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ENVIRONMENTAL PROTECTION

COMPLIANCE AND ENFORCEMENT

Water Pollution Control

Water Pollution Control Act Rules

Adoption: N.J.A.C. 7:14

Proposal Number: PRN 2009-310

Proposed: October 5, 2009 at 41 N.J.R. 3776(a)

Adopted: _____, 2010, by Bob Martin, Commissioner, Department of
Environmental Protection

Filed: _____ as R.2010 d. _____, without changes.

Authority: N.J.S.A. 13:1B-3 et seq., 13:1D-1 et seq., 13:1E-1 et seq., 58:10-23.11 et seq., 58-10A-1 et seq., 58:11-49 et seq., 58:11A-1 et seq., and 58:12A-1 et seq.

DEP Docket Number: 13-09-09/728

Effective Date:

Expiration Date:

The Department of Environmental Protection (Department) hereby adopts without changes N.J.A.C. 7:14, the Water Pollution Control Act rules. Chapter 14 contains the rules of the Department of Environmental Protection governing the construction of wastewater treatment facilities, and provisions regarding civil administrative penalties and adjudicatory hearings under the State's Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.

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The proposal to readopt the Water Pollution Control Act (WPCA) rules without amendments was published in the New Jersey Register on October 5, 2009 at 41 N.J.R. 3776(a). Timely filing of the proposal extended the chapter expiration date until April 3, 2010, in accordance with N.J.S.A. 52:14B-5.1c. On January 20, 2010, Governor Christie issued several executive orders. Executive Order No. 1 suspended for 90 days more than 150 then-pending proposals of various New Jersey agencies, among which was the proposal to readopt the WPCA rules and 11 other proposals of the Department. Executive Order No. 1 states that one of the Governor's priorities is to establish, under the direction of a Red Tape Review Group, a "commonsense" approach to the promulgation of rules. The commonsense principles are described in Executive Order No. 2, and the Red Tape Review Group is established under Executive Order No. 3. The purpose of the suspension was to afford the Red Tape Review Group the opportunity to examine the suspended rulemakings and make recommendations as to those proposed rules it determines are "unworkable, overly-proscriptive or ill-advised."

On February 3, 2010, the Department filed for publication in the New Jersey Register a notice of the extension or reopening of the comment period on the proposal to readopt the WPCA rules, and the other 11 suspended Department rulemakings, to March 15, 2010. The notice appeared in the March 1, 2010, New Jersey Register (see 42 N.J.R. 642(a)). The Department posted the notice on its website on February 4, 2010. The Department sought through the notice to focus any additional written comments submitted on the purposes of the rules review set forth in the executive orders. The Department also announced in the notice that it would be scheduling informal stakeholder meetings on the proposals and that the dates for the

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The stakeholder meeting for the proposal to readopt the WPCA rules was held on March 11, 2010. At the stakeholder meeting, the Department specifically sought discussion of the economic analysis, Federal standards comparison, process improvement, and compliance and enforcement review for the proposal. The stakeholder meeting was attended by five people representing commercial laboratories, environmental advocates, consultants and responsible parties. One stakeholder commented about Governor Christie's Executive Orders. He was asked to submit a written comment which he did, and the Department has responded to the comment in this adoption. One stakeholder commented that cost benefit analyses of environmental regulations, when attempted, are invariably wrong. This comment was also later submitted in writing during the extended comment period, and is responded to in this adoption. One stakeholder was supportive of the rules going forward as is.

Another topic discussed at the stakeholder meeting was the need to revise the Underground Storage Tank (UST) rules at N.J.A.C. 7:14B. The Department explained that this was the subject of another stakeholder meeting regarding the UST rules. Several of the stakeholders were from the petroleum industry and had various comments and questions on the UST rules and how Water Compliance and Enforcement assesses penalties for violations. There was an open discussion regarding these subjects. The written comments received subsequently from these stakeholders are addressed in this adoption.

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

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Summary of Public Comments and Agency Responses.

The Department received timely written comments during the original and reopened comment period from the following persons:

1. Bill Wolfe, Public Employees for Environmental Responsibility (PEER)
2. Christopher Len, New York/New Jersey Baykeeper and Hackensack Riverkeeper
3. Jeff Tittel, Sierra Club
4. Eric DeGesero, Fuel Merchants Association of New Jersey
5. John F. Donohue, Petroleum Equipment Contractors Association of New Jersey
6. Emanuel Alveraz, C-3 Technologies

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.

1. COMMENT: The Department's notice and comment procedure, the informal stakeholder process, and the Red Tape Review Group process created by Governor Christie's Executive Order No. 2 do not comply with the rulemaking requirements of the New Jersey Administrative Procedure Act (APA). Web posting and reliance on the authority of Governor Christie's Executive Order Nos. 1 through 3 cannot supersede or replace APA requirements. All 12

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Department may not - after the fact - revise these procedures. (1)

RESPONSE: As the commenter acknowledges, this rulemaking, as well as the other proposals to which the commenter referred, were proposed in accordance with the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 et seq. On January 20, 2010, Governor Christie issued a number of executive orders. Executive Order No. 1 (EO1) suspended for 90 days more than 150 then-pending proposals of various New Jersey agencies, including 12 proposals of the Department. EO1 states that one of the Governor's priorities is to establish, under the direction of a Red Tape Review Group, a "commonsense" approach to the promulgation of rules. The commonsense principles are described in Executive Order No. 2 (EO2), and the Red Tape Review Group is established under Executive Order No. 3 (EO3). The purpose of the suspension was to afford the Red Tape Review Group the opportunity to examine the suspended rulemakings and make recommendations as to those proposed rules it determines are "unworkable, overly-proscriptive or ill-advised" (see EO1, 4th whereas clause). EO1 directed that the suspension be undertaken in a manner consistent with APA rulemaking requirements, and specifically exempted from suspension any proposed rulemaking for which the failure to adopt would adversely impact public safety or security; adversely impact public health; prejudice the State with respect to receipt of monies from the Federal government or the ability to obtain any certifications from the Federal government; prevent the application of powers, functions and duties essential to the operations of the relevant State agency; or adversely impact compliance with any judicial deadline.

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Both EO2 and EO3 stress transparency and the involvement of stakeholders and the public in agency rulemaking, which is a fundamental tenet of the APA. Accordingly, the Department determined it was appropriate both to extend the formal comment period on its suspended proposals and to also hold stakeholder meetings to facilitate informal discussions of the rulemakings in consideration of the purposes of the executive orders.

On February 3, 2010, the Department filed for publication in the New Jersey Register a notice of the extension or reopening of the comment period on the 12 suspended rulemakings to March 15, 2010. The notice appeared in the March 1, 2010, New Jersey Register (see 42 N.J.R. 642(a)). The Department posted the notice on its website on February 4, 2010.

The notice provided an additional period for public comment on each of the rulemakings beyond that required by the APA. The notice did not change the content of the original proposals in any way. While not precluding additional comment on any aspect of the pending proposals during the extended/reopened comment period, the Department sought through the notice to focus any additional comments submitted on the purposes of the rules review set forth in the executive orders. The Department also announced in the notice that it would be scheduling stakeholder meetings on the proposals and that the dates for the meetings would be posted on the Department's website. The schedule of the stakeholder meetings was subsequently posted on the website on February 22, 2010. The first of the stakeholders meetings was held on March 2, and the last on March 11, 2010.

The stakeholder meeting regarding this rulemaking is described above in the introductory section of this adoption. Public comments for the administrative record were accepted in writing during the original public comment period and during the additional comment period that ended

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2. COMMENT: The Department's web post states the following: "[Note: The Department prefers electronic submissions in order to facilitate timely review of comments to meet the timeframes for action in the Executive Orders.]"

The time restriction (in other words, the timeframe for action pursuant to Executive Order Nos. 1 through 3 and the Red Tape Review Group review process) cannot replace or supersede the requirements of the APA. The March 15 deadline is arbitrary and not in accordance with APA requirements. (1)

RESPONSE: The Administrative Procedure Act prescribes minimum notice requirements to ensure that adequate opportunity for public input on a proposed rule is provided. As indicated in response to comment 1 above, the proposals for which the Department extended or reopened the comment period for purposes of the review initiated by the executive orders satisfied the notice and public comment requirements of the APA at the time they were originally proposed. The notice provided an additional period for public comment on each of the rulemakings beyond the

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was established so that comments related to the purposes of the executive orders would be received within the 90-day timeframe (ending April 20) established by Executive Order No. 1 for the Red Tape Review Group to conduct its review of the suspended proposals so that it might thereafter make its recommendations.

3. COMMENT: The substantive requirements of Executive Order Nos. 1 through 3, particularly the requirements to conduct cost/benefit analysis and to consider cost/benefit analysis as a basis for regulatory decisions, is ultra vires and not authorized by either the APA or the enabling authorities pursuant to which each of the 12 rules were proposed. (1)

RESPONSE: The Administrative Procedure Act requires that each proposed rulemaking include a description of the expected socio-economic impact of the rule, as well as a regulatory flexibility analysis of impacts on small businesses, a jobs impact statement, an agriculture industry impact statement, a housing affordability impact statement, and a smart growth development impact statement. See N.J.S.A. 58:14B-4. See also the Rules for Agency Rulemaking, N.J.A.C. 1:30-5.1. In addition, the APA requires that a Federal standards analysis must be included in each proposal and adoption. See N.J.S.A. 52:14B-23, and N.J.A.C. 1:30-5.1. Neither the APA nor the enabling authority for this rulemaking preclude an analysis of the costs and the benefits of a proposed rule as part of the APA-required impact analyses.

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4. COMMENT: The "reopening" of the public comment period and retroactive application of new procedures, standards, and decision criteria established by Executive Order Nos. 1 through 3 is ultra vires, not authorized by law, and inconsistent and in violation of law. This includes the APA requirements as well as the enabling statute for each rule proposal. (1)

RESPONSE: As indicated in prior responses, the procedure followed for this rulemaking, including the reopening of the comment period to provide additional opportunity for public comment and the request to focus the additional public comments on the purposes of the rules review set forth in the executive orders, is consistent with the rulemaking requirements of the Administrative Procedure Act. Seeking additional public input on, for example, the potential costs and benefits of the rulemakings in a more focused way as contemplated by the executive orders did not result in new procedures, standards, and decision criteria being imposed. Rather, the extended comment period and stakeholder meetings supplemented the statutorily required rulemaking procedures for public comment and participation in rulemaking. The commenter has not explained how providing an opportunity for additional public comment, or having the Department consider those additional comments, violates the APA or the enabling statutes for this or any of the affected rulemakings. Consequently, the Department is not able to further specifically address this aspect of the comment.

5. COMMENT: The Department's application of the provisions of Executive Order Nos. 1 through 3 to the subject rule proposals would violate the procedural and substantive requirements of Federal environmental laws and the delegation agreements under which New Jersey

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implements Federal laws. These laws include, but are not limited to the Safe Drinking Water Act, the Coastal Zone Management Act, the Resource Conservation and Recovery Act (RCRA), the Clean Water Act, and the Clean Air Act. The same violations arise by the Department's after the fact "reopening" of the public comment procedure, as part of which this comment is submitted. (1)

RESPONSE: Several of the programs for which proposals were suspended under Executive Order No. 1 and for which the Department reopened or extended the comment period are administered by the Department in conjunction with equivalent Federal programs under independent State statutory authority, as allowed by the applicable Federal statute. Others are programs that have been delegated to the Department by the Federal government, again in accordance with the applicable Federal statute. The Department's decision to allow further opportunity for public comment in order to obtain comments focused on the directives contained in the executive orders is not barred by the New Jersey Administrative Procedure Act and does not violate any Federal environmental law related to any of the Department's programs that implement the affected rules. The Federal statutes and delegation agreements do not preclude the Department from seeking public input determined to be appropriate before taking regulatory action. Similarly, the Federal statutes and delegation agreements do not preclude the Department from considering the impacts of the rulemaking on the regulated public for purposes of determining the best way to implement the required standards.

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6. COMMENT: The "reopening" process and the provisions of Executive Order Nos. 1 through 3 violate Federal funding agreements and the National Environmental Partnership Performance Agreement (NEPPS). The Department may not substitute the provisions of the Executive Orders and the Red Tape Review Group review process for the requirements of Federal law, regulation and funding agreements. (1)

RESPONSE: Federal funding agreements and the National Environmental Partnership Performance System (NEPPS) do not establish requirements for the rulemaking process. NEPPS has two major components, the Performance Partnership Agreement (PPA) and the Performance Partnership Grant (PPG). The PPA focuses mainly on activity commitments that the Department makes to earn the overall PPG from the U.S. Environmental Protection Agency. While some of the commitments may relate generally to the development of rules and expected timeframes, neither the PPA nor PPG deals with the procedures for rulemaking. Accordingly, the PPA and PPG do not preclude the Department from seeking and considering public comments related to the purposes of the rules review set forth in the executive orders.

7. COMMENT: Based on the concerns expressed by the commenter in comments 1 through 6 above, the Department should withdraw this sham "reopening of the public comment process." This "reopening" process is not in compliance with procedural notice/comment requirements of applicable law. (1)

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8. COMMENT: The "common sense principles", standards, criteria, and informal process established by Executive Order Nos. 1 through 3 are not authorized by law, can have no legally binding effect, and expressly violate State and Federal law. Accordingly, this "proposal" must be withdrawn. (1)

RESPONSE TO COMMENTS 7 AND 8: As explained in the responses to comments 1 through 6 above, the Department's actions to propose and adopt this rulemaking meet the requirements of the APA, and do not violate the enabling statutes or applicable Federal law.

9. COMMENT: The "Red Tape Review" process is an informal process that is not on the record. This process is not transparent and not authorized by law. It may not be considered or relied upon in any way for final agency regulatory decisions regarding the subject rule proposals. No information considered or decisions reached during that process may be considered as part of the administrative record of the subject rule proposals, and none of it can be relied on as a basis for final regulatory decisions by the Department. (1)

10. COMMENT: The stakeholder process announced for this proposal is an informal process that is not on the record. This process is not transparent and not authorized by law. It may not be considered or relied upon in any way for final agency regulatory decisions regarding the subject rule proposals. No information considered or decisions reached during that process may be considered as part of the administrative record of the subject rule proposals, and none of it can

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RESPONSE TO COMMENTS 9 AND 10: As indicated in the response to comment 1, the process followed by the Department in this rulemaking, including the additional public comment period, meets the requirements of the Administrative Procedure Act. The extended/reopened comment period and the informal stakeholder meetings were intended to facilitate receipt of additional public input on the 12 Department proposals suspended under Executive Order No. 1 in consideration of the purposes of the executive orders as enumerated therein. The notice extending and/or reopening the comment period on the suspended rulemakings specifically noted that the stakeholder meetings were not public hearings and that testimony on the proposals was not going to be accepted at them. The stakeholder meetings were open to all, and their purpose was to facilitate informal discussion of the rulemakings. The stakeholder meeting regarding this rulemaking is described above in the introductory section of this adoption. Public comments for the administrative record were accepted in writing during the original public comment period on each of the proposals, and in writing during the additional comment period that ended March 15, 2010. As with any rulemaking, and as contemplated by the APA, the Department has reviewed, considered, summarized and is responding in this adoption to all formally submitted comments received during the entirety of the public comment period.

11. COMMENT: The Governor's Red Tape Review executive orders have raised potentially troublesome issues for the Department's rulemaking and enforcement process. Considering the

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economic impacts of environmental regulation is a fraught process. Even the best economists struggle to quantify environmental benefits in dollar terms; their best efforts, with the benefit of hindsight, tend to underappreciate environmental value at the time of quantification tragically and repeatedly. Economists struggle with correctly finding and valuing the external impacts of economic transactions, discount rates and contingent values for natural resources; most ecosystem services are not captured in market transactions and are thus of indeterminate value. There is simply no economically viable way for the Department to say, for example, that 15 shopping malls are of equal value to New Jersey as a self-sustaining osprey population.

Cost benefit analyses of environmental regulation, when attempted, are invariably wrong, invariably non-confirmable and invariably minimize the benefit while maximizing the cost. Including such cost benefit analyses in the regulatory process is an important decision for any statute, and legislatures are well aware of the importance of deciding on whether particular legislation will impel or forbid such a process.

Inappropriately applying cost benefit analyses is a common and fatal mistake many levels of government make; one that often puts them on the wrong end of an environmental lawsuit.

While true benefit analysis is probably not possible, only a highly trained economist can be expected to wade through analysis of contingent valuation, externalities and discount rates. Reasonable analysis, let alone accurate analysis, is not possible for a layperson to produce. The commenter's understanding is that the Department has not used any particular economic theory to generate its benefits analysis, has no methodology to quantify benefits, has not used economists to review the effects of these rules and has only one economist on staff for the entire

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benefits, a qualified economist is likely to find far greater benefit than the Department has. (2)

RESPONSE: Governor Christie's Executive Order No. 2 delineates "common sense principles" for rulemaking that are intended to provide the "opportunity to energize and encourage a competitive economy to benefit business and ordinary citizens." At section 1a, the Executive Order directs all State agencies to solicit 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. At section 1d, the Executive Order directs State agencies to "employ the use of cost/benefit analyses, as well as scientific and economic research from other jurisdictions, including but not limited to the federal government when conducting an economic impact analysis on a proposed rule."

The Administrative Procedure Act (APA) at N.J.S.A. 52:14B-23 and 24 (P.L. 1995, c.65, effective June 5, 1995, which codified the substance of Governor Whitman's Executive Order No. 27(1994) into the APA) requires State agencies that adopt, readopt or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a comparison with Federal law. The analysis must include a cost-benefit analysis that "supports the agency's decision to impose the standards or requirements and also supports the fact that the State standard or requirement to be imposed is achievable under current technology, notwithstanding the Federal government's determination that lesser standards or requirements are appropriate." Therefore, since 1994 in accordance with State law the Department has included a cost-benefit analysis in all of its rulemakings where the rules or standards exceed Federal law.

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The APA at N.J.A.C. 7:52-14B-4(a)2 requires State agencies to include in each rulemaking a “description of the expected socio-economic impact of the rule.” The Office of Administrative Law’s Rules for Agency Rulemaking implement the APA and require at N.J.A.C. 1:30-5.1(c)3 that a notice of proposal include “an economic impact statement which describes 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.” Each of the Department’s rule proposals contains such a statement.

As required by the APA and the Rules for Agency Rulemaking, the Department’s rule proposals also contain statements of social impact, jobs impact, agriculture industry impact, impact on small business (regulatory flexibility analysis); and statements addressing the proposed rules’ impact on smart growth and the cost of housing. The Department in addition includes an environmental impact statement, describing the impact that its proposed rules will have on the environment.

The Department acknowledges that it has not historically provided as much detail in its impact analyses as an economist might. The Department endeavors to employ a practical approach to its determination of the costs and benefits of its rulemakings, and necessarily relies to a certain extent on information developed by other sources. For instance, the Department may adapt and tailor to the circumstances in New Jersey the economic analysis for a rule performed by another state or the Federal government. In addition, the Department conducts informal and formal outreach to regulated communities, environmental interest groups, the U.S. Environmental Protection Agency, other Federal and State agencies, agencies of other states, and the general public in the early stages of rulemaking. This is particularly the case for larger, more

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Register, and/or use mail and electronic mail to known stakeholders, providing a description of the rules anticipated to be changed and the timeframe and means by which input will be gathered, for instance, at informal meetings or by written submissions, or both. Through outreach such as this, the Department obtains information on possible costs and benefits of rules that it is developing, as well as suggestions for the approach the Department should take in pursuing its regulatory goals.

Through the impact statements and Federal standards analyses for its rulemakings the Department attempts to identify the anticipated costs and benefits that will result from the proposed rules, including reasonably foreseeable indirect or secondary costs and benefits. The Department does attempt to identify and describe, even if it cannot always quantify in dollar terms, the proposed rules' costs and benefits in order to provide the public with as complete a picture and/or rationale as possible regarding the positive and negative economic impacts of the rulemaking.

Going forward the Department anticipates looking to the scientific and economic research of other jurisdictions and conducting advance outreach for its rulemakings in order to obtain enhanced insight into the costs and benefits that will flow from its rules and help accomplish the regulatory balance contemplated by Governor Christie's Executive Orders.

12. COMMENT: The Governor's concern that Department standards may, in some instances, exceed Federal standards is misplaced. The Federal law in most environmental matters acts as a basement, below which states cannot fall, but above which they may build. The

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New Jersey's regulations, because of the State's population density, industrial legacy and proximity to several huge metropolitan areas, should probably exceed Federal standards in many and diverse ways. The Department is uniquely positioned to use Federal standards as a starting point to create regulations that specifically address the unique problems facing New Jersey and its citizens. The Department, therefore, should not hesitate to exceed Federal standards when the health, safety, and welfare of New Jersey's citizens and its environment require it. (2)

RESPONSE: The APA at N.J.S.A. 52:14B-23 and 24 requires State agencies to include in their Federal standards analysis a discussion of the policy reasons that support the agency's decision to impose a standard that is more stringent than a comparable Federal standard. This is in addition to the cost/benefit analysis that the APA requires, as discussed in the immediately preceding response. The Legislature stated, at N.J.S.A. 52:14B-22, "[i]t is the declared policy of the State to reduce, wherever practicable, confusion and costs involved in complying with State

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Governor Christie’s Executive Order No. 2, section 1e, requires State agencies to “[d]etail and justify every instance where a proposed rule exceeds the requirements of federal law or regulation. State agencies shall, when promulgating proposed rules, not exceed the requirements of federal law except when required by State statute or in such circumstances where exceeding the requirements of federal law or regulation is necessary in order to achieve a New Jersey specific public policy goal.” This directive establishes a focus and approach to the comparison with Federal law that the APA requires all State agencies and the Department to conduct for rulemaking.

As the commenter points out, the conditions and circumstances of New Jersey and its citizens can be unique to the State. Consequently, both the APA and Executive Order No. 2 acknowledge that there will be times when it is absolutely appropriate for the Department to promulgate standards that are more stringent than Federal standards, either because New Jersey law so requires or because doing so is necessary in order to achieve important public policy goals for the State.

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13. COMMENT: There are probably many instances where Department procedures could be more clear. For example, Department forms may have increased in complexity over the years, some information may be requested redundantly and some permits could, perhaps, be merged. The Department, however, should keep in mind that it is not a “Department of Environmental Permitting,” and its mission should not be to smooth the path from developmental permit applications to development. Central to the idea of protection is that one must often say “no.” The Department should not look at “process improvement” as making it easier to get to “yes.”

(2)

RESPONSE: The Department undertakes various efforts to assist the regulated community in the permit application and review process. For example, in accordance with N.J.S.A. 13:1D-111, the Department develops and makes available technical manuals relating to its various environmental permits. The Department also provides checklists, identifying the application steps and submissions required under the respective permitting program rules. Checklists and applications are made available through the Department’s website. The Department often assigns case managers to assist applicants with the permit process, and to coordinate permitting across various Department programs.

The Department convened the Permit Efficiency Review Task Force in 2008 and, in response to its recommendations (see <http://www.state.nj.us/dep/permittf/documents.html>), has undertaken various initiatives to improve outreach for rulemaking and to streamline and improve the permit application and review process. The Department is committed to upgrading its information technology infrastructure to support electronic submission and processing of permit

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applications and associated reports. The Department is in the process of increasing its network capacity, and is accelerating its efforts to design and develop electronic permitting and reporting services. Recent efforts include, for instance, implementation of an electronic water use and transfer reporting program by the water supply program to facilitate data management, eliminate the use of paper forms, reduce data errors, improve tracking and reporting of data, and make data available in a more timely fashion.

The Department believes process improvements that facilitate the issuance of permits that are consistent with the applicable standards and that are issued in a coordinated and timely fashion are beneficial to the regulated community, the Department, and the environment. Streamlining permitting will conserve the resources of all involved and maintain proper focus on achieving substantive environmental protections. As the Permit Efficiency Review Task Force's recommendations and Governor Christie's Executive Orders recognize, the process of obtaining a permit from the Department should not stand in the way of development that is otherwise allowable under applicable environmental protection law and standards.

14. COMMENT: Although many of the State's environmental regulations could be improved, the Department ought not curtail any protections or delay any rules based on the Governor's Executive Orders. (2)

RESPONSE: The Department, in order to inform the reviews of pending proposed rules being conducted by the Department and the Red Tape Review Group established under Executive Order No. 3 issued by Governor Christie on January 20, 2010, extended or reopened the public

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comment periods and informal stakeholder meetings for pending Department of Environmental Protection proposals suspended under Executive Order No. 1 (2010),

<http://www.nj.gov/dep/rules/notices.html>, 42 N.J.R. 642(a).) In accordance with Executive

Order Nos. 1 and 3, the Red Tape Review Group's task is, among other things, to examine various proposed administrative rules and regulations by a number of State agencies prior to their adoption and make detailed recommendations to the Governor to rescind, repeal or amend those rules. Based on those recommendations, the Commissioner of the Department will determine whether or not to proceed with adoption or amendment of the Department's affected proposals.

The Executive Orders and the Red Tape Review process expressly recognize that some rules must be adopted in order to prevent an adverse impact to public safety or security or public health; prevent prejudice to the State with regard to receipt of funding or certifications from the Federal government; allow State agencies to exercise their essential powers, duties and functions; and comply with any judicial deadline. Rule proposals that would result in such adverse impacts if adoption were delayed therefore were not suspended. Executive Order No. 2 also directs State agencies to implement the “common sense principles” in all rulemaking while keeping in mind the core missions of the agency; public health, safety, welfare and the environment; and the agency’s underlying regulatory objectives. In determining whether to proceed with its rule proposals and for all future rulemaking, the Department will necessarily take all of these factors into consideration.

15. COMMENT: The Water Pollution Control Act rules must go forward because they meet

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

16. COMMENT: In 1995 the Legislature enacted P.L.1995, c.296 (the Grace Period Law), to provide small businesses a grace period to comply with certain environmental regulations. It took the Department many years to implement regulations and when it did, it turned the concept completely on its head. The Department went line by line through every regulation and came up with a penalty matrix for minor and non-minor regulations. The penalties enforced through the Water Pollution Control Act specific to the Underground Storage of Hazardous Substances Act, N.J.S.A. 58:10a-21 et seq., are dramatically out of proportion to the infraction. (4)

RESPONSE: Pursuant to the Grace Period Law the Department reviewed each of the rules issued pursuant to the Water Pollution Control Act to determine if a violation would be minor or non-minor. These are identified in N.J.A.C. 7:14-8.18, and include violations of the Underground Storage Tank rules at N.J.A.C. 7:14B. Based on the designation as minor or non-minor, a grace period would or would not apply. The designation of minor or non-minor violations for purposes of a grace period was based on the criteria of the Grace Period Law, N.J.S.A. 13:1D-129(b). Only those violations that met the criteria were statutorily eligible for a grace period.

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The penalty matrix at N.J.A.C. 7:14B-8.5(f) was not put in place as part of the amendments under the Grace Period Law. Rather, the matrix predated the Grace Period Law amendments by a number of years. The Department bases penalties under the Water Pollution Control Act rules on the seriousness of the violation, and the conduct of the violator, each on a scale of “major,” “moderate,” and “minor,” as described in N.J.A.C. 7:14-8.5(g) and (h). Proportionality is not a factor to be directly considered; however, a violation that is minor in seriousness and is committed by a person whose conduct is also deemed minor will warrant the lowest penalty. Moreover, those violations that are minor for purposes of a grace period will not be assessed a penalty if they are corrected during the grace period.

17. COMMENT: Non-minor infractions under the rules generally stem from the deficiency of Underground Storage Tank (UST) Facility Certification Questionnaire combined with the UST inspectors’ lack of discretion in assessing a violation against what is clearly a paperwork violation.

For example, the questionnaire requires the UST facility owner to check all that apply for demonstration of compliance with the corrosion protection requirement. If the UST owner has an ACT 100 tank, the means of corrosion protection is the tank’s coating. In some instances the UST owner adds a system redundancy of a sacrificial anode. The UST owner checks all that apply on the questionnaire, and then is fined for not testing the anode during an inspection. Since failure to test corrosion protection systems is a non-minor violation, the UST owner is fined \$15,000 and is supposed to be pleased that the fine was mitigated to \$7,500. It goes

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RESPONSE: Most non-minor UST infractions observed during an inspection are related to a piece of equipment (mechanical, electronic or computerized) that is missing, malfunctioning, broken, incompatible with other equipment or has not been tested properly to demonstrate efficacy. In 2004 over 70 percent of the UST facilities in the State did not possess a valid UST registration certificate. Today over 80 percent of the UST facilities in the State possess a valid UST registration certificate. In addition, New Jersey is a national leader in UST operational compliance based upon the EPA mandated metrics used nationwide. These metrics are directly related to documentation regarding equipment operation and equipment testing.

The issue the commenter raises was discussed with stakeholder representatives. The Department no longer assesses penalties in this scenario and accepts the primacy of the UST coating as the method affording cathodic protection, even if a sacrificial anode is also present.

18. COMMENT: Another example where the UST Facility Certification Questionnaire has led to fines in the past is relative to release detection. If a UST owner has a double walled UST system, the means for release detection is monitoring of the interstitial space. If the UST owner also has automatic tank gauging and does not keep records since it is a redundant feature, there should be no penalty. It is important to verify that both the corrosion protection and release detection systems are operating as intended. Therefore, if the systems are working and there has

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While the examples speak to the need to have the UST rules (N.J.A.C. 7:14B) revisited, especially in light of the requirement for UST operator training as per the Energy Policy Act of 2005, the original intent of the grace period regulations should be realized and the penalty matrix should be revisited to ensure that a minor violation receives a minor penalty, if any penalty at all. Maybe some of the issues can be resolved by having the inspectors afforded latitude to recognize what are obvious system enhancements and not penalize the UST owner for them. Additionally, the process may be made less problematic by a revised UST Facility Certification Questionnaire Form. (4)

RESPONSE: The first part of this comment speaks to the operation of multiple and redundant methods of release detection monitoring (RDM) for a double-walled UST. The owner/operator has to identify the means of providing RDM at the point of registration. Typically monitoring of the interstitial space is achieved by the use of a probe tied to the automatic tank gauging system. This kind of array would require the preservation of monitoring records for review by the Department's inspectors. If the method identified by the owner/operator for achieving UST RDM is found to be compliant at the inspection point, while another redundant RDM system is in operation at the same time but not fully compliant (i.e. incomplete or no records) the Department will not assess a penalty for the redundant system non-compliance. The unanswered question in this scenario is whether or not the UST was registered properly. Did the owner/operator know what system for UST RDM was specified when the UST in question was

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With regard to the second part of the comment, in the Grace Period Law, 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. 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 these criteria the Department determined which violations listed in Table 2 of N.J.A.C. 7:14-8.18 are minor or non-minor for purposes of a grace period. 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, failure to supply information if the UST system is modified 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. Accordingly, the violation is appropriately identified as non-minor.

The Department will continue to discuss with the regulated community the manner in which the Department is applying the penalty matrix for certain types of violations that have not or would not result in a release.

19. COMMENT: Given the regulated UST facility registration process in its current form and the vagueness of the UST rule, we question the number of penalties issued which are categorized

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as moderate for both “conduct” and “seriousness.” Compliance failure, when attributed in part to misinformation or the poor exchange of information, certainly should be categorized at the lowest level of the penalty range. Further, when penalties are assessed, the regulated party is not informed of how the penalty is derived in accordance with the matrix. Although the information is available to the regulated party if requested, transparency should dictate the regulated party be provided the information with the penalty. (5)

RESPONSE: Water Compliance and Enforcement utilizes the penalty matrix to determine “conduct” (minor, moderate, major) and “seriousness” (minor, moderate, major) when assessing penalties for UST code violations and indicates the degree in the penalty assessment. Absent any specific comments regarding these definitions, it is not possible for the Department to address whether a specific penalty that was imposed was appropriately identified as “moderate.” However, N.J.A.C. 7:14-8.5(g) establishes the criteria for evaluating whether “seriousness” could be classified as major, moderate or minor. N.J.A.C. 7:14-8.5(h) establishes the criteria for identifying “conduct” as major, moderate or minor.

With respect to the part of the comment that links certain categories of violations and subsequent penalty assessments to the weaknesses inherent to the UST registration process, the comment points to misinformation and the poor exchange of information. The Department relies on the information that facilities provide on the UST registration forms. It is incumbent on the regulated entity to provide complete and accurate information.

Each Administrative Order and Notice of Civil Administrative Penalty (AONOCAPA) that the Department issues has an Appendix, describing the rationale on which the penalty is

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20. COMMENT: The Red Tape Review process was to focus on "coordination with other programs and agency requirements." The Compliance and Enforcement Program should improve the coordination of information and the use of databases in order to aid compliance with the rules governing USTs. (5)

RESPONSE: Water Compliance and Enforcement and the Site Remediation Program (which is involved with contamination from leaking underground storage tanks) hold routine coordination meetings to address the many issues that affect the regulated community. These programs share much of the same information through the Department's New Jersey Environmental Management System (NJEMS) database. The programs discuss and implement additional measures, including outreach (and rulemaking when necessary), to aid the regulated community in its efforts to comply with the rules.

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In addition, since the inception of the UST enforcement program in 2004, Water Compliance and Enforcement has reached out to stakeholder groups and provided annual compliance assistance programs. These programs have been conducted for retail fuel merchants, petroleum equipment contractors and government (Federal, State and local) UST owners and operators. In addition, Water Compliance and Enforcement has posted compliance advisories on the Department's website.

21. COMMENT: Comments were sought relative to "the performance-based nature of the proposed rules." The rule is performance-based in nature, but that is problematic if the regulated community does not understand the expected performance, whether from the interpretive nature necessitated by the unclear underlying rule or if as a result of the poor exchange of key information. (5)

RESPONSE: The Department recognizes that an update of the Underground Storage Tank rules, N.J.A.C. 7:14B, would assist the regulated community in complying with those rules. Accordingly, the Department anticipates amending N.J.A.C. 7:14B in the future to further explain what is expected.

22. COMMENT: Regulated UST facilities should be informed of the current information on file with the Department relative to the specifics of their facility configuration. The Compliance and Enforcement Program should be intimately involved in development of the facility registration form and the regulated community stakeholders should be involved as well to

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produce a clear and technically correct form and accompanying instructions. Compliance and Enforcement could include the current inspection form and an overview of an UST facility inspection process to the regulated UST facility owner/operator so the owner/operator is aware of the key issues of compliance with operating requirements in the absence of their inclusion in the UST rule. (5)

RESPONSE: The Department's Data Miner application, available at www.nj.gov/dep/opra/online.html, makes UST information about specific facilities available online to the public, without charge. UST owner/operators are advised to keep a copy of their registration form in order that they may refer to it in completing future registration forms. The Department continues to explore ways to improve public access to information, keeping in mind financial and technological constraints.

Stakeholders will have a further opportunity to participate in the rulemaking process when the UST rules at N.J.A.C. 7:14B are amended. The Department will also be taking steps in the next two years to implement the operator training requirements of the Energy Policy Act of 2005, which will address training and re-training of facility operators.

23. COMMENT: Regulated facilities should have the option of scheduling a voluntary inspection to encourage familiarity with the UST requirements. Facilities availing themselves of this voluntary inspection should be afforded a limited period to make corrections. In this way funds that a facility might spend in a penalty could be redirected to improving the facility compliance. (5)

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RESPONSE: By August 8, 2010 every UST facility will have been inspected at least once by the Department or county agents. Regulated facilities should be familiar with the UST requirements at this point. Pursuant to the grace period provisions, the Department provides a period of time during which a facility can correct a violation that is determined to be minor, during which time the facility will not incur a penalty. This grace period provision provides the window of opportunity that the commenter seeks to correct minor violations. For purposes of a grace period, non-minor violations are those that result in a discharge, or are contrary to the purposes of the rules. Accordingly, no grace period is provided. Even under the commenter's suggested voluntary inspection program, any non-minor violation should not be subject to a grace period.

If an owner/operator has a question about operational compliance, the owner/operator should feel free to contact Leonard Lipman (Water Compliance and Enforcement) at 609-221-3996. The Department routinely offer compliance assistance this way, and enforcement may be deferred as long as there is no significant ongoing environmental issue at the facility.

24. COMMENT: Compliance and enforcement are necessary to a program's success. Effective enforcement requires a regulated community to understand what is required. The existing UST program is not clear to the regulated community. (5)

RESPONSE: In the last four years the State of New Jersey has emerged as a national leader in UST compliance rates based upon metrics mandated by the USEPA and utilized nationwide.

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If a facility requires compliance assistance, it may contact the Department, as discussed in the response to Comment 23.

25. COMMENT: The UST penalty matrix does not have enough flexibility for the enforcement personnel to consider things like conduct, return to compliance, or environmental impact. In the current format, a UST operator who has demonstrated a clear desire to comply, has been told it is in compliance in prior inspections, and now has a violation that is created because of a different enforcement approach by the regulators, is subject to the same penalty as a chronic violator with numerous repeat offenses and who has had a release due to their negligence. The penalty matrix needs to make provisions for these situations. The responsible operators are actually being punished more than the irresponsible ones because they have been bearing the financial burden of attempting to maintain compliance, yet still receiving the same penalty as someone who has taken the short cut. The Department should have more authority to revoke the right to operate USTs in the State, but still have the authority to abate penalties or issue minor penalties in some situations. (6)

RESPONSE: If a facility has violated the rules, the Department is constrained by the Water Pollution Control Act to consider factors of “seriousness” and “conduct.” In some instances the Department may consider the length of time that it takes for a facility to return to compliance when determining the degree of “conduct.”

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Some violations that may appear insignificant create a risk of environmental impact that could go undetected. Thus, a lack of an immediately noticeable environmental impact should not be determinative when considering the seriousness of a violation. At the other end of this spectrum, if the inspection reveals a visible on-going environmental impact that has been ignored by the owner/operator, the Department will take this into account when determining both “seriousness” and “conduct.”

One explanation for the commenter’s multiple inspection scenario with full compliance at the first inspection and violations documented at a subsequent inspection is the Department’s implementation of a significant change to the UST inspection process. In January 2010 UST inspectors began to also conduct Minor Source Air Pollution permit compliance (Stage I/Stage II Vapor Recovery) inspections at all motor fuel facilities with those permits. The performance of these air compliance inspections with the UST inspection was made for several reasons. Federal law requires that all Federally regulated USTs must be inspected at least once every three years. There are approximately 3,800 UST facilities where these air compliance inspections must be conducted. Assigning these air compliance inspections to UST inspectors reduced the number of Department inspection visits to the sites in question. Reduced numbers of inspections reduced the business interruptions caused by inspections. The reassignment of the inspections to UST inspectors also enabled the Department’s Air Compliance and Enforcement program to allocate personnel to other air pollution priorities, such as dry cleaners, emergency generators and mobile sources.

The marriage of the UST inspection with the Stage I/Stage II Vapor Recovery System inspections allows for a full system inspection at one time. The vapor recovery systems are an

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integral part of a regulated motor fuel UST system. Department inspectors are now inspecting these fueling systems from the point where fuel is introduced into the UST to the tip of the dispenser that is inserted into a vehicle or container. In addition, dispenser cabinet contents are now more routinely subject to physical inspection. When a dispenser cabinet is unlocked for the purpose of completing an air permit compliance inspection the Department often discovers additional UST violations that went unnoticed in the past. The two predominant violations being found are fuel leaking to the ground due to faulty components, and metallic transition piping that is not cathodically protected.

The operational compliance portions of the UST rules have not been changed in more than five years. That timeframe overlaps with the creation of the UST inspection program. In that same timeframe UST compliance rates have risen dramatically. In addition, the UST-related grace period regulations allow for the correction of minor violations within reasonable timeframes. A significant number of UST minor violations are cited and corrected, thereby avoiding the assessment of a penalty.

Federal Standards Analysis

N.J.S.A. 52:14B-1 et seq. and Executive Order No. 27 (1994) 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.

N.J.A.C. 7:14-2 establishes construction standards and requirements for wastewater treatment facilities in New Jersey. The standards included in this subchapter are associated with such activities as mobilization costs, payment to contractors, and identifying the roles and

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The Department has determined that there are no Federal standards or requirements analogous to readopted N.J.A.C. 7:14-2. Accordingly, no Federal standards analysis is required.

N.J.A.C. 7:14-8 contains requirements or standards that exceed Federal requirements or standards. New Jersey's Water Pollution Control Act, as amended by P.L. 1990, c.28 (see N.J.S.A. 58:10A-10), exceeds the Federal program by requiring that mandatory minimum penalties be assessed for certain types of violations and imposes restrictions upon settlement of these violations. N.J.A.C. 7:14-8 mandates penalties of \$1,000 for a serious violation, \$5,000 for a violation that causes the violator to be or continue to be in significant noncompliance and \$100.00 per day for up to 30 days for each effluent parameter omitted on a discharge monitoring report. Once assessed pursuant to this subchapter, penalties may be reduced up to 50 percent, provided that the reduced penalty is not less than the applicable minimum amounts set forth in N.J.A.C. 7:14-8.5(a) or 8.9(e). The Federal statute at 33 U.S.C. §1319(g) provides the United States Environmental Protection Agency with the authority to assess administrative penalties, but there are no mandatory minimums or settlement restrictions set forth therein. The Department's experience during the approximately 17 years the mandatory penalty provisions have been in effect is that the financial effects have been, and will continue to be, minimal.

Full text of the readopted rules may be found in the New Jersey Administrative Code at N.J.A.C. N.J.A.C. 7:14.

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Based on consultation with staff, I hereby certify that the above statements, including the Federal Standards Statement, addressing the requirements of Executive Order 27 (1994) and N.J.S.A. 52:14B-23, permit the public to understand accurately and plainly the purposes and expected consequences of this adoption. I hereby authorize this adoption.

Date:

Bob Martin, Commissioner
Department of Environmental Protection