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ENVIRONMENTAL PROTECTION

COMPLIANCE AND ENFORCEMENT

Water Pollution Control Act Rules

Grace Period

Adopted Amendments: N.J.A.C. 7:14-8.1, 8.2, 8.4, 8.5 through 8.10, 8.12, 8.14, and 8.16 through 8.17, and 7:14 Appendix A; and 7:14A-19.3, 19.4, and 19.6 and 7:14A-19

Appendix A

Adopted New Rules: N.J.A.C. 7:14-8.4A and 8.18

Proposed: July 17, 2006 at 38 N.J.R. 2919(a)

Adopted: _____, 2007, by Lisa P. Jackson, Commissioner, Department of
Environmental Protection

Filed: _____ as R.2007 d. _____, with substantive and technical changes
not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3)

Authority: N.J.S.A. 13:1D-1 et seq., 13:1D-125 through 133; 58:10A-1 et seq.; 58:10A-21 et
seq.

DEP Docket Number: 08-06-06/435

Effective Date: _____, 2007

Expiration Date: October 5, 2009, N.J.A.C. 7:14; December 5, 2007, N.J.A.C. 7:14A.

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The Department of Environmental Protection (Department) is adopting amendments and new rules at N.J.A.C. 7:14, Water Pollution Control Act rules, to identify violations of New Jersey Pollutant Discharge Elimination Program (NJPDES) (N.J.A.C. 7:14A), and portions of the Underground Storage Tanks rules (N.J.A.C. 7:14B) as either minor or non-minor for the purpose of providing grace periods in accordance with N.J.S.A. 13:1D-125 et seq., commonly known as the Grace Period Law. The adopted amendments and new rules set forth how the Department will respond to any violation identified as minor. The Department is also adopting amendments to N.J.A.C. 7:14-8.1, 8.4(b), 8.17(c)iv and Appendix A to N.J.A.C. 7:14 to correct omissions and inaccuracies in cross-references.

Summary of Public Comments and Agency Responses:

The following persons submitted written comments during the comment period on the proposal:

1. David Brogan, New Jersey Business and Industry Association
2. Eric DeGesero, Fuel Merchants Association of New Jersey
3. John F. Donohue, Petroleum Equipment Contractors Association of New Jersey
4. Gary G. Fare, Linden Roselle Sewerage Authority
5. Cheryl A. Hess, Conectiv Energy
6. Betsy McDonald, NY/NJ Baykeeper
7. Michael G. McGuinness, National Association of Industrial and Office Properties
8. Anthony Russo, Chemistry Council of New Jersey

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9. Leann Foster Sitar, American Littoral Society

A summary of the comments received and the Department's responses follows. The number(s) in parentheses after each comment identifies the respective commenter(s) listed above.

General Comments

1. COMMENT: In Table 1 at N.J.A.C. 7:14-8.18, a violation N.J.A.C. 7:14A-3.1(a)3, failure of NJPDES permittee/applicant to submit payment within 30 days of assessment of the permit fee, is classified as a non-minor violation, subject to a mandatory penalty. This should be a minor violation. The spirit of the Grace Period Law is to allow for the correction of violations that pose no threat or harm to the public and environment without fear of penalty. Failure to pay a fee within 30 days does not constitute a threat to the public or harm to the environment, and should therefore be changed to minor. (8)

RESPONSE: In N.J.S.A. 13:1D-129, the Legislature directed the Department to promulgate regulations identifying types or categories of violations as minor or non-minor. In determining whether a violation is minor or non-minor, the Department was required to apply the criteria at N.J.S.A. 13:1D-129(b). Under these criteria the failure to make a payment within 30 days of assessment of the permit fee would materially and substantially undermine or impair the goals of the regulatory program. Fees are imposed in order that the people and facilities that use **THIS IS**

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a program pay for its operations. Fees are assessed to cover the Department's costs to issue and manage NJPDES permits. If a fee is not paid, then the cost is borne by the public at large. Accordingly, the violation is appropriately classified as non-minor.

2. COMMENT: In Table 1, N.J.A.C. 7:14-8.18, violation of N.J.A.C. 7:14A-4.2(e)3, failure of person to file an application for renewal or a request for authorization under a general permit at least 180 calendar days prior to the expiration of the existing permit, is classified as non-minor, subject to a mandatory penalty. This violation is administrative in nature and should be revised to "minor." (8)

RESPONSE: As stated above in response to Comment 1, in classifying violations as minor or non-minor, the Department was required to apply the criteria set forth in the law at N.J.S.A. 13:1D-129(b). Under these criteria, the failure of person to file an application for renewal or a request for authorization under a general permit at least 180 calendar days prior to the expiration of the existing permit would materially and substantially undermine or impair the goals of the regulatory program as stated in the law. The period of 180 days allows the Department time to process an application for renewal prior to the expiration date of a permit. A shorter period of time, such as would result from allowing a grace period, would give the Department insufficient time to review the application. Therefore, the violation is appropriately classified as non-minor.

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3. COMMENT: In Table 1, at N.J.A.C. 7:14-8.18, violation of N.J.A.C. 7:14A-6.12(c), failure to comply with the operation and maintenance manual requirements for treatment works, including related appurtenances and collection system, is classified as a non-minor violation, subject to a mandatory penalty. This should not be a violation at all, let alone a non-minor violation. Typically treatment works approvals are accompanied by a NJPDES permit. Permittees construct and operate a treatment system to comply with NJPDES permit conditions. If the treatment system is not properly maintained and operated, the permittee will likely violate permit conditions and would be subject to significant penalties. This violation should be deleted altogether or should be reduced to minor. (8)

RESPONSE: Under the criteria of N.J.S.A. 13:1D-129(b), the failure to comply with the operation and maintenance manual requirements for treatment works, including related appurtenances and collection system, would pose a risk to the public health, safety and natural resources. As such, the violation does not qualify for a grace period under the criteria of N.J.S.A. 13:1D-129(b). If treatment systems are not properly maintained and operated, violations may occur that may harm the environment. Therefore, the violation is appropriately classified as non-minor.

4. COMMENT: As required by the Grace Period Law, the Department's new rule at N.J.A.C. 7:14-8.4A(d)4 provides for written requests to extend the grace period specified in the

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Department's notice of violation. Two of the proposed criteria for such extensions – whether the delay will pose a risk to public health, safety and natural resources, or materially or substantially undermine or impair the goals of the regulatory program – are inappropriate. The same criteria were already considered (and found inapplicable) when the Department determined that the violation in question is minor. N.J.A.C. 7:14-8.4A(d)4 should be modified accordingly. (5)

RESPONSE: The Grace Period Law allows the person responsible for the minor violation to seek additional time beyond the specific grace period to achieve compliance, provided that the request meets the requirements of the law, which the Department has incorporated into its rules at N.J.A.C. 7:14-8.4A.

Pursuant to N.J.A.C. 7:14-8.4A(d)4, the Department may exercise its discretion to approve a request for an extension. The Department may consider whether the delay in compliance will pose a risk to the public health, safety and natural resources, and if the delay in compliance would not materially and substantially undermine or impair the goals of the regulatory program. It is true that in classifying the violation as minor the Department has determined that the violation conforms to the criteria at N.J.A.C. 7:14-8.4A(d)4; however, not all violations will continue to conform to those requirements if the violation is not corrected within the period of the initial grace period. Accordingly, it is necessary for the Department to consider whether failure to correct the violation for an additional period of time will exacerbate the violation, such that an additional period of time for compliance is not appropriate.

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5. COMMENT: The term “person responsible for the minor violation” is used a number of times in proposed N.J.A.C. 7:14-8.4A(c) and (d). In most of those instances the meaning of the term is clear and refers to the corporation (or other entity) that owns or operates the facility at which the violation occurred. On the other hand, in several instances the term is used to refer to the individual that would sign a document or certify information on behalf of the entity responsible for the violation. In those instances, the usage of the term is not clear. The NJPDES regulations’ general signature requirement in N.J.A.C. 7:14A-4.9 refers to “a responsible corporate officer”; consequently, the Department should substitute the term “responsible corporate officer” for “person responsible for the violation” at several points in the proposed regulation, specifically at N.J.A.C. 7:14-8.4A(d)3 and 4. (5)

RESPONSE: The NJPDES rules at N.J.A.C. 7:14A-1.2 define a “person” as an “individual, corporation, company, partnership, firm, association, owner or operator of a treatment works, political subdivision of this State and any state, Federal or interstate agency or an agent or employee thereof.” “Person” also means any responsible corporate official for the purpose of enforcement action under the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. Adopted N.J.A.C. 7:14-8.4A(c) and (d) refer only to a “person responsible,” which could include an entity other than a corporation. Accordingly, the adopted rule language is appropriate as written.

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6. Comment: N.J.A.C. 7:14A-6.2(a)14 requires NJPDES permittees to “furnish to the Department, within a reasonable timeframe specified by the Department, any information which the Department may request to determine whether cause exists for issuing, modifying, revoking and reissuing, or revoking a discharge permit, or to determine compliance with a NJPDES permit.” Table 1 at N.J.A.C. 7:14-8.18 classifies as “non-minor” all situations in which N.J.A.C. 7:14A-6.2(a)14 is not satisfied. The non-minor classification is inconsistent with the fact that circumstances beyond a permittee’s control are often the reason that prevents the permittee from furnishing the required information “within the reasonable timeframe specified by the Department.” It is not appropriate to classify as non-minor those situations in which a permittee is delayed in furnishing the requested information due to circumstances beyond its control. Such violations should be minor. (5)

RESPONSE: The Grace Period Law requires the Department to establish the length of the grace period, which may be no fewer than 30 days or more than 90 days. N.J.A.C. 7:14A-6.2(a)14 provides that the Department will set a “reasonable” time for furnishing the information. That period of time takes into account the reason that the information is needed, and whether there may be underlying conditions or violations that could cause harm to the public health or the environment. If a reasonable time under the circumstances is determined to be, for example, 10 days, to allow an additional 30 day grace period (the minimum under the statute) would effectively quadruple the time that a facility has to respond to the Department. Had 40

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days been “reasonable,” the Department would have set the time period at that length in the first instance.

Allowing an additional 30 days to submit information could result in harm to human health or the environment. Therefore, the violation does not qualify as a minor violation under the Grace Period Law.

7. COMMENT: N.J.A.C. 7:14A-6.4 addresses schedules of compliance, “including interim deadlines for progress or reports of progress towards compliance,” with requirements of the New Jersey Water Pollution Control Act and the Federal Clean Water Act. Table 1 at N.J.A.C. 7:14-8.18 classifies as “non-minor” all departures from the requirements of a compliance schedule under N.J.A.C. 7:14A-6.4. Although deadlines for such matters as facility design, procurement and construction are important, it is inconsistent with the criteria of the Grace Period Law to categorize every instance in which a progress report is delayed as a “non-minor” violation. (5)

RESPONSE: The Department was required to apply the criteria at N.J.S.A. 13:1D-129(b) in designating types or categories of violations as minor. Under these criteria the Department has determined that a violation of N.J.A.C. 7:14A-6.4 would materially and substantially undermine or impair the goals of the regulatory program as stated in the law. The failure to comply with a schedule of compliance in a permit, including interim deadlines for progress

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reports or reports of progress towards compliance, may also pose risk to the public health, safety and natural resources. If progress reports are not submitted or not submitted timely the Department is unable to determine the status of a project, or whether the facility is meeting its goals in achieving compliance. Because such a report could contain information relating to an ongoing or imminent discharge, failure to comply with the schedule would be detrimental to Department oversight and, potentially, to the environment. Therefore, the violation is appropriately identified as non-minor.

8. COMMENT: N.J.A.C. 7:14A-6.7(a) provides that “as soon as possible” all permittees “shall give written notice to the Department of any planned physical alterations or additions to the permitted facility” if the physical alteration relates to a new source from which there may be a pollutant discharge, significant changes in pollutant discharges or residuals disposal, or may result in permit non-compliance. While recognizing the purpose of such notice, the “as soon as possible” requirement is subject to differing interpretations. Moreover, it is inappropriate to apply an across-the-board “non-minor” categorization both to the failure to provide the required notice, as well as to those instances in which notice was provided but untimely. Thus, even though the Department may conclude in a given situation that the permittee’s notice was not provided “as soon as possible,” the untimely notice would nevertheless meet the Department’s description of a “minor” violation as one that “is purely administrative in nature, and does not

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result in a discharge, . . . provided the violation does not ‘materially and substantially undermine or impair the goals of the regulatory program.’” (5)

RESPONSE: N.J.A.C. 7:14A-6.7(a) refers to criteria in N.J.A.C. 7:14A-6.7(b), which details when a notice is required. The Department has determined that failure to submit a notice of any planned physical alterations or additions to the permitted facility “as soon as possible” may not be purely administrative in nature, because the planned physical alteration may pose a risk to the public health, safety and natural resources. In addition, the Grace Period Law requires the Department to establish the length of the grace period, which may be no fewer than 30 days or more than 90 days. The requirement to submit the notice “as soon as possible” does not meet the criteria for a non-minor violation because the Department may need to determine in fewer than 30 days if the planned physical alteration would pose a risk to the public health, safety and natural resources. Allowing an additional 30 days to submit the notice beyond what is “as soon as possible” may cause harm to human health and the environment. Therefore, the violation is appropriately identified as non-minor.

9. COMMENT: N.J.A.C. 7:14A-6.9 addresses signature requirements for Discharge Monitoring Reports (DMR) and Baseline Reports (BR). Generally, this requirement must be satisfied by “the highest ranking official having day-to-day managerial and operational responsibilities for the discharging facility, whose responsibilities usually include authorizing

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capital expenditures and/or hiring personnel.” (See N.J.A.C. 7:14A-4.9(b).) In that person’s absence the signature requirement can be satisfied by “another responsible high ranking official,” such as “a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function.” Departures from these signature requirements would be inadvertent and quite infrequent, and would clearly meet the criteria in proposed N.J.A.C. 7:14-8.4A(c) for identifying violations as “minor.” Moreover, categorization of a violation of N.J.A.C. 7:14A-6.9 as “non-minor” is inconsistent with the Department’s categorization of the very similar in fact, in some ways identical, requirements of N.J.A.C. 7:14A-4.9(a) as “minor.” (5)

RESPONSE: The purpose of DMRs and BRs is to allow permittees to report results of monitoring that the permittee conducts itself. The effluent data in the reports represents a discharge that has already occurred, and that may have resulted in a risk to public health, safety and natural resources. The Department categorized a violation of N.J.A.C. 7:14A-6.9(a) as non-minor because the signatory requirement is a certification by a person in a position of responsibility that the discharge has occurred. Because the person certifying is one who is in a management and decision-making position, he or she can respond immediately if there is evidence of harm to human health or safety, or damage to the environment.

If a DMR is submitted unsigned, or by a person that is not identified in the regulation, it is likely that the person who is responsible for reviewing and certifying the information has not reviewed the report, and is unaware of its contents. A person with management or decision-

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making authority may not even be aware that a discharge took place. This could result in ongoing harm, which is contrary to the purpose of the NJPDES program. Therefore, a violation of N.J.A.C. 7:14A-6.9(a) is appropriately identified as non-minor.

In contrast N.J.A.C. 7:14A-4.9 specifies signatory requirements for permit applications and reports other than DMRs that do not involve certification of discharge monitoring data.

10. COMMENT: There is an internal inconsistency in Table 1 of N.J.A.C. 7:14-8.18's classification of violations of N.J.A.C. 7:14A-6.2(a)14. The reference in Table 1 to N.J.A.C. 7:14A-6.2(a) states that violations of the provision are non-minor "excluding" N.J.A.C. 7:14A-6.2(a)14. But three paragraphs later Table 1 indicates that a violation of N.J.A.C. 7:14A-6.2(a)14 would be included in the non-minor category. (5)

RESPONSE: The Department is modifying Table 1 of N.J.A.C. 7:14-8.18 on adoption to change the description of a violation of N.J.A.C. 7:14A-6.2(a) to "Failure to comply with any general conditions applicable to all NJPDES permits specified in N.J.A.C. 7:14A-6.2 excluding N.J.A.C. 7:14A-6.2(a) 6, 7, 8 and 10." This will correct the inconsistency.

11. COMMENT: In the case of certain types of non-complying discharges identified at N.J.A.C. 7:14A-6.10(e) and (f), such as upsets and bypasses, the rules require detailed written follow-up reports to the Department within five days of the discharge at issue. In addition, each of the two regulations also provides that if the permittee becomes aware that it has failed to

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submit any relevant facts or has submitted incorrect information, it shall immediately submit such facts or information to the Department. This implies that a permittee is expected to correct a previous deficiency in the required reports, and a permittee's prompt correction of its omission would clearly meet the Grace Period Law's criteria for a minor violation. Furthermore, categorization of violations of N.J.A.C. 7:14A-6.10(e) and (f) as "non-minor" is inconsistent with the Department's categorization of the very similar requirements of N.J.A.C. 7:14A-2.11(f) as "minor." (5)

RESPONSE: The Department does expect information that was omitted from a report that concerns a non-complying discharge to be submitted immediately. A non-complying discharge does not meet the criteria set forth in the law at N.J.S.A. 13:1D-129(b). Such a discharge, because it is outside of what is allowed under a NJPDES permit, would pose a risk to the public health, safety and natural resources as stated in the Grace Period Law. In addition the requirement is to immediately report the non-complying discharge. Because 30 days is not "immediate," it is not appropriate for the Department to allow a grace period. The purpose of the NJPDES program is to avoid unpermitted discharges. Therefore, the violation is appropriately identified as non-minor.

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12. COMMENT: N.J.A.C. 7:14B-2.6(a) requires prominent display of underground storage tank (UST) registration certificates. An inadvertent failure to display a UST certificate is easily corrected, and meets the criteria in N.J.A.C. 7:14-8.4A(c) for identifying violations as “minor.” In addition, N.J.A.C. 7:14B-2.6(a)’s certificate display requirement for USTs is very similar to the requirement in N.J.A.C. 7:14A-6.2(a)9 for display of outfall (DSN) tags as well as the requirement in another UST regulation, N.J.A.C. 7:14B-5.5(b), regarding the availability of Release Response Plans. The Department’s regulations classify violations of both of the latter as “minor,” and a violation of N.J.A.C. 7:14B-2.6(a) should be classified as minor, as well. (2, 5)

RESPONSE: A violation of N.J.A.C. 7:14B-2.6(a) is appropriately categorized as non-minor. The purpose of a UST certificate is to indicate that the facility and the UST is in compliance with UST registration requirements. Violation of any of those UST requirements is a non-minor violation. Displaying the certificate allows a petroleum transporter, for example, to know that the UST complies with the applicable regulations. Petroleum transporters are responsible for ensuring that the USTs into which they deposit product are registered prior to delivery. Often these deliveries occur after hours, and a visible current registration is the only means for the transporter to determine if the UST is appropriately registered. Because one of the purposes of the certification program is to identify tanks as in compliance, and failure to display a certification contravenes that purpose, the violation is one that would materially and substantially undermine or impair the goals of the regulatory program. The failure to display an

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outfall (DSN) tag does not indicate compliance with effluent limitations. It is for identification purposes only. Therefore, this violation was determined to be minor.

13. COMMENT: N.J.A.C. 7:14B-6.7(e) and (f) require UST owners and operators to, among other things, maintain and make available for inspection a summary of UST monitoring systems and release detection equipment maintenance checks. The proposed regulations classify violations of these requirements as “non-minor.” That is inconsistent with the “minor” categorization the Department applies to the very similar requirements of N.J.A.C. 7:14B-6.7(a) through (d). Accordingly, the “minor” classification should also apply to violations of N.J.A.C. 7:14B-6.7(e) and (f). (2, 5)

RESPONSE: Violations of N.J.A.C. 7:14B-6.7(e) and (f) are based upon the failure to maintain records that are directly related to release detection monitoring. Such records indicate to the Department whether or not the USTs are leaking. The Department relies on such records to determine compliance with the UST regulations. Without such records, the Department cannot readily determine whether there have been discharges from the USTs. Because prevention of discharges is at the very core of the purpose of the UST regulations, failure to maintain records such that the Department can determine whether a discharge occurred would materially and substantially undermine or impair the goals of the regulatory program. Accordingly, the violation is appropriately identified as non-minor.

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In contrast, N.J.A.C. 7:14B-6.7(a) through (d) do not relate to actual releases or the results of monitoring; instead, they address procedural manuals, written performance claims, and maintenance logs. While important, the documentation required in N.J.A.C. 7:14B-6.7(a) through (d) would not reveal the presence of a discharge to the environment. Accordingly, they are appropriately designated minor violations, subject to a grace period.

14. COMMENT: The efforts of the Department have been effective in meeting the objective of reducing the incidence of the discharge of hazardous substances by the regulated UST community and have effectively administered the Facility Compliance Inspection Initiative in close approximation to the intent of the Grace Period Law. The Department should adhere to its own policy statement found in the Summary, 38 N.J.R. at 2920, which states, “The law does not affect the Department’s enforcement authority, including the exercise of enforcement discretion to treat a violation as minor” in its future administration of the UST Facility Compliance Inspection program.

The Department, with the enactment of the UST rules, made a reasonable effort to inform the regulated community of the requirement for UST upgrade or replacement. The Department has made virtually no effort to inform the regulated community of the ongoing operation and maintenance requirements to which these facilities are subject. Many of the affected facilities are small businesses for which the UST is nothing more than an infrastructure item and for which these businesses have expended great resources to bring into compliance. But these very same

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operators are not expert in, much less familiar with the ongoing operating requirements to which they are subject, and the Department has done little to make them knowledgeable in this regard. Additionally, the intent of the Grace Period Law is to afford the well-intentioned members of the regulated community the opportunity to come into full compliance with a Department rule within a reasonable time, without the assessment of fines and penalties. Yet, over 75 percent of the citations enumerated within Table 2 of N.J.A.C. 7:14-8.18 are termed “non-minor,” allowing the regulated facility operator no time frame to come into full compliance prior to the imposition of fines and penalties. (3)

RESPONSE: In the Grace Period Law, N.J.A.C. 13:1D-129, the Legislature directed the Department to promulgate regulations identifying types or categories of violations as minor or non-minor. The Grace Period Law required the Department to apply the criteria at N.J.S.A. 13:1D-129(b) in designating types or categories of violations as minor. Under this criteria the Department determined which violations listed in Table 2 of N.J.A.C. 7:14-8.18 are minor or non-minor.

Many of the violations that relate to UST regulations were determined to be non-minor because they would materially and substantially undermine or impair the goals of the regulatory program, would pose a risk to the public health, safety and natural resources, or would be the result of the purposeful, knowing, reckless or criminally negligent conduct. For example, the

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violations would result in a discharge, or inhibit the ability of the Department to determine whether such a discharge occurred.

The Department is aware that many affected facilities are small businesses and has made a strong effort to educate operators during the course of an inspection what their responsibilities are. In addition, the Department gives notice to the public when it promulgates regulations, in order that the public is able to learn what regulations will affect them, and what their responsibilities are. The Department also makes information available on its website.

Department representatives are available to discuss with members of the regulated community the UST requirements that apply to them. See also the response to Comment 17, below.

15. COMMENT: Although there may currently be pressure on the Department to promulgate rules in accordance with the Grace Period Law, the UST Rule, N.J.A.C. 7:14B, is due for perhaps significant revision. As the regulated community begins to become aware of the specific citations enumerated in Table 2 of N.J.A.C. 7:14-8.18, the underlying UST rules could be subject to amendment. As the regulated community attempts to comply with the specifics of the Table 2, it will find there is yet a new standard with which to comply, and once more find themselves subject to “non-minor” citations. Grace period amendments to N.J.A.C. 7:14-8.18, Table 2, should be withheld and proposed as part of overall amendments to the UST rules. (3)

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RESPONSE: The Department is under a Court ordered obligation to promulgate regulations consistent with the Grace Period Law, as a result of litigation brought by the Chemistry Council of New Jersey. (See Chemistry Council of New Jersey v. New Jersey Department of Environmental Protection, Superior Court of New Jersey, Mercer County, Docket no. MER-L-3862-02.) Accordingly, the Department does not have discretion to delay the amendments, as the commenter recommends.

16. COMMENT: The Department should amend the UST rules at N.J.A.C. 7:14B to include grace period provisions in an appendix, and it should also include the grace period designation within the specific rule provision. This would provide clarity for the benefit of the regulated community. (3)

RESPONSE: By including the violations in table form, with a citation to each substantive requirement, the Department has attempted to make the grace period designations readily accessible to the public.

N.J.A.C. 7:14B is scheduled to sunset in April 2008. Accordingly, the Department anticipates reviewing the chapter to determine what amendments are appropriate as part of the readoption. At that time, it will consider the commenter's recommendation. At this time, incorporating the grace period and penalty provisions associated with the Water Pollution Control Act are appropriately included in adopted new N.J.A.C. 7:14-8.18, and those provisions

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associated with UST remediation are appropriately located in the Department's Oversight of the Remediation of Contaminated Sites rules at N.J.A.C. 7:26C-10.4(c)5.

17. COMMENT: The Department, upon issuance of the facility registration renewal certificate, should advise the facility of its ongoing maintenance and inspection obligations, and the penalties associated with a violation. The facility should not be subject to penalties resulting from a change in the regulations until such time as they are notified during the next registration renewal cycle. (3)

RESPONSE: Since the Department initiated the Regulated UST Facility Compliance and Enforcement inspection program, the level of compliance has increased among the regulated community. This indicates that the Department has been effective in communicating to the regulated community the inspection and maintenance requirements. Furthermore, the Department has made available on its website documents that provide information on inspection and maintenance requirements. Courtesy copies of the applicable regulations are available on the Department's website, and the Department provides public notice of each proposed and adopted amendment to its rules. Accordingly, there are ample opportunities for the regulated community to become aware of its obligations, without the Department's giving each facility individual notice.

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Enforcement of regulations cannot be deferred against a particular facility, if the Department is to achieve the goals of the program. In enacting the Water Pollution Control Act, the Legislature found,

[P]ollution of the ground and surface waters of this State continues to endanger public health; to threaten fish and aquatic life, scenic and ecological values; and to limit the domestic, municipal, recreational, industrial, agricultural and other uses of water...

It is the policy of this 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 uses of the water.

(N.J.S.A. 58:10A-2)

Similarly, in enacting the statute governing underground storage tanks containing hazardous substances, N.J.S.A. 58:10A-21 et seq., the Legislature found,

[L]eakage 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 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)

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A facility's registration is for a three-year period (N.J.A.C. 7:14B-3.2(b)). Under the procedure the commenter suggests, in which the Department would not enforce the regulations against a facility until it notifies the registrant of changes to the regulations at the time of renewal, a facility could continue to ignore its maintenance and inspection obligations without penalty for as long as three years. This is in direct contravention of the stated Legislative purpose of the underground storage tank law at N.J.S.A. 58:10A-21, which is to "detect leaks and discharges as early as possible and thus minimize further degradation of potable water supplies." Accordingly, to withhold enforcement until the Department provides each facility with individual written notice of changes to the regulations is not appropriate.

18. COMMENT: What are the financial penalties for a minor and non-minor violation? Other grace period rules include the amounts of the penalties, while this one does not. (2)

RESPONSE: If a minor violation is corrected within the time period required in the adopted rules, the Department will not assess a penalty. A non-minor violation is subject to penalty. The Department uses N.J.A.C. 7:14-8.5 to determine a civil administrative penalty. Penalties for UST related violations were determined by using the penalty matrix specified in N.J.A.C. 7:14-8.5(f). The Department uses the matrix to determine the seriousness and conduct associated with each violation.

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19. COMMENT: A violation of N.J.A.C. 7:14B-2.2(c), the failure to complete a New Jersey Underground Storage Tank Facility Certification Questionnaire prior to expiration of the facility's Registration Certificate, should be classified as minor and subject to a 30 day grace period. This is a paperwork violation that has no consequence relating to the integrity of the UST system. It is precisely the type of minor paperwork violation the Legislature was attempting to provide a remedy for when it passed the Grace Period Law. Additionally, not only is this a paperwork violation, it is a violation that may be the direct result of a lack of timeliness on the Department's part in sending the renewal to the facility. A few years back the Department had a similar problem when the computer system managing the Stage II vapor recovery permits encountered problems. (2)

RESPONSE: Under the criteria set forth in the law at N.J.S.A. 13:1D-129(b), the failure to complete a New Jersey Underground Storage Tank Facility Certification Questionnaire prior to expiration of the facility's Registration Certificate, would materially and substantially undermine or impair the goals of the regulatory program. The Department relies on the accuracy and completeness of the information submitted on the questionnaire prior to expiration because the information indicates current conditions of the UST system. The Department uses this information, as well as physical inspections, to determine compliance. Accordingly, the violation is appropriately identified as non-minor.

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20. COMMENT: A violation of N.J.A.C. 7:14B-2.2(f), failure to supply information if any change in status to the UST system has been made, should be classified as minor and subject to a 30 day grace period. It is precisely the type of minor paperwork violation the Legislature was attempting to provide a remedy for when it passed the Grace Period Law. (2)

RESPONSE: Failure to supply information if any change in status to the UST system has been made would materially and substantially undermine or impair the goals of the regulatory program. The information that needs to be supplied is directly linked to compliance. Any changes made to the system, therefore, may change the status of the facility's compliance. Accordingly, the violation is appropriately identified as non-minor.

21. COMMENT: A violation of N.J.A.C. 7:14B 5.1(c) is identified as non-minor, and not subject to a grace period. In many instance the small business owner utilizes a small business transporter to deliver product. Although the Department has a desire to minimize any discharge that may occur during delivery, this is one of the instances where further Department outreach is needed to educate the regulated community. The small business owner's employees are not necessarily the ones introducing product to the tank. A greater familiarity with this as an operating requirement would benefit the Department and the regulated community. In instances

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where there is a violation found of these spill/overfill requirements the commenter believes that it should be a minor violation and serve as an opportunity to educate all parties involved. (2)

RESPONSE: A violation of N.J.A.C. 7:14B-5.1(c), the failure of a owner and/or operator to report, investigate and remediate any spills and overfills, is classified as non-minor because the violation would pose a risk to the public health, safety and natural resources. As such, it is not eligible for a grace period under the criteria of N.J.S.A. 13:1D-129(b). Violations of N.J.A.C. 7:14B-5.1(a) and (b), the failure to ensure no spillage or overflow occurs, and failure to constantly monitor the transfer operation or failure to use the specified transfer procedures, are violations that could result in a discharge, which would also pose a risk to the public health, safety and natural resources. Accordingly, the violations are appropriately identified as non-minor, as is a violation of N.J.A.C. 7:14B-5.1(d), failure to ensure proper operation of spill containment equipment. As discussed in responses to Comments 14 and 17, above, the Department continues to work with the regulated community to educate it about the applicable regulations.

22. COMMENT: Violations of N.J.A.C. 7:14B-5.6(a) and (b), failure to maintain records of installation, site and remedial investigations, release detection results, tank system repairs, operation of corrosion protection and design of the corrosion protection, should be classified as minor and subject to a 30 day grace period. This is a paperwork violation that has no

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consequence relating to the integrity of the system. It is precisely the type of minor paperwork violation the Legislature was attempting to provide a remedy for when it passed the Grace Period Law. At the very least, failure to maintain the record of the installation checklist should be a minor violation. The installation checklist has little utility, and few owners or operators are even aware of it. Maintaining the record should not be included in the readoption of N.J.A.C. 7:14B.

(2)

RESPONSE: Violations of N.J.A.C. 7:14B-5.6(a) and (b) are based upon the failure to maintain records. Included in these records is information related to release detection monitoring and corrosion protection. These records would indicate to the Department what the status of the UST's leak detection system is, and if adequate corrosion protection is being provided. These relate directly to the ability of the UST system to prevent a discharge. Because prevention of discharges is at the very core of the purpose of the UST regulations, failure to maintain records such that the Department can determine whether discharge protection is in place would materially and substantially undermine or impair the goals of the regulatory program. Accordingly, the violation is appropriately identified as non-minor.

With regard to the appropriateness of requiring a facility to maintain an installation checklist, the Department can consider the necessity of maintaining the checklist as part of the upcoming readoption of N.J.A.C. 7:14B; however, removing the provision is beyond the scope of the within adoption.

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23. COMMENT: Violations of N.J.A.C. 7:14B-6.2(b)1 and 2, failure to provide adequate release protection for tanks and piping as required pursuant to N.J.A.C. 7:14B-16.2, apply to regulated USTs that have separate product bearing supply and return lines, such as regulated heating oil tanks. This violation should not be a violation at all, let alone a non-minor violation, since there is no record keeping requirement. (2)

RESPONSE: Pursuant to N.J.A.C. 7:14B-6.7, release detection recordkeeping is required for all UST systems, including regulated heating oil tanks. As discussed above in response to Comment 22, these relate directly to the ability of the UST system to prevent a discharge. Because prevention of discharges is at the very core of the purpose of the UST regulations, failure to maintain records such that the Department can determine whether a discharge protection is in place would materially and substantially undermine or impair the goals of the regulatory program. Accordingly, the violation is appropriately identified as non-minor.

24. COMMENT: N.J.A.C. 7:14B-15.1(i), failure of the financial institution to notify the Department in writing within 30 days of the cancellation or expiration of any form of financial assurance, is a requirement imposed on financial institutions. Are financial institutions aware of this requirement? Do financial institutions currently provide the Department with the cancellation or expiration notices of financial assurance mechanisms for their insured's USTs? (2)

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RESPONSE: Financial Assurance is a component of the UST registration that a permittee must demonstrate. The requirement that financial institutions notify the Department is the only means that the Department has to determine if the UST system is properly insured. Financial institutions are aware of this requirement. Moreover, courtesy copies of the applicable regulations are available on the Department's website, and the Department provides public notice of each proposed and adopted amendment to its rules. Accordingly, there are ample opportunities for the regulated community, including financial institutions, to become aware of its obligations. The Department also engages in outreach and education initiatives to make requirements known to interested parties.

25. COMMENT: The proposed regulations do not reflect the intent of the Grace Period Law. Particularly troubling is the classification as "non-minor" of administrative noncompliance that amounts to nothing more than a minor oversight or clerical error. Non-compliance matters that have absolutely no impact on the performance of work should be considered minor. Deficiencies in the application process should continue to be addressed with a delayed permit or, if the issue remains uncorrected, a permit denial. (7)

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RESPONSE: The Department was required to apply the criteria set forth in the Grace Period Law at N.J.S.A. 13:1D-129(b) in classifying certain types of violations as minor or non-minor. Certain violations that are “administrative” in nature were determined to be non-minor and not subject to a grace period as listed in Table 1 at N.J.A.C. 7:14-8.18. These include the absence of certain information that is critical to Department decision making during the application process would substantially undermine or impair the Department’s regulatory functions.

The Department has classified as minor those administrative violations that are purely clerical, and do not contravene the criteria enumerated in the Grace Period Law. For example, a violation of N.J.A.C. 7:14A-2.11(f), as described in the response to Comment 31, would not materially and substantially undermine or impair the goals of the regulatory program, nor would it cause harm to human health or environment; therefore, it was determined to be minor.

26. COMMENT: The Grace Period Annual Report, required under proposed N.J.A.C. 7:14A-19.6(i), appears unnecessary as it provides no substantial information, nor does it aid in enforcement of the overall Industrial Pretreatment Program. The proposed Grace Period Annual Report appears only to address minor violations in relation to extending existing due dates. It seems trivial to track such information. A simple addendum to the existing Clean Water Enforcement Act Report under existing N.J.A.C. 7:14A-19.6(c) would apparently satisfy the requirement, identifying the number of minor violations and the amount of times the new grace

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periods were implemented as a result of the new Grace Period Rule. Information collected from the proposed Grace Period Annual Report would in no way measure the effectiveness of the program. This is reflected in the Grace Period Law's own criteria, which states that if the violation does not materially and substantially undermine or impair the goals of the regulatory program, it should be considered minor. In addition, the Department states in the Summary, 38 N.J.R. at 2920, that the law does not affect the Department's enforcement authority, including the exercise of enforcement discretion to treat a violation as a minor. If there are no substantial changes to the existing law, why must another report be established? (4)

RESPONSE: The Grace Period Law at N.J.S.A. 13:1D-132 requires the Department to provide the Governor and Legislature with a grace period annual report that provides information on the regulatory and enforcement programs that the Department administers. Delegated Local Agencies (DLAs) administer enforcement programs for the Department and, therefore, the Department must obtain the information required at N.J.A.C. 7:14A-19.6(c) from the DLAs.

27. COMMENT: The requirement to include grace period provisions in the Department's rules, including listing the grace period time and to differentiate between minor and non-minor violations, seems excessive. Since there is presently no mandatory penalty for existing "non-minor" violations, there is no future need to distinguish between minor and non-minor violations. The existing rules differentiate minor and non-minor violations based on the

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fact that mandatory penalties are enforced for non-minor violations. Therefore, the distinction is self evident. Minor violations are already subject to the DLA's discretion when assessing penalties, if any. In the case of the Industrial Pretreatment Program (IPP) Enforcement Response Plan there is only one minor violation proposed by the new rules. (4)

RESPONSE: The Clean Water Enforcement Act, N.J.S.A. 58:10A-1 et seq., requires the Department to assess mandatory minimum penalties for violations of the Water Pollution Control Act that are considered serious violations and for violations by permittees designated as significant noncompliers. N.J.S.A. 58:10A-10.1. The implementing penalty regulations define major, moderate and minor seriousness and conduct for purposes of determining the appropriate penalty amount. (See N.J.A.C. 7:14-8.5(g) and (h).) These definitions serve a separate function and purpose than the definitions of minor and non-minor provided in the grace period rules. Under the adopted grace period rules, violations that are subject to mandatory penalties do not meet the criteria for designation as minor in the Grace Period Law. Also under the rules, violations that are determined to be minor will not be subject to a penalty, provided they are corrected within the specified time period.

28. COMMENT: The specific enumeration of minor and non-minor violations in the individual regulatory programs and inclusion of related criteria to guide Departmental discretion are improvements; however, too much discretion and subjectivity remain. (9)

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RESPONSE: The Legislature directed the Department in N.J.S.A. 13:1D-129 to designate particular permit conditions or regulations as minor or non-minor. The Legislature mandated the criteria that the Department must use to designate types or categories of violations as minor. This was incorporated into the rules to guide the Department's discretion, and has provided a framework for how grace periods will be applied to the violations listed in the tables.

29. COMMENT: Although the Department has limited enumerated "minor" violations to what, on their face, appear to be largely administrative or procedural errors, these errors can and do lead to substantive failures to protect resources. (9)

RESPONSE: The Department has reviewed each type of violation against the criteria of the Grace Period Law at N.J.S.A. 13:1D-129(b). In determining whether an administrative or procedural error will be considered minor, the Department considered whether the error is one that violates the criteria. For example, an error or omission that fails to disclose a discharge, or makes it impossible for the Department to determine whether a discharge occurred, is a non-minor violation. Accordingly, not all administrative or procedural errors are classified as minor. See response to Comment 25, above.

30. COMMENT: It is not clear what the role of Compliance and Enforcement staff is in making minor/non-minor violation determinations. (9)

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RESPONSE: Compliance and Enforcement staff will refer to N.J.A.C. 7:14-8.18 to determine if a violation is classified as minor or non-minor, and will apply the additional criteria at N.J.A.C. 7:14-8.4A(c) to violations classified as minor.

31. COMMENT: A violation of N.J.A.C. 7:14A-2.11(f), failure of permittee to submit relevant facts previously omitted in a permit application, or request for authorization or submit corrected information for a permit application, request for authorization or any report within 10 days of becoming aware of the correct information, is considered minor and subject to a grace period. To provide an additional 30 days to supply the information seems to give an unnecessary benefit to the permittee, especially considering the information is likely relevant to permit approval. (6)

RESPONSE: In N.J.S.A. 13:1D-129, the Legislature directed the Department to promulgate regulations identifying types or categories of violations as minor or non-minor. In determining whether a violation is minor or non-minor, the Department was required to apply the criteria at N.J.S.A. 13:1D-129(b). Under these criteria the failure of a permittee to comply with N.J.A.C. 7:14A-2.11(f) would not materially and substantially undermine or impair the goals of the regulatory program, nor would it cause harm to human health or environment. This type of violation may occur during the Department's review of a permit for administrative completeness. An additional 30 days would allow the permittee to submit the information during that review.

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Until the information is submitted, the applicant would not receive a permit. Accordingly, the violation is appropriately identified as minor. The Department has the ability, under N.J.A.C. 7:14A-8.4A(c), to designate a violation as non-minor, if the facts of the specific violation cause it to fall outside of the criteria of N.J.S.A. 13:1D-129(b).

32. COMMENT: A violation of N.J.A.C. 7: 14A-19.3(c)1, failure of delegated local agency to notify indirect users of the responsibilities required in the DLA's rules and regulations or sewer use ordinance, is classified as minor. The failure of the DLA to notify indirect users of the responsibilities required of them could result in violations and, therefore, is appropriately classified as non-minor. (6)

RESPONSE: The requires a DLA to notify indirect users of the responsibilities required in the DLA's sewer use ordinance or rules. DLA compliance with this requirement can be achieved by meeting with the user to provide a copy of and discuss the ordinance or rules, or by the DLA's mailing a copy of the ordinance or rules to the user. Although a DLA's failure to notify a user could lead to violations, a user's failure to receive this information does not preclude the DLA from taking enforcement action for non-compliance events. This ability is clearly specified at N.J.A.C. 7:14A-19.3(c)1. Further, a user's failure to ascertain the discharge standards and requirements is not a defense to any violation. N.J.A.C. 7:14A-19.3(c)1 applies to

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the DLA notification requirement and not user noncompliance. It is not the lack of notification that would result in a violation, but rather it is the user's noncompliance with the DLA's ordinance or rules that results in a violation. Accordingly, the violation is appropriately identified as minor.

33. COMMENT: A violation of N.J.A.C. 7:14A-19.3(c)3, failure of a DLA to perform compliance monitoring and inspections of indirect users, is classified as minor. Allotting an additional 30 days for DLAs to comply with this standard may result in a violation's going undetected. Strict compliance with a monitoring/inspection timeline is necessary; otherwise the purpose of the NJPDES program is frustrated. (6)

RESPONSE: N.J.A.C. 7:14A-19.3(c)3 requires DLAs to perform compliance monitoring and inspections of indirect users. However, significant indirect users are required to conduct self-monitoring and report to the DLA on a monthly basis. (See N.J.A.C. 7:14A-21.3(h).) Also, all indirect users must immediately report any discharges that could cause problems to the local agency's treatment works. (See N.J.A.C. 7:14A-21.2(b).) Under the United States Environmental Protection Agency's guidance (*Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Implementation Requirements*, EPA Office of Water, September 1987), a DLA does not meet the reportable noncompliance criteria (RNC) unless it fails to conduct at least 80 percent of the inspection and sampling events at all significant indirect users. The Department has found that, in general, significant indirect users are inspected and

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sampled as required, and allowing an additional 30 days to achieve compliance with this standard where a small number of users need to be inspected and/or sampled is prudent. The Department has determined that the violation conforms to the criteria at N.J.A.C. 7:14-8.4A(c) and is appropriately classified as minor.

34. COMMENT: A violation of N.J.A.C. 7:14A-19.3(c)4, failure of a DLA to review and respond to violations of an IPP permit or the sewer use ordinance/rules and regulations within 60 days of receipt of the compliance information generated by indirect users or the DLA, is classified as minor. Any such violations should be reviewed and responded to immediately, discouraging any future noncompliance, which would result in more violations. (6)

RESPONSE: N.J.A.C. 7:14A-19.3(c)4 requires DLAs to respond to violations of the Industrial Pretreatment Program (IPP) permit or Sewer Use Ordinance (SUO) or Rules within 60 days of receipt of the compliance information. Failure by a DLA to meet this requirement is a minor violation with a 30-day grace period. The Department believes that allowing an additional 30 days is appropriate, given that DLAs receive reports from all their Significant Indirect Users (SIUs) on a monthly basis. With monthly reporting, a DLA must review a number of reports that is equal to the number of SIUs or permittees that it regulates. Such reviews may also include review of the laboratory quality assurance/quality control (QA/QC) data; therefore, requiring an immediate response by a DLA is not practical. In accordance with the model enforcement

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response plan (Appendix A of N.J.A.C. 7:14A-19), enforcement responses must be escalated where continuing violations occur. The Department has determined that the violation conforms to the criteria at N.J.A.C. 7:14-8.4A(c) and is appropriately classified as minor.

35. COMMENT: A violation of N.J.A.C. 7:14A-19.3(c)5, failure of a DLA to take enforcement actions based upon indirect users' noncompliance, is classified as minor. Enforcement actions should be taken immediately, in order to demonstrate to the user that non-compliance will not be tolerated. (6)

RESPONSE: N.J.A.C. 7:14A-19.3(c)5 requires a DLA to take enforcement action against indirect users in accordance with the approved enforcement response plan (ERP), or approved Industrial Pretreatment Permit (IPP). The ERP specifies how soon after a violation is reported that the DLA must commence an enforcement action. This ranges from two days to as long as six months, depending on the violation. Accordingly, the approved ERP does not require, in any instance, "immediate" enforcement action, as the commenter suggests. It would not be appropriate for the Department to require in its table of violations an immediate enforcement action when the approved ERP or IPP does not contain such a requirement.

In the adopted rules, the Department has designated the DLA's failure to timely enforce a violation as minor, and subject to a grace period. However, the Grace Period Law is clear that a

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violation that is generally designated minor can be deemed non-minor, and not subject to a grace period, if the specific violation does not meet the requirements of the Grace Period Law at N.J.S.A. 13:1D-129. Therefore, in the event that a DLA does not timely commence an enforcement action against, for example, a discharge violation, then the Department can determine that a grace period is not appropriate and issue a penalty to the DLA immediately.

Moreover, that a local agency is delegated with authority to enforce the Department's rules does not eliminate the Department's own authority to initiate an enforcement action, if a particular violation requires a more immediate response. Accordingly, if a DLA has not timely commenced an enforcement action in accordance with the ERP or IPP, the Department can commence an enforcement action on its own.

Summary of Agency-Initiated Change:

The Department is modifying N.J.A.C. 7:14A-19.3(c)11 on adoption to include reference to the requirement to submit the grace period annual report among the reports that DLAs must submit annually. Although the Department included references to other requirements for DLAs to submit annual reports (N.J.A.C. 7:14A-19.6(h) and N.J.A.C. 7:14-8.17(c)2iv), it inadvertently omitted the reference to the grace period annual report from the list at N.J.A.C. 7:14A-19.3(c)11.

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Federal Standards Statement

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

The Department has conducted an analysis of the adopted amendments and new rules and has determined that they do not exceed any standard or requirement imposed by Federal law, and are consistent with Federal law and Federal penalty assessment guidance. (See the NPDES provisions of the Clean Water Act, 33 U.S.C. §§ 1251 et seq., 40 CFR Part 122; the underground storage tank provisions of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, the Hazardous and Solid Waste Amendments of 1984, and the Superfund and Reauthorization Act of 1986, 42 U.S.C. §§ 6901 et seq. (collectively referred to as "RCRA"), 40 CFR Part 280.) Accordingly, no Federal Standards analysis is required.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

7:14-8.18 Tables of minor and non-minor violations; grace periods

(a) – (c) (No change from proposal.)

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TABLE 1

N.J.A.C. 7:14A POLLUTANT DISCHARGE ELIMINATION SYSTEM RULES

...			
7:14A-6.2(a)	Failure to comply with any general conditions applicable to all NJPDES permits specified in N.J.A.C. 7:14A-6.2(a) excluding 7:14-6.2(a)6, 7, 8*[,]* <u>and</u> 10 *[and 14]*.	NM	
...			

TABLE 2

N.J.A.C. 7:14B UNDERGROUND STORAGE TANKS RULES

(No change from proposal.)

7:14A-19.3 Industrial pretreatment program requirements for all local agencies

(a) – (b) (No change.)

(c) All delegated local agencies (DLAs) shall comply with the following IPP requirements:

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1. – 10. (No change.)

11. All DLAs shall submit annual reports required by N.J.A.C. 7:14A-19.6(c)*[and]* *,* (f)

and (h); and

12. (No change.)