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ENVIRONMENTAL PROTECTION

SITE REMEDIATION PROGRAM

Administrative Requirements for the Remediation of Contaminated Sites; Technical Requirements for Site Remediation

Timeframes, Vapor Intrusion and Form Names

Adoption of Amendments: N.J.A.C. 7:26C-3.2, 3.3, 3.5 and 9.5; and 7:26E-1.8, 1.12, 1.14, 1.15, 1.17, 1.18, 3.2 and 3.3

Proposed: October 4, 2010 at 42 N.J.R. 2297(a).

Adopted: January 26, 2011 by Bob Martin, Commissioner, Department of Environmental Protection

Filed: January 28, 2011 as R. 2010 d.072, **with substantive changes** not requiring additional public notice and opportunity for comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 13:1K-6 et seq.; 58:10-23.11a et seq.; 58:10A-1 et seq.; 58:10B-1 et seq.; and 58:10C-1 et seq.

DEP Docket Number: 06-10-09.

Proposal Number: PRN 2010-235.

Effective Date: February 22, 2011

Expiration Date May 4, 2011, N.J.A.C. 7:26C; May 7, 2012, N.J.A.C. 7:26E.

The New Jersey Department of Environmental Protection (the Department) hereby adopts the amendments to the Administrative Requirements for the Remediation of Contaminated Sites (ARRCS), rules N.J.A.C. 7:26C, and to the Technical Requirements for Site Remediation rules (Technical Requirements), N.J.A.C. 7:26E, that extend certain mandatory and regulatory remediation timeframes, amend the requirements for mitigation of vapor intrusion, amend the penalty table consistent with the other amendments, and revise certain form names.

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The proposal was published in the New Jersey Register on October 4, 2010 at 42 N.J.R. 2297(a). The comment period closed on December 3, 2010.

Summary of Hearing Officer's Recommendations and Agency Responses:

The Department held two public hearings on the proposal, the first on November 1, 2010 in the Department's Public Hearing Room, 401 E. State St., Trenton, and the second on November 3, 2010 at the New Jersey Water Supply Authority, 1851 Route 31, Clinton. Five people attended the first public hearing, of which four presented oral comments. One person attended the second public hearing and that person presented oral comments. Len Romino, Assistant Director of the Responsible Party Remediation element served as hearing officer.

The Hearing Officer has recommended that the proposal be adopted with the changes described below in the Summary of Public Comments and Agency Responses. The Department accepts the Hearing Officer's recommendation.

A record of the public hearing is available for inspection in accordance with applicable law by contacting:

Department of Environmental Protection
Office of Legal Affairs
ATTN: DEP Docket No. 06-10-09
401 East State Street, 4th Floor
PO Box 402
Trenton, New Jersey 08625-0402

This adoption document may also be viewed or downloaded from the Department's website at <http://www.nj.gov/dep/rules/adoptions.html>

Summary of Public Comments and Agency Responses

The following persons submitted comments on the proposal:

1. John R. Dalvet
2. Elizabeth George-Cheniara, New Jersey Business Association
3. Michael G. McGuinness, National Association of Industrial and Office Parks
4. Michael L. Pisauro, New Jersey Environmental Lobby
5. David Pringle, New Jersey Environmental Federation
6. Anthony Russo, Chemical Council of New Jersey/Site Remediation Industry Network
7. Jeff Tittel, New Jersey Sierra Club
8. Bill Wolfe, New Jersey Public Employees for Environmental Responsibility

The comments received and the Department's responses are summarized below. The number(s) in parenthesis after each comment identify the respective commenter(s) listed above.

General support for the amendments

- 1. COMMENT:** The commenter is appreciative of the Department's responsiveness to concerns raised by stakeholders and members of the regulated community. The proposed amendments reflect an understanding of the challenges inherent in remediation projects. (2)

- 2. COMMENT:** The commenter is pleased by the Department's efforts to amend the ARRCs rules and Technical Requirements to provide more realistic timeframes within which remediation tasks must be completed. The commenter encourages the Department to continue its stakeholder processes to garner such valuable feedback about the practical aspects and complexities of remediation and translate these insights into its rulemaking. (2)

- 3. COMMENT:** The commenter commends the Department for extending the mandatory timeframes. As stated in the rule proposal summary, given the complexity and nature of site cleanups, the original timeframes were not achievable and therefore placed sites in jeopardy. The commenter also appreciates the stakeholder process the Department has undertaken to

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implement the requirements of the Site Remediation Reform Act (SRRA). The commenter firmly believes that these discussions and interactions will result in a more workable cleanup program. (6)

RESPONSE TO COMMENTS 1 THROUGH 3: The Department appreciates the commenters' support of this rulemaking effort.

General opposition to the amendments

4. COMMENT: The Department has not complied with Governor Christie's Executive Order No. 2 (EO No. 2). That order specifically requires advanced notice of rule proposals to avoid, "... certain ill advised rules from being adopted." The proposal is ill advised and the environmental, public health and public interest communities have not had any advanced notice or the opportunity to participate in accordance with the procedures prescribed under EO No. 2. (8)

RESPONSE: The Department believes that the proposal, including the pre-proposal outreach that the Department conducted, and its analysis of the commonsense principles enumerated in EO No. 2, do meet the requirements of EO No. 2. The amendments that the Department is adopting herein are in response to comments that the Department received in connection with its regular consultation with stakeholders at regularly scheduled meetings, to which the Department invited stakeholders representing varied constituencies, including representatives from the environmental community. The rule is performance-based and strikes a "reasonable balance between the underlying regulatory objectives and the burdens imposed by the regulatory activities" as required by EO No. 2 section 3a. Specifically, the rule provides for an extension of certain remediation timeframes, which achieves the Department's objective of protecting public health and the environment by ensuring that remediation activities are conducted within a promulgated timeframe, while also ensuring that the timeframes are reasonable and not overly burdensome.

5. COMMENT: The commenter objects to an extension of any remediation timeframe because to do so would unnecessarily delay Department approval of site remediation projects. This is in

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conflict with the Commissioner's stated goal that Departmental approvals must be expedited.
(8)

RESPONSE: An extension of a remediation deadline does not implicate any Departmental approvals. The ARRCs rules are designed to allow a person responsible for conducting the remediation to proceed without Department approval, thereby expediting the remediation of contaminated sites. An extension of a remediation timeframe ensures that persons responsible for conducting remediation and their licensed site remediation professionals (LSRPs) have enough time to be thorough in conducting the remediation tasks that must be completed within the set timeframe, while also ensuring that these sites do not become subject to direct Departmental oversight pursuant to N.J.S.A. 58:10C-27 due to missing that timeframe. SRRA mandates that when a person is subject to direct oversight, the Department must approve each phase of the remediation. There may be instances when those approvals could result in delays in the remediation that are neither beneficial to human health and the environment nor helpful towards accomplishing the Department's goal of expediting the remediation of contaminated sites. Accordingly, the Department believes that extending remediation timeframes furthers its goal of thorough and timely site investigation and cleanup.

6. COMMENT: Multiple stakeholder groups are working on both procedural and substantive modifications to the existing Technical Requirements, and this process is resulting in weaker rules, particularly since the members of those stakeholder groups represent only industry interests, to the exclusion of public and environmental interests. (8)

RESPONSE: The Department acknowledges it is currently engaged in a major stakeholder outreach process concerning the provisions of the Technical Requirements. However, those amendments are not a part of this rulemaking and are therefore beyond the scope of this adoption. The Department has made and continues to make every effort to include interested parties in the stakeholder process, and public interest and environmental group representatives are members of several of the stakeholder guidance committees.

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7. COMMENT: The commenter is concerned that the extension of the time frames will mean that there will be a delay in cleaning up sites to appropriate levels. Although it is understood that there may be the need for some delay, extending timeframes for one year will undermine the intent of the legislation, and will cause more contamination of the environment. (7)

RESPONSE: Pursuant to the adopted amendments, only the mandatory remediation timeframes set forth in the ARRCS rules are being extended by one year. The regulatory timeframes codified in the Technical Requirements, which are designed to help the person responsible for conducting the remediation complete the statutorily specified remediation milestones within the mandatory timeframes set forth in the ARRCS rules, are being extended by three months. Compliance with both regulatory and mandatory timeframes is enforceable, and there are significant penalties for non-compliance. Requiring compliance with the remediation timeframes (or any extensions thereto) is intended to ensure that the remediation continues to be conducted and in a timely fashion. The extension of those timeframes and the associated mandatory timeframes will help ensure that the person responsible for conducting the remediation and the LSRP have enough time to make informed decisions about how best to conduct the remediation in a manner that is of the greatest protection to public health, safety and the environment.

The Department has determined to extend the mandatory and regulatory timeframes based on its experience and on stakeholder input since implementing the interim rule, which indicated that the timeframes initially adopted may have been unrealistically short. The Department acknowledges that the LSRP remediation paradigm is still a relatively new paradigm. The mandatory timeframes established in this adoption reflect the Department's current thinking concerning the balance between protecting public health and the environment and ensuring that sites are remediated quickly and efficiently. The Department strives for continuous improvement. As the Department gains more experience and data concerning the LSRP remediation paradigm, it may consider changing the timeframes, including possibly shortening them.

8. COMMENT: The tradeoff that the environmental community was told existed in terms of privatizing the program was that the public benefit would flow from the mandatory requirements

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that were established. By both delaying and weakening the implementation of mandatory time tables, the amendments are totally contrary to the entire thrust of the legislation that mandated these rules. (8)

RESPONSE: The Department has not privatized the remediation program. Rather, the Department continues to have a significant role in remediation decision making at sites and areas of concern that pose the greatest environmental risk to public health, safety and the environment and will be reviewing the work performed by LSRPs on all sites being remediated in this State.

Use of Rapid Action Level to trigger vapor intrusion Immediate Environmental Concern condition

9. COMMENT: The commenter supports the amendment which substitutes an exceedance of the rapid action levels for exceedance of the indoor air screening levels to determine if an area of concern is an area of immediate environmental concern. This will allow persons responsible for conducting the remediation and the LSRP more time to develop the most cost effective and efficient strategy possible while limiting direct Department oversight to only the most heavily impacted sites. (1)

RESPONSE: The Department appreciates the commenter's support.

10. COMMENT: The Department is proposing the use of the rapid action level to trigger an immediate environmental concern (IEC) condition. Page 37 of the October 2005 NJDEP Vapor Intrusion Guidance states, "The Department has developed indoor air concentrations to determine when prompt actions are indicated to address the potential for adverse VI related impacts. Table 2 presents Rapid Action Levels (RAL) By policy, the Department has based the RAL values on a factor of 100 times the cancer health based residential [indoor air screening level] IASL or a factor of 2 times the non-cancer health-based residential IASL (presented in Table G-4)."

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SRRA defines “immediate environmental concern” as: “... (3) confirmed contamination at the site of a nature that either [*sic*] dermal contact, ingestion, or inhalation of the contamination could result in an acute human health exposure; or (4) any other condition that poses an immediate threat to the environment or to the public health and safety (emphasis added).” Both “acute” and “immediate” are terms that describe the same set of conditions. The term “acute” is defined by the United States Environmental Protection Agency (USEPA) Integrated Risk Information System (IRIS) as, “one dose or multiple doses of short duration spanning less than or equal to 24 hours.” Therefore, as defined by SRRA, an immediate environmental concern has the documented potential to produce negative short-term effects and not long term chronic effects. Although SRRA does not provide a specific basis for developing indoor air levels for an immediate environmental concern, it does specify that they have to be “acute” or have an “immediate threat.” Nevertheless, the Department has elected to use the non-promulgated rapid action levels, which are based on the non-promulgated IASLs. IASLs are “cancer health based,” intended to be protective over a lifetime of exposure, and are not for use as acute exposure limits. Immediate environmental concerns, by their definition are not long-term conditions, and do not and should not represent conditions that persist over a lifetime. (6)

11. COMMENT: Until the Department develops “acute/immediate threat” vapor intrusion action levels for an immediate environmental concern, a technically appropriate action level could be the Health Department Notification Levels (HDNL - listed on Table 2 of the October 2005 Vapor Intrusion Guidance), provided they are based only on the Agency for Toxic Substances Disease Registry (ATSDR) acute Minimum Risk Level (MRL) (or the intermediate MRL in the absence of an acute MRL). According to the ATSDR, “An MRL is an estimate of the daily human exposure to a hazardous substance that is likely to be without appreciable risk of adverse non-cancer health effects over a specified duration of exposure.” (6)

RESPONSE TO COMMENTS 10 AND 11: The definition of an “immediate environmental concern” in SRRA describes four conditions, joined by the conjunction “or.” For an immediate environmental concern to exist, any of the four conditions must be satisfied, but not necessarily all of them must be. The first condition pertains to groundwater to be used for potable purposes and is therefore not relevant to this response.

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The second condition is "... confirmed contamination that has migrated into an occupied or confined space producing a toxic or harmful atmosphere resulting in an unacceptable human health exposure, or producing an oxygen-deficient atmosphere, or resulting in demonstrated physical damage to essential underground services" The infiltration of vapors at concentrations above the rapid action levels represents an "unacceptable human health exposure" pursuant to the second condition in the statutory definition of "immediate environmental concern."

The third condition is "... confirmed contamination at the site of a nature that either [sic] dermal contact, ingestion, or inhalation of contamination could result in an acute human health exposure" The commenter is correct that the ATSDR MRLs apply to acute concentrations. However, MRLs have not been developed for a sufficient number of contaminants, and the Department does not believe that the MRLs that have been developed are protective enough of all end-points to address all "unacceptable human health exposures."

The fourth condition is broadly worded to include "any other condition that poses an immediate threat to the environment or to the public health and safety." The infiltration of vapors at concentrations above the rapid action levels represents an "immediate threat" pursuant to the fourth condition in the statutory definition of "immediate environmental concern." Accordingly, exceedances of the rapid action levels are the appropriate criteria for the Department to use when setting vapor intrusion pathway immediate environmental concern investigation triggers.

12. COMMENT: The commenters object to substituting "rapid action level" for "indoor air screening" in the definition of "immediate environmental concern." This is a significant change from the Department's prior policy and a significant increase in exposure to people. The commenter states that the Administration has, on multiple occasions, indicated that it will not weaken environmental laws. As buildings become better sealed, more and more pollutants are accumulating in our buildings. This increased exposure makes it more important that the levels of pollutants in our indoor spaces be mitigated to levels that are as protective of human health as possible. (4, 5)

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13. COMMENT: The commenter supports the amendment that specifies that detection of contaminants in indoor air should trigger a requirement to implement vapor intrusion mitigation. However, the commenter disagrees with what level should trigger the requirement. The proposal to change the trigger value for the vapor intrusion immediate environmental concern condition from the current value of the indoor air screen levels to the rapid action levels listed in the NJDEP Vapor Intrusion Guidance weakens the current vapor intrusion numeric values by a range, depending on the parameter, from 2 to 100 times, thus making protection of the public's health 2 to 100 times weaker. The indoor air screening levels were derived based on risk assessment in accordance with the statutory 1 in a million cancer risk standard. The Department may not weaken those values in the way they have in this proposal. (8)

RESPONSE TO COMMENTS 12 AND 13: The Department does not consider changing the immediate environmental concern trigger for the vapor intrusion pathway from the indoor air screening levels to the rapid action levels to be a weakening of the regulation. Using the rapid action levels as the trigger for establishing the vapor intrusion immediate environmental concern condition better comports with the consensus reached by the Department and the stakeholders when developing the NJDEP Vapor Intrusion Guidance. The Vapor Intrusion Guidance states, "The Department has prepared rapid action levels ... that represent trigger levels for the initiation of prompt action at occupied buildings to further investigate the VI pathway and/or minimize impacts to building occupants through the implementation of an interim remedial measure (IRM). The VI investigation can proceed following the mitigation of the RAL exceedance."

Even though the indoor air screening levels no longer serve as the trigger to be considered for evaluating an immediate environmental concern condition, the rule as amended at N.J.A.C. 7:26E-1.18(f) requires the person responsible for conducting the remediation to remediate indoor air vapor contamination related to the vapor intrusion pathway to the indoor air screening levels, which meet the one in one million risk for carcinogens or the hazard index of one for non-carcinogens.

14. COMMENT: The Department must promulgate any acute effect action levels through the rule-making process and not publish them as a policy statement. (6)

RESPONSE: SRRA at N.J.S.A. 58:10C-14c requires the LSRP to employ certain enumerated remedial action performance standards when providing professional services for the remediation of contaminated sites. Third on the list of remedial action performance standards are "... any available and appropriate technical guidelines concerning site remediation as issued by the Department ..." N.J.S.A. 58:10C-14c(3). When issuing guidelines, SRRA requires that the Department "... provide interested parties the opportunity to participate in the development and review of the technical guidelines issued for the remediation of contaminated sites." N.J.S.A. 58:10C-14c(3).

The Department's October 1995 Vapor Intrusion Guidance, as amended in 2006 and 2007, contains the Department's guidelines for determining whether an immediate environmental concern condition exists due to toxic vapors indoors. These guidelines were developed in consultation with multiple external stakeholders, including environmental consultants, the laboratory community, the USEPA, the Site Remediation Industry Network (SRIN), and the Technical Regulations Advisory Committee (TRAC). This guidance document is currently being updated through the ongoing stakeholder process being conducted by Department in connection with the transformation of the Site Remediation program.

Moreover, SRRA at N.J.S.A. 58:10C-14a requires the person responsible for conducting the remediation to certify all documents submitted to the Department, and also requires the LSRP to certify that the work was performed and the documents submitted are consistent with all applicable remediation requirements established by the Department, which includes Department issued guidelines. The requirement for the person responsible for conducting the remediation to follow Department guidelines is in addition to the requirement to apply the standards enumerated at N.J.S.A. 58:10C-14c(1) and (2), which include remediation standards and technical standards that the Department has adopted pursuant to the Brownfield Act; those standards are codified in the Remediation Standards at N.J.A.C. 7:26D, and the Technical Requirements at N.J.A.C. 7:26E.

15. COMMENT: At N.J.A.C. 7:26E-1.14, immediate environmental concern requirements, the Department should not change the requirement concerning certain activities associated with

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immediate environmental concerns from being “complete” to being “initiated.” Not only is the Department extending the time frame for these activities, but it is also changing the actual technical requirements, and the Department should not adopt these amendments. (8)

RESPONSE: The amendments to N.J.A.C. 7:26E-1.14 do not change the requirements from completion of an activity to only initiating an activity. Rather, N.J.A.C. 7:26E-1.14(b) sets forth the specific tasks that must be undertaken when the person responsible for conducting the remediation identifies an immediate environmental concern, and specifies the number of days within which each of those tasks must be accomplished.

16. COMMENT: A new phrase inserted in the definition of “immediate environmental concern” at N.J.A.C. 7:26E-1.8 that states, “developed consistent with the vapor intrusion guidance,” and it seemed to follow an “or,” which leads the commenter to believe that the NJDEP Vapor Intrusion Guidance itself no longer becomes binding, and that there could be alternative approaches, alternative methodologies, or alternative screening calls that could replace or supplant the NJDEP Vapor Intrusion Guidance. The commenter seeks clarification and suggests that the phrase be eliminated, as it does not seem to serve a purpose and it undermines the enforceability of the NJDEP Vapor Intrusion Guidance and creates all kinds of potential abuses for applicants to determine their own methods to try to demonstrate compliance. The commenter believes that the NJDEP Vapor Intrusion Guidance includes rapid action levels for only 13 parameters, whereas there are indoor air screening levels for over 50 contaminants. The commenter believes that decisions will be made based on a much smaller set of contaminants. (8)

RESPONSE: As the commenter notes, Table 2 of the NJDEP Vapor Intrusion Guidance includes rapid action levels for only 13 parameters. The person responsible for conducting the remediation is required to use the rapid action levels included in the NJDEP Vapor Intrusion Guidance. Importantly, however, if no rapid action level is listed for a particular contaminant of concern in the NJDEP Vapor Intrusion Guidance, the person responsible for conducting the remediation must develop a rapid action level using the methodologies described in the NJDEP Vapor Intrusion Guidance. The amended provision should not be interpreted to mean that the

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NJDEP Vapor Intrusion Guidance is not to be used as the means of properly investigating the vapor intrusion pathway.

17. COMMENT: At the present time there are no promulgated “acute levels” for soils. Neither the NJDEP Vapor Intrusion Guidance nor any other regulation defines “acute” soil levels. The requirement at N.J.A.C. 7:26E-1.14(b)2iii to, within five days after identifying an immediate environmental concern condition for soils contaminated above acute levels, restrict access to that soil, should be clarified or deleted. (6)

RESPONSE: The commenter is correct that currently there are no promulgated or defined acute soil remediation standards. However, historically, the Department has developed acute soil remediation standards on a site-by-site basis, as needed. Pursuant to the Technical Requirements, the person responsible for conducting the remediation is required to sample the soils at a particular site, if necessary. If contaminants are present, it is incumbent upon the LSRP to use his or her professional judgment to determine whether the concentrations are representative of acute levels. As a part of the decision making process, the LSRP may contact the Department to determine if contamination exists at levels that would present an acute exposure risk.

18. COMMENT: N.J.A.C. 7:26E-1.18(f)1, receptor evaluation requirements for vapor intrusion, requires that when the rapid action level is not exceeded, a mitigation plan must be submitted to the Department within 60 days of receipt of data showing exceedances of the indoor air screening levels, and the plan must be implemented within 120 days. Since such action mitigates chronic effects (defined by the USEPA IRIS as “occurring over an extended period of time, or a significant fraction of ... the individual’s lifetime”), these timeframes are unnecessarily aggressive, considering that, in many cases, the remediating party will need to complete further sampling and analysis to better and fully define the extent of the concern. Especially when access to third party property is needed, these timeframes do not provide adequate time to properly complete data collection, nor determine an appropriate response to the condition found. Since even the rapid action levels are “chronic” numbers, it is not appropriate to use a similar timeframe process as for an immediate environmental concern condition. As a

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result, unless an “acute” condition exists, the timeframes for addressing the vapor intrusion should be similar to that of contaminated soil. As an interim alternative, the response timeframes should be amended to be 120 and 180 days respectively and the reporting timeframe extended to 270 days. (6)

RESPONSE: The Department does not believe that the timeframes are unnecessarily aggressive. Rather, delaying the remediation of indoor air vapors beyond these timeframes would unnecessarily continue the exposure to occupants of the structures to contaminated vapors at concentrations of concern in a situation where exposure has already warranted the establishment of an immediate environmental concern area.

Regarding third party property access, both SRRA and ARRCS state that the Department may grant extensions to mandatory timeframes on a case-by-case basis as a result of, “a delay in obtaining access to property, provided the person responsible for conducting the remediation demonstrates that good faith efforts have been undertaken to gain access, access has not been granted by the property owner, and, after good faith efforts have been exhausted, a complaint was filed in the Superior Court to gain access.” See N.J.S.A. 58:10C-28d(1) and N.J.A.C. 7:26C-3.5(d)1.

19. COMMENT: The commenter notes the phrase “attributed to background sources,” at N.J.A.C. 7:26E-1.18(c)2vi(1), which would allow an applicant to demonstrate that the indoor contamination was due to household products or construction materials or off-gassing of household chemicals, as opposed to contamination from groundwater, opens up the site remediation program to scientific debate about what is the source of the contaminant. In the meantime, the occupant of the building and that occupant’s health does not necessarily depend on the source of the contamination. A vapor mitigation system would mitigate the impacts from the vapor intrusion, regardless of the source. Therefore, if an indoor air vapor immediate environmental concern is identified, the Department should be under an obligation to require it to be remediated, regardless of whether the source was from household chemicals or the groundwater. It is a human exposure and it should be corrected and those risks reduced. The commenter is troubled by this language, particularly given some in the chemical industry who

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consistently argue that the sources are not attributed to their contamination but to household products. (8)

20. COMMENT: N.J.A.C. 7:26E-1.18(f)2 states that, “if the results are below the indoor air screening levels, or are above the indoor air screening levels but below the rapid action levels and a determination has been made that a mitigation system is not necessary,” the person responsible for conducting the remediation shall complete a vapor intrusion investigation. Who is charged with the responsibility to make the determination that a mitigation system is not necessary? The commenter believes that the rule as currently written allows that this determination may be made by the licensed site professional or other responsible party. However, allowing the LSRP or other responsible person to make this determination is inappropriate. There does not seem to be any criteria or standards by which the Department could evaluate whether the determination was correct and whether it is protective of public health and the environment. As part of the adoption, the Department should clarify who makes this determination, what is the basis for the determination, and what are the risk levels within the gray area between the indoor air screening values and the rapid action levels. (8)

RESPONSE TO COMMENTS 19 AND 20: The purpose of the vapor intrusion investigation is to determine whether volatile contamination migrating from a site or area of concern is impacting a structure. Part of this investigation includes determining whether the contaminants detected inside of the structure are from the contaminants associated with the site or area of concern, or from sources associated with the structure itself. If the investigation determines that the indoor air vapor contamination is solely caused by a source or sources associated with the structure itself, the person responsible for conducting the remediation is not liable under the Spill Compensation Control Act for mitigating this contamination because Spill Compensation Control Act liability only extends to “discharges” of “hazardous substances.” For situations where the person responsible for conducting the remediation determines that the indoor air vapor contamination in a structure is in any way caused by a discharge at the site, then the person responsible for conducting the remediation is responsible for addressing the vapor intrusion contamination. The NJDEP Vapor Intrusion Guidance explains how to evaluate and

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address the vapor intrusion pathway, including situations where there are potentially additional sources associated with the structure.

In situations where the indoor air screening levels are exceeded but the rapid action levels are not, the person responsible for conducting the remediation is still required to remediate the vapor intrusion indoor air contamination to or below the indoor air screening levels. It should be noted that for situations where the source of contamination is inside of a structure, installation of a mitigation system will most likely not be effective in addressing the indoor source or mitigating impacts to the occupants.

The person responsible for conducting the remediation, with the assistance of an LSRP, is responsible for determining whether the source of the vapor intrusion contamination is from a discharge at the site or area of concern or from the structure itself, as well as whether and what type of mitigation system is necessary. The LSRP will base this determination on his or her professional judgment, within the technical guidance the Department has provided via the NJDEP Vapor Intrusion Guidance. The LSRP making sound remedial decisions based on his or her professional judgment is the foundation of the LSRP program.

Regulatory timeframes

21. COMMENT: Under the Technical Requirements amendments proposed at N.J.A.C. 7:26E-3.3(e)1, the PA/SI Report deadline for ISRA and UST cleanups was extended from 270 days to one year from the initiation of remediation. However, the deadline for submission of the Remedial Investigation Workplan under the ISRA rules at N.J.A.C. 7:26B-6.1(d) was not changed and is still 270 days. The commenter presumes the Department did not intend to require submission of the RIW before the PA/SI. (3)

22. COMMENT: Under the ISRA rules at N.J.A.C. 7:26B-6.1(e), the Remedial Investigation Report is still due within 420 days of the submission of the general information notice, which is less than two months from the one-year due date for completing the PA/SI. Again, we presume that the Department did not intend this. The ISRA rule deadline should be revised to conform with the timeframes set forth in these October 4, 2010 amendments to the Technical Requirements. (3)

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23. COMMENT: Under the UST rules at N.J.A.C. 7:14B-8.3(a), the Remedial Investigation Report is due within 270 calendar days after notification of a discharge or by November 25, 2010, whichever is later. This would put submission of the RIR prior to the submission of the PA/SI, which we presume the Department did not intend. (3)

RESPONSE TO COMMENTS 21 THROUGH 23: The Department will be proposing an amendment to the ISRA and UST rules in May, 2011 for adoption in May of 2012 to correct any such inconsistencies. That subsequent proposal will take all regulatory timeframes and remediation requirements out of the ISRA and UST rules. Instead, these rules will reference the Technical Requirements for all remediation requirements, including the regulatory timeframes for implementation.

24. COMMENT: Proposed N.J.A.C. 7:26E-1.12(b)2 extends the regulatory timeframe from nine months to one year for remediation tasks of Light Non-Aqueous Phase Liquid free product removal. The commenter supports this extension as necessary to support the efforts of the regulated community to timely complete remediation requirements. (2)

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

25. COMMENT: The amendment at N.J.A.C. 7:26E-1.14(d) states, "Within one year after either March 1, 2010 or identifying the IEC condition, the person responsible for conducting the remediation shall initiate control of the IEC contaminant source" It appears that the words "whichever is later" were omitted. That qualification was used consistently throughout the amendments and we presume this was a typographical error. (3)

RESPONSE: The Department appreciates the commenter pointing out this inconsistency in the regulatory text and will amend, on adoption, N.J.A.C. 7:26E-1.14(d). As the commenter points out, throughout the rules concerning timeframes by which certain remedial steps must be accomplished, the Department consistently states "whichever is later," and this subsection should also have included such a qualification. To not include such a qualification at N.J.A.C. 7:26E-

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1.14(d) when it is included elsewhere throughout the rules leads to a logical inconsistency that should be rectified on adoption.

26. COMMENT: The Department proposes a number of changes to N.J.A.C. 7:26E-1.14 that increase the regulatory timeframe from 5 days to 14 days to take certain actions for areas of immediate environmental concern. For example, proposed subsection N.J.A.C. 7:26E-1.14(b)2ii extends the regulatory timeframe from 5 days to 14 days to mitigate vapors that have infiltrated structures. Similarly, proposed subsection N.J.A.C. 7:26E-1.14(b)4 extends the regulatory timeframe from 5 days to 14 days to submit the analytical results from all indoor air sampling to the New Jersey Department of Health and Senior Services. The Department also proposes an increased timeframe (from 270 days to one year) for the completion of some mitigation tasks for immediate environmental concern conditions at N.J.A.C. 7:26E-1.14(d).

These proposed amendments are in line with other proposed time extensions in that they are more realistic expectations of the time necessary to complete the tasks and therefore should be adopted. (2)

RESPONSE: The Department appreciates the support for the amendments.

Mandatory Timeframes

27. COMMENT: The Department will benefit from increasing mandatory and regulatory timeframes. Making the mandatory timeframes more realistic will result in fewer parties being in direct oversight where parties are under strict Department oversight. This will allow the Department to allocate its resources more efficiently by focusing on the most heavily contaminated sites that pose the greatest risk to human health and the environment. Having fewer Department case managers and personnel overseeing contaminated sites will allow the Department to consume less taxpayer resources as more oversight is borne by LSRPs. Less Department oversight of contaminated sites is consistent with the purpose of SRRA of allocating more responsibility and costs from the public sector to the private sector where resources are more efficiently utilized.

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The rule changes are also consistent with the purpose of SRRA of developing the most efficient and effective remediation strategy for each site. Recognizing more realistic timeframes considering unique circumstances and delays encountered remediating sites will result in more time to plan the best remedial strategy possible. Responsible parties and LSRPs will have an additional year to perform site investigations resulting in more accurate delineations of site impacts. This will produce more efficient remedial strategies and less supplemental remediation proposals will be required to obtain a final site closure. (1)

28. COMMENT: Proposed N.J.A.C. 7:26C-3.3(a)1 increases all mandatory timeframes from one year to two years for the submission of the preliminary assessment and or the site investigation report. The proposed extension of the mandatory timeframe would alleviate concerns identified by stakeholders that the current one year timeframe would undoubtedly be impossible to meet and result in enforcement action. Clearly, this extension should be adopted as it is practical and would support remediation efforts. (2)

RESPONSE TO COMMENTS 27 AND 28: The Department appreciates the commenters' support in this rulemaking effort.

Forms

29. COMMENT: The commenter is generally in favor of reducing the need of the Department to needlessly amend regulations to account for new forms and changes of form names. However, the commenter is concerned about this particular amendment. Currently, the rule provides under N.J.A.C. 7:26C-3.2(b)1 that a remediation timeframe extension request form must be completed no later than 30 days prior to the end date of the regulatory timeframe. The new rule provides that a responsible person must complete a form found on the Department website. This direction is unfortunately too vague to provide enough guidance to the responsible party and may lead to claims that the Department was not clear enough and therefore the responsible party should not be responsible for a violation. The commenter suggests that the Department revise this proposed change to provide that the responsible party provide and complete the appropriate form requesting an extension. This should be definitive enough to provide the responsible party sufficient guidance so there is no confusion. (4)

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RESPONSE: The Department deleted the specific names of the forms from the rule text so that if the form name changes, the Department would not have to formally propose and adopt an amendment to the rule text to correct the name of the form pursuant to the requirements of the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 et seq.

As pointed out in the proposal, to ensure that the person responsible for conducting the remediation chooses the correct form, the Department has included on its webpage a table that lists each form by using a name that indicates the subject of the form and a cross reference to the citation in the New Jersey Administrative Code to which the form pertains. Also included on this table are the version number of the form and the date that the form was last updated, and a link to the downloadable version of that form. This webpage is updated appropriately as form names change, and forms are added or removed, and alerts concerning form updates appear at the top of the page. That said, the Department recognizes that there may be occasions on which the wrong form is inadvertently attached to a document being submitted to the Department. In those anticipated rare instances, the Department will not penalize the person for submitting the wrong form.

The Department is working on making the link in the provision of the rule referencing a form take the reader directly to the referenced form when one is reading the rule on the Department's website. The Department will send a listserv message when that service is available. Until then, the reader should go to the forms link indicated in the rule and find the form either by searching the names of the documents listed or finding the rule citation that corresponds to the form required by the rule.

30. COMMENT: The commenter looked at the Department's form referenced at N.J.A.C. 7:26C-3.2 and the form does not follow the statute. There are criteria in the statute for the regulatory timeframes. The form should reflect the statute. (8)

RESPONSE: The forms do not have the force of regulation; rather, they are a management tool the Department developed to make it easier to gather and track data. However, each of the forms cross references the citation to the New Jersey Administrative Code that requires that a particular form be submitted. It is through the Code that the Department enforces the applicable statute.

The form to which the commenter refers is the Remediation Timeframe Extension Request form. This form is to be used when the person responsible for conducting the remediation wishes to seek an extension of a regulatory, mandatory, or expedited site specific timeframe. On this form, the person responsible for conducting the remediation must certify that the request is for an extension of (1) a regulatory time frame and that the request meets all of the requirements set forth at N.J.A.C. 7:26C-3.2, (2) a mandatory or an expedited timeframe and that the request meets all of the requirements set forth at N.J.A.C. 7:26C-3.5, or (3) a regulatory, a mandatory or an expedited site specific timeframe that requires written Department approval pursuant to N.J.A.C. 7:26C-3.2 and 3.5.

Extension requests

31. COMMENT: N.J.A.C. 7:26C-3.5 contains a clause that provides that if the Department did not affirmatively deny the extension request, the extension request is deemed to have been approved. The commenter believes this to be the exact opposite of what should be occurring, because the Department does not have the adequate resources to adequately review all extension requests. The commenter notes that there could be cases where extension requests were submitted to the Department but did not get sufficient review and therefore would be deemed approved, and that would not make sense. This is part of the interim rules, and should be corrected as part of the next set of rulemaking for final rules for the program. (8)

32. COMMENT: SRRA at N.J.S.A. 58:10C-28 provides the criteria for when the Department shall provide extensions to the mandatory timeframes under specific conditions and when the Department may provide extensions to the timeframes. The criteria are descriptive and prescribe a clear and limited basis that the Department must consider. Those criteria are 1) risk to human health and the environment; 2) the results of the receptor evaluation; 3) ongoing commercial operations at the site; 4) the operations of the facility has resulted in no release of groundwater or surface water and; 5) impacts to the other sites. Those determinations and those decisions are allowable under the statute only on a site-specific basis and the Department cannot do that by rule. In this case, the Department seems to be adopting a rule that would apply to all sites that would allow extensions without going through a site-specific determination. (8)

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RESPONSE TO COMMENTS 31 AND 32: The extension of mandatory timeframes outlined at N.J.A.C. 7:26C-3.5 reflects the requirements in SRRA for mandatory timeframe extensions and are not the subject of this rulemaking. SRRA at N.J.S.A. 58:10C-28 states that mandatory timeframe extension requests shall be deemed to be granted by the Department in the following circumstances: (1) a delay by the department in reviewing or granting a permit, provided that there was a timely filing of a technically and administratively complete permit application; (2) a delay in the provision of State funding for remediation, provided that there was a timely filing of a technically and administratively complete application for funding; or (3) a delay by the department for an approval or permit required for long-term operation, maintenance and monitoring of an engineering control at the site provided the request for approval or permit application is technically and administratively complete. The Department has incorporated this statutory language into ARRCS at N.J.A.C. 7:26C-3.5 and is not proposing to amend it by this rulemaking. N.J.A.C. 7:26C-3.2(c) provides that an extension request for a regulatory timeframe submitted in accordance with the requirements outlined in N.J.A.C. 7:26C-3.2(b) shall be deemed to be approved by the Department unless the Department notifies the person in writing that the extension request is denied. The extension procedure for regulatory timeframes is not addressed in the statute.

33. COMMENT: The commenter believes there are policy flaws and fatal legal flaws in the proposal. Certain provisions are *ultra vires*. Certain provisions are directly contrary to the statute. Certain provisions are arbitrary and capricious and lack any factual basis. Certain provisions are clearly inconsistent with legislative intent. Furthermore, the rationale has to reflect N.J.S.A. 58:10C-28, which establishes the mandate that the Department develop mandatory timeframes, and the statute very clearly states that the basis for the mandatory timeframes shall be to protect public health and the environment. The Department should provide evidence that supports the proposal with respect to how extensions of the timeframes can in any way protect public health and the environment. (8)

34. COMMENT: The commenter requests that the Department explain its thinking in amending the rules to allow a blanket extension to the timeframes, when the statute places the burden on an applicant or an LSRP to go through a site-specific determination. The commenter

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does not believe the statute gives the Department the authority to develop rules for these extensions. (8)

35. COMMENT: As the Department noted in its social impact section, “it is critical to the health of our citizens and the environment, as well as the health of our communities, to remediate contaminated sites New Jersey as quickly as possible while maintaining strict cleanup standards the Department has always applied.” Providing an additional year for a responsible person to comply with the requirements of this section is counter to the obligations of the Department to protect the health of its citizens and the environment. Further, this amendment is unnecessary. The current rule provides under N.J.A.C. 26C-3.3(d) that a responsible party may request an extension of the mandatory time frames. Providing a blanket extension to all sites no matter how long remediation at a give site has been in progress does not comport with the Department’s obligation to move site remediation forward.

Amending these rules to provide a blanket extension runs counter to SRRA. SRRA provides for extensions when the Department has delayed on their part or when necessary for other factors. NJSA 58:10C-28(c) and (d). These statutory requirements are implemented by the Department in N.J.A.C. 7:26C-3.5. By requiring the responsible party to make an application for an extension SRRA forces sites to be cleaned up and not encouraging delay. By providing an additional one year for the preliminary assessment and site investigation, the Department rewards those that have not moved appropriately in their obligations and punishes those who have abided by the law. The proposal is counter to law as it does not require the responsible party to provide a rationale behind the delay in complying with the law. (4)

RESPONSE TO COMMENTS 33 THROUGH 35: SRRA, at N.J.S.A. 58:10C-28.a. sets forth the remediation phases and activities for which the Department must establish mandatory and expedited site specific timeframes. Mandatory timeframes are the default timeframes by which a person responsible for conducting the remediation must complete a particular remediation activity. Expedited site specific timeframes are timeframes the Department will develop when protection of public health and the environment necessitates that the site be cleaned up more quickly than pursuant to the codified regulatory and mandatory timeframes. The

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mandatory timeframes are codified in the ARRCs rule at N.J.A.C. 7:26C-3.3, and the provisions concerning establishing an expedited site specific timeframe are codified at N.J.A.C. 7:26C-3.4.

The four criteria cited by the commenter are four of the five criteria the Department must use when developing timeframes. Those five criteria are: (1) the potential risk to the public health, safety, and the environment; (2) the results of the receptor evaluation; (3) the ongoing industrial or commercial operations at the site; (4) whether, for operating industrial or commercial facilities, there are no releases of contamination to the groundwater or surface water from the site; and (5) the complexity of the contaminated site. The Department used these criteria to develop the mandatory timeframes and has promulgated the criteria as the ones the Department will use when determining if an expedited site specific timeframes is necessary.

N.J.S.A. 58C-28.c. and N.J.S.A. 58C-28.d set forth the circumstances under which the Department has the discretion to grant extensions and those circumstances when the Department must grant extensions, respectively. Discretionary extensions are to be granted on a site specific basis. See also N.J.A.C. 7:26C-3.5(d), where the Department codified the discretionary criteria. The “shall” category cases are not discretionary. As provided in SRRA at N.J.S.A. 58C-28.c and codified at N.J.A.C. 7:26C-3.5(c), if the person responsible for conducting the remediation meets the listed criteria, that person is deemed to have an extension of the mandatory or expedited site specific timeframe.

As mentioned in response to comment 7, the Department has determined to extend the mandatory and regulatory timeframes based on its experience and on stakeholder input since implementing the interim rule, which indicated that the timeframes initially adopted may have been unrealistically short. The Department acknowledges that the LSRP remediation paradigm is still a relatively new paradigm. The mandatory timeframes established in this adoption reflect the Department’s current thinking concerning the balance between protecting public health and the environment and ensuring that sites are remediated quickly and efficiently. As the Department gains more experience and data concerning the LSRP remediation paradigm, it may consider changing the timeframes, including possibly shortening them.

36. COMMENT: The proposal rule summary stated that the reason the Department is proposing to extend the regulatory timeframes is to provide a “safety cushion” to help persons responsible for conducting the remediation to meet the mandatory timeframes outlined in

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N.J.A.C. 7:26C-3.3. The commenter asks for evidence stakeholders provided to the Department that would support the need for extensions in regulatory timeframes. (8)

37. COMMENT: The proposal says that the basis for the regulatory timeframes is to provide, “a safety cushion” for the regulated community because the regulated community felt that the proposed adopted interim timetables for the mandatory timetables were “too short.”

Clearly, this rule proposal is not considering any impact on human health and the environment and is purely based upon compliance obligations of the regulated community. That is not allowable under the statute. Nowhere does the statute say that the Department should consider the regulated community’s concerns about providing a safety cushion. (5, 8)

RESPONSE TO COMMENTS 36 AND 37: The “safety cushion” to which the Department referred in the summary to the proposal of the amendments to the ARRCs rules and Technical Requirements concerns building in time for a person responsible for conducting the remediation who may encounter problems with meeting a regulatory timeframe to be able to still remain in compliance with the mandatory timeframe. Pursuant to SRRA at N.J.S.A. 58:10C-27, the Department must undertake direct oversight of a remediation conducted by a person who misses a mandatory timeframe. Overseeing the remediation of a case that is in direct oversight places an enormous burden on the Department and may hinder the remediation. Placing a significant number of cases under direct oversight would defeat the purpose of the LSRP program, which was to relieve the Department from overseeing the remediation of every case in favor of having enough resources for the Department to focus on the cases that pose the greatest risk to public health and the environment. In addition, the extension of the regulatory timeframes ensures that sites are properly, yet timely remediated so that they are protective of public health, safety and the environment. Providing an adequate amount of time for the person responsible for conducting the remediation to do a thorough job in conducting the required remedial work avoids “sloppy” workplans and reports which may result from rushing to meet an inadequate timeframe. The “safety cushion” alluded to in the rule proposal is good for the person responsible for conducting the remediation, the Department and the citizens of New Jersey as a whole.

Impact statements

38. COMMENT: The commenter asks that the Department identify the number of immediate environmental concern cases, the name of the site, the location of the site, the contaminant of concern, the level detected, the applicable regulatory standard, should it be soil or groundwater or indoor air intrusion issue, the exposure pathway, and the date that the immediate environmental concern condition was discovered by either the responsible party or the Department so the public would have some understanding of how the extension of the timeframes could impact public health and the environment and how the case was progressing. (8)

RESPONSE: The specifics of the data that the commenter is requesting can be found in the reports located in the Department's database in Data Miner at <http://www.nj.gov/dep/opra/online.html>. For example, Data Miner shows that there are currently 586 immediate environmental concern cases in the Department's data base. Of these, 189 involve vapor intrusion, 367 involve potable well contamination and 9 involve direct contact. The remaining 21 immediate environmental concern cases do not contain information concerning the type of immediate environmental concern.

39. COMMENT: The commenter does not understand the rationale and justification for the extension, at N.J.A.C. 7:26E-1.15, of the Receptor Evaluation timeframe, from November of 2010 to March 2011, and questions what are the impacts on human health and the environment. The Department should have provided in its proposal of this amendment site specific statistics concerning how extending this timeframe would actually impact human health and the environment or public health and the environment as a part of the basis for the proposal, so that the public may better understand the impacts. (8)

40. COMMENT: The commenter notes that the proposal at 7:26C-3.3 adds the timeframe for submitting the initial receptor evaluation to two years. If the extension results in the creation of exposure pathways and increased chance of exposure to individuals, then the extension of the receptor evaluation deadline will result in a negative impact to human health and the

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environment, which is contrary to the statutory requirement that human health and the environment be protected. (8)

RESPONSE TO COMMENTS 39 AND 40: As mentioned in the Environmental Impact Statement in the proposal, although the proposed amendments extend certain timeframes for remediation, they will have a positive environmental impact by allowing persons responsible for conducting the remediation to better allocate resources to remediate contaminated sites, and allow them to take a more studied approach to the remediation, and therefore implement a more effective remedial action. This means less human and ecological exposure to the contamination, and therefore fewer negative consequences to human health and to the State's natural resources.

41. COMMENT: The proposed environmental impact statement in the rule proposal states that the extension of the timeframes will result in an environmental benefit by allowing persons responsible for conducting the remediation to better allocate resources to remediate the sites and provide for better studies in order to implement a more effective remedial action. The commenter does not agree with this premise. The allocation of a company's resources has nothing to do with the protection and public health of the environment. In addition, the Department does not know how a person responsible for conducting the remediation allocates the resources for remediation, thus it can't be a basis for the proposal.

How a remediating entity allocates those resources is completely outside the scope of the Department's consideration. Rather, the regulated community would more likely be chilled by that kind of thinking. The Department's premise as stated in the environmental impact statement results in an arbitrary proposal having no factual or permissive regulatory basis. (8)

RESPONSE: The Department's experience in implementing the Technical Requirements and overseeing the remediation of contaminated sites for more than 20 years has shown that the way the person responsible for conducting the remediation allocates its resources (including personnel, financial, and time) has significant impact on the quality of the remediation of a contaminated site. Persons responsible for conducting the remediation have represented to the Department that having a known and reasonable time to conduct remediation has better enabled them to budget for the steps and studies necessary to determine the most protective and cost

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effective remedial actions. The Department is basing its premise on its experience in overseeing the remediation of contaminated sites and on the factual input it has received from persons responsible for conducting remediation.

Initial Receptor Evaluation Reporting

42. COMMENT: Proposed N.J.A.C. 7:26C-3.3(a)2 limits the required information for the initial receptor evaluation report to only that which is known when the report is submitted. Proposed N.J.A.C. 7:26C-3.3(a)3 deletes the requirement that the immediate environment concern contaminant source be delineated. Both proposed amendments should be adopted as they are practical measures that recognize that every task of the remediation action may not be accomplished within the two-year timeframe. (2)

43. COMMENT: Proposed N.J.A.C. 7:26E-1.15(c) is amended to require that the information on the initial receptor evaluation would be only that which “is known by the person responsible for conducting the remediation at the time the report is submitted.” As the Department acknowledges, this proposed amendment reflects the reality of remediation projects that “not all information may be know or available at this stage of the remediation,” and therefore should be adopted. (2)

RESPONSE TO COMMENTS 42 AND 43: The Department appreciates the commenters’ support of this rulemaking.

Civil Administrative Penalties

44. COMMENT: The penalty descriptions at N.J.A.C. 7:26C-9.5 related to N.J.A.C. 7:26C-3.3(a)3, recodified as 3.3(a)4 is not consistent with the text of the proposed rule amendment. Specifically, the penalty description references LNAPL “recovery system installation,” whereas the amended language of the proposed rule has deleted the requirement of a recovery system and has replaced it with a “free product interim remedial measure.” The penalty language should be revised accordingly. (6)

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RESPONSE: The Department agrees that the description of the penalty should accurately reflect the content of the paragraph to which it refers. On adoption, at the table in N.J.A.C. 7:26C-9.5(b), in the violation for N.J.A.C. 7:26C-3.3(a)3, recodified as 3.3(a)4, the Department will correct the phrase “recovery system installation” to “free product interim remedial measure” to more accurately reflect the content of the paragraph to which it refers.

45. COMMENT: The Department proposes at N.J.A.C. 7:26E-9.5 to amend the base penalty for failure to submit a preliminary assessment from \$8,000 to \$20,000. This increase is not justified and should be deleted. This increase is contrary to both the Red Tape Review Commission’s report and the Governor’s Executive Orders, which strive to reduce the burdens on industry. This penalty would apply equally to a large, multi-media investigation by a large and/or sophisticated company with consulting expertise, as well as to a small mom-and-pop dry cleaner or other small business, or even the heirs of such a company attempting to address legacy issues associated with historic family-owned businesses. Since these are non-minor penalties and the Department has no discretion to deviate from the issuance of the penalty, nor adjust the amount, the base amount should be kept at the lower level. Also, the Department should provide the rationale as to how the \$20,000 penalty was determined. (6)

RESPONSE: N.J.A.C. 7:26C-3.3(a)1 requires that the preliminary assessment and site investigation report be submitted to the Department within the mandatory timeframe established in the rule. The Department does not anticipate that the increase in the base penalty for a violation of N.J.A.C. 7:26C-3.3(a)1 will place any additional burden on the person responsible for conducting the remediation that remains in compliance with the mandatory timeframes. However, the effects of the contamination remaining in the environment on public health and the environment are the same regardless of the size of the site; thus, the penalty should not be assessed differently based on the type of business. The mandatory timeframes adopted at N.J.A.C. 7:26C-3 are critical to the success of the remediation program because they ensure that parties will timely remediate sites without Department oversight. The public must be assured that sites that are being remediated with a LSRP will be remediated in a timely manner without the Department directing the pace of the remediation.

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As noted in the proposal, the Department is increasing the penalty from \$8,000 to \$20,000 so that the penalty both reflects the seriousness of this violation and is consistent with the penalty for other violations of the same gravity noted in N.J.A.C. 7:26C-3.3(a)2 through 4. The timeframes are mandatory. The penalties in N.J.A.C. 7:26C-9.5 are the base penalties for violation of the listed provisions.

46. COMMENT: Proposed N.J.A.C. 7:26C-9.5(b) increases the base penalty amount from \$8,000.00 to \$20,000.00 for failing to comply with the mandatory timeframe for submitting a preliminary assessment and site investigation report. The Department explains that this change is needed to reflect the seriousness of the violation and to be consistent with other penalties for violating mandatory timeframes. The Department also proposes a new penalty in the amount of \$20,000.00 for failing to submit indoor air data to DHSS within the required timeframe.

The Department should maintain the base penalty associated with preliminary assessments and site investigation reports at the current assessment of \$8,000.00. Given that the Site Remediation Program reforms are still in their infancy stage, it is not unreasonable to expect that some administrative missteps may occur as the regulated community and its environmental consultants (LSRPs or otherwise) adjust to the new program requirements. Specific to this rule, the concept and requirement of meeting mandatory timeframes, in addition to the regulatory timeframes, is a new element of the site remediation program.

Further, the potential of being assessed increased penalties (anywhere upwards of the proposed \$20,000.00) would only serve as a deterrent to the undertaking of remediation projects, rather than being a means to ensure that preliminary assessments and site investigation reports are submitted within the prescribed mandatory timeframe, which is the intended purpose of the Department. In these harsh economic times, the Department should ensure that any enforcement actions that impose monetary penalties truly fit the violation and the environmental harm incurred from the infraction. (2)

RESPONSE: The penalties for violations of mandatory timeframes must serve as a deterrent from delaying or stalling the remediation effort. However, the threat of a penalty should not be a

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deterrent to undertaking a remediation. In fact, pursuant to the Brownfield Act, the person responsible for conducting the remediation has an affirmative obligation to remediate (N.J.S.A. 58:10B-3). Therefore, once a discharge is discovered, the person responsible for conducting the remediation must proceed with the remediation.

The Department is extending the mandatory timeframes based on comments from the regulated community that the extension would be more reflective of the time it takes to conduct the remediation tasks that are the subject of the existing mandatory timeframes. Thus, the penalty should not be a deterrent to undertaking remediation since compliance with the timeframe should be achievable. The rules at N.J.A.C. 7:26C-3.2 and 3.5 allow for that person to seek an extension of the regulatory and mandatory timeframes if certain conditions exist at a site. Extensions are irrelevant where no remediation is underway. The Department agrees that the reforms to the remediation process contained in SRRA are still in their infancy stage and that it will take time for the regulated community to adjust to the new program requirements. That is why the Legislature established a 3-year phase in process for the new program. However, the Department does not believe that missing a mandatory timeframe is an “administrative misstep.” Rather, missing a mandatory timeframe indicates to the Department that the person responsible for conducting the remediation has already missed the applicable regulatory timeframe and has failed to take advantage of the extension requests that would allow for more appropriate management of the remediation.

47. COMMENT: The commenter approves of the changes provided in the penalty sections at N.J.A.C. 7:26C-9.5. Penalties should serve as a true deterrent for violating the rules. (4)

RESPONSE: The Department appreciates the commenter’s support for this rule initiative.

Miscellaneous

48. COMMENT: The commenter states that the interim rule, which was not subject to public comment, has a number of major flaws, including the fact that there no mandatory time frames as required by the statute for remedial investigation, for remedial action or, “Completion of remedial action,” in spite of the legislative direction that mandates the Department to establish timeframes for these remediation phases. (8)

RESPONSE: The Department anticipates proposing regulatory and mandatory timeframes for the remedial investigation and the remedial action phases in May, 2011 for adoption in May, 2012.

49. COMMENT: The commenter recognizes that there have been some delays in trying to get the LSRP program off the ground because of a failure in getting appointments to the Board, but is concerned that this delay for one year not only goes against the statutory intent of the law, but it will mean more pollution as we keep the interim rules and programs in place, which we believe have less oversight and less accountability. (7)

RESPONSE: The commenter's concerns about the constitution of the LSRP Board are beyond the scope of this rulemaking. The LSRP program has been functioning since November 4, 2009. There are over 435 temporarily licensed LSRPs and they are actively remediating sites.

50. COMMENT: The public hearings on this proposal were held the day before an election and the day after an election, thereby suppressing public participation. Additionally, reporters that would otherwise have been interested in attending these meeting were forced to miss them because they were engaged in election coverage. The commenter believes that the hearings were held on these dates in order to thwart public awareness. Additionally, the commenter states that the sites selected for public hearings were inappropriate because they were not located in counties in which the majority of contaminated sites are located, thereby frustrating the ability of the public to participate. (8)

RESPONSE: In scheduling the public hearings, the Department considered dates that were in the middle of the public comment period, which was open from October 4 to December 3, 2010. When choosing venues, the Department scheduled one hearing in central New Jersey and one in the northern portion of the State. An important factor in venue selection was the cost to use the venue. The Department's public hearing room and the New Jersey Water Supply Authority were free of charge to the Department and available during the window the Department sought to have the hearings.

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Additionally, on September 29, 2010, the Department faxed a copy of the proposal to each of the 14 news organizations that maintains a press office in the State House; included in that group are the Atlantic City Press, the New Jersey Network, the Trenton Times, the New York Times and the Philadelphia Inquirer.

As mentioned above, the Department makes every effort to invite members of all constituent groups.

Federal Standards Analysis

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. (as amended by P.L. 1995, c. 65) require State agencies that adopt, readopt, or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal Standards Analysis. Following are analyses for each rule that is being amended by these adopted amendments:

Administrative Requirements for the Remediation of Contaminated Sites rules, N.J.A.C. 7:26C

The adopted amendments to the mandatory timeframes promulgated in the ARRCS rules do not implement, comply with or enable the State to participate in any program established under Federal law, standards or requirements. Of all the statutes that provide the basis for the promulgation of the ARRCS rules, the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., is the only one that contains references to the National Contingency Plan, 40 CFR Part 300 (NCP). The NCP contains the Federal technical requirements for addressing environmental contingencies. The NCP does not contain any provisions for administrative requirements for a person wanting to participate in the remediation of a contaminated site, with or without Department oversight. Therefore, there are no Federal provisions with which to compare the provisions of the ARRCS rules. Based on this analysis, the Department has determined that the adopted amendments do not contain any standards or requirements that exceed those imposed by Federal law, and no further analysis under Executive Order No. 27 (1994) or N.J.S.A. 52:14B-1 et seq. is required.

Technical Requirements for Site Remediation Rule, N.J.A.C. 7:26E

The Technical Requirements for Site Remediation rules, N.J.A.C. 7:26E, were promulgated under the authority of the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11a et seq., the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., and the Underground Storage of Hazardous Substances Act, N.J.S.A. 58:10A-21 et seq., and these State statutes all refer to or incorporate Federal law, Federal standards or Federal requirements. In addition, the EPA has delegated its Underground Storage Tank program to New Jersey pursuant to 40 CFR 280. Thus, in accordance with N.J.S.A. 52:14B-22 through 24 and Executive Order No. 27 (1994), the Department has compared these adopted amendments to the Federal rules and associated guidance documents issued pursuant to the following Federal laws: the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601 et seq., and the Resource Conservation and Recovery Act (RCRA) of 1980, 42 U.S.C. §§ 6901 and 6991 et seq.

The establishment of regulatory timeframes for the completion of certain remedial work is more stringent than equivalent Federal programs; the Federal programs do not establish remediation timeframes at all. Rather, the Federal remediation programs, allow the remediation of contaminated sites to be conducted on site specific schedules. Prior to the adoption of remediation timeframes, the Department also permitted remediation to proceed on site specific schedules, but has found that this practice has allowed cleanups to be dragged out unnecessarily and has prolonged the remediation process. Accordingly, the Department established regulatory timeframes for the completion of remediation tasks that lead up to the mandatory remediation milestone so that the person responsible for conducting the remediation completes the statutorily mandated remediation milestones within the mandatory time frames set forth in the ARRCs rules. This ensures that site cleanups are not unnecessarily prolonged, and ensures that remediating parties are not unnecessarily pushed into the direct Department oversight program. The Department believes that there will be an overall cost savings associated with the timeframes. When contamination is allowed to persist in the environment, it is more likely to migrate to ground water, surface water and to soil off the property being remediated, which often

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adds to the overall cost of remediation. Additionally, if the remediation of contaminated sites is completed in a timelier manner, such sites can be put to better use and often can result in increased ratables for local and State government.

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

CHAPTER 26C

ADMINISTRATIVE REQUIREMENTS FOR THE REMEDIATION OF CONTAMINATED SITES

SUBCHAPTER 9. ENFORCEMENT

7:26C-9.5 Civil administrative penalty determination

(a) (No change.)

(b) The following summary of rules contained in the “Subchapter and Violation” column of the following tables is provided for informational purposes only. In the event that there is a conflict between the rule summary in the following tables and the corresponding rule provision, then the corresponding rule provision shall prevail. The “Citation” column lists the citation and shall be used to determine the specific rule to which the violation applies. In the “Type of Violation” column, “M” identifies a violation as minor and “NM” identifies a violation as non-minor. The length of the applicable grace period for a minor violation is indicated in the “Grace Period” column. The “Base Penalty” column indicates the applicable base penalty for each violation.

Administrative Requirements for the Remediation of Contaminated Sites N.J.A.C. 7:26C

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3 Remediation Timeframes and Extension Requests

Failure to comply with the mandatory timeframe for completion of light non-aqueous phase liquid (LNAPL) *[recovery system installation]* *free product interim remedial measure* , initiation of LNAPL recovery system monitoring, and submittal of interim remedial action report.	7:26C-3.3(a)4	NM	\$20,000
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CHAPTER 26E

TECHNICAL REQUIREMENTS FOR SITE REMEDIATION

SUBCHAPTER 1. GENERAL INFORMATION

7:26E-1.14 Immediate environmental concern requirements

(a) (No change.)

(b) through (c) (No change from proposal.)

(d) Within one year after either March 1, 2010 or identifying the IEC condition, ***whichever is later,*** the person responsible for conducting the remediation shall initiate control of the IEC contaminant source using the Department's IEC Guidance and submit an IEC contaminant source control report, with an updated form found on the Department's website at www.nj.gov/dep/srp/srra/forms that includes descriptions of each of the following:

1. - 3. (No change.)