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ENVIRONMENTAL PROTECTION

WATER RESOURCE MANAGEMENT

DIVISION OF WATER SUPPLY

Safe Drinking Water Act Rules

Adopted Amendments: N.J.A.C. 7:10-2.4, 3.3 through 3.6, 3.8, 3.9, 10.2, 10.5, 10.7, 11.5, 11.7 and 11.10.

Adopted New Rule: N.J.A.C. 7:10-3.10

Proposed: January 4, 2010 at 42 N.J.R. 17(a) (see also 42 N.J.R. 642(a))

Adopted: January 4, 2011 by Bob Martin, Commissioner, Department of Environmental Protection

Filed: January 4, 2011 as R.2011 d.039 **with a substantive change not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).**

Authority: N.J.S.A. 13:1D-1 et seq., 58:11-9.1 et seq., 58:11-23 et seq., and 58:12A-1 et seq.

DEP Docket Number: 19-09-11/751

Effective Date: February 7, 2011

Expiration Date: April 30, 2015

The Department of Environmental Protection (Department) is adopting amendments and a new rule in the Safe Drinking Water Act Rules at N.J.A.C. 7:10. The rules establish the State

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primary and secondary drinking water regulations for public and nonpublic water systems, construction standards, fees, physical connections between an approved and an unapproved water supply, and provisions regarding civil administrative penalties and adjudicatory hearings under the New Jersey SDWA, N.J.S.A. 58:12A-1 et seq. The amendments address certain process changes to increase permit efficiency and to update the penalty and enforcement provisions to conform to the amendments to the SDWA at N.J.S.A. 58:12A-10 made by P.L. 2007, c. 246, commonly referred to as the Environmental Enforcement Enhancement Act, enacted effective January 2008.

The proposal was published in the New Jersey Register on January 4, 2010 at 42 N.J.R. 17(a). No public hearing was requested or held concerning the proposal. The comment period was set to close on March 5, 2010. 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 amend the SDWA 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 amend the SDWA

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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 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 stakeholder meeting for the proposed amendments to the SDWA rules was held on March 10, 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 29 persons representing water systems, commercial laboratories, environmental advocates, consultants, attorneys, and realtors. The amendments related to permit efficiency were supported by those who participated in the discussion. Participants were in favor of the extended permit term and increased thresholds for water main extension permits. One participant expressed concerns that by raising thresholds the Department is moving in the opposite direction of environmental protection and losing oversight of key factors that pose environmental threats, such as the density of service area. There was debate over the focus of the Water Supply Program, which is to oversee water supply management of system resources in accordance with the Water Quality Management Plan and not to restrict development or mandate how each system manages available resources. Another participant questioned if the program was entirely fee supported as

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the reduction in permit application will result in loss of fees from those projects. The program is funded by federal funds, grants, and regulated fees without State funds and the participant felt in this economic climate that it was important for the public to be aware of that fact so the program would be better supported. Overall, participants supported adoption of the proposed amendments.

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

Summary of Public Comments and Agency Responses.

The Department timely received written comments on the proposal from the following persons:

1. Bucco, Anthony, M., Assemblyman, 25th Legislative District
2. Caplan, Harvey
3. Chiavari, Suzanne, New Jersey American Water
4. George – Cheniara, Elizabeth, Esq., New Jersey Builders Association
5. Holloway, Jo
6. Len, Christopher, New York/New Jersey Baykeeper and Hackensack Riverkeeper
7. Liebermann, Stuart, Liebermann & Blecher
8. Sweeney, Richard, T., Laddey, Clark & Ryan, LLP
9. Wolfe, Bill, New Jersey Public Employees for Environmental Responsibility
10. Woods, Howard J., Jr., Howard J. Woods, Jr. & Associates, L.L.C.

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

1. COMMENT: Proposed new N.J.A.C. 7:10-3.10 provides that the Department may assess the economic benefit that “the violator has realized as a result of not complying, or by delaying compliance, with the requirements of the State Act or any rule, administrative order or permit issued....” (49 N.J.R. 23.) This assessment would be in addition to the civil penalty or civil administrative penalty that may total \$25,000.00 per day (42 N.J.R. 23.) Although this provision is consistent with the Environmental Enforcement Enhancement Act, the Department should assess economic benefit penalties only in the most extreme cases and upon documented evidence presented by the Department establishing the amount of the economic benefit in direct relation to the violation and confirming that the economic benefit exceeds the amount of the assessed civil administrative penalty. Absent such a showing, the rules are prone to abuse and should be revised to preclude economic benefit penalties. Rather, this proposed amendment provides no environmental benefit and is only a punitive measure that sends the wrong message to businesses that are evaluating whether to remain in New Jersey or relocate elsewhere. (4)

RESPONSE: The amendments to the penalty provisions are intended to provide an additional deterrent to violators. The Environmental Enforcement Enhancement Act amendments to the Safe Drinking Water Act specifically authorize assessment of economic benefit amounts notwithstanding, and therefore in addition to, the \$25,000 maximum civil administrative penalty per violation per day. The Department does not assess economic

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benefit for every penalty because in many cases a violator has not realized a significant economic benefit from a violation. However, in an instance where documentation clearly shows a violator has profited and gained an economic advantage by avoiding compliance with the rules, for instance, not providing adequate treatment of drinking water, the Department will determine and assess an additional amount for economic benefit.

2. COMMENT: The elements of the rule change are consistent with Governor Christie's Executive Orders, more specifically those that implement the recommendations of the Permit Efficiency Review Task Force. These changes should not be held up because the proposal also contains additional regulatory features under the Environmental Enforcement Enhancement Act. Clearly, the Governor's objective in temporarily suspending all new regulations was designed to spur economic progress not delay it. (1)
3. COMMENT: The work of the Permit Efficiency Task Force is supported. The Department should implement those recommendations that improve or increase efficiency in the permitting process. (4)
4. COMMENT: Proposed amended N.J.A.C. 7:10-10.2(d) permits an applicant for an initial physical connection permit to use a certified tester for the initial installation testing and inspections. Upon issuance, the permit holder will be required to "use a certified tester for the purpose of performing quarterly pressure tests and inspections" as of one year from the effective date of the rule amendments. The Department explains that mandating the use of a

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certified tester will conserve resources by eliminating duplication of reviews of testing and inspection data by the local administrative authority, the water system and the Department.

The commenter supports this amendment, which would eliminate duplicate reviews at various levels of government and save time and financial resources. (4)

5. COMMENT: Proposed N.J.A.C. 7:10-10.5(a)1 incorporates the Permit Efficiency Review Task Force's recommendation to institute e-permitting by making the application forms and checklists for physical connection permits available electronically, on the Department's website. The commenter supports using technology to streamline and expedite the permitting process. (4)

6. COMMENT: Proposed N.J.A.C. 7:10-10.5(e) requires the electronic submission for initial permit applications in an effort to streamline the permitting process. This amendment should be adopted. (4)

7. COMMENT: As recommended by the Permit Efficiency Review Task Force, proposed N.J.A.C. 7:10-11.10(a)3 requires water suppliers to apply for a master permit where an average of four or more permit applications had been submitted for water main extensions, replacements, and transmission mains per year. The commenter supports this amendment to require large water purveyors to operate under a master permit. (4)

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8. COMMENT: Proposed amended N.J.A.C. 7:10-11.10(b)1 and 2 increase the thresholds that determine whether an individual permit for a water distribution system improvement must be obtained. Specifically, the Department increases the threshold from 15 to “more than 30 realty improvements but less than 50 new service connections” and for non-residential demand from 6,000 to 12,000 gallons per day. Proposed N.J.A.C. 7:10-11.10(b)2 is amended to increase the threshold length of the water main from 1,500 feet to 3,000 feet for any water main connection of 50 or more new service connections. The Department explains that these threshold revisions would enable better utilization of its resources “on larger projects with the potential for more significant water supply and public health impacts”, while smaller projects would be reviewed by the respective water systems. Any anticipated revenue loss from fewer permit applications would be offset by the need for less staff resources on application reviews. The commenter supports adoption of these thresholds as review of smaller projects would be expedited given they would not be under departmental oversight. (4)

9. COMMENT: The Department should be commended for several of the proposed changes that will reduce the regulatory burden on the Department and the regulated community while promoting economic development without diminishing the Department’s ability to assure that water suppliers maintain adequate supply capacity. Specifically, the amendments to N.J.A.C. 7:10-11.10(b), which raise thresholds for projects requiring permits, will reduce the number of permit applications that will need to be submitted to and processed by the Department. (10)

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10. COMMENT: The Department should adopt those proposed amendments that eliminate administrative redundancies, reduce expenditure of fiscal and staffing resources in the preparation of and review of multiple permit applications, and expedite the permit approval process. (10)

RESPONSE TO COMMENTS 2 through 10: The Department appreciates the commenters' support for the efficiency related amendments.

11. COMMENT: Proposed N.J.A.C. 7:10-10.2(f) requires the permit holder to maintain all information, data and test results related to physical connection for a "minimum" period of five years from the date of issuance of both the initial permit and each renewal permit. The subsection should be amended to delete the word "minimum" as permit holders would essentially be required to maintain records indefinitely. (4)

RESPONSE: The term "minimum" in the rule does not require the permittee to maintain the information and records for an indefinite period. As noted in the proposal summary the Department is requiring that the records be maintained for five years from the date of issuance of the initial permit and for five years from the date of issuance of each renewal permit thereafter. Retention of these records will enable review of such documents should the need arise, for instance, if there is contamination to the public water supply or the backflow prevention device fails. If the permit holder chooses to maintain the required information and records for a period longer than five years, they may, but they are not compelled to do so by the rules. Retention of records for five years rather than the one year

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term of a permit will assure that sufficient records will be available for review by the Department during an inspection to evaluate the permittee's compliance with this subchapter and that the device is and has been operating properly. The requirement is consistent with other record retention requirements in the rules.

12. COMMENT: Given the foreseeable consequence that a permit may lapse as a result of the new process proposed at N.J.A.C 7:10-10.5(b)1 which requires the permit holder to submit a completed permit renewal application to the Department sixty days before the permit expires, the Department should implement a notification mechanism to alert the permit holder that renewal action is necessary. This mechanism could be as simple as an email message to the permit holder alerting them to take action. (4)

RESPONSE: It is ultimately the responsibility of the permit holder to know when the permit renewal documents must be submitted. Because the annual renewal date is the same for all such permits, April 1, the Department believes permit holders will be able to comply with the submittal requirements without a reminder from the Department. While the Department provided individual reminders to permittees in the past, the need to conserve staff resources for higher priority tasks militates against continuing to do so.

13. COMMENT: Proposed new N.J.A.C. 7:10-10.5(b)2vii modifies the renewal application submittal requirements to include information regarding modifications to existing devices and the installation of new devices in the preceding year. Proposed new N.J.A.C. 7:10-10.5(b)2ix requires a certification by a certified tester that the approved physical connection

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has been tested for tightness. N.J.A.C. 7:10-10.5(b) should be revised to require the permit holder to annually perform the needed tests and then submit the certification to the Department and eliminate the requirement that physical connection permits expire. (4)

RESPONSE: The statute governing interconnections between approved public potable water supplies and unapproved water supplies at N.J.S.A. 58:11-9.2 requires that all physical connection permits expire on April 1 of each year. A statutory change would be required for the Department to eliminate the requirement for permits to be renewed. The amendments, however, do streamline the permitting process and reduce paperwork for the Department and the permit applicants. One year after the amendments become effective, a certified tester must perform the tests on the device and certify in writing that the device has been tested and is operating in accordance with the standards of these rules; the need for oversight of device testing by the Department, the local health Department and the purveyor will be eliminated. The permit holder will submit the renewal application and the required certification, which simplifies the renewal process.

14. COMMENT: Proposed N.J.A.C. 7:10-10.7(a) requires permit holders to submit an application, instead of a written request, for a permit modification. While using technology for permit modifications is a positive step, the Department should ensure that any new applications are processed within a set timeframe. (4)

RESPONSE: N.J.A.C. 7:10-10.7(a) governs administrative changes to an existing physical connection permit. The requirement to submit an application rather than simply notifying the Department in writing is intended to ensure that complete and accurate

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information is submitted in a consistent format that will allow the administrative changes (for example, change in a permit holder's name, mailing address, or tenancy of the facility where the physical connection installation is located) to be processed more efficiently. For new applications, the Department's policy is to issue permits within 90 days of receipt. A review of the Department's records for these permits shows that for administratively and technically complete applications, this 90-day timeframe is generally met; currently only a four percent backlog, 48 of 1102 applications, exists.

15. COMMENT: The proposed amendments should be adopted as they should enable a particular project in Randolph Township, Morris County, which would provide age-restricted housing and the preservation of 61.63 acres of open space that would otherwise be developed, to begin immediately. All required approvals are in place with the exception of public water, which will be remedied by the amendments. (1, 8)

16. COMMENT: It has taken more than five years to secure all approvals for a subdivision in Randolph Township for 150 acres of wooded property with five-acre zoning. A solution was developed where 75 acres of green area was preserved for conservation. On the remaining 75 acres, there are 25 lots of two and three acres that include additional buffers on the rear of each of them. Because of the costs to obtain the approvals, to build septic, to drill wells for water and to sink two 30 thousand gallon tanks for fire fighting, along with the general loss of value in the market, starting the project has been delayed. If the amendments are adopted, they will enable the start of the subdivision by allowing water lines to be brought into the

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subdivision and eliminating the required ground water tanks for fire fighting that the fire department does not embrace. The amendments would also make a big difference for the homeowners' security and the homeowners would not have to pay as much for fire insurance for their houses. (2)

RESPONSE TO COMMENTS 15 AND 16: These amendments do not revise the existing requirements for firm capacity or reverse previous Department decisions regarding the use of ground water tanks or the extension of water mains for fire fighting purposes in Randolph Township. Though the amendments increase the thresholds that determine whether an individual Department-issued permit for a water distribution improvement, such as a water main extension not otherwise covered by a master permit, must be obtained and what type of application information must be submitted, they do not change the provisions of N.J.A.C. 7:10-11.10(b)4, which require that the connection or extension meet applicable firm capacity, water allocation limits and the Areawide Water Quality Management Plan pursuant to N.J.A.C. 7:15. For smaller projects that are below the amended thresholds for Department review, construction of water mains will be reviewed and approved by the respective water systems to ensure that the projects meet the standards of N.J.A.C. 7:10-11.10(b)4.

A continuous and dependable water supply is critical for the protection of public health and is necessary for the construction of new housing developments, the continuous operation of businesses and for fire protection. The protections built into the factors for determining available firm capacity and water supply for new developments and fire protection at N.J.A.C. 7:10-11.4(a)3, 11.5 and 11.10(c) are designed to provide ample water and treatment under a variety of conditions, including peak water demands and potential

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infrastructure failures. These protections have been successful in achieving the goal of an uninterrupted, high quality potable water supply throughout the State. The fact that a project may be below the revised thresholds for Department review does not relieve the purveyor from its obligation under N.J.A.C. 7:10-11.5(e) and 11.10(b)4 to ensure that adequate water is available to serve the project. The Randolph Township Water Department must meet the requirements of N.J.A.C. 7:10-11.5(e) and 11.10(b)4 in order to approve the projects noted by the commenters.

17. COMMENT: Proposed new N.J.A.C. 7:10-11.5(m), which establishes a five-year term for construction permits for public community water systems, is a concern. In instances of limited capacity and where permits are issued for water main extensions to serve new developments, the 5-year term would require that a significant amount of a utility's available capacity be reserved for a longer period for development that may not be realized as compared to more viable projects that may be developed in a shorter period of time. This provision should not be adopted as the commenter's developer services program is geared and dovetailed to the current three-year permit terms. (3)

18. COMMENT: Proposed N.J.A.C. 7:10-11.5(e)4 would provide for a five-year term for permits and allow for one extension. Unfortunately, the language indicates that an extension is not considered complete until water is delivered to all of the lots that would be served by the extension. This goes against good land use planning because it forces developers and utilities to segment projects into often less economical phases simply to avoid the uncertainty

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of the regulatory process and unpredictable market conditions that impact build-out rates.

N.J.A.C. 7:10-11.5(e)4 should not be adopted. (10)

RESPONSE TO COMMENTS 17 AND 18: The Department considered the needs and concerns of both the water supplier and developer when extending the permit term from three to five years, and believes the change provides a reasonable balance. The Department recognizes that developers may have projects that are delayed due to economic or other unforeseen conditions, or are of such a scale that they are developed in phases. Where this occurs, however, developers must be certain that the commitment of water to the project remains, particularly since large sums of money have often been committed to the project. Water purveyors also have a legitimate need to ensure water that is committed to a project, and therefore not available to other projects, is used within a reasonable time period. The five year permit term, with the potential for a two year extension, provides the developer ample time to complete a project and should not present an unreasonable burden on a water supplier. In addition, lengthening the term of the initial permit will reduce the need for permit extensions thereafter and thus reduce the administrative burden on the water purveyor and the Department. Finally, the amendments do not prohibit a water purveyor from entering into other arrangements with the developer to ensure water is used within a reasonable time or establish a cost for reserving the water for extended periods, nor do they prohibit the water purveyor from requesting that the Department issue a permit of shorter duration.

By defining the term “completed” the Department is ensuring that a purveyor continues to properly account for water which is dedicated to Department approved projects. By allowing submission of a construction completion certificate at a point in time when there

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are still outstanding connections that number less than the revised thresholds adopted at N.J.A.C. 7:10-11.10(b) (specifically, 30 realty improvements but less than 50 new service connections or a new non-residential average demand of more than 12,000 gallons per day), the Department is assured that the purveyor will continue to track the demand associated with the remaining connections. The tracking of the demand remains the obligation of the purveyor, but the revised thresholds allow the purveyor to certify construction as complete with a greater number of connections outstanding.

19. COMMENT: The proposed amendments to N.J.A.C. 7:10-11.10(a) for master permits, which delete reference to interconnections, are a concern. Not all interconnections provide a new source of supply for a system that would trigger different monitoring requirements or have an impact on a system's firm capacity. There already is a process for contract review under the Water Supply Allocation Permits rules at N.J.A.C. 7:19. Interconnections between systems, particularly emergency interconnections, should be encouraged, not discouraged, and should be not restricted from a master permit. Many of these interconnections are of mutual benefit. They become an issue when a system that is in need of capacity wishes to utilize the existing emergency interconnections for additional capacity. In these instances, the process already exists and is fully implemented through a contract approval process under N.J.A.C. 7:19. (3)

RESPONSE: As noted in the proposal summary at 42 N.J.R. 20, the Department proposed elimination of the reference to interconnections in the master permit provisions because interconnections provide a new source of water supply for the system and can trigger

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different monitoring requirements or have an impact on a system's firm capacity.

Interconnections are generally for the routine transfer of water and so require contract review by the Department to assess firm capacity or allocation capacity. Further, that capacity must be credited to the purveyor and tracked in the Department's electronic data system to continue to assure capacity. The commenter noted, however, that interconnections for emergency purposes should be encouraged by the Department, not discouraged. In proposing to delete interconnections from N.J.A.C. 7:10-11.10(a) the Department overlooked the importance of interconnections for emergency purposes that are necessary for public safety as they provide an immediate source of water where, for example, a well or other source fails. Emergency interconnections do not require the more in-depth review associated with routine transfers of water because they are used on an infrequent basis and so do not trigger additional or changed sampling requirements, and the inventory modifications in the Department's database are more easily made. Therefore, the Department agrees that emergency interconnections should be encouraged and their inclusion in master permits allowed. Accordingly, the Department is amending the rule at N.J.A.C. 7:10-11.10(a) on adoption to restore the reference to interconnections. However, the Department is limiting interconnections that can be included in master permit applications to only those for emergency transfers of water.

20. COMMENT: Because the efficiency of the master permit process helps support economic growth in the State, it is strongly recommended that master permit applications be given review priority. (3)

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RESPONSE: The intent of the master permit is to reduce the administrative burden on the water supplier and the Department, and to provide latitude to the supplier in making connections to its systems within the constraints of its firm capacity and water allocation limits. To the extent the Department prioritizes the review of permit applications it does so based on considerations of public health and the environment.

21. COMMENT: The requirement at N.J.A.C. 7:10-11.5(e)4 provides that construction of the water main extension will be considered complete for available firm capacity analysis when “water is being delivered to the realty improvements approved under the permit...” 42 N.J.R. 24. The commenter disagrees with this requirement and finds it to be unfair and impractical as it requires water delivery to all the units. Permit approval should be vested once the water main extension itself is installed. (4)

RESPONSE: A continuous and dependable water supply is critical for the protection of public health and is necessary for the construction of new projects, the continuous operation of businesses, and for fire protection. Consistent with its charge under both the Federal and State Safe Drinking Water Acts to ensure a safe and adequate water supply on a continual basis, the Department requires that water systems “reserve” an adequate supply of water when projecting anticipated demands to be derived from new connections. This margin of safety requires every water system to demonstrate that there is adequate infrastructure and water supply to meet all future demands, including when the system experiences the highest peaks in demand – on a monthly, daily, and instantaneous basis. The Department utilizes water use reports submitted by water purveyors on a quarterly basis for this purpose,

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identifying the water demands associated with current customers as well as pending demands associated with all previously approved, but not yet constructed, water main extensions or connections to the water system authorized pursuant to an approved permit. The amendments provide that construction of the water main extension will be considered complete for the purpose of conducting this analysis when water is being delivered to the realty improvements approved under the water main extension permit. As noted in the proposal summary, these amendments do not require that “all” improvements are completed. If at the time of the analysis, there are realty improvements authorized under the permit to which water is not being delivered, the number of such realty improvements cannot exceed the threshold at which a water main extension permit is required in accordance with N.J.A.C. 7:10-11.10(b)1 (specifically, not more than 30 realty improvements but less than 50 new service connections, or generates a new non-residential average demand of more than 12,000 gallons per day). However, the demand associated with those units is required to be accounted for and reported by the purveyor.

22. COMMENT: The proposed amendments to N.J.A.C. 7:10-11.5 miss a significant opportunity to eliminate redundancy in the Department’s rules. The intent of the rule is clearly to avoid situations where the Department issues permits to extend water systems in a way that would cause a permit holder to violate its water allocation permit. While the intent of the existing and proposed rule is laudable, the rule only serves to place additional hurdles in the way of projects that have already received local land use approvals. Compliance with the rule does not assure that a public water supplier will satisfy the conditions of its

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allocation permit. Water use can increase as a result of the addition of new users through projects that do not require construction permits, operational modification to the water system that could shift load from one source to another in a way that contravenes the requirements of an allocation permit, or changes in customer use patterns brought about by weather related conditions. In addition, the Department's method of tracking historic actual use and committed use for projects not yet complete is ineffective because it cannot track actual peak day demand or the actual number and type of connections being served by the water system at any point in time.

Proposed N.J.A.C. 7:10-11.5(e)4 does not recognize the realities of land development. Even moderately sized land development projects take time to implement and this time often extends over several years. The proposed language could force a water supplier to construct mains well in advance of the time they may be needed, or this language could require a water supplier and a developer to reapply for approval of a water main extension that had previously been approved by the Department. In order to secure project financing, the developer, and in some cases the water supplier, must secure approvals to construct the entire project, not only the portions likely to be constructed in the first five years. In cases where the construction and delivery of housing units under one project may require years, the proposed language is a significant impediment to logically planned development.

N.J.A.C 11.5(e) through (g) should be deleted in their entirety and replaced with the following:

(e) Except for a non-capacity related water system modification, a firm capacity

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analysis for the proposed water system shall be submitted on the form available from the Department, Water Supply Administration, 401 East State Street, PO Box 426, Trenton, N.J. 08625-0426, or from the Department's website at www.state.nj.us/dep/watersupply. The firm capacity analysis shall demonstrate that:

1. The proposed water system will have adequate firm capacity to meet the peak water demands forecast by the applicant's professional engineer to occur during the five years immediately following the date of the application to modify the system; and
2. The applicant for the proposed water system possesses a valid water allocation permit issued by the Department under N.J.A.C. 7:19, with applicable limits and/or bulk purchase agreements to divert or obtain the amount of water needed to meet the monthly and annual estimated demands forecast by the applicant's professional engineer to occur during the five years immediately following the date of the application to modify the system; or
3. The proposed water system is necessary to alleviate an adverse environmental impact or a threat to public health, safety or welfare, including, for example, where the existing water supply provided by a public noncommunity or nonpublic system does not meet drinking water standards, or an individual domestic well has lost yield and is unable to meet existing demands or is threatened by contamination.

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The above-suggested changes place the burden of certifying that the water utility has sufficient peak day, peak month and annual production capacity and water allocation to meet the demands anticipated in the next five years on the purveyor. They would also eliminate a series of application requirements that cannot properly track true peak day demand, as opposed to the lower average day during the peak month, or the actual number and type of customers connected to the system at any point in time. The Department has authority under its water allocation rules to assure that water suppliers maintain adequate water allocation permits or water available under contract to meet normal water demands that have been experienced by the water system. As long as the Department continues to enforce the water allocation rules, there is no need to maintain a complex and ineffective series of rules related to system modifications in N.J.A.C. 7:10-11.5.

When the water allocation rules are re-proposed, the Department should consider adding a margin of safety requirement similar to that used in regulating public wastewater treatment works. In the case of wastewater systems, the owner is required to develop a plan of action to expand capacity or reduce extraneous flow once actual demands reach 80 percent of the permitted capacity of the system. Such an approach would be beneficial and would serve as a reasonable guideline for water supply planning. Connecticut, for example, requires water suppliers to maintain a margin of safety of 10 percent in comparing water allocation to average daily demands. That is, the annual allocation must exceed actual average daily demands by 10 percent to be considered adequate. This provides a reasonable factor of safety where extraordinary demands are concerned and allows the water suppliers to reasonably plan for future expansion of their systems to meet anticipated needs. (10)

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RESPONSE: As stated previously, a continuous and dependable water supply is critical for the protection of public health and is necessary for the construction of new housing developments, the continuous operation of businesses and for fire protection. Consistent with its charge under both the Federal and State Safe Drinking Water Acts to ensure a safe and adequate water supply on a continual basis, the Department requires that water systems “reserve” an adequate supply of water when projecting anticipated demands to be derived from new connections. This margin of safety requires every water system to demonstrate that there is adequate infrastructure and water supply to meet all future demands including when the system experiences the highest peaks in demand – on a monthly, daily, and instantaneous basis.

The Department explained in greater detail the process used to determine required firm capacity in its readoption of the Safe Drinking Water Act rules published in the New Jersey Register on June 21, 2010 (see 42 N.J.R. 1170(a); response to comments 5 through 7). The application of the peaking factor of 1.5 for residential development pursuant to N.J.A.C. 7:10-11.5(f)1 is consistent with that required by the Residential Site Improvement Standards at N.J.A.C. 5:21-5.3, which is used to estimate future demands in the water allocation permit review process governed by the Water Supply Allocation Permits rules at N.J.A.C. 7:19. A uniform methodology provides water systems and the Department with a predictable process that ensures adequate water for users while helping to protect the quantity and quality of the State's water resources. As noted by the commenter, projects may not be constructed or completed for years after approvals are issued. By assuring that capacity is available at the

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time of the approval and limiting the permit's term to five years, a balance is struck between the competing factors of safety and the economy.

The existing requirements for the determination of peaking factors and firm capacity were promulgated at N.J.A.C. 7:10-11.5 in 2004. At that time, the Department reviewed Statewide water use data to determine an appropriate method for firm capacity analysis, including a peaking factor, establishing that the value of 1.5 was representative of the data available at that time. Recent data reviewed by the Department indicate that the firm capacity requirements are still appropriate. The Department's experience in the review of permit applications since 1996 indicates that firm capacity calculations prepared by developers, engineers, or applicants are often inaccurate. Typical errors include using incorrect well capacity, unapproved sources or incorrect demand figures. Therefore, reliance only on the builders' or developers' estimates, even if certified by a professional engineer, will not ensure protection of the public health and the environment and may not accurately reflect the the purveyor's current supply and demand.

The commenter suggests that as long as the Department continues to enforce the water allocation rules, there is no need to have the rules related to system modifications in N.J.A.C. 7:10-11.5. However, in the Department's experience, the requirements at N.J.A.C. 7:10-11.5 ensure that purveyors adequately project future demand. The Water Supply Allocation Permits rules establish maximum monthly and annual allocation limits for water purveyors. The requirements in N.J.A.C. 7:10-11 ensure that before a water main extension is approved, that extension would not cause the water system to exceed the allocation limit. The Department's experience has shown that prior to the adoption of these requirements in

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2004, there was widespread exceedance of allocation limits, The Department will evaluate the commenter's recommendation for incorporation of a margin of safety requirement in the Water Supply Allocation rules at N.J.A.C. 7:19 when those rules are proposed for readoption.

23. COMMENT: The existing rules are ineffective because they do not properly track peak use in water systems and they have no ability to properly assess the number and type of connections being served by the public water utility. (10)

RESPONSE: Though the existing rules do not track peak use or assess the number of connections being served, the rules are effective in limiting overall water use through implementation of the requirements at N.J.A.C. 7:10-11.5 for firm capacity and water allocation analysis. Specifically, implementation of those requirements during the permit application review process assesses the reported peak demands using the average day of the peak month in the last five years, to assure that adequate firm capacity to supply demand at will be available when the applicable project is completed and water is ultimately delivered to all customers. This is the most effective means of assuring that an adequate water supply will be available when the demand is realized.

24. COMMENT: The proposed amendments to extend the permit term would implement the practical Recommendation 22.1 of the Permit Efficiency Review Task Force Final Report. The commenter has long advocated for, and therefore strongly supports, extending the duration of the water main extension permits where there are no significant or adverse environmental impacts on water supply, and no significant changes to the approved project

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and activities as well as available firm capacity and water allocation. Increasing overall permit duration to seven years would certainly eliminate unnecessary administrative paperwork and reviews for both the Department and permit holders, and also permit fees. More importantly, once a water main extension permit is issued, permit holders should be able to rely, without paying any surcharge, upon the required water allocation being available (i.e., reserved firm capacity) for future construction, absent significant changes to water supply, firm capacity and system demands. The Department should adopt the approach of the Treatment Works Approval process where approvals remain valid unless construction is stopped for two consecutive years. At that time, the Department has the authority to void an approval. (4)

RESPONSE: The Department appreciates the commenter's support for the efficiency related amendments. Any surcharge levied by a purveyor is not governed by the Safe Drinking Water Act rules. The Department does not consider the approach used in the Treatment Works Approval process appropriate for water main extension permits due to the differences in flow patterns between drinking water provided to a home and waste flow conducted away from a home. Specifically, sanitary flows from a home are much less variable over the course of a year as compared to drinking water use. Drinking water flows and thus the peak demands on potable water supplies vary significantly from year to year as well as throughout a single year due to increases in outdoor water use in warmer months (irrigation, pools and other outside use) and varying weather patterns. Without an annual review of construction completion, the Department cannot assess whether anticipated flows are being realized.

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25. COMMENT: Proposed N.J.A.C. 7:10-11.10(a)1 increases the term for the set number of service connections covered by a master permit to five years from three years. The commenter supports this amendment, since increasing the permit term will enable water purveyors to more fully extend service to the already identified water supply limits and firm capacity. The commenter further recommends that the master permit should not be required to be renewed on an annual basis. For consistency purposes, the master permit should be valid for five years as proposed for other permits. (4)

RESPONSE: The Department appreciates the commenter's support for the requirements related to the increase in the time period for those service connections included in a master permit from three years to five years. The Department included this provision so that service connections authorized under a master permit would have the same timeframe in which to be completed as those that are approved individually. The amendments require a master permit where four or more applications for permits for water main extensions and/or replacements or transmission mains per year are submitted over the three years preceding the Department's notice. In cases where multiple applications are submitted, often significant changes in water demand will be occurring. It is in these cases that the subsequent annual renewals will aid the Department in tracking water demands and assuring that demand is not exceeding allocation.

26. COMMENT: The Department appears to interpret the master permit rules at N.J.A.C. 7:10-11.10(a) more restrictively than the rule provides, as evidenced by a recent master permit

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issued for the New Jersey American Water Atlantic System. The master permit section of the rules should be amended to make clear that a water system with a valid and current master permit is not limited to water main extensions and/or replacements identified at the time of permit application. If the system has adequate capacity, it should be allowed to extend and/or replace mains regardless of whether the mains were specifically identified at the time of application, so long as the system has capacity to handle the additional demand. Particularly, for very large regional systems, it is difficult to timely identify all possible construction including replacements. Limiting the permit to those projects specifically identified in the master permit application undermines the very intent of the master permit concept. (3)

RESPONSE: The commenter is correct that a master permit recently issued by the Department was limited to the water main extensions and/or replacements identified at the time of the application. This was an error which the Department has since rectified for the permittee. The language of the rule at N.J.A.C 7:10-11.10(a) does not limit the water main extensions and/or replacements allowed under a master permit to those identified in the permit application. However, it limits a set maximum number of service connections based on the limits of their capacity.

27. COMMENT: The Department must ensure that drinking water standards are as stringent as possible. To that end, permitting in this area must be strict and protective. And enforcement cannot become politicized. Lobbyists and elected officials should not be able to manipulate this important process. (7)

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REPOSE: As described above in the introductory section of this adoption, one of the Governor's priorities is to establish a "commonsense" approach to rulemaking. The extended period for comment on this proposal was intended to obtain additional public input on, for example, the potential costs and benefits of the rulemaking in a more focused way as contemplated by the executive orders. The executive orders and red tape review process expressly recognized that some rules must be adopted in order to prevent an adverse impact to public safety or security or public health. As also noted in the introductory section, discussions held at the March 10, 2010 stakeholder meeting support the adoption of these amendments. The amendments do not affect drinking water standards. The amendments affecting permitting do not lessen environmental protections but will result in a more efficient administrative process and conserve Department resources. The amendments will increase Department efficiency by allowing the extension of permits so long as there are not significant adverse environmental or water supply impacts. The amendments will enable the Department to focus staff resources on more environmentally critical issues. The Environmental Enforcement Enhancement Act amendments will enhance the deterrent effect of the penalty provisions.

28. COMMENT: The Department should not be imposing costly mandates on New Jersey residents and the real estate industry in these economic times. (5)

RESPONSE: These amendments address certain process changes to increase permit efficiency and update the penalty and enforcement provisions to conform to the amendments

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to the Safe Drinking Water Act by the Environmental Enforcement Enhancement Act. They do not impose new mandates on residents or the real estate industry.

Red Tape Review Process and Rulemaking; Executive Order Nos. 1 through 3 (2010)

29. 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 proposals were proposed pursuant to and in accordance with the APA requirements. The Department may not - after the fact - revise these procedures. (9)

RESPONSE: As the commenter acknowledges, this rulemaking, as well as the other proposals to which the commenter refers, 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 was 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

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recommendations as to those proposed rules it determines were "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.

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

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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 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. In conclusion, DEP did not "revise the procedures after the fact" but, rather, supplemented the statutorily required rulemaking procedures in order to facilitate public input into the review of the rules required by the executive orders.

30. 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

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supersede the requirements of the APA. The March 15 deadline is arbitrary and not in accordance with APA requirements. (9)

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 29 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 minimum required by the APA. The March 15, 2010 close of the additional comment period 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.

31. 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. (9)

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

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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.

32. 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. (9)

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

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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.

33. 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 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. (9)

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

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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.

34. 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. (9)

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.

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35. COMMENT: Based on the concerns expressed by the commenter in comments 29 through 34 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. (9)

36. 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. (9)

RESPONSE TO COMMENTS 35 AND 36: As explained in the responses to comments 29 through 34 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.

37. 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. (9)

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38. 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 be relied on as a basis for final regulatory decisions by the Department. The Department should withdraw this proposal and abandon this process. (9)

RESPONSE TO COMMENTS 37 AND 38: As indicated in the response to comment 30, 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

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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.

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

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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 department. Although it is good that the Department concludes that its rules are justified by their benefits, a qualified economist is likely to find far greater benefit than the Department has. (6)

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."

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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.

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

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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 complex rulemakings. The Department will publish notice on its website or in the New Jersey 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

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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.

40. 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 Congress and the EPA are aware that they are setting national minimums, just as they are aware that the states are very different. A minimum that makes sense in a relatively unpopulated state such as Montana, will not necessarily make sense in New Jersey, the most densely populated state in the country. A minimum in a relatively virgin state such as Oregon will not necessarily make sense in New Jersey, a state with legacy of toxic industrial pollution. In this context, it is not only appropriate that New Jersey's regulations would exceed Federal standards in a number of instances, it is essentially mandatory. Any state's environmental protection agency that is doing its job will find instances where the peculiarities of the particular state make Federal regulation inadequate.

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

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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. (6)

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 regulations. Confusion and costs are increased when there are multiple regulations of various governmental entities imposing unwarranted differing standards in the same area of regulated activity. It is in the public interest that State agencies consider applicable federal standards when adopting, readopting or amending regulations with analogous federal counterparts and determine whether these federal standards sufficiently protect the health, safety and welfare of New Jersey citizens."

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

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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.

41. 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.” (6)

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,

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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 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

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of development that is otherwise allowable under applicable environmental protection law and standards.

42. 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. (6)

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 comment period for certain pending proposals. (See Notice of extension or reopening of 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

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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.

Federal Standards Analysis

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 at 52:14B-23, requires State agencies which adopt, readopt or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal Standards Analysis. The Federal government does not regulate the issuance of physical connection or water system permits. Provisions related to the assessment and issuance of penalties for violations of the SDWA are delegated to the State by the Federal government. Therefore, no Federal Standards Analysis is required for these amendments.

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

[thus]):

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SUBCHAPTER 11. STANDARDS FOR THE CONSTRUCTION OF PUBLIC COMMUNITY
WATER SYSTEMS

7:10-11.10 Permit requirements and standards for the construction of distribution systems;
master permits

(a) Except as otherwise directed by the Department under (a)3 below, a supplier of water may apply for a master permit, including all proposed routine water main extensions and/or replacements, *[and]* transmission mains ***and interconnections for the emergency transfer of water***, covering a set maximum number of service connections for a period not exceeding five years. At the time of application for such master permit, the supplier of water shall submit specifications and an engineer's report demonstrating that the water system can meet the requirements of this subchapter, as well as a system distribution map that differentiates between existing and proposed water mains. The following shall apply to master permits:

1. Each master permit shall be renewed annually;
2. A master permit is available only to public community water systems; and
3. A supplier of water shall apply for a master permit within six months from the date of notification by the Department that the system has submitted, over the three years preceding the Department's notice, an average of four or more applications for permits for water main extensions and/or replacements and/or transmission mains per year.

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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), 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