clean fill;</p> <p><i>Demarcation –</i> Visible</p>	
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			contamination boundary marker; and <i>Inspection -</i> Annual.	
Historic Fill*[, DAP]* and/or all other discharged contaminants not otherwise excluded in N.J.A.C. 7:26E- 5.3	Concrete or Asphalt Surfaces (e.g., Driveways, Roadways, Parking, Walkways, Bicycle Paths, etc.)	Restricted Use	<i>Barrier - Minimum</i> of four (4) inches of concrete or asphalt; <i>Buffer - Minimum</i> of four (4) inches of sub base; <i>Demarcation –</i> Visible contamination boundary marker; and	Same engineering control requirement as Schools, Child Care Centers and Type II Residential

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			<i>Inspection – Annual.</i>	
Historic Fill*[, DAP]* and/or all other discharged contaminants not otherwise excluded in N.J.A.C. 7:26E- 5.3	Building Footprint- New Construction	Restricted Use	Option #1. <i>Barrier</i> - Minimum of four (4) inches of concrete; <i>Buffer</i> - Minimum four (4) inches of sub base; <i>Demarcation – Visible</i> contamination boundary marker; and <i>Inspection –Annual</i>	Same engineering control requirement as Schools, Child Care Centers and Type II Residential

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			<p>Option #2 (for crawl spaces).</p> <p><i>Barrier</i> - Minimum of one (1) foot clean fill and vapor barrier;</p> <p><i>Buffer</i> - Minimum of one (1) foot clean fill;</p> <p><i>Demarcation</i> – Visible contamination boundary marker; and</p> <p><i>Inspection</i> - Semi-annual.</p>	
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<p>Historic Fill*[, DAP]* and/or all other discharged contaminants not otherwise excluded in N.J.A.C. 7:26E- 5.3</p>	<p>Building Footprint – Existing Construction</p>	<p>Restricted Use</p>	<p>Option #1. <i>Barrier</i> - Minimum of four (4) inches of concrete; <i>Buffer</i> - Minimum four (4) inches of sub base; <i>Demarcation</i> - Not required ; and <i>Inspection</i> – Annual. Option #2 (for crawl spaces and basements with a dirt floor). <i>Barrier</i> - Minimum</p>	<p>Same engineering control requirement as Schools, Child Care Centers and Type II Residential</p>
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			<p>of one (1) foot clean fill and vapor barrier;</p> <p><i>Buffer - Minimum</i> of one (1) foot clean fill;</p> <p><i>Demarcation –</i> Visible contamination boundary marker; and</p> <p><i>Inspection - Semi-</i> annual.</p>	
Historic Fill*[, DAP]* and/or all other discharged	Vegetative Cover (e.g., Lawn Areas)	Restricted Use	<i>Barrier -</i> Vegetative cover with a minimum of six (6)inches of	Option #1. <i>Barrier –</i> Vegetative cover with a

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<p>contaminants not otherwise excluded in N.J.A.C. 7:26E- 5.3</p>			<p>clean fill; <i>Buffer - Minimum</i> of six (6) inches of clean fill; <i>Demarcation –</i> Visible contamination boundary marker; and <i>Inspection - Semi-</i> annual</p>	<p>minimum of one (1) foot clean fill; <i>Buffer -</i> Minimum of one (1) foot clean fill; <i>Demarcation –</i> Geotextile fabric; and <i>Inspection -</i> Quarterly. Option #2. <i>Barrier –</i> Vegetative cover with a</p>
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				<p>minimum of two (2) feet clean fill;</p> <p><i>Buffer -</i></p> <p>Minimum of two (2) feet clean fill;</p> <p><i>Demarcation –</i></p> <p>Visible contamination boundary marker or geotextile fabric; and</p> <p><i>Inspection -</i></p> <p>Semi-annual.</p>
Historic Fill*[,	Landscaped	Restricted Use	Option #1.	Same

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<p>DAP]* and/or all other discharged contaminants not otherwise excluded in N.J.A.C. 7:26E- 5.3</p>	<p>Areas</p>		<p><i>Barrier</i> - Minimum of one (1) foot clean fill;*</p> <p><i>Buffer</i> - Minimum of one (1) foot clean fill;*</p> <p><i>Demarcation</i> – Geotextile fabric; and</p> <p><i>Inspection</i> - Semi- annual.</p> <p>Option #2. <i>Barrier</i> - Minimum of two (2) feet of clean fill;*</p>	<p>engineering control requirement as Schools, Child Care Centers and Type II Residential</p>
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			<p><i>Buffer - Minimum of two (2) feet clean fill;*</i></p> <p><i>Demarcation – Visible contamination boundary marker; and</i></p> <p><i>Inspection - Semi-annual.</i></p> <p><i>* Trees and shrubs can be planted within barrier and/or buffer layer(s), but must maintain a minimum of one</i></p>	
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			(1) foot clean fill on all sides and below the extent of planted root ball of larger plant materials.	
Historic Fill*[, DAP]* and/or all other discharged contaminants not otherwise excluded in N.J.A.C. 7:26E- 5.3	Maintenance Areas/Dumpsters and Compactor Pad/Other Areas Restricted to Workers	Restricted Use	<i>Barrier</i> - Minimum of four (4) inches of concrete or asphalt; <i>Buffer</i> - Minimum of four (4) inches of sub base; <i>Demarcation</i> – Visible contamination boundary marker; and	Not Applicable

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			<i>Inspection -</i> Annual.	
Historic Fill*[, DAP]* and/or all other discharged contaminants not otherwise excluded in N.J.A.C. 7:26E- 5.3	Underground Utility Corridors	Restricted Use	Piping & Conduits Placed in Trenches: <i>Barrier</i> - Clean fill from surface down to utility (minimum of one (1) foot); <i>Buffer</i> - Minimum of one (1) foot of clean fill below and around the sides of the utility; <i>Demarcation –</i> Visible contamination boundary marker	Same engineering control requirement as Schools, Child Care Centers and Type II Residential

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			<p>along the bottom and sides of the trench; and</p> <p><i>Inspection -</i></p> <p>Annual.</p> <p>Burial Cable may be installed within barrier and/or buffer layer(s) but a minimum of one foot clean fill must be maintained on sides and below installation.</p>	
...				

*[7:26E-5.5 Remedial action requirements for diffuse anthropogenic pollutants in soil

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(a) Notwithstanding the presumptive remedies for residences, schools, and child care centers required pursuant to N.J.A.C. 7:26E-5.3(a), the person responsible for conducting the remediation of contamination associated with diffuse anthropogenic pollutants in soil shall:

1. Remediate the contaminated soil to an unrestricted use standard; or
2. Leave the contaminated soil in place and establish engineering and institutional controls, as appropriate, pursuant to N.J.A.C. 7:26C-7.]*

7:26E-*[5.6]**5.5* Remedial action workplan requirements

(a) (No change from proposal.)

(b) The person responsible for conducting the remediation shall include the following in each remedial action workplan for each area of concern:

1. - 10. (No change from proposal.)
11. The proposed completion date of the remedial action and a schedule of the remedial action for the initiation and completion of each remedial action task, pursuant to the required regulatory timeframe at N.J.A.C. 7:26E-*[5.9]**5.8*.

(c) (No change from proposal.)

7:26E-*[5.7]**5.6* Permit identification and requirements for discharge to ground water proposals

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(a) The person responsible for conducting remediation shall apply for and obtain all required permits prior to initiating the activity requiring the permit, permit modification, or certification*[, except that a Hazardous Waste Facility Permit issued pursuant to the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., and the Hazardous Waste rules, N.J.A.C. 7:26G, for hazardous waste treatment, storage, or disposal, is not required for any remediation conducted on site pursuant to the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C] *.

(b) – (e) (No change from proposal.)

7:26E-*[5.8]**5.7* Remedial action report requirements

(a) The person responsible for conducting the remediation shall implement the remedial action and submit to the Department a remedial action report, along with a form found on the Department's website at www.nj.gov/dep/srp/srra/forms, pursuant to (b) below, and according to the applicable regulatory timeframe in N.J.A.C. 7:26E-*[5.9]**5.8*.

(b) The person responsible for conducting the remediation shall present and discuss in the remedial action report all of the information identified or collected pursuant to N.J.A.C. 7:26E-5.1 through *[5.7]**5.6*, along with all of the following:

1. – 5. (No change from proposal.)
6. Documentation, by area of concern, that each remedial action is effective in

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protecting the public health and safety and the environment by:

i. Providing an overview of the data to establish the remedial action is operating as designed; ***[and]* *or***

ii. (No change from proposal.)

7. – 13. (No change from proposal.)

7:26E-**[5.9]**5.8*** Remedial action regulatory timeframes

(a) The person responsible for conducting the remediation shall complete the implementation of the remedial action, within the applicable regulatory timeframe listed in (b) below, by:

1. Implementing all remedial actions required to address the ***[contamination at a]* *contaminated*** site, pursuant to the requirements of this subchapter;

2. Submitting a remedial action report for all remedial actions at the ***contaminated*** site to the Department pursuant to N.J.A.C. 7:26E-**[5.8]**5.7***;
and

3. ***[Causing]**Ensuring that*** a licensed site remediation professional ***[to submit]**submits*** a final remediation document to the Department pursuant to the Administrative Requirements for the Remediation of Contaminated Sites, at N.J.A.C. 7:26C-6.2.

(b) - (d) (No change from proposal.)

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APPENDIX B - Model public notice for a discharge to ground water proposal

The model public notice in this appendix contains blanks and matter in brackets []. These blanks shall be replaced with the appropriate information prior to publication in appropriate local newspapers. As provided at N.J.A.C. 7:26E-*[5.7]****5.6***(c), the wording of this model public notice shall not be otherwise changed or modified.

...

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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), permit the public to understand accurately and plainly the purposes and expected consequences of this adoption of amendments, repeals and new rules. I hereby authorize this adoption.

Date: _____

Bob Martin, Commissioner

Department of Environmental Protection