

Varying from a Rule and Applying Technical Guidance

Section 1.7 of the current Technical Requirements for Site Remediation (Technical Requirements, N.J.A.C. 7:26E) was written to apply to both regulation and guidance. It is the New Jersey Department of Environmental Protection's (Department) intent through the final rule to separate requirements for varying from regulation and applying technical guidance. This document outlines the Department's position on this issue prior to adoption of the final rule.

In the Department's Technical Guidance documents, terms such as "shall," "must," or "required" are used when referring to specific **rule** requirements. In these cases, the citation for the rule should be provided. When varying from a rule, the variance process set forth in the Technical Requirements and outlined in Section I below (Varying from a Rule) must be followed. When terms like "may," "should," and "recommended" are used in the Department's Technical Guidance, this denotes Committee recommendations that are scientifically and technically based but not specifically required by a rule. When using an approach that is different from the recommendations provided in the Department's Technical Guidance, the person responsible for conducting the remediation should refer to Section II of this document (Applying Technical Guidance).

I. Varying from a Rule

The variance process is outlined in the Technical Requirements for Site Remediation (Tech Rule) at N.J.A.C. 7:26E-1.7. When conducting remediation of a contaminated site, the person responsible for conducting the remediation may vary from a regulatory technical requirement.

In order to vary from a regulatory technical requirement, the person responsible for conducting the remediation is required to identify the citation for the technical requirement, provide a description of how the variance differed from the regulatory requirement and provide supporting documentation demonstrating the variance provides:

- Verifiable and reproducible results;
- Achieves the objective of the cited technical requirement; and
- Furthers the attainment of the specific remedial phase.

This information is required to be presented within the applicable remedial phase report.

N.J.A.C. 7:26E-1.7(b) requires that a person conducting remediation shall not vary from any non-technical requirement, including but not limited to, the following examples:

1. Department notification requirements (e.g., reporting a spill to the communications center at 1-877-WARN DEP);
2. Regulatory timeframes (e.g., the regulatory timeframe to submit an initial receptor evaluation or PA/SI report for an ISRA subject facility);
3. The requirement to obtain a permit (e.g., Discharge to Ground Water permit or Remedial Action permit);
4. The requirement to submit reports in the format required by N.J.A.C. 7:26E (e.g., the remedial investigation report requirements);
5. The requirement to comply with applicable remediation standards (e.g., direct contact soil remediation standards); and
6. The requirement to comply with the quality assurance laboratory requirements (e.g., the requirement to utilize New Jersey certified laboratories).

II. Applying Technical Guidance

The Site Remediation Reform Act (SRRRA) at N.J.S.A. 58:10C-14c(3) and the Administrative Requirements for the Remediation of Contaminated Sites (ARRCS) at N.J.A.C. 7:26C-6.2(c)3 require LSRPs to apply Department technical guidelines (i.e., guidance) in regard to site remediation.

Additionally, as provided in both N.J.S.A. 58:10C-14c(4) and N.J.A.C. 7:26C-6.2(c)4, if there is no specific Department requirement and guidelines issued by the Department are not considered appropriate or necessary in the professional judgment of the LSRP, additional guidelines may be used to make remedial decisions providing the rationale for such use is set forth in the relevant submittal by the LSRP. Additional guidelines would include (in order of preference, as set forth in SRRRA):

- Relevant guidance from the Federal Environmental Protection Agency or other states; and
- Other relevant, applicable, and appropriate methods and practices that ensure the protection of the public health and safety, and of the environment.

If the LSRP does not consider Department Guidance appropriate or necessary, the LSRP must explain why and provide adequate justification to document that the decisions made are still protective of public health, safety and the environment pursuant to SRRRA. The complexity of the explanation will be relative to the complexity of site conditions, and whether Department guidelines were available. LSRPs should exercise their professional judgment regarding the level of detail needed to adequately justify decisions that were made.