ENVIRONMENTAL PROTECTION

SITE REMEDIATION AND WASTE MANAGEMENT

Discharge of Petroleum and Other Hazardous Substances Rules, Underground Storage Tanks Rules; Industrial Site Recovery Act Rules; Department Oversight of the Remediation of Contaminated Sites

Adopted Amendments: N.J.A.C. 7:1E-6.5; 7:14B-12.1; 7:26B-1.11 and 7:26B, Appendix A; and 7:26C-1.2, 1.3, 3.2, 3.3, 3.4, 10.1 and 10.2 and 7:26C, Appendix A

Adopted New Rules: N.J.A.C. 7:26C-10.3, 10.4, 10.5, and 10.6

Adopted Repeal: 7:26C-10.4

Adopted Recodifications: N.J.A.C. 7:14B-1.8 as 5.9 and 7:26C-10.3 as 10.8

Proposed: August 15, 2005 at 37 N.J.R. 2923.

Adopted: August 15, 2006 by Lisa P. Jackson

Filed: August 15, 2006 **with substantive and technical changes** not requiring additional public notice and comment (N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 13:1D-1 et seq., 13:1D-125 through 133; 13:1E-1 et seq., 13:1K-6 et seq, 58:10-23.11a et seq., 58:10A-1 et seq; 58:10A-21 et seq; 58:10B-1 et seq.

DEP Docket Number: 25-05-07/456.

Effective Date: September 18, 2006

Expiration Date: April 21, 2008

The Department of Environmental Protection hereby adopts amendments to the Department Oversight of the Remediation of Contaminated Sites Rules, N.J.A.C. 7:26C (Oversight Rules) to set forth penalties for violations of the Underground Storage Tank Rules, N.J.A.C. 7:14B (UST Rules), the Industrial Site Recovery Act Rules, N.J.A.C. 7:26B (ISRA Rules), the Oversight Rules, N.J.A.C. 7:26C, and the Technical Requirements for Site Remediation Rules (Technical Rules.), N.J.A.C. 7:26E, and identify these violations as either minor or non-minor for the purpose of providing grace periods in accordance with P.L. 1995, c. 296 (N.J.S.A. 13:1D-125 et seq.), commonly known as the Grace Period Law. The amendments to these rules set forth how the Department will respond to any violation identified as minor.

The Department is also adopting amendments to the Oversight Rules regarding the penalty provisions of N.J.A.C. 7:26C-10, Civil Administrative Penalties and Requests for Adjudicatory Hearings, to conform those provisions to the Grace Period Law.

The Department is also adopting amendments to the Oversight Rules at N.J.A.C. 7:26C-3 regarding the memoranda of agreement (MOA) application and termination process.

The Department is also adopting amendments to the Standard ISRA RA (RA) at N.J.S.A. 7:26B, Appendix A, and the Standard Administrative Consent Order (ACO) contained in the Oversight Rules at N.J.A.C. 7:26C, Appendix A, to replace the stipulated penalties provisions of these agreements with provisions that conform with the Grace Period Law and to make the provisions of these two agreements consistent with each other.

The Department is also adopting amendments to the Underground Storage Tank rules at N.J.A.C. 7:14B-1.8 and 12.1 that clarify the enforcement process for these rules; and the Industrial Site Recovery Act rules, N.J.A.C. 7:26B-1 that make these rules consistent with the Oversight Rules at N.J.A.C. 7:26C-10.

The Department published the proposed amendments in the New Jersey Register at 37 N.J.R. 2923 on August 15, 2005. The comment period for the proposal closed on October 14, 2005.

Abbreviations and Acronyms

The following abbreviations and/or acronyms are commonly used in the Summary of Public Comments and Agency Responses:

Regulatory Term	Acronym

Administrative Consent Order	ACO
Immediate Environmental Concern	IEC
Industrial Site Recovery Act	ISRA
Memorandum of Agreement	MOA
Notice of Violation	NOV
Remediation Agreement	RA
Underground Storage Tank	UST

Summary of Hearing Officer's Recommendations and Agency Responses:

The Department held a public hearing concerning the proposal on September 19, 2005 at the New Jersey Department of Environmental Protection, 401 East State Street, Trenton, New Jersey. Ronald T. Corcory, Assistant Director of the Oversight Resources Allocation Element of the Division of Remediation Support, served as the hearing officer. Two people presented oral testimony at the hearing. Eleven people submitted written comments. After reviewing the comments presented at the hearing and the written comments received by the Department, Mr. Corcory recommended that the Department adopt the proposed amendments with the changes described in this notice of adoption. The Department accepts the recommendation of Mr. Corcory.

In addition to the public hearing, the Department conducted outreach with the public on two occasions. On March 7, 2005, the Department presented an overview of the Grace Period Rule proposal to the Site Remediation Advisory Group. In attendance at this meeting were representatives of environmental consulting firms, law firms, and trade groups. The Department also gave an overview to the Site Remediation Industry Network of New Jersey on Monday May 2, 2005. In attendance at that meeting were representatives of industries regulated by the Department. Finally, the Department gave a presentation of the Grace Period rules to the Site Remediation Industry Network on July 13, 2005. No formal testimony was given at these information sessions.

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

New Jersey Department of Environmental Protection
Office of Legal Affairs
Attention Docket Number: 25-05-07/456
401 East State Street
P.O. Box 402
Trenton, New Jersey 08625-0402

This adoption document is available from the Department's website at www.state.nj.us/dep/srp.

Summary of Public Comments and Agency Responses:

The following individuals submitted written comments and/or oral comments on the proposal:

1. David Brogan, New Jersey Business and Industry Association
2. Richard J. Conway, Jr, Schenck, Price Smith & King, individually
3. Richard J. Conway, Jr, Schenck, Price Smith & King, representing the Site Remediation Industry Network
4. Michael Egenton, N.J. State Chamber of Commerce
5. John Maxwell, New Jersey Petroleum Council
6. Michael G. McGuinness, National Association of Industrial and Office Properties
7. John J. Riggio, Roche
8. Anthony Russo, Chemistry Council of New Jersey
9. John M. Scagnelli, Scarinici & Hollenbeck
10. Theodore Schwartz, Scarinici & Hollenbeck
11. William L. Warren, Drinker Biddle & Reath
12. Nancy B. Wittenberg, New Jersey Builders Association

13. Jersey Central Power and Light

The timely submitted comments and the Department's responses are included below. The number in parentheses after each comment identifies the respective commenter listed above.

General Comments

1. COMMENT: The commenters appreciate the Department's efforts to use enforcement mechanisms to compel remediation where remediation has not proceeded in a manner that is protective against real threats to human health or the environment, or where there exists an impact to human health and the environment that remains un-addressed. (3, 4, 8, 12, 13)

2. COMMENT: The commenters are supportive of the Department's efforts to use appropriate enforcement discretion to compel remediation where there exist actual threats to human health and the environment or to use enforcement where the basic underlying components of the remediation program are not adhered to (for example, failure to report a discharge, failure to comply with ISRA, failure to register an UST). (3, 4, 8, 12, 13)

RESPONSE to 1 and 2: The Department appreciates the commenters' support.

3. COMMENT: The commenter recognizes the considerable challenge that DEP faces in developing and administering a site remediation program that is protective of human health and the environment, but that does not undermine the economic base necessary for "smart growth." They applaud the case managers who regularly work in a cooperative manner with companies to achieve accurate site characterizations and efficient cleanups. (7)

RESPONSE: The Department appreciates the commenter's support for its case managers' commitment to working with the regulated community in a cooperative

manner in order to achieve accurate site characterizations and efficient cleanups. The Department is committed to continuing this collegial interaction with the regulated community to further its goal of protecting human health and the environment.

4. COMMENT: The commenter appreciates the Department's efforts to propose regulations to implement the provisions of the Grace Period Law, N.J.S.A. 13:1D-125 et seq. (11)

RESPONSE: The Department thanks the commenter for its support.

5. COMMENT: The commenters accept that at some point, patterns of deviation from the Technical Rules and delay in remediation may justify enforcement, and assessment of penalties, because actual adverse environmental conditions and threats to health do need to be timely investigated and remediated. (3, 4, 8, 12, 13)

RESPONSE: The Department agrees with the commenters' assertion.

MOA amendments and the Voluntary Cleanup Program

6. COMMENT: These rules will have a chilling effect upon the willingness of developers and others to remediate contaminated sites, including brownfield sites in New Jersey and on the willingness for the developers to come together with the Department, to try to work out difficult solutions. (9, 6, 10)

7. COMMENT: The grace period rule should be substantially modified and/or rescinded because it will have a substantial chilling effect upon the willingness of builders/developers, property owners and others in New Jersey to become involved in contaminated brownfields rehabilitation projects in the state by turning MOAs used by the Voluntary Cleanup Program into enforcement documents. (9)

8. COMMENT: The proposed amendments to the rules serve to limit the use of the Voluntary Cleanup Program which will not serve the development goals of the State. (12)

RESPONSE to 6 through 8**:** The Department disagrees that the proposed rules will have a chilling effect on development in the State. The grace period amendments do not address the way in which sites, including brownfield sites, are remediated or developed in New Jersey. Rather they clearly enumerate each rule violation and set forth how the Department will respond to any violation identified as minor. The Department believes the grace period amendments will encourage developers to work with the Department and will spur development by providing a period of time to correct a violation prior to taking punitive action. For example, since most of the violations are designated as minor, a developer remediating a site pursuant to a MOA will usually have a period of time to correct the issue of the non-compliance prior to the Department terminating the MOA. The Grace Period amendments do not apply to the Voluntary Cleanup Program; hence there will be no enforcement of MOAs.

Additionally, the amendments to N.J.A.C. 7:26C-3.3 concerning MOA re-application procedures are intended to reduce the number of frivolous MOA applications, thus permitting the Department to focus its limited resources on remediations by developers who are committed to the remediation project. Finally, conforming the terms of RAs with the terms of ACOs encourages consistency between the programs that utilize these agreements.

9. COMMENT: The Smart Growth Impact Analysis of the Proposed Grace Period Rule states that the Proposed Rule does not involve land use policies for infrastructure development and therefore does not impact the achievement of Smart Growth and that the proposed amendments are consistent with the goals and objectives of the State Development and Redevelopment Plan. The commenters disagree that the Grace Period Rule does not impact the achievement of Smart Growth. To the contrary, the Grace Period Rule will have a substantial chilling effect upon the willingness of

builders/developers and others to undertake the rehabilitation of contaminated brownfields sites in New Jersey. (9, 10)

10. COMMENT: The commenter is concerned about the potentially adverse impact of the proposed rule on the Administration's smart growth efforts to redevelop the older communities in New Jersey, many of which have brownfields sites. (6)

RESPONSE: The Department does not believe that the amendments contained in this rulemaking will have an adverse impact on smart growth in New Jersey. The amendments do not involve land use policies or infrastructure development, and thus do not have a negative impact on the achievement of smart growth. To the extent that smart growth encourages development in "brown" areas of the State, the Department believes that the amendments will encourage smart growth by ensuring that only parties who are committed to complying with the regulations and the terms of an oversight document, such as an MOA, will ensure that contaminated sites are remediated more quickly and that the Department's limited resources are focused on parties that are committed to remediating a site, including brownfields.

11. COMMENT: The Voluntary Cleanup Program has encouraged private parties to undertake the cleanup of brownfields sites, and it would do injustice to that program and the legislative intent of the Brownfields Act to turn it into an enforcement program through the adoption of the proposed Grace Period Rule. (9)

12. COMMENT: The message of the proposal is that the Department has taken a one hundred and eighty degree turn from its more recent practices of using a "carrot and stick" approach to encourage voluntary remediation to a "regulatory big stick" approach to allow punishment of those the Department concludes have deviated from the rules (regardless of actual consequences of those deviations), without regard to the need to programmatically encourage a cooperative approach and/or voluntary remediation. There is a middle ground that would better accomplish the goal of site remediation.

Accordingly, the commenter recommends against adoption of the harsh, as opposed to the ameliorative, provisions of the proposal. (3, 4, 8, 12, 13)

13. COMMENT: The proposal provides several examples to confirm the commenters' belief that the Department intends to improve the MOA process. The Department says that changes to the Oversight Rules at N.J.A.C. 7:26C-3 "… are intended to increase the efficiency of the voluntary cleanup program by eliminating frivolous applications for MOAs." The Department proposes to add a $1000 fee for second MOAs after a first MOA was terminated by the Department. The Department allows those whose request for an MOA is refused to enter into an ACO (which allows penalties under the ACO). The Department redefines "applicant" to include family and affiliated entities (as a way to prevent a return into the program by affiliates of the original terminated applicant). Further a review of the Department's economic analysis of the Proposal, particularly in contrast to other parts of that analysis, confirms that the Department never says that the Proposal will have a bigger impact on volunteers with MOAs after its adoption because of fines and penalties.

Thus the commenters conclude that the Department does not intend to initiate enforcement and/or to assess fines against volunteers under MOAs for failure to comply with the Technical Rules (e.g., a failure to give a case manager adequate prior notice of field work). However, the overall tone of the proposal is sufficiently negative and discouraging to those who may yet consider entering, or continuing, in the voluntary cleanup program, that the Department should clarify this matter by confirming in a new section that fines never be issued under MOAs for errors in compliance although the Department is allowed to terminate. If the Department intends otherwise, it is wrong and the Department should withhold adoption, re-issue the Proposal with a clarification and justification so as to clarify its intent, and allow further comments by those who agree with the commenters' interpretation of the proposal. (3, 4, 8, 12, 13)

RESPONSE to 11 through 13: The Department agrees that the Voluntary Cleanup Program has been successful in encouraging private parties to volunteer to undertake the remediation of contaminated sites, such as brownfields. However, the Department disagrees with the assertion that the amendments will turn the Voluntary Cleanup Program into an enforcement program or that the Grace Period amendments will affect the Voluntary Cleanup Program. In fact, the Department is not making any changes to the program that may interfere with its success. The Grace Period amendments do not apply to the Voluntary Cleanup Program; hence there will be no enforcement of MOAs. Additionally, "volunteers" have an added incentive to participate in the program because, pursuant to the amendments at N.J.A.C. 7:26C-3.3(c)2, the Department will allow a period of time to correct non-compliance with provisions of a MOA, instead of immediately terminating the MOA upon discovery of the non-compliance.

The commenters have concluded that, since the Department has proposed more structured enforcement provisions, it no longer intends to encourage and accommodate voluntary remediation efforts. This conclusion is in error. The Department is not making any changes to the program that may interfere with the success of the Voluntary Cleanup Program. The amendments to the rule to implement the Grace Period Law do not apply to the Voluntary Cleanup Program; hence there will be no enforcement of MOAs. Voluntary cleanup efforts will continue to be a vital part of the program. The only change the Department is making with regard to the MOA in the interest of parity is that a grace period, commensurate to that applicable for non-voluntary cleanup program remediation cases, will be afforded for correction prior to termination. The Department is in effect expanding the ameliorative goals of the grace period statute to the voluntary cleanup program.

N.J.A.C. 7:26C-10.1, which outlines the scope of the penalty provisions, does not include MOAs. Further, N.J.A.C. 7:26C-3.3(c) indicates that the consequence for non-compliance on MOA cases is MOA termination. No mention of penalties is included.

Since MOAs are voluntary, the Department will not issue penalties for failure to conduct remediation pursuant to the MOA.

Upon adoption, the Department is adding a new N.J.A.C. 7:26C-10.3(e) in order to clarify that persons remediating sites pursuant to MOAs are not subject to penalties for non-compliance with the MOA. In the interest of parity, the Department will manage MOA cases in a manner similar to non-MOA cases. First, submittals made to document work that is planned or has been conducted will be reviewed for completeness and technical merit and deficiencies will be relayed to the party conducting the remediation. If the party fails to address the deficiencies, they will be afforded a grace period during which they must correct the deficiency; this process will apply to MOA and non-MOA cases. For non-MOA cases, failure to correct the violation within the grace period, or if the violation is non-minor, may result in the assessment of penalties. For MOA cases, if the deficiency is not corrected, or if the deficiency is equivalent to a non-minor violation, the MOA will be terminated. No penalty will be assessed for a party's failure to comply with the MOA. Termination of the MOA is the appropriate response on the part of the Department. The terms of the MOA are defined at N.J.A.C. 7:26C-3.3(a)3, and these terms commit that party to compliance with the Technical Requirements for Site Remediation, N.J.A.C. 7:26E. After MOA termination the Department maintains its right to evaluate the site-specific conditions and initiate an enforcement action, which may include penalties, if warranted.

The Department disagrees that the threat of MOA termination will deter parties from volunteering to remediate sites under a MOA. The Department feels that it has defined in the proposal a logical process that incorporates opportunities for the dialogue necessary to resolve highly technical and site-specific issues, yet addresses the issue of appropriate consequences for MOA noncompliance, which drains Department resources and ultimately delays the implementation of protective remedies.

14. COMMENT: In order to eliminate any mis-impression that under the Proposal the Department intends to impose fines even on volunteers for failures to comply with the Technical Rules we recommend the Department revise its Proposal to include the following amendment: "7:26C-10.1(c) This Subchapter does not apply to any violation of, or failure to comply with, a memorandum of agreement made subject to N.J.A.C. 7:26C-3, whether of the terms of that memorandum of agreement or of the requirements applicable to the work, plans or proposals conducted, made or due in accordance with that memorandum of agreement. Such are not subject to fine or penalty or enforcement hereunder, although they may result in the denial of approvals under, and/or termination of, the memorandum of agreement." (3, 4, 8, 12, 13)

RESPONSE: The Department agrees with the commenter and is adding a new N.J.A.C. 7:26C-10.3(e) to clarify that the penalty provisions of N.J.A.C. 7:26C-10 do not apply to parties remediating sites pursuant to a MOA.

15. COMMENT: The Legislature intended the Grace Period Law as a relief from enforcement, fines and penalties, and threats of enforcement. Further, as the Department acknowledges, MOAs are contracts allowing a voluntary remedial alternative. Yet the Proposal may create the mis-impression in some that the Department intends to impose fines even on volunteers for failures to comply with the Technical Rules. While compliance with the Technical Rules may be relevant to the quest for the no further action letter, and in rare instances even serve as a basis for termination of an MOA, they are not relevant to enforcement against volunteers and if the Department concurs, the Department should say so more clearly than it did in the Proposal. (3, 4, 8, 12, 13)

RESPONSE: The Voluntary Cleanup Program is a vital component of the Department's site remediation program and the Department continues to be committed to encouraging remediators that are serious about cleaning up contaminated sites to do so voluntarily through the Voluntary Cleanup Program. Accordingly, the amendments do not change how an MOA is initially obtained, nor do the amendments change how the Voluntary

Cleanup Program is implemented. Moreover, the amendments that implement the provisions of the Grace Period Law do not apply to the Voluntary Cleanup Program. However, in light of the importance that the Department places on the Voluntary Cleanup Program, this adoption amends the provision at N.J.A.C. 7:26C-3.3(c)2 to allow a volunteer remediating a site pursuant to an MOA a period of time to correct a deficiency in complying with the MOA prior to termination. This will further encourage voluntary remediation including the remediation of brownfields by giving the volunteer every possible opportunity to succeed in the remediation process. If the volunteer is deficient in complying with the terms of the MOA (e.g., fails to submit a document in accordance with the schedule that the volunteer submitted to the Department), the Department will notify the volunteer of the deficiency, and allow the volunteer time to correct the deficiency. During that time period, the Department encourages dialogue between the volunteer and the Department's case manager to resolve any differences, thus fostering a more collegial relationship. This positive relationship and experience can only lead to more developers seeking to develop brownfield sites, thus promoting smart growth and the economic well being of the State.

The other amendments to N.J.A.C. 7:26C-3 concerning MOA's (such as the requirement to include a payment of $1,000 with an MOA application for parties who have had a previous MOA terminated by the Department for non-compliance) are intended to increase the efficiency of the Voluntary Cleanup Program by providing a disincentive to parties who are not committed to complying with the terms of the MOA. The intent of this provision is to eliminate frivolous MOA applications. This will have no impact on volunteers, such as developers, who are seriously committed to remediating a site. Additionally, the amendments make it clear that the MOA is not the only avenue by which an applicant may remediate a site with Departmental oversight. That is, any applicant may enter into an ACO with the Department pursuant to the Department Oversight of the Remediation of Contaminated Sites rules (see N.J.A.C. 7:26C-3.3(c)4).

16. COMMENT: To the extent that the proposal is intended to increase enforcement and impose and collect more in penalties, the proposal will be bad for the effort to obtain better and faster remediation, and fewer will enter and/or remain in the Voluntary Cleanup Program. (3, 4, 8, 12, 13)

RESPONSE: The adopted rules are not intended, as the commenters suggest, to "increase enforcement and impose and collect more in penalties." Rather, the Legislature, in its directive to the Department to establish grace periods, believed that "expanding the use of grace (compliance) periods will promote compliance by allowing those members of the regulated community who are committed to working diligently and cooperatively toward compliance, to invest private capital in pollution control equipment and other measures which will yield long-term environmental benefits, instead of in costly litigation and the payment of punitive monetary sanctions (emphasis added)." N.J.S.A. 13:1D-125. The intent of the rules is to ensure that remediation of contaminated sites occurs more quickly through better compliance with the Department's remediation requirements.

Further, as stated in the summary to the rule proposal, the Grace Period Law does not apply to MOAs which are part of the Voluntary Cleanup Program. Therefore, the rules should have no effect on the number of parties that wish to remediate sites under the Voluntary Cleanup Program.

17. COMMENT: The Proposal is likely to have an adverse effect on the willingness of some to enter into, or continue subject to, an MOA in the Voluntary Cleanup Program. This is bad for the program, the Department and the State. The tone, approach and provisions of the proposal indicates that volunteers will end up in a confrontations with the Department about strict compliance with the Technical Rules, perhaps even fines. Yet fines and confrontation are not expected by volunteers. (3, 4, 8, 12, 13)

18. COMMENT: The voluntary clean up process is an important component of the remediation and redevelopment of sites throughout the State. All efforts should be directed toward making this program more accessible and user friendly. (11, 12)

19. COMMENT: The Department is on the wrong track in the proposal's attempt to make the MOA more difficult to obtain and implement. The Department should be encouraging the use of the Voluntary Cleanup Program rather than discouraging its use. Fewer brownfields will be redeveloped if the Department makes the voluntary cleanup process more difficult to use. (11)

20. COMMENT: The proposed amendments make the MOA program more difficult to use. The Department should not be trying to make it more difficult to access and use the MOA process. Unfortunately, the Department's proposed changes to the MOA make the program more onerous and burdensome. Why, for example, should a company that acquires and/or merges with a company that has had an MOA terminated be required to enter into an ACO rather than an MOA or otherwise discouraged from entering into an MOA? Indeed, the acquiring company that wishes "to do the right thing" should be encouraged to enter into an MOA rather than be discouraged from doing so. (11)

21. COMMENT: Overall, the proposed modifications to the regulations regarding the use of a Memorandum of Agreement (MOA) at N.J.A.C. 7:26C-3.2 unnecessarily add further limitations and restrictions which would serve to limit and reduce the use of the Voluntary Cleanup Program. The Voluntary Cleanup Program continues to be one of the most effective programs in achieving compliance with the State Site Remediation Program's regulations. Each new requirement and limitation placed on the use of an MOA carries with it the likelihood that fewer parties who otherwise qualify for the Voluntary Cleanup Program, will choose to do so. By modifying the regulations regarding MOAs to add limitations, the Department will discourage use of the Voluntary Cleanup Program. (12)

22. COMMENT: The use of a MOA is required to allow for interaction with the Department under the Voluntary Cleanup Program. The Voluntary Cleanup Program is of critical importance and continues to be one of the most effective programs in achieving compliance with New Jersey's laws and regulations governing the investigation and remediation of discharged hazardous substances. The Department's efforts to enhance and ease the use of the Voluntary Cleanup Program has become a cornerstone to increased efforts to address site remediation issues, particularly for brownfield sites. Many of the proposed modifications to the regulations at N.J.A.C. 7:26C-3.2 through 3.4 regarding the use of a MOA unnecessarily limit and restrict access to the Voluntary Cleanup Program. The Department overemphasizes the need for modifications at the cost of encouraging prompt compliance without protracted dispute resolution. Many of the changes will discourage resolution of site remediation concerns in New Jersey. Further, these regulations may act as a disincentive to those willing to voluntarily remediate Brownfields and require the Department's involvement through an MOA. (6)

RESPONSE to 17 through 22: The Department disagrees with the commenters' assertions that the rules make the use of the Voluntary Cleanup Program more difficult. In fact, the amendments to the rule encourage "volunteers" to participate in the Voluntary Cleanup Program program. For example, N.J.A.C. 7:26C-3.3(c)2 allows the Department to provide the person responsible for conducting the remediation a period of time to correct a deficiency in complying with an MOA identified pursuant to N.J.A.C. 7:26C-3.3(c)1i through iii in order to avoid termination by the Department. Even if the party fails to take advantage of the period of time for compliance granted to it by the Department and the Department terminates the MOA, that party may still participate in the Voluntary Cleanup Program by including payment of $1,000 with a subsequent MOA application. This ensures that a party that enters into the program is committed to either conducting the remediation that it chooses to do, or requesting that the Department terminate the MOA. In this way, the Department can focus its limited resources on oversight of actual remediation, as opposed to continually following up on MOA sites at which there is no action.

The amendments do not affect the process for obtaining an MOA, unless the person responsible for conducting the remediation had a prior MOA terminated by the Department pursuant to N.J.A.C. 7:26C-3.3(c)1i through iii for either not following the schedule that the person committed to follow, or for not conducting remediation pursuant to the Technical Rules, or for failing to pay the Department's oversight costs as it agreed to do. As mentioned above, even if the person had a prior MOA terminated, that person may still apply for another MOA pursuant to new N.J.A.C. 7:26C-3.2(a)6 upon payment of $1,000 to cover the Department's costs associated with evaluating the application to determine whether the person can have a new MOA in light of the person's non-compliance with a prior MOA.

In order to further encourage remediations by private parties using private funds, the Department added a provision at N.J.A.C. 7:26C-3.2(b)2 which allows a party whose MOA application is rejected due to one or more MOA terminations by the Department to conduct the remediation of a site if the person executes an ACO with the Department. As explained in the proposal summary at 37 N.J.R. 2930, this provision, coupled with N.J.A.C. 7:26C-3.2(a)6, improves the efficiency of site remediation by ensuring that the Department's limited resources are focused on parties that truly intend to remediate a site. It is not clear which of the amendments to N.J.A.C. 7:26C-3.2 through 3.4 that the commenters believe will create a need for protracted dispute resolution. The process of the Department's oversight of a person's remediation of a contaminated site has not changed. A party that is remediating a site pursuant to an MOA must still conduct the remediation in accordance with the Technical Rules and with the schedule that is of the party's making. Upon receipt of the results of the Department's review of a document submitted pursuant to an MOA, the party still has a period of time to revise the submittal so that it complies with the Department's comments and the Technical Rules. It is during this period that the Department encourages dialogue with the case manager to resolve disagreements about the case manager's comments. The amendments to N.J.A.C. 7:26C-3.2 through 3.4 do not change this process, and therefore should not result in protracted dispute resolution.

The rules do not require that a company that acquires and/or merges with a company that has had an MOA terminated by the Department enter into an ACO, nor do the rules discourage that company from obtaining an MOA.

23. COMMENT: The Department states in its Social Impact Analysis that the Grace Period Rule will have neither a positive nor a negative impact upon jobs in the State. The commenter strongly disagrees with this statement. The Grace Period Rule will have a negative impact upon jobs in the State because it will discourage builders/developers and others in the State from becoming involved in brownfields projects which create jobs. (9)

RESPONSE: The Department disagrees that the rules will have a negative impact on jobs in New Jersey by discouraging interest in developing brownfields. The amendments to the rules do not address the way in which sites, including brownfield sites, are remediated or developed in New Jersey. Therefore, parties should not be discouraged from becoming involved in brownfield projects, or any other projects, that create jobs.

24. COMMENT: The proposal suggests to readers by its tone, approach and provisions that volunteers will end up in confrontations with the Department about strict compliance with the Technical Rules, perhaps even fines. Yet fines and confrontation are not expected by volunteers. Volunteers may volunteer precisely to avoid threats of fines and penalties and confrontation, then or in the future. Volunteers do not see themselves as being in an enforcement setting but rather engaged in a cooperative effort. They do not see themselves as victims of intransigent demands, but rather in discussions of choices and alternatives. If there are to be fines or confrontations, many will elect to not volunteer. Less remediation will result. The Department's proposal should be revised in every instance to encourage volunteers and approach remediation in non-confrontational ways. (3, 4, 8, 12, 13)

25. COMMENT: Previously, an applicant could use an MOA for portions of the remediation process (such as investigation of one issue) without being committed to all remediation. It is unclear whether the Department intends a change in this approach in its quest in this proposal for "full commitment." If so, we oppose such a change. If not, the Department should clarify the distinctions intended by the Department. Full commitment should not be required of a volunteer. (3, 4, 8, 12, 13)

26. COMMENT: Much of the proposal aimed at MOAs, by its express language, seeks "full commitment" by volunteers. Not every volunteer need be fully committed to full remediation, or even to 100% compliance with every detail of every one of the Technical Rules. A volunteer could, for example, commit to perform some work, or to address some problems, and indeed in some circumstances, could withdraw if more was needed to continue than it was prepared to commit. The commenters understood the Department accepted that some voluntary investigation, remediation or compliance is better than none, and that enforcement mechanisms are too difficult, expensive and time-consuming to use as a primary tool to bring about remediation of all the various sites on the Department's Known Contaminated Site List, or sites yet unknown to the Department. (3, 4, 8, 12, 13)

27. COMMENT: Full commitment by a volunteer should not be required. One hundred percent compliance should not be required. Even 90 percent or less compliance (as measured against the concept of absolute fulfillment of every Department demand under the Technical Rules) or less than full commitment has in the past achieved, and can in the future achieve, an acceptable and proper (as measured against the goal of achieving better protection of health and the environment) investigation and remediation of a site. If the Department means that full commitment by a volunteer is always required (e.g., despite the examples) to address all issues in 100% compliance with the Technical Rules, the Department is acting erroneously. (3, 4, 8, 12, 13)

RESPONSE to 24 through 27: The amendments to Subchapter 3 of the Oversight rules do not alter the requirement that it is the applicant, and not the Department, that determines the scope of the voluntary remediation and the timetable for its completion. See N.J.A.C. 7:26C-3.2(a)4, which provides that an application for an MOA must specify the scope of the remediation for which Department oversight is sought, including a detailed remediation schedule. Moreover, N.J.A.C. 7:26C-3.3(b), which provides the procedure for the person responsible for conducting the remediation to have the Department terminate the MOA, also remains unchanged. Therefore, a party remediating a site pursuant to a MOA chooses the scope of the remediation and the remediation timetable, both of which the applicant details in the application for the MOA. That being said, regardless of the scope of the remediation to which a volunteer commits, each phase of that remediation must be conducted in full conformity with the Technical Rules. This requirement is not new to this adoption.

However, as discussed in the proposal, the Department has found that all too often, the volunteer chooses not to follow the terms of the MOA, even though it is the volunteer that proposed them in the application. Accordingly, in order to improve the efficiency of the remediation program, the Department is encouraging parties volunteering to remediate a contaminated site or area of concern through an MOA to be fully committed to the terms of the MOA, especially since it is the person entering into the MOA that dictates the scope of the remediation (whether it be one area or the entire site) and the schedule by which the remediation that is the subject of the MOA will occur.

28. COMMENT: Not every volunteer is liable for the environmental problems it elects to address. The volunteer may be a prior innocent purchaser with a defense under the Spill Compensation and Control Act, or a new buyer or developer, or a lender, or a tenant, or a neighbor, or a community association, or a government. Therefore, it may, when it volunteers, have no liability by law for the remediation it proposes, so its willingness to proceed may be of considerable added value over and above what the Department could obtain in even the most successful enforcement action. The volunteer

may be a current owner seeking to remediate a previous remediation to restricted standards to an improved standard (e.g., unrestricted standards) or to permit a change in the site or its use (a new brownfields development, for example). Some of the problems to be addressed by the volunteer may be known or believed to have offsite origins (for which the volunteer has no liability). In each of these cases, why should the Department require that volunteer be committed to more?

If the Department means that full commitment by a volunteer is always required (e.g., despite the examples) to address all issues in 100% compliance with the Technical Rules) then the Department is acting erroneously. If the Department agrees with the commenters, the Department should clarify its position. (3, 4, 8, 12, 13)

RESPONSE: The Department agrees that volunteers that are not statutorily obligated to remediate sites are vital to site remediation in this State. The Department does not intend to discourage these entities from stepping forward and cleaning up part or all of a site. For this reason, the Department has not altered the portions of the MOA rules that specify that it is the volunteer, and not the Department, that specifies the scope of the cleanup. See existing N.J.A.C. 7:26C-3.2(a)4, which is not amended pursuant to this rulemaking.

However, all remediations conducted pursuant to the terms of a MOA, and regardless of scope, must comply with the Technical Rules, N.J.A.C. 7:26E. This requirement is codified at existing N.J.A.C. 7:26C-3.3(a)3.ii., which was not amended in this rulemaking.

29. COMMENT: A key point of emphasis for this proposal is to provide "a disincentive for parties to apply for an MOA without being committed to actually remediating the site." In the past there has been considerable flexibility available in the voluntary cleanup program. An applicant could use an MOA for portions of the remediation process (such as investigation) without being committed to all. This allows an investigation to be initiated (a good thing) so that, for example, (i) a potential buyer could decide whether or

not to buy or a seller could decide to sell, (ii) scarce resources could be applied in a positive manner (for investigation) even though, depending on the findings, the applicant might lack the resources to finish the entire remediation, (iii) some conditions could be remediated, reducing the scope of concern at a site, even if all could not, (iv) an applicant could undertake or begin the process, uncertain of the ultimate cost, commitment or liability, but certain that it could withdraw from the program if the effort was beyond its means or intent, (v) an applicant could address the issues it believes it has responsibility to address leaving other issues to be addressed by others (perhaps, for example, in the case of offsite migration of a problem onto a site, or a contractual liability, or a problem for which there is innocent purchaser status or lender immunity, or arising in connection with a lease, or a condemnation). If the Department means by this Proposal to discourage such flexibility seeking a full commitment for full remediation of a site, then the Department's approach is misguided and inappropriate and undermines the Department's Voluntary Cleanup Program. (3, 4, 8, 12, 13)

30. COMMENT: The Department is wrong to expect full blind commitment for every site from every volunteer. There are many reasons why full commitment may be impossible: (a) the volunteer may not know what it can commit to before the investigation is complete. It may be willing to volunteer to test the situation, but not be willing to fully commit until it sees some results. Threat of enforcement is likely to deter such volunteers. (b) The volunteer may lack unlimited resources to remediate a site completely. While the volunteer may have enough resources for some remediation when it begins, the adequacy of its resources over the long haul, or for all problems, may be uncertain. But if someone does volunteer for a site, despite the above factors limiting the commitment, then the volunteer has elected to work in cooperation with the Department to do what it can do and every threat of confrontation is not encouraging, but discouraging to that effort. (3, 4, 8, 12, 13)

RESPONSE to 29 and 30: As stated above, the Department considers the Voluntary Cleanup Program to be an asset to the site remediation program. Because of the flexible

approach, the Department gains information about the nature and extent of contamination at sites that may not come to the Department's attention, but for the efforts of the volunteer during the preliminary assessment and site investigation phases of remediation. Additionally, through the Voluntary Cleanup Program, sites can at least be partially remediated, depending upon the scope of the work set forth in the MOA application. Accordingly, the Department disagrees that the rule amendments somehow require "full blind commitment." Additionally, if a party finds that it cannot or chooses not to continue with the work that it agreed to do in the MOA, existing N.J.A.C. 7:26C-3.3(b) provides the procedure for that party to have the Department terminate the MOA (as opposed to the Department unilaterally terminating the MOA for non-compliance pursuant to N.J.A.C. 7:26C-3.3(c)1).

MOA Termination Provisions

31. COMMENT: The commenters agree with the Department that at some point of inaction, the Department's scarce resources may necessitate termination of MOAs in order to focus those resources on sites and volunteers who are moving forward. (3, 4, 8, 12, 13)

RESPONSE: The Department appreciates the commenters' support.

32. COMMENT: The Department should not terminate a MOA, or even threaten or punish the volunteer, so long as the Department believes on balance that continuing with the remediation does more good than harm. Termination loses the investment in many of those sites, for little gain on others. (3, 4, 8, 12, 13)

33. COMMENT: As a participant in the MOA process with the Department, the commenter appreciates the cooperative relationship with the Department that can and should prevail during the remediation process. The commenter is concerned that the proposal will have adverse effects on the Voluntary Cleanup Program, and companies

will be discouraged from proactively addressing their environmental remediation concerns. For instance, the proposal has a misplaced emphasis on termination of MOAs for alleged noncompliance. In most cases the continuation of an MOA will be preferable to a forced cleanup, unless harm is occurring or scarce Department resources are being wasted. The focus of the remediation programs should be results and not procedure or enforcement. (7)

34. COMMENT: Termination of an MOA is often ill advised, and will be counter-productive, because most MOAs bring about some measurable improvement in a site over the status that would exist without the MOA and volunteer. (2)

35. COMMENT: The commenters note that if any volunteer is at least willing to begin the process of remediation and carry it forward to some extent under a MOA, the Department is still ahead of where it would be if no one volunteered. Little, if anything is lost, by a more cooperative approach and tone, and much is potentially gained. (3, 4, 8, 12, 13)

RESPONSE to comments 32 through 35: The Department agrees with the commenters that when remediation proceeds under a MOA the benefits are undeniable. The Department gains information and remediation at sites at which remediation would not be conducted but for the Voluntary Cleanup Program. The Department will continue to encourage and facilitate voluntary remediations. However, the Department does not agree that any activity at a site is better than no activity. If a party remediating a site under an MOA fails to comply with the Technical Rules, a Department case manager must review the deficient work and spend time convincing the party to comply. Similarly, if a party indicates that they intend to submit a document for Department review but then fails to do so, Department workload planning efforts are thwarted. The Department intends to give parties conducting remediation every benefit available toward moving the remediation toward completion. This includes continuing to allow schedule adjustments when they are needed and providing comments on technical submittals.

Although the Grace Period provisions do not apply to MOA cases, the Department also intends to provide the equivalent of a "grace period" on MOA cases. However, when a deficiency on a MOA case is not corrected so that it complies with the terms of the MOA, the consequence will be MOA termination.

36. COMMENT: If an applicant for an MOA has had the MOA terminated by the Department on either the site at issue or on another site, there will be an extra $1,000 charge that that applicant has to pay if he or she wants another MOA. This is the antithesis of supporting a voluntary procedure and a voluntary program. (9)

37. COMMENT: N.J.A.C. 7:26C-3.2(a)6 provides that, where the Department has terminated a prior MOA with an applicant pursuant to N.J.A.C. 7:26C-3.3(c)1i through iii, that applicant must include a payment of $ 1,000 with the application for a second or subsequent MOA. The Department states that this payment is intended to cover the Department's costs associated with evaluating the application for the second or subsequent MOA, in consideration of the party's activities in connection with a prior MOA. The commenters oppose this change in that the Department has the right to be paid for its oversight charges in the original and subsequent MOAs. The commenters see no justification for the Department charging an additional $1000. In addition, if the vast majority of the MOAs that have been, or will be, terminated are homeowner UST cases, the $1000 cost may be a disincentive to finalizing the remediation with Department oversight. (3, 4, 8, 12, 13)

38. COMMENT: The addition of a $1,000 charge at N.J.A.C. 7:26C-3.2(a)6 for second or subsequent MOAs for the same site, for the same "party" is arbitrary, capricious and inconsistent with the goal of encouraging interaction with the Department to address site remediation issues through the Voluntary Cleanup Program. The choice of $1,000 is well in excess of the time that may be involved with reprocessing MOA claims. The addition of a $1,000 fee is excessive. The inclusion of this provision will discourage the Voluntary Cleanup Program. (6, 12)

RESPONSE to 36 through 38: In order to further encourage remediations by private parties using private funds, the Department has added a provision at N.J.A.C. 7:26C-3.2(b)2 that allows a party whose MOA application is rejected due to one or more MOA terminations by the Department to conduct the remediation of a site if the person executes an ACO with the Department. As explained in the proposal summary at 37 N.J.R. 2930, this provision, coupled with N.J.A.C. 7:26C-3.2(a)6 improves the efficiency of site remediation by ensuring that the Department's limited resources are focused on parties that truly intend to remediate a site.

Frivolous MOAs contribute to Departmental caseload management difficulties and require Department staff to direct their time towards cases in which there was never an intention by the person responsible for conducting the remediation to do any remedial work at the site. This takes the Department's limited resources away from overseeing remediation at sites at which there is a serious commitment from a party to remediate a site so that it is protective of human health and the environment. The $1,000 reflects the cost for the Department to evaluate whether a subsequent MOA should be approved in light of the applicant's past noncompliance. A party that works with the Department to achieve compliance with the terms of the MOA will not be subject to a $1,000 charge for a subsequent MOA application. Nor will a party who enters into an MOA, but then determines that it cannot comply with it, if that party requests that the Department terminate the MOA pursuant to N.J.A.C. 7:26C-3.3(b).

39. COMMENT: The Department provides no insight into the frequency or seriousness of either frivolous applications for MOAs or the absence of commitment to remediation of those who enter into them. In the absence of such information the Department should not adopt its proposal to the extent it is based on those issues. (3, 4, 8, 12, 13)

RESPONSE: The Department has sent out termination notices concerning more than 700 MOAs for failure to make scheduled submissions. Of these, approximately 30% have made the submissions. This indicates that a large percentage of persons making MOA applications that did not intend to comply with the terms of those MOAs.

40. COMMENT: Many of the MOA applications that are filed, and ultimately not pursued are homeowner UST cases. The Department should review its files, and, if the commenters' assumption is correct, revisit its underlying rationale for broad-based application of these provisions. If, on the other hand, the Department has had few experiences with such applications, there appears to be little justification for the Proposal insofar as it is aimed at same. Similarly given the Department's existing authority to terminate an MOA, it is quite unclear to us that the Proposal is warranted because we are not aware of any reason why the Department cannot have so acted under existing authority and we do not understand how the new provisions of the Proposal will improve things. In fact, the Department provides no information that allows the regulated community to understand these issues. Without such support or explanation, the Proposal should not be adopted. (3, 4, 8, 12, 13)

RESPONSE: The Department does not believe an analysis is necessary to determine whether the Department terminated MOAs are homeowner UST cases. Cases subject to termination, whether homeowner USTs or other types, represent MOAs where the party was not committed to fulfilling its agreement to conduct remediation. In these cases, the Department spent time processing the applications, tracking and assigning the cases, and assuring adequate staffing distribution to manage remediation that failed to proceed. The Department did not amend the rule to provide it with more authority to terminate such MOAs. The commenter correctly notes that such authority already exists. It merely added the process of notice required by the grace period rule for non-MOA cases into the termination process for MOA cases.

41. COMMENT: Given the Department's existing authority to terminate an MOA under the existing rules, it is unclear how the new proposal for termination of MOAs is warranted (if intended to result in more frequent terminations), except only to the extent that it provides a better process for prior notice to the volunteer and right to cure before termination. If the Department has not acted under existing authority, the commenters do not understand how the new provisions will improve its ability to act hereafter. In the absence of such information the Department should not adopt its Proposal and impose more harsh results to the extent based on those issues. (3, 4, 8, 12, 13)

42. COMMENT: The commenters read the Department's proposal as suggesting that it intends to terminate MOAs more often regardless of the relative balance of good. (3, 4, 8, 12, 13)

RESPONSE to 41 and 42: The amendments to N.J.A.C. 7:26C-3.3(c) concerning the Department's process for terminating MOAs are intended to result in less frequent terminations by providing prior notice to the volunteer and allowing the volunteer an opportunity to cure the non-compliance with the MOA that might result in the Department terminating the MOA pursuant to N.J.A.C. 7:26C-3.3(c)1i through iii. The commenter is correct that the amendments will require the Department to provide better notice of its intent to terminate an MOA, including the specific reasons for termination, thereby allowing the person time to correct the deficiencies cited in the notice.

43. COMMENT: Terminations of MOAs should be a rare occurrence. The commenter is concerned that the Department intends to terminate hundreds of MOAs after adoption of this Proposal. The delay or lack of progress in some MOAs results from many factors, including a long history of remediation issues and efforts, and often including changing rules and standards, changing Departmental staffing, and delays in Department review and response. Even if termination hereafter occurs only after some prior warning to a volunteer of the Department's intent, and a relatively brief period to correct the

Department's concerns, in many cases of termination, the result will be unfair. Further, multiple terminations by the Department may, as it intends, deter those without full commitment from volunteering, but will serve also to discourage future volunteers who could do much good at their sites, but will react to the Department's approach as a signal that they should not enter the program. If the Department does not intend so many terminations, it should say so on adoption; if it does, it should not adopt its approach. (2)

RESPONSE: The Department does not intend to increase the number of MOAs that it terminates. The number of MOAs terminated by the Department is determined by the compliance rate of persons responsible for conducting remediations with their respective MOAs. The criteria for unilateral termination of an MOA by the Department are contained in existing N.J.A.C. 7:26C-3.3(c)1i through iii and are not amended by this rulemaking. The person responsible for conducting the remediation, not the Department, is the determining factor in the number of MOA terminations that person has. The Department is not sending a signal through its regulations that a party should not enter into the Voluntary Cleanup Program.

The amendment to the Oversight Rules at N.J.A.C. 7:26C-3.3(c)2, wherein the Department may provide a period of time for a person responsible for conducting the remediation to correct a deficiency in compliance with the MOA prior to terminating the MOA, and clarifying the Department's notice of termination process at N.J.A.C. 7:26C-3.3(c)3 will serve to encourage parties to enter the voluntary cleanup program by encouraging compliance prior to terminations and making the program more efficient and "user-friendly."

The commenter's concern that a party's delay in compliance with a MOA is due to changing rules and standards and changing staff is misplaced. The change in staff at the Department should not affect a person's ability to comply with the terms of the MOA since all staff in the Department's Site Remediation Program are trained in the remediation process and rules. Further, it is the responsibility of the regulated community to keep abreast of changing regulations and to adjust their actions accordingly. Finally, if

non-compliance with a schedule in a MOA is due to Departmental delay (for example, in reviewing and commenting on a submission by a party to the MOA), the Department will not penalize the volunteer by terminating the MOA.

Remediation to a restricted use remedial action

44. COMMENT: The commenter notes that the Department ignores the legislative command that it is the remediating party who selects the remedy, not the Department, and that the Legislature has expressly allowed the remediating party to select remediation to other than the most stringent standards. (See N.J.S.A. 58:10B-12.g.1: "The Department, however, may not disapprove the use of a restricted use remedial action or a limited restricted use remedial action so long as the selected remedial action meets the health risk standard established in subsection d. of this section, and where, as applicable, is protective of the environment. The choice of the remedial action to be implemented shall be made by the person performing the remediation in accordance with regulations adopted by the Department and that choice of the remedial action shall be approved by the Department if all the criteria for remedial action selection enumerated in this section, as applicable, are met. The Department may not require a person to compare or investigate any alternative remedial action as part of its review of the selected remedial action. . . .") (3, 4, 8, 12, 13)

RESPONSE: The proposed amendments do not address the choice of the remedial action. The commenters do not specify which amendment they believe limits the ability of the person responsible for conducting the remediation to choose the remedy to be implemented at the site. The Department agrees with the commenters that the decision to remediate to a less stringent standard is up to the person responsible for conducting the remediation provided that the proposed remedy is protective, and provided that the property owner allows remediation to a less stringent standard when the party conducting remediation is not the property owner.

45. COMMENT: The proposal may be read to discourage remediations to anything other than unrestricted use, i.e., that remediation to any standard other than unrestricted creates a disincentive to remediation by providing no finality, and burdening the person conducting the remediation with on-going filings, costs and requirements even after land ownership has changed. This is inconsistent with the Grace Period Law and several other laws. (3, 4, 8, 12, 13)

46. COMMENT: The commenters disagree that obligations under an RA survive approval of a no further action letter if the remediation is not to an unrestricted use remedial action. The commenters also disagree with the Department's handling of this matter under ACOs. The commenters see no authority for this change. It is an inappropriate application by the Department of provisions in statutes that were designed to permit restricted use remediations. It is an attempt to permanently trap those who do not perform what used to be called a permanent remedy. It is unrelated to the Grace Period Law and is not the appropriate subject of this Proposal. (3, 4, 8, 12, 13)

47. COMMENT: Instead of the reference to existing paragraph 71, the Department proposes to include language in existing paragraph 70 that clarifies that the ACO remains in effect until the site is remediated to the applicable unrestricted use standard. This same change is being made to the RA for consistency with the ACO. Both the prior language and this language are inappropriate and fail to accept the legislative decisions that remediation can be completed by the use of engineering controls, institutional controls and other restricted use standards and remedies. There is nothing in the legislative history of any statute of which we are aware that justifies the Department requiring a waiver by a remediating party of the right to avail itself of the right to remediate to other than an unrestricted standard. The 1993 changes to ECRA (the legislative predecessor to ISRA) were expressly intended to promote finality; this change seeks the opposite. The Department does not need to impose added burdens arising by reason of such a

remediation if the liabilities exist by operation of law; and if they do not then the Department lacks the power to impose such liabilities as part of a rule change and/or as part of the execution of an ACO. (3, 4, 8, 12, 13)

RESPONSE to 45 through 47: The amendments do not mandate that sites only be remediated to an unrestricted standard, nor do they alter the requirement that sites that are remediated to a restricted use remedial action must comply with the biennial reporting requirements of N.J.A.C. 7:26C-8. If a restricted use remedial action is implemented, the legislatively imposed conditions related to that restriction apply and the Department must assure that the restrictions remain in place in order for the remedy to remain protective. Continuance of the oversight document, for example, an ACO or RA, provides that the Department has an enforceable mechanism to help ensure that the remedy remains protective.

Pursuant to the ISRA rules, a party executes an RA to allow it to proceed with the sale of a contaminated property prior to the completion of remediation. The RA memorializes the party's commitment to implement a protective remedy and allocates responsibility for remedy implementation among the RA signatories. The amendments do not alter the obligation of the party to the RA to choose the remedial action to be implemented, in accordance with Departmental regulations. See N.J.S.A. 58:10B-12g(1). If the parties choose to remediate to a restricted use remedial action using institutional and engineering controls, the parties remain liable to the Department to maintain those controls for as long as contamination above the unrestricted use remedial actions remain on site.
The amendments make the RA at Appendix A of the ISRA Rules, N.J.A.C. 7:26B, consistent with the Administrative Consent Order at Appendix A of the Oversight Rules, N.J.A.C. 7:26C. Both of these documents have the same purpose: to set forth the terms by which parties agree to remediate contaminated sites. Therefore, their terms should be the same, except where the ISRA statute imposes requirements that only apply to ISRA cases. In order to make the RA and the ACO consistent, the Department added new

paragraph 63 to the RA which corresponds to existing paragraph 70 of the ACO (recodified as paragraph 66). The addition of paragraph 63 of the RA clarifies the existing Department policy (as stated in existing paragraph 70 of the ACO) that if a party remediates a site to a restricted use standard and implements institutional and engineering controls, the RA remains in effect until the Department determines that the site is remediated to the applicable unrestricted use remedial action.

As stated in the proposal summary, the proposal addresses issues other than those raised by the Grace Period Law. The amendments to the RA and the ACO are among those not related to the Grace Period Law.

48. COMMENT: Many requirements pertaining to controls are procedural in nature and have no effect on the continued protection of health and the environment achieved by the control because in many cases, despite the deviation, the controls will remain effective. Thus a failure to file a biennial report, for example, may well be minor because the implemented remedy may be fully protective and the controls remain effective. Not every violation of those requirements undermines the program's goals. For example, if a disturbance of an engineering control occurs but the disturbance is fixed in every respect except that the required post-disturbance report is filed late, such a failure does not have the result reasoned by the Department to justify the approach in this Proposal. The commenters do not need show every instance in which the Department's logic is flawed: having shown an example, the Department should not adopt the proposed approach without a careful review of the requirements and a determination of which of the requirements might have the impacts complained (for example the construction of a residence over property restricted against residential use or the removal of an engineering control with no compliance with the requirements and without restoration) as opposed to minor violations with minor to no impacts (such as a brief disturbance of an engineering control without prior notice to the Department, but restored, and the disturbance resulted in no exposure to the covered contaminants), and then the Department should re-propose. The blanket statements made by the Department in support of its position fail both the

requirements of the Legislature under the Grace Period Law itself and under the Administrative Procedures Act and do not support or justify its decision. (3, 4, 8, 12, 13)

RESPONSE: The Department has designated the violations of most requirements concerning biennial certification of an institutional and/or engineering control as non-minor. In so doing, the Department applied the second and third criteria for designating a violation as minor from N.J.S.A. 13:1D-129: (2) the violation poses minimal risk to the public health, safety and natural resources; and (3) the violation does not materially and substantially undermine or impair the goals of the regulatory program. The majority of the provisions of N.J.A.C. 7:26C-8 meet neither of these categories.

One of the Department's Legislative mandates is to ensure that contaminated sites are remediated so that they are protective of human health and the environment by reducing a receptor's exposure to contaminated media. The Legislature also directed in the Brownfield and Contaminated Site Remediation Act at N.J.S.A. 58:10B-12.35.g(1) that a person responsible for conducting the remediation can choose to remediate a site using a restricted use remedial action, meaning that contamination is left at the site above an applicable residential remediation standard. In order to implement these Legislative mandates, the Department requires at N.J.A.C. 7:26E-8.1 that a person responsible for conducting a remediation implementing a restricted use remedial action include an institutional and/or engineering control as part of the remedial action to minimize exposure to the contamination left at the site. The institutional control (such as including a description of the contamination left behind at the site in a deed notice recorded with the applicable county) and the engineering control (such as a fence around the area of contamination) implements the legislative mandate that the Department ensure that the site is protective of human health and the environment by reducing a receptor's exposure to contaminated media. The Department's requirements for institutional and engineering controls are found in the Technical Rules at N.J.A.C. 7:26E-8, including the requirement to submit biennial reports to the Department. The biennial reports provide assurance to the Department that the engineering and institutional controls required to ensure that

contamination left behind at a site are being maintained and still are protective of human health and the environment. Thus, failure to submit the reports may pose more than a minimal risk to the citizens of New Jersey, and materially and substantially undermines and impairs the goals of the Department to protect public health and the environment and would materially and substantially undermines and impairs the goals of the regulatory program. Thus the majority of the violations of N.J.A.C. 7:26E-8 are classified as non-minor.

Returning to the commenters' example, without timely submission of the biennial report, the Department does not know if a disturbance has occurred or whether it has been corrected with no intervening sensitive receptor exposure to the contamination.

49. COMMENT: The Department proposes designating as non-minor most violations regarding maintenance of engineering and institutional controls. It does so because "if any terms, conditions or requirements related to these controls are compromised, the controls become ineffective and the remedy could become non-protective. Additionally, violations related to these controls undermine the program's goal to implement and maintain protective remedies at contaminated sites and therefore make them unsuitable for grace period treatment." The commenters disagree with both conclusions. (3, 4, 8, 12, 13)

50. COMMENT: Violations involving maintenance of engineering and institutional controls should not be automatically designated as non-minor in the table at N.J.A.C. 7:26C-10.4(e). The application of the criteria in the Grace Period Law does not automatically require such a designation. (11)

RESPONSE to Comments 49 and 50: The requirements related to the maintenance of engineering and institutional controls have not been designated as minor because they fail to meet two of the criteria that are specified in the statute for minor designations. Engineering and institutional controls are imposed as part of protective site remedies.

The Department's approval of remedies that involve allowing contaminants to remain on site above the applicable unrestricted use criteria is granted solely due to the fact that the engineering and institutional controls will assure that the remedies remain protective over time. These controls are a crucial component of the remedy and the basis for the Department's ability to approve the remedy. They are, in fact, what assure that conditions at the site do not pose a "greater than minimal risk to public health, safety and natural resources." So, failure to comply with any requirements related to the maintenance of these controls represents a violation that fails to meet this statutory criterion for minor violations.

Additionally, violations of requirements related to the maintenance of engineering and institutional controls cannot be considered minor because they materially and substantially undermine or impair the goals of the program. The goal of the Site Remediation Program is to protect public health, safety and natural resources through the remediation of sites. The Department has, over the years, moved away from strict requirements that every site must be remediated to the applicable unrestricted use criteria in recognition that exposure to and impacts from contaminants left on site can be eliminated or minimized through the use of engineering and institutional controls. Reliance on these controls represents the cornerstone of that decision. The Department has built this decision into the remedial approval process, issuing no further action letters that are conditioned upon the maintenance of engineering and institutional controls. If these controls are part of the approved remediation, but are not maintained, such violations undermine the program because they impair the Department's ability to assure that the remedies it has approved which rely upon the controls will remain protective.

Identification of violations as minor under the Grace Period Law – Generally

51. COMMENT: The Grace Period Law allows for a grace period of between 30 to 90 days for minor violations (see N.J.S.A. 13:1D-127(b)). Despite this statutory authority (and perhaps as a result of the Department's failure to fully consider the "minimal risk" criteria in the definition of minor violations), the Department only allows for a grace

period of more than 30 days in a small percentage of cases. An analysis of the Proposal demonstrates that the Department has failed to honor the letter and spirit of the Act:

- The Department proposes a 30 day grace period for 360 of 398 Minor violations at 7:26C-10.4(e) (approximately 90% of proposed Minor violations);

- The Department proposes a 60 day grace period for 30 of 398 Minor violations at 7:26C-10.4(e) (approximately 8% of proposed Minor violations); and

- The Department proposes a 90 day grace period for 8 of 398 Minor violations at 7:26C-10.4(e) (approximately 2% of Minor violations).

Clearly, the Department needs to review its assignment of grace periods for the various Minor violations in order to fully implement the letter and spirit of the Act. The Proposal should include many more instances in which grace periods of 60 to 90 days are proposed. (11)

RESPONSE: The Department has reviewed the number of grace period days assigned for each minor violation and believes that the assignment is proper and complies with the letter and intent of the Grace Period Law. The Grace Period Law does not specify that a certain percentage of violations be designated as minor, nor does it mandate that the Department assign a certain percentage of 30-day, 60-day or 90-day grace periods. Rather, the Grace Period Law requires the Department to analyze each citation to determine if a grace period should apply. The Department established the length of the grace period by considering the reasonable number of days that would be required to comply. The rule, at N.J.A.C. 7:26C-10.3(d)4 allows for the request of an extension to the established grace period for those instances where a party may not be able to comply within that timeframe.

52. COMMENT: Does the Department's real experience in its remediation programs support the need for classification of so many violations as non-minor (for example, has the Department experienced many remedial projects where preliminary assessments have not been filed)? Has the Department issued many fines or penalties for such violations historically? If not, what has the Department learned recently that suggests it needs to change its past practices to be more rigorous? How will the new approach affect future delivery of preliminary assessments? The Department provides no information for the regulated community to understand whether the concern is legitimate or over-zealous. In the absence of such information, the regulated community cannot assess whether the classification of a violation as non-minor is reasonable. Nor can the regulated community determine whether the dividing line for minor versus non-minor can and should be drawn differently. In the absence of such information all violations should be classified as non-minor unless the particular violation actually fails the particular criteria specified for a non-minor violation (rather than classifying all violations as potentially non-minor because it may have such consequences). (3, 4, 8, 12, 13)

RESPONSE: The Department's designation of a violation as minor or non-minor is not based upon "the Department's real experience in its remediation programs" as suggested by the commenters, but rather on the statutory criteria contained in the Grace Period Law at N.J.S.A. 13:1D-129. The Department applied these criteria as described in the summary of the proposal. The statute identified the criteria that apply to minor violations; any violation that did not meet those criteria was designated as non-minor.

53. COMMENT: The aspects of the proposal, aimed at imposing enforcement-based structures on the Voluntary Cleanup Program and ISRA RAs are misplaced. (3, 4, 8, 12, 13)

RESPONSE: As previously explained, the proposal does not impose enforcement provisions on the Voluntary Cleanup Program. On the other hand, the amendments do not change the fact that RAs are enforceable documents, violations of the terms of which

are subject to potential penalties for non-compliance. The only change with regard to enforcement of violations of an ISRA RA relates to the fact that stipulated penalties have been replaced with the penalty scheme detailed in N.J.A.C. 7:26C-10 for agreements executed after the promulgation of these amendments. In making this change, the Department has assured consistency among the various oversight documents for similar violations.

54. COMMENT: The Proposal labels too many deviations from the Technical Rules as violations and too many of those violations as non-minor. There are too many specific violations listed in the rules, and it is likely that even the most conscientious RP would inadvertently, often unavoidably, come into noncompliance. (8)

55. COMMENT: There is a middle ground that would better accomplish the goal of site remediation. A more straightforward approach to the Grace Period Law would be to identify only those violations of provisions that are key to the underpinnings of the site remediation program, such as discharge reporting, as non-minor violations, and change all others to minor violations. The Department should revise the Proposal accordingly and remove the imposition of penalties and an enforcement scheme for most of the proposed non-minor violations of the Technical Rules. Because there is nothing to prevent the Department from taking enforcement action when a minor violation is not cured within the allowed Grace Period, this alternative will meet the intent of the Legislature, as well as the needs of the Department and the regulated community. (3, 4, 8, 12, 13)

56. COMMENT: The commenters are doubtful that even the Department itself, or any other government entity conducting remediation, has in the past avoided, and can in the future avoid, errors or omissions that the Department's has designated as non-minor violations. The Department should revise the proposal to dramatically reduce the threat of penalty for many of these provisions, to encourage the remediation of sites, to allow

identification and correction of errors or omissions, without all such events resulting in fear of enforcement. (3, 4, 8, 12, 13)

RESPONSE to 54 through 56: The rules as adopted not only allow for, but encourage, the identification and correction of errors or omissions that cause minor violations of the Department's rules. The rules also reduce the threat of penalty for such violations by ensuring violators will be served with a notice of the violation and by giving that person an opportunity to correct prior to assessing a penalty.

Consideration of whether government entities conducting remediation in the past were able to avoid violations which under the current proposal would be considered non-minor is not a relevant inquiry in designating minor violations. The Department followed the direction of the Legislature in the determination of non-minor violations. The Department disagrees with the implication that such violations are unavoidable. Diligent attention to requirements and schedules is expected of those responsible for conducting remediation. If a party fails to make a required submission at all, and it is a minor violation, the party will receive a notice of violation prior to the assessment of penalties and will be afforded an opportunity to correct the violation. If a party submits a deficient document, the party will be apprised of the nature of the deficiency through a notice of deficiency, which is equivalent to the current practice of issuing a comment letter. The person will have the opportunity to address the deficiencies in accordance with a schedule developed through discussion with the case manager.

57. COMMENT: Neither the Department, nor other government entities such as the Federal Environmental Protection Agency are immune from tensions in their efforts, both as remediating parties and as regulators. The commenters note, for example, that time and again the Department has been unable to meet the demands of the Legislature and the judiciary for better rules and guidance about remediation in specific timetables (e.g., the obligation to adopt remediation standards has been unsatisfied for over twenty years,

presumably at least a non-minor violation, but presumably one the Department intends to cure); in the face of such failures, justified or not, it is inappropriate for the Department to hold the regulated community to a higher standard. To the extent the Proposal intends otherwise, the commenters recommend it not be adopted. (3, 4, 8, 12, 13)

RESPONSE: The purpose of the rule amendments is to implement the requirements of the Grace Period Law. The standards to which the regulated community will be held under the rules are those established by the Legislature.

Enforcement of violations

58. COMMENT: The number of minor and non-minor violations identified by the Department suggests that the frequency of assessment of violations will increase. The commenters oppose this approach and results. If the Department does intend to increase the frequency of assessment of violation, particularly non-minor, the Department is in error and the number of specifically identified violations should be reduced dramatically. (3, 4, 8, 12, 13)

59. COMMENT: The Department has failed to explain how this proposal will change its approach towards identification and assessment of violations and alter, if at all, its current enforcement approach. In the absence of such explanations some will conclude that the Department intends increased, more frequent and more demanding enforcement, and others will conclude that the Department intends the same or similar approaches. Others will conclude the Department intends no change. (3, 4, 8, 12, 13)

60. COMMENT: In the context of such complex, difficult and expensive efforts, the commenters are concerned that the Department is proposing that it may hereafter more frequently assess the existence of multiple violations, minor and non-minor, for the failure to achieve some specific or objective, but unrealistic, schedule. If this is the Department's plan the commenters oppose it and strongly urge that this should not occur. (3, 4, 8, 12, 13)

61. COMMENT: If the frequency of assessment of violations will increase, in general and/or on each site or each submission, the amount assessed will be unreasonable. The commenters oppose that approach and results. (3, 4, 8, 12, 13)

62. COMMENT: The provisions of N.J.A.C. 7:26C-10.4(b), 10.5 and 10.7 (for daily penalties, multiplied penalties and economic adjustments), and other provisions of the Proposal, can be used, and the Department does not explain how it will avoid using them, unfairly and inequitably alone and/or together. This is a particular risk considering that many of the violations of the Technical Rules, while being the result of one event, could also be treated by the Department as being multiple violations, existing for many days, and allegedly having economic benefits, particularly if circumstances when delays in Department review of submissions result in late identifications of errors or omissions (for example if multiple sampling events occur with similar flaws). The Department should reconsider its position and explain how unfair results will be avoided, particularly in such instances. Lesser included offenses, for example, should not be separately punished when the larger offense is being punished. Thus, e.g., under N.J.A.C. 7:14B-12.1 the Department should confirm that by its litany of possible fines the Department does not propose to, and cannot, impose penalties under each and all of the provisions listed, but rather will penalize under only one of the listed options. As examples we note that: (a) a violation of N.J.A.C. 7:26E-1.4(a)3 could be duplicative of N.J.A.C. 7:26E-1.4(a)1 and (a)2; (b) under N.J.A.C. 7:26E-4.8(c)7 any penalty should be determined once per event and not assessed separately for each well; (c) violations of N.J.A.C. 7:26E-5.1(e) and -6.1(e) are duplicative of general and enumerated violations of N.J.A.C. 7:26E-8; (d) N.J.A.C. 7:26E-6.1(b)1 is duplicative of N.J.A.C. 7:26E-6.1(a); (e) N.J.A.C. 7:26E-8.1(b)1 is duplicative of N.J.A.C. 7:26E-8.1(b)2. (3, 4, 8, 12, 13)

RESPONSE to 58 through 62: The frequency of the citing of violations may increase as a result of the adoption of the grace period provisions since the adoption will result in

enhanced enforcement of the regulations under the purview of the Site Remediation Program. However, the occurrence of the violations, and especially the assessment of penalties depends on the behavior of the regulated community in complying with the regulations. Department enforcement policy allows several opportunities for a person responsible for conducting the remediation to correct a violation prior to the assessment of penalties. If a party fails to make a required submission at all, and it is a minor violation, the party will receive a notice of violation prior to the assessment of penalties and will be afforded an opportunity to correct the violation. If a party submits a deficient document, the party will be apprised of nature of the deficiency through issuance of a notice of deficiency, which is equivalent to the current comment letter. The person will have the opportunity to address the deficiencies in accordance with a schedule developed through discussion with the case manager. If the party does not address the deficiency it will be considered to be a violation. For violations designated as minor, the person will have another period to correct the violation, the grace period, after the issuance of a notice of violation and prior to penalties being assessed.

As to the amount of the civil administrative penalties that the Department has the authority to assess, the statute provides that each day of violation shall constitute an additional, separate, and distinct violation to which penalty liability attaches. See, for example, N.J.S.A. 58:10-23.11u.c.(1) and N.J.S.A. 58:10A-10d. Second, the statute establishes the maximum amount of the civil administrative penalty that the Department may assess for each such violation.

Regulations governing remediation refer to N.J.A.C. 7:26E, which identifies specific technical requirements. If a party fails to conduct remediation in accordance N.J.A.C. 7:26E, they also fail to conduct remediation in accordance with whatever oversight document or rule compels remediation. Due to this overlap, multiple requirements may apply to a single violation. For completeness, the Department included the violation of N.J.A.C. 7:26E and the violation of the rule or oversight rule that triggered remediation in the table of violations at N.J.A.C. 7:26C-10.4(c). This results in a certain amount of

redundancy. Similarly, cross references within N.J.A.C. 7:26E itself result in some redundant requirements. The Department included all violations in the table at N.J.A.C. 7:26C-10.4(c), even though some may be redundant, in order to allow it to cite a violation of any given requirement. That a base penalty is specified for each violation does not mean that the Department intends that the base penalties will necessarily be additive for multiple violations of a single section of a rule, or that it will penalize for duplicative requirements. While the Department has the discretion to assess a penalty for any and all violations and may consider each day that a violation exists as a separate and distinct violation, the Department intends to employ a fair and equitable approach to penalty assessment. If a single violation could be attributed to multiple regulatory requirements, although the Department may cite violation of all requirements in the enforcement document, the assessment of the penalty would be based upon the violation most applicable to the specific circumstances at hand. For example, if a party required to conduct remediation pursuant to N.J.A.C. 7:14B fails to delineate groundwater contamination, it has violated both N.J.A.C. 7:14B-8.2(a)1 and N.J.A.C. 7:26E-4.4(h)3i. The Department may cite both of these violations in its enforcement action but does not anticipate assessing penalties for both. Finally, the Department does not intend to multiply its penalties by the number of objects to which it applies (for example, a penalty for each ground water monitoring well that the violator failed to install). In summary, the Department generally does not intend to assess duplicative or additive penalties.

Some of the examples used by the commenter do not support the comment made. Specifically N.J.A.C 7:26E-1.4(a), which requires notification to the Department prior to sampling and/or upon submission of specific documents, is not duplicative of N.J.A.C. 7:26E-1.4(a)3, which requires notification of the Department and municipal clerk prior to the initiation of the remedial action. N.J.A.C. 7:26E-6.1(b)1 is not duplicative of N.J.A.C. 7:26E-6.1(a); N.J.A.C. 7:26E-6.1(b)1 requires that a remedial action be approved by the Department prior to implementation, whereas N.J.A.C. 7:26E-6.1(a) concerns notification prior to implementation of the remedial action. Finally N.J.A.C. 7:26E-8.1(b)1, which requires that a deed notice be proposed if the remedial action will

include the use of engineering or institutional controls, is not duplicative of N.J.A.C. 7:26E-8.1(b)2, which defines those requirement that must be included in the remedial action workplan when the remedial action will include the use of engineering or institutional controls.

63. COMMENT: The Department should add the following suggested language as a new section following N.J.A.C. 7:26C-10.3(c) as new N.J.A.C. 7:26C-10.3(d): "The Department shall not be required to issue a notice of violation for an alleged violation unless and until the Department, in the exercise of its enforcement discretion, determines that the activity, report, work plan, etc., is a violation of a specific statutory or regulatory provision or other requirement. It may elect instead to provide a warning letter to a possible violator in lieu of a notice of violation and that recipient would then have the same right to cure a minor violation as it would have if it received a notice of violation." (N.J.S.A. 13:1D-127 does not require a notice of violation as the only means of enforcement; it allows other options). The Department's proposed section N.J.A.C. 7:26C-10.3(d) would then be renumbered as N.J.A.C. 7:26C-10.3(e). In addition, the Department could then change its proposed N.J.A.C. 7:26C-10.3(d)(1) to read, "If the Department has made a determination pursuant to (d) above that there is a violation and the violation is determined to be minor under (c) above," instead of the Department's proposed language. (3, 4, 8, 12, 13)

RESPONSE: The Grace Period Law at N.J.S.A. 13:1D-127 states, "Upon identification of a violation of an environmental law which, pursuant to section 5 of the act is designated as a minor violation, the Department or a local government agency, as the case may be, shall issue an order, notice of violation, or other enforcement document to the person responsible for the minor violation. . . . The commenter proposes the issuance of a warning letter, as the "other enforcement document," but provides no rational for the change of name of the notice. Therefore, the Department will not add the language suggested by the commenter concerning the issuance of a warning letter in lieu of a notice of violation.

64. COMMENT: The Department's Proposed Grace Period Rule injects a penalty enforcement scheme into the Department's regulatory programs, which have historically involved cooperation and negotiation between the Department and the regulated community in addressing complex environmental technical issues at brownfields sites. The Department's Social Impact Analysis fails to recognize this and incorrectly states the following:

> "The proposed amendments to N.J.A.C. 7:26C-10 to implement the Grace Period Law will provide a positive social impact by helping encourage a greater sense of cooperation between the Department and the regulated community. By removing the threat of penalties for certain types of violations where compliance is achieved within the time specified, and the proposed amendments will encourage the regulated community to take positive action toward achieving compliance resulting in the remediation of contaminated sites."

See 37 N.J.R. 2931.

The commenter disagrees that the Proposed Grace Period Rule will encourage a greater sense of cooperation between the Department and the regulated community. To the contrary, the injection of a penalty enforcement scheme into the Department's regulatory programs which have historically involved cooperation and negotiation between the Department and the regulated community will inject an adversarial component which has no place in the process of negotiating and addressing complex environmental technical issues at brownfields sites. (9)

65. COMMENT: Deviations, discussions and disagreements in remedial matters, in all states and at the federal level, are common and are not to be discouraged because they

flow from the complexity, distinctiveness and changing facts and circumstances inherent in the system. (3, 4, 8, 12, 13)

66. COMMENT: The nature of the effort required to accomplish the correction of conditions in various environmental media requires a cooperative effort between responsible parties and the state, an effort to collect data and evaluate and understand it, an effort to address appropriate priorities in the face of scarce resources (time, money and personnel) both in the Department and the responsible parties, and an effort to address complex, often long-standing circumstances, where the immediate risks may be low or non-existent. The process for completion of this task is difficult, complex, site specific and time-consuming. Sites under investigation and remediation are often unique, posing unique issues and concerns; what serves at one site may not serve at another. (3, 4, 8, 12, 13)

RESPONSE to 64 through 66: The Department intends, through adoption of these rules, to strengthen its enforcement program. By establishing a structure regarding the notification of violations, use of established grace periods and notice of potential penalty liability, the Department hopes to encourage compliance and build stronger enforcement cases. The Department does not believe the rule will create an adversarial relationship due to the threat of penalties. Penalties could be imposed under N.J.A.C. 7:26C-10 before these amendments; however most parties conducting remediation work cooperatively with the Department on a daily basis. The Department does not intend to eliminate the flexibility that site remediation requires nor to eliminate the productive dialogue between parties conducting remediation and Department case managers. The Department will continue to provide technical feedback on submittals such as work plans and reports, pointing out deficiencies before a violation is incurred. The Department does intend to implement the Technical Rules as the minimum applicable requirements, and will assess penalties when parties fail to correct cited violations within the specified grace period.

67. COMMENT: The Department can easily rewrite the proposal to identify fewer than the 700 distinct potential violations identified by this proposal, to re-classify fewer violations as non-minor, and to create better procedures that encourage remediation. (3, 4, 8, 12, 13)

RESPONSE: As explained in the rule summary, in order to implement the requirements of the Grace Period Law, the Department analyzed the following rules and identified the enforceable provisions of these rules: Underground Storage Tank Rules, N.J.A.C. 7:14B, the Industrial Site Recovery Act (ISRA) Rules, N.J.A.C. 7:26B, the Oversight Rules, N.J.A.C. 7:26C, and the Technical Requirements for Site Remediation Rules (Technical Rules), N.J.A.C. 7:26E. In doing so the Department identified 550 enforceable provisions which are listed in the table at N.J.A.C. 7:26C-10.4(c). The Department then applied the criteria found at N.J.S.A. 13:1D-129(b) for designating a violation of the rule provision as minor (see 37 N.J.R. 2934 for a more detailed explanation of this process). The commenters do not specify the rule provisions to which they believe the Department erroneously applied the requirements of the Grace Period Law.

Length of grace periods for minor violations – generally

68. COMMENT: The commenters note that with respect to many scheduling issues, the Department's willingness to allow some relief in the form of a short cure or grace period for resolution of complex issues is both unrealistic and unfair. Short periods for implementation and completion of tasks or projects, and/or correction of deviations, are often impracticable, particularly in response to the complex and delayed communications from the Department ending in a demand for responses in as short as 30 days, and particularly in the context of the schedule for prior and ongoing efforts and tasks. The Proposal should not be used as a means to pursue unrealistic demands or schedules. Only confrontation can result from such an approach. The goal of cooperative remediations will not be achieved from such an approach. The ameliorative goals sought by the Legislature in the Grace Period Law and the various remedial laws, including those concerning brownfields, also will not be achieved. (3, 4, 8, 12, 13)

RESPONSE: The Grace Period Law prescribes the maximum grace period allowed and authorizes the Department to establish violation-specific grace periods. Working within this statutory mandate, the Department assigned as long a grace period as allowed by the statute to those violations that will take longer to correct. The Department established grace periods in anticipation of how long the necessary corrective action will take. The Department included in the rule provisions that accommodate extension requests when they may be needed to complete the corrective action.

Penalty amounts

69. COMMENT: The commenter has concerns about the impact of proposing specific dollar penalties for violations as these rules do. (9)

RESPONSE: The commenter does not elaborate on its specific concerns. Accordingly, the Department cannot respond other than to say that the inclusion of specific penalties for each minor and non-minor violation will assist parties in determining what the penalty liability is for non-minor violations and for minor violations not corrected within the grace period.

70. COMMENT: The commenter reads the proposed penalties for minor and non-minor violations to be a floor. This injects a penalty element into the site remediation regulations. (9)

RESPONSE: The commenter is correct in that the penalties do represent a floor, that is, the lowest applicable penalty for the subject violation. As noted in prior responses, before this rulemaking, violations of the Technical Rules, Oversight Rules, ISRA Rules, UST Rules and applicable oversight documents were subject to the penalty provisions at N.J.A.C 7:26C-10.

71. COMMENT: The Department should consider establishing a panel consisting of Department Senior Staff and qualified members of the regulated community to review the Proposed Grace Period Rule and propose substantial modifications or recommend its rescission. (9, 10)

RESPONSE: The Department appreciates the comments submitted by the regulated community concerning the rule proposal, and has carefully considered them all. The Department does not believe a panel to review the grace period rules is necessary, as such a review was already done through the public comment period and through discussion of the rule in informal committees, such as the Site Remediation Advisory Group (SRAG), which is comprised of Department senior staff and members of the regulated community.

72. COMMENT: The "Base Penalty" amounts at 7:26C-10.4(e) are too high. This point takes on added importance due to the subjective nature of many (if not all) of the violations the Department may allege under the Technical Rules and the Department's other regulatory programs. (11)

73. COMMENT: The penalties established as bases are too harsh absent aggravating circumstances or in the presence of mitigating or extenuating circumstances. They do not reflect past practices or the trends of enforcement nationally, particularly if the Department retains its broad list of violations and if the Department in fact increases the frequency of assessment of violations. (3, 4, 8, 12, 13)

74. COMMENT: The Department has not adequately explained the basis for its determination to fine at a higher level and, the level selected for most violations is excessive. (3, 4, 8, 12, 13)

75. COMMENT: The Proposed Grace Period Rule goes far beyond its purpose by establishing an unprecedented penalty enforcement scheme for violations of the Department's technical regulatory requirements, with base penalties in the thousands of

dollars range for violations. The Department's proposed base penalties are so high that they will have a deterrent effect upon a builder/developer's willingness to undertake projects which involve the rehabilitation of contaminated brownfields sites in the State. The high proposed base penalties are illustrated by the following examples: failure to notify the Department of any sampling activities prior to initiation, N.J.A.C. 7:26E1.4(a)1 - $2,000 (non-minor); failure to contain and/or stabilize contaminants, N.J.A.C. 7:26E-1.11 - $20,000 (non-minor). (9)

76. COMMENT: The penalty amounts assigned to violations are arbitrary; they are not consistent with past enforcement actions. Lesser amounts have in past been sufficient to encourage prompt compliance and there is no basis to conclude that the larger amounts proposed are needed. The Department has current discretion that is more than ample to encourage prompt compliance. (6)

77. COMMENT: The Department's guidelines for establishing base penalties are not objectionable. However, the Department has not properly applied its own criteria for establishing base penalties for violations that the Department's own Proposal acknowledges are "minor." The Proposal picks the arbitrary amount of $8,000 to serve as the base penalty for failure to submit any required document under the Department programs covered by the Act. The justification for the $8,000 amount is not given (nor does the Department justify any of the other base penalty amounts). The Department could satisfy its own rationale and still set all of the base penalty amounts as lower by half. (11)

78. COMMENT: The Department has failed to provide justification for the selection of these high base penalty amounts. The Department's explanation in the Summary of the Proposed Grace Period Rule is that it grouped similar violations in the Technical Rules, ISRA Rules, UST Rule and Spill Act Notification Rules and assigned the same penalty to each type of violation. The Department provided no explanation concerning why or how

it selected the proposed dollar base penalty amount for the specific violations. The Department's only justification for the dollar amounts of the base penalties is the following statement:

> "Base penalties are established at a level determined to be minimally necessary to deter future violations, and assuming that the violation was neither an intentional act nor omission by the violator. Base penalties must also have a deterrent effect sufficient to insure that regulated entities do not avoid incurring the necessary costs to comply with the rules because it appears more cost-effective to instead pay penalties for violations."

See 37 N.J.R. 2926.

The Department must provide specific justifiable reasons which support its selection of these high base penalty amounts. Without this justification, the proposed penalties are arbitrary and capricious. For example, the Department should explain why it assigned a $5,000 base penalty for the implementation of a remedial action not approved by the Department, N.J.A.C. 7:26E-6.1(b)1, why it has proposed a $5,000 base penalty for failure to submit an ISRA General Information Notice (GIN) within five calendar days, N.J.A.C. 7:26B-3.2(a), and why it has proposed a $1,000 fee for the filing of a Memorandum of Agreement (MOA) application with the Department if the Department has terminated a prior MOA Application, N.J.A.C. 7:26C-3.2(a)6. (9)

79. COMMENT: There has been no explanation, and there is no justification, for the high penalties associated with site remediation. (7)

RESPONSES to 72 through 79: In deciding the base penalty amount appropriate for each violation the Department considered a number of factors. First, the Department considered the penalties already adopted in the Hazardous Waste Rules, N.J.A.C. 7:26G and recently proposed (see 37 N.J.R. 3130(a)) for the Solid Waste Rules, N.J.A.C. 7:26.

As costs to ameliorate site remediation violations have increased, base penalties must also sufficiently increase to a level that ensures their deterrent effect, so that those responsible for conducting remediation will avoid non-compliance. Accordingly the Department has established $3,000 as the minimum base penalty for site remediation violations identified in this rule, similar to its approach in other Department rules. Second, the Department considered the penalty provisions of the Spill Compensation and Control Act and the Water Pollution Control Act, which authorizes penalties of up to $50,000 per violation per day.

Third, the Department utilized the following principles: the base penalty for administrative violations should be less than the base penalty for non-administrative violations, or violations of requirements that represent action toward the completion of remediation; and, the base penalty for violations designated as minor should be less than for similar violations designated as non-minor. For example, minor administrative violations are assigned a lower base penalty ($3,000/$4000) than non-minor administrative violations ($5,000). Base penalties for non-minor, non-administrative violations ($8,000) are higher than for minor, non-administrative ($5,000).

The one exception is the category of violations characterized above as “Failure to submit a required remediation document that complies with the Technical Requirements for Site Remediation and Department comments.” Both minor and non-minor violations that fall into this category warrant a penalty of $8,000. The reason for this is that the Site Remediation Program relies primarily upon the timely submittal of documents that reflect competent execution of the Technical Rules.

The highest base penalties ($12,000 and $20,000) are assigned only to non-minor violations. These higher amounts are assigned to violations that the Department has determined are the most serious violations. These base penalties are still less than half of the maximum statutory penalties authorized under the Spill Compensation and Control Act and the Water Pollution Control Act.

In summary, the Department determined the following base penalty amounts are appropriate for the indicated categories of minor (M) and non-minor (NM) violations:

$3,000

Failure to notify (M)

Failure to certify (M)

Failure to maintain records (M)

$4,000

Failure to comply with technical requirements (M)

Failure to comply with administrative requirements (M)

$5,000

Acting or failing to act (M)

Failure to comply with administrative requirements (NM)

Failure to submit required tank registration or permit-related document (M & NM)

Failure to allow Dept. access & provide assistance (M)

$8,000

Failure to notify (NM)

Acting or failing to act (NM)

UST certified contractor-related (M)

Failing to submit required remediation document that complies w/ Tech Rule & Dept. comments (M & NM)

$12,000

UST certified contractor-related (NM)

Failure to allow the Department access and provide assistance (NM)

$20,000

Acting or failing to act (NM) when violations involve:

- Failure to address IEC conditions and imminent hazards;
- Failure to contain contamination, stabilize site conditions or remove free product;
- Failure to evaluate potential receptors to contamination;
- Causing a discharge.

The Department has carefully reviewed each base penalty to assure that it correctly assigned each violation to the appropriate category and is making the following adjustments upon adoption:

80. COMMENT: The amount of the penalties could be enormous. They can be multiplied by the number of days of violation. If a person fails to contain or stabilize contaminants the base penalty is $20,000. If the violation continues unabated for several weeks, the penalty can be multiplied by the number of days the person is in violation and could result in a very large dollar amount. In addition, if the person is in violation of other regulations, penalties could be assessed for those violations concurrently. That could effectively rise up to enormous numbers. (9, 10)

RESPONSE: Multiple violations may result in a party being liable for larger penalty amounts. However, a violator may avoid large penalty amounts in a number of ways. If the violation is minor, the grace period provisions at N.J.A.C. 7:26C-10 afford the violator a period of time to correct those minor violations and avoid all penalties. If the party fails to correct the violation within the grace period or if the violation has been designated as non-minor, the Department may assess a penalty based on the table at N.J.A.C. 7:26C-10.4(c). In order to allow the Department to cite a violation of a particular requirement, it was necessary for the Department to designate a base penalty for each potential violation of the rules. However, the violator may avoid a large penalty by quickly correcting the violation and thereby avoid the additive factor for multiple non-compliant days.

In addition, the Department does not intend that the base penalties will always be additive for multiple violations of a single section of a rule or that it will penalize violators for violation of duplicative requirements in a rule. The Department recognizes that there is some amount of duplication in the rules and that the cumulative penalties for sub-sections of a rule could be higher than the penalty for the section itself. For example, the base penalty for failure to submit a remedial investigation report as required by N.J.A.C. 7:14B-8.3(a) is $8,000. If the person submitted a remedial investigation report, but upon review of the document the Department determined that the report did not conform to N.J.A.C. 7:26E-4.8 in that it was missing historical information required by N.J.A.C. 7:26E-4.2(b) (base penalty is $4,000), did not include a sampling results table as required by N.J.A.C. 7:26E-4.8(c)3 (base penalty is $4,000), and failed to include the ground water elevation of each monitoring well (base penalty is $4,000), the Department could add the penalties for each violation and assess a $12,000 penalty. However, that penalty would be higher than if the person failed to submit the report at all. While the Department has the discretion to assess a penalty for any and all violations, the Department generally intends to continue its current practice of penalizing for a single applicable violation when multiple related violations exist, and to penalize for a single violation when that violation could be attributed to multiple requirements at various citations.

81. COMMENT: Under the Department's current Oversight Rules, the Department has the authority to assess civil administrative penalties for minor violations of $500 per calendar day for the first one to seven days of violation up to $2,500 per calendar day for violations in excess of fifteen days, and for non-minor violations of $1,000 per calendar day for the first one to seven days of violation up to $5,000 per calendar day for violations in excess of fifteen days. The Department's existing Oversight Rules provide it with more than adequate penalty authority and the Grace Period Rule provides no explanation why its penalty authority should be increased. (9)

RESPONSE: The Department has increased its penalty authority for several reasons. First, the Department considered the penalties already adopted in the Hazardous Waste Rules, N.J.A.C. 7:26G and recently proposed (see 37 N.J.R. 3130(a)) for the Solid Waste Rules, N.J.A.C. 7:26. The increased penalty numbers reflect consistency with recent Department trends for penalty amounts. Second, as costs to ameliorate site remediation violations have increased, base penalties must be sufficiently high to ensure that they have a deterrent effect, so that those responsible for conducting remediation will avoid non-compliance. Finally, the procedures for calculation of the penalty in the existing rule were inconsistent with other Department rules. For these reasons the Department decided to establish a base penalty amount for each violation, establish the minimum base penalty at $3000, and develop other base penalties as described above.

82. COMMENT: The base penalties established in the Proposal are excessive and unwarranted. The commenter did a quick comparison of the Proposal to the RCRA violation section and found that the average penalty in the Proposal was roughly double the average RCRA penalty. (7)

RESPONSE: The Department does not enforce the federal RCRA rules. If the commenter is referring to the penalty provisions in the existing Hazardous Waste Rules at N.J.A.C. 7:26G, then the Department agrees that penalties proposed in this rulemaking are higher than the penalties that had been set forth in those rules. However, on May 2, 2005, the Department proposed amendments to the Hazardous Waste rules (see 37 N.J.R. 1285) which increased the penalties so that they are consistent with the penalties adopted herein. See N.J.A.C. 7:26G-2.4. The Hazardous Waste penalty rules were adopted effective June 5, 2006. See 38 N.J.R. 2426(a).

83. COMMENT: The Department's failure to provide specific justifiable reasons supporting its selection of these high base penalty amounts is compounded by the fact that the Proposed Grace Penalty Rule permits the Department to adjust the base penalties upwards (but not downwards) for non-minor or for non-qualifying minor violations by a

factor of two for the second time the violation occurs, by a factor of five for the third time if occurs, and up to 100 percent if the violation is the result of any intentional, deliberate, purposeful, knowing or willful act or omission by the violator. See N.J.A.C. 7:26C-10.5. In addition, the Proposed Grace Period Rule permits the Department to multiply the base penalty by the number of days the violation existed. The Department's ability to multiply and compound the high proposed base penalties confronts a builder/developer or other person attempting to remediate a brownfields site with potentially ruinous penalties. (9)

RESPONSE: The commenter correctly states that the Department may consider each day that the violation continues as a separate and distinct violation, and that the second, third and subsequent offenses warrant increased penalties. Note that the person responsible for remediation can avoid penalties for minor violations by addressing the violation within the grace period, and can avoid the assessment of penalties for violations which continue over many days, and the increase in those penalties because the violations represent subsequent offenses by promptly achieving compliance. These provisions are intended to help ensure that violations are avoided, are addressed timely, and are not repeated. With regard to the commenter's particular concern related to penalties assessed against the "builder/developer" conducting remediation at brownfields sites, many remediations conducted for purposes of development proceed under MOAs. . As explained in prior responses, cleanups conducted under MOAs are not subject to the penalty provisions of N.J.A.C. 7:26C-10.

84. COMMENT: The Department's Proposed Grace Period Rule fails to provide for any downward adjustment of the base penalties and does not allow the Department to consider mitigating factors in determining penalty amounts. The Department has the ability to consider mitigating factors in the penalty provisions of its other program rules, such as the Department's Air Administrative Rules. In its Air Administrative Rules, the Department is provided with a flexible procedure permitting the upward or downward adjustment of proposed penalties and the consideration of mitigating, extenuating and

aggravating circumstances. See the Department's Air Administrative Penalty Regulation at N.J.A.C. 7:27A-3.5(e). (9)

RESPONSE: The Department has established base penalties in an effort to clearly identify the specific penalty that will apply for non-minor violations and minor violations not corrected within the applicable grace period. This approach is straightforward and affords the regulated community penalty information they need to know regarding risks related to noncompliance. Case-specific mitigating, extenuating and aggravating circumstances may be considered by the Department during settlement discussions.

Application of grace period amendments to site specific situations

85. COMMENT: Remediation processes are often by their nature complex and site specific. The commenters are concerned that the combination of the Technical Rules and the Oversight Rules, as further revised in this Proposal, create a regulatory paradigm that removes the creativity and flexibility that is needed to appropriately address remedial risks that may exist at a site. Creativity and flexibility are lost in favor of a "box-checking" approach that will not advance our mutual goals of protection of the human health and the environment and economic prosperity for the state. (3, 4, 8, 12, 13)

86. COMMENT: Adoption of this proposal will significantly reduce, if not eliminate, the flexibility that is so critical for achieving compliance with the existing oversight documents. In its place, the Department is replacing it with a punitive system with significant penalties for not strictly adhering to the Technical Rules. (6)

87. COMMENT: This proposal seems to be a step backwards for the Department, from cooperation to command and control, from innovation to inflexibility. The commenters hope that the Department chooses to rethink this proposal, in order to streamline the remediation process and provide the regulatory relief clearly intended by the Legislature in the Grace Period Law. (7)

88. COMMENT: The grace period proposal removes any flexibility and innovation in conducting site characterizations and adds onerous penalties over and above the already exorbitant costs of conducting remediation in New Jersey. In addition, it almost inevitably causes persons responsible for conducting the remediation who are proactively conducting site remediation to accrue a record of noncompliance for things they might not be able to control. (7)

RESPONSE to 85 through 88: The grace period provisions will not affect the use of innovation in remediating sites, nor will they affect the flexibility that the Department has historically applied to working with persons responsible for conducting the remediation. The intent of the Legislature in enacting the Grace Period Law was to encourage compliance with environmental laws by providing for a period of time (grace period) to correct minor violations. The rules implement this intent by identifying specific violations, designating them as minor or non-minor, and providing a grace period for correction of minor violations. This will provide the regulatory relief intended by the Grace Period Law.

89. COMMENT: The Department inappropriately proposes penalty provisions that rely intensely on strict adherence to the Technical Rules. The Technical Rules, if only by virtue of their design, while intended to function as minimum standards, often are subject to change and deviation (either by the Department or the person conducting the cleanup) depending on site specific circumstances and conditions, changing law, science, governance and priorities. The Technical Rules also are often subjective and open to issues of professional judgment and interpretation, and the different professionals in the regulated community, their advisors and the Department itself can look at data for a particular site and differ on the basic question of whether or not the data for that site confirms that delineation is complete. Interpretations of that issue alone can differ markedly from site to site. (3, 4, 8, 12, 13)

90. COMMENT: In many ways, at its best, the remediation process can involve serious and productive dialogue between the remediating party and the Department. The conditions and problems at each site, legal and technical, can vary significantly. Not surprisingly, remediation itself varies from site to site. What is easy or economically justified at one site can be difficult at others. What may be easy in one period may become impossible in the next. What may be an adequate preliminary assessment at one site may be inadequate at another. Complying parties also rarely have the expertise or ability to predict or comply with Departmental requirements on their own. Their compliance may require the remediating party to rely on the expertise and judgment of outside experts, whose opinion may vary from the Department's opinions. Compliance may depend on the approval of third parties over whom the remediating party has little influence or control and who may have their own agendas and concerns (such as tenants, neighbors, other regulators, judges, carriers or lenders). Access to third party sites may be needed and it may be difficult or time consuming to arrange, however pursued. (3, 4, 8, 12, 13)

91. COMMENT: Many technical aspects of remediation vary based on site specific natural conditions. Furthermore, there are legitimate technical disagreements which may occur based on differing professional judgments. DEP case managers need discretion in dealing with such disagreements in a productive manner, without resorting to heavy handed enforcement. Creating a list of highly specific rigid violations for technical aspects of remediation is incompatible with the inherent unpredictable nature of conducting site remediation. (7)

92. COMMENT: The Legislature intended through the Grace Period Law, that the Department clarify and provide certainty to its enforcement program – especially for "minor" violations. This is a laudable and appropriate goal for many State environmental programs. However, the nature of the remediation process itself is so complex, that application of this concept to the remedial program has the opposite effect. The Department signals that it is interested in assessing, and collecting fines for, many more

violations merely by classifying so many as non-minor. The Department has converted what should have been a proposal to ameliorate the threat of harsh enforcement seemingly into the threat of more detailed and unfriendly enforcement of its Technical Rules. This is not what the Legislature intended and the non-ameliorative portions of the Proposal should not be adopted. (3, 4, 8, 12, 13)

93. COMMENT: Some of the violations cited in the Proposal arguably involve relatively straightforward fact issues regarding obligations to submit reports, submittal dates, and specific analytical requirements that are often unambiguous and subject to little interpretation or disagreement. However there are a substantial number of "violations" listed in the Grace Period Rule that involve highly subjective and/or substantially difficult issues and/or processes, often sequential in nature (such as site characterization and data collection). The Technical Rules are often open to issues of professional judgment and interpretation. For example, different professionals in the regulated community, their advisors and the Department itself can look at data for a particular site and differ on the basic question of whether or not the data for that site confirms that delineation is complete. Interpretations of that issue alone can differ markedly from site to site. In this context the identification and categorization of many violations fails to account for such issues. For example, the rule calls for fines under a minor violation for failure to "adequately characterize the impacted aquifer at the site." However, many site remediation cases involve interpretations, and sometimes disagreements, as to whether and when and to what extent an aquifer is or is not "adequately" characterized. The Department’s case team often suggests that significant amounts of additional data need to be collected before meeting their threshold of "adequacy." (See e.g., N.J.A.C. 7:26E-4.4h3iii) Such efforts or discussions, or the associated exchanges or delays, are not violations but rather are reflective of technical discussions that are necessarily part of the difficult and complex tasks of, and issues in, accomplishing remediation. Such violations should be removed from the Proposal and the Technical Rules otherwise amended to reflect our approach. (3, 4, 8, 12, 13)

RESPONSE to 89 through 93: The commenters express concern that the nature of site remediation efforts, and in particular the scope, purpose and intent of the Technical Rule, does not lend itself to the application of the Grace Period Law. Regardless of whether the commenters agree that the Grace Period Law should apply to site remediation, the Grace Period Law specifically identifies statutes that govern site remediation such as the Water Pollution Control Act, the Spill Compensation and Control Act (Spill Act), and the ISRA. The Technical Rules are promulgated pursuant to these statutes and others; thus it was the Legislature that mandated that they be subject to provisions of the Grace Period Law.

The process of obtaining Department oversight is unaffected by the adoption of the proposed amendments; thus the Department anticipates that there will be no diminution in communication between a person responsible for conducting the remediation and a Department case manager. The Department will continue to provide technical feedback on submittals such as work plans and reports, pointing out deficiencies before a violation is incurred. The Department does intend to implement the Technical Rules as the minimum applicable requirements and will assess penalties when parties fail to correct cited violations within the specified grace period.

94. COMMENT: The commenter believes that the following rules should be removed from the table of violations because they are highly subjective and involve substantially difficult issues and/or processes that are often sequential in nature: (a) N.J.A.C. 7:26E-2.1(a)9, N.J.A.C. 7:26E-2.1(e), N.J.A.C. 7:26E-4.2(a), N.J.A.C. 7:26E-5.1(c)4 & 5, N.J.A.C. 7:26E-5.1(d), N.J.A.C. 7:26E-5.2(a)2, N.J.A.C. 7:26E-6.2(a)9, N.J.A.C. 7:26E-6.7(c) & (e), N.J.A.C. 7:26E-8.6(a)5, N.J.A.C. 7:26C-1.5(c) and N.J.A.C. 7:14B-8.1 identify violations based on subjective requirements; (b) N.J.A.C. 7:26E-2.1(a)11 identifies a violation based on whether it is “acceptable;” (c) N.J.A.C. 7:26E-2.1(b), N.J.A.C. 7:26E-4.4(e), N.J.A.C. 7:26E-4.4(f), N.J.A.C. 7:26E-4.4(h)2, N.J.A.C. 7:26E-4.5(b) & (c), N.J.A.C. 7:26E-8.5(c)1 and N.J.A.C. 7:26E-8.7(c)1 identify violations based on whether the conduct is “appropriate” or “proper;” and (d) N.J.A.C. 7:26E-4.4(h)3vii,

N.J.A.C. 7:26E-4.5(a), N.J.A.C. 7:26E-5.1(c)2 and N.J.A.C. 7:26E-5.2(a)3 identify violations based on the exercise of professional judgments. The above list is not exhaustive (for example a number of the violations identified with respect to N.J.A.C. 7:26B-Appendix A and N.J.A.C. 7:26C-Appendix A pose the same concerns). (3, 4, 8, 12, 13)

RESPONSE: Many of the rules identified by the commenter as being based on subjective requirements are not subjective. Specifically, N.J.A.C. 7:26E-2.1(a)9 identifies when sample matrix cleanup must be performed by detailing indicators such as elevated method detection limits, inadequately separated gas chromatograph peaks, analytical method specifications, or matrix interference. N.J.A.C. 7:26E-2.1(e) identifies the two acceptable ways to address tentatively identified compounds. N.J.A.C. 7:26E-4.2(a) indicates that, when a party is required by a rule or site specific oversight document to submit a remedial investigation workplan, such workplan shall conform to the format specified in this section. The applicable rules or oversight documents clearly indicate when a party is required to submit a remedial investigation workplan. N.J.A.C. 7:26E-5.1(d) indicates that a party may choose to apply an innovative technology and specifies the information needed by the Department to evaluate such a proposal. While the use of innovative technology is not a requirement, if a party chooses to use innovative technology, it must comply with this section in order for the Department to approve the use of this technology.

N.J.A.C. 7:26E-5.2 identifies when a party must submit a Remedial Action Selection Report to the Department for approval prior to the implementation of the remedial action. One of the triggers for Department pre-approval is the selected remedial action uses an innovative remedial action technology. For a proposed technology to be considered as an innovative technology it must be verified in accordance with N.J.A.C. 7:26E-5.1(d)1. N.J.A.C. 7:26E-6.2(a)9 specifies the requirements that must be met if the remedial action involves construction activity. A party will be aware of whether the remedial action includes construction and may seek clarification from the case manager on whether the

specified items need to be included. N.J.A.C. 7:26E-6.7(c) specifies the required information necessary to document completion of the remediation. N.J.A.C. 7:26E-8.6(a)5 requires the identification of land use disturbances and sampling to evaluate the potential impacts of such disturbances. N.J.A.C. 7:26C-1.5(c) requires Department notification upon discovery of conditions that pose an immediate environmental concern. Immediate environmental concern is clearly defined, by reference, at N.J.A.C. 7:26E-1.8. N.J.A.C. 7:14B-8.1 identifies specific, non-subjective actions required upon confirmation of a discharge from a regulated underground storage tank. The process for confirmation of a suspected discharge is detailed at N.J.A.C. 7:14B-7.2.

The Department agrees with the commenters' conclusion that the evaluation required by N.J.A.C. 7:26E-5.1(c)4 & 5 is subjective. These sections require that, when selecting a remedial action, the party responsible for conducting remediation consider potential impacts on the local community and consider the potential for the selected action to cause natural resource injury. However, as explained above, the party conducting remediation will have the opportunity to demonstrate to the Department that its selected remedy is protective and that impacts to the local community and natural resources have been fully considered. If the Department disagrees, the party will be notified and afforded the opportunity for further evaluation prior to the issuance of a penalty. The Department maintains the authority and responsibility to make the final determination in order to assure the chosen remedy is protective of human health and the environment.

N.J.A.C. 7:26E-6.7(e) identifies the Remedial Action Report requirements related to remedies that involve the natural remediation of ground water. N.J.A.C. 7:26E-6.7(e) 1 and 2 require specific data reporting and application of a prescribed statistical test. However, N.J.A.C. 7:26E-6.7(e)3 is subjective in that it involves professional evaluation of the data and a recommendation regarding the continued need for a classification exception area. However, the Department's requirements for a classification exception area are clearly articulated in N.J.A.C. 7:26E-8.3. In addition, if the Department disagrees with a party's conclusion regarding the continuing need for a classification

exception area, the party will be notified and have the opportunity to correct the violation prior to the issuance of a penalty. N.J.A.C. 7:26E-6.7(e)4 requires a plan for compliance with N.J.A.C. 7:26E-8 when a classification exception area is still needed.

The Department disagrees that N.J.A.C. 7:26E-2.1(a)11, regarding the use of methods acceptable to the Department for the determination of the presence of free and/or residual product in soil or groundwater makes this requirement ineligible for citation as a violation due to its subjective nature. Rather, this subparagraph identifies what methods are acceptable. Further, if the Department disagrees with a party's use of one of the listed methods (or another method since the rule indicates that the acceptable methods are not limited to the list), the party will be notified and have the opportunity to correct the violation prior to the issuance of a penalty.

Contrary to the commenters' assertion, the following rules do not identify violations based on whether the conduct is "appropriate" or "proper:" N.J.A.C. 7:26E-2.1(b), N.J.A.C. 7:26E-4.4(e), N.J.A.C. 7:26E-4.4(f), and N.J.A.C. 7:26E-4.4(h)2.
At N.J.A.C. 7:26E-4.5(b), the use of the term "appropriate" is clearly meant to distinguish between media-specific sampling requirement at N.J.A.C. 7:26E-3.4 and N.J.A.C. 7:26E-4.1, since both of those sections are referenced. The use of this term does not make compliance subjective.

The Department acknowledges that the use of the term "appropriate" at N.J.A.C. 7:26E-4.5(c) is subjective. This section requires a party to submit "appropriate" documentation to support a position that a migration pathway is not considered to be significant and should be subject to a less stringent water quality analysis. Since the range of supporting documentation that a party may have available to support their position depends on site-specific conditions the party should submit whatever documentation it believes is "appropriate." If the Department determines that what was submitted does not support a less stringent water quality analysis, the party will be notified and have the opportunity to submit additional or different documentation, or to comply with N.J.A.C. 7:26E-4.5(d)

prior to the issuance of a penalty. Accordingly, the subjective nature of this requirement furthers the choice of an appropriate remedy.

N.J.A.C. 7:26E-8.5(c)1 concerns a certification that a deed notice or declaration of environmental restrictions, including all engineering controls, is being "properly" maintained. Since the specific maintenance requirements related to a deed notice or declaration of environmental restrictions, including all engineering controls, are clearly stated in those documents, the Department disagrees that the use of the term "proper" makes compliance subjective.

N.J.A.C. 7:26E-8.7(c)1 also concerns a certification that a deed notice or declaration of environmental restrictions, including all engineering controls, is being "properly" maintained, for any engineering or institutional control not included in N.J.A.C. 7:26E-8.5 or 8.6. Essentially this is the same as the requirement at N.J.A.C. 7:26E-8.5(c)1. Since the specific maintenance requirements related to a deed notice or declaration of environmental restrictions, including all engineering controls, are clearly stated in those documents, the Department disagrees that the use of the term "proper" makes compliance subjective.

The Department acknowledges that the violations identified by the commenters as being based on the exercise of professional judgment have a subjective component. However, the Department will notify the person responsible for remediation when it disagrees with the professional judgment of the person or its consultant and give that person an opportunity to comment. This flexibility is necessary and vital to ensuring that the best remedy is implemented.

Specifically, N.J.A.C. 7:26E-4.4(h)3vii requires the confirmation of ground water flow direction. The Department agrees that compliance with this requirement involves the exercise of professional judgment. During the dialogue that will occur between the party conducting remediation and the case manager, the party will have the opportunity to

explain its data and conclusions. If the Department disagrees with the determination of flow direction, the Department may require additional data to confirm the direction of flow prior to the initiation of an enforcement action.

N.J.A.C. 7:26E-4.5(a) requires an investigation of surface water bodies potentially impacted by contamination emanating from the site. The only professional judgment involved in complying with this requirement concerns the determination of whether there is the potential for impact. If the Department disagrees with a party's conclusion that a surface water body is not potentially impacted, the party will be notified and have the opportunity to investigate the surface water body prior to the initiation of an enforcement action.

N.J.A.C. 7:26E-5.1(c)2 agrees that this section, which concerns the requirement to evaluate the implementability of a remedy, is subject to professional judgment. If the Department believes that a proposed remedy is not implementable, it will relay its concerns to the party proposing the remedy and they will have the opportunity to address the Department's concern. If the Department's concerns are not adequately addressed the party will have the opportunity to propose an alternate remedy prior to the initiation of an enforcement action.

The Department agrees that the determination of whether a remedial action will take longer than five years to complete pursuant to N.J.A.C. 7:26E-5.2(a)3 is also subject to professional judgment. Professional judgment relies largely upon the scope and length of professional experience, which varies from consultant to consultant. Parties who are not able to confidently conclude that their proposed remedial action will be completed within five years should err on the side of caution and submit a remedial action selection report to the Department for approval prior to initiating the remedial action.

95. COMMENT: The commenters are concerned that a number of violations identified by the Department in the Proposal do not account for the realistic and varied schedules

for implementation of investigation and remediation at the many different sites before the Department. Many remedial projects can take years to propose, obtain the Department's review and approval, to obtain required permits, approval and access and then to implement, and sometimes complete. Many of these tasks involve persons or entities over whom the remediating party has little or no control. The schedule for achievement of these tasks is often unpredictable, and even when predicted, often occurs on schedules significantly different than as predicted. (3, 4, 8, 12, 13)

RESPONSE: The Department agrees that remediation projects often take years from identifying that there is a possibility of contamination through implementation of a remedial action that is protective of human health and the environment. That is why the Department approves schedules that are based on the completion of a single task (for example, submit a remedial investigation report within 180 days of receipt of Department approval of the remedial investigation work plan), and not on the end date of all remediation activities, which is difficult to predict. If a party cannot achieve a milestone as scheduled, the party should notify the Department to request an extension prior to missing the deadline which may result in a violation. In addition, N.J.A.C. 7:26C-10.3(d)4 allows a person to request an extension of a grace period based on the criteria outlined in N.J.A.C. 7:26C-10.4(d)4i through iv.

96. COMMENT: The proposed rules are overly prescriptive. For example, the inclusion of penalties for violations such as "failure to collect soil samples in saturated zones." This is a very specific violation that provides no flexibility in interpretation, and it assumes that a soil sample can be collected every time in the saturated zone. Specific rigid requirements such as this are in conflict with real world situations. Site remediation involves dealing with the unknown. It cannot always be foreseen whether or not a sample can be collected from the saturated zone. For example, a responsible party may write into his Remedial Investigation Work Plan that he will collect a soil sample from the saturated zone. While drilling in the field, however, he may encounter bedrock before he hits water, and thus a soil sample cannot be collected from the saturated zone

and the party cannot complete the task approved in his work plan. He has become liable for a condition he could neither control nor foresee. The party who volunteered to conduct site remediation then receives an NOV, is fined several thousand dollars, and now has a violation on his compliance record. This is neither fair nor technically defensible, and it does not have anything to do with actual environmental or human health risks. Furthermore, this system damages the cooperative relationship between a volunteer and the Department. (7)

97. COMMENT: The commenters think the Department fails to account for the uncertainties of remediation in its Proposal, particularly its list of violations. Not the least is the uncertainty arising from the Department's own practices. Many problems arise because of the substantial delays often experienced by those making submissions to the Department. Many problems arise because of the variations in the approaches of case managers and consultants, both over time, and from site to site. Regardless of the prescriptive nature of some aspects of the Technical Rules, there remains a fair amount of uncertainty and variability between sites that can never be addressed through a "by the book" procedural approach. Actual field work often generates surprises that may adversely affect years of effort and planning. Proper decision making on remedial activities require and rely on good judgment, interpretation and extrapolation of data despite the uncertainties. Case management teams change; economic circumstances change; laws, policies and rules change; science and technology change; owners and operators change; management changes (both at companies and in government); contractors change. Changes bring uncertainty and difficulties and unavoidably adversely affect progress. Such uncertainties and changes are the source of many deviations from the Technical Rules and it is not appropriate to engage in enforcement in such circumstances, at least without adequate notice and opportunity to cure, particularly in the absence of real harm. (3, 4, 8, 12, 13)

98. COMMENT: The Department cannot fine a party for failure to fill out the Preliminary Assessment Form properly or, in most instances, to otherwise comply with

the Technical Rules or the Department demands thereunder. For this reason, the Department fails to account for the complexity and uncertainty of remediation, and the alternatives available to reach a proper result. The process is more variable and less fixed than merely reading and implementing a regulation. (3, 4, 8, 12, 13)

RESPONSE to 96 through 98: The Department agrees that the technical aspects of investigating and implementing a remedial action require some flexibility. The Department will accommodate this need for flexibility by responding to a submission with a notice of deficiency, which will take the place of the comment letters that the Department issues now. A notice of deficiency is not an enforcement document; it is a description of where a submission fails to comply with the rules and of the corrective action that the party needs to take to come into compliance. These descriptions take into account site specific conditions. The party may discuss the corrective actions with the case manager to ensure that there is an understanding and agreement on how the party can revise the submission so that it is in compliance.

If the party does not feel that an agreement can be reached with the case manager, the party may raise the issue up the Department's chain of command. The party may also pursue resolution through the Department's Technical Review Panel (see www.nj.gov/dep/srp/guidance/techreview for more information concerning the Technical Review Panel). Thus, the Department will continue to allow for the flexibility that the commenter asserts is required in order to comply with the rules and avoid enforcement actions.

Additionally, the variance procedure outlined in the Technical Rules at N.J.A.C. 7:26E-1.6(c) provides for circumstances in which site specific issues require a deviation from the Technical Rules. If the person responsible for conducting the remediation determines that a requirement of the Technical Rules cannot be met due to field conditions (such as

encountering bedrock while attempting to take a required sample) that person is obligated to seek a variance from that requirement in order to avoid being out of compliance and subject to enforcement.

The grace period provisions will encourage consistency in case manager implementation of the regulations by requiring case managers to be specific in linking each violation to a specific regulatory requirement. In addition, implementing the grace period provisions will streamline the remediation process by encouraging compliance with remediation regulations, including encouraging the regulated community to make timely submission to the Department of documents that comply with the Technical Rules. The delays in Departmental response sometimes experienced by the regulated community are often the result of the difficulty in managing a case load when the party conducting the remediation fails to submit documents in a timely manner. The iterative submissions of a single document (e.g. a remedial investigation work plan), which often slows down the remediation process, will be curtailed by these regulations. A case manager will review a submitted document to determine compliance with the Department's remediation regulations, notify the submitting party of any deficiencies in compliance and discuss the deficiencies and corrective actions with the submitter, if necessary. The dialogue between the case manager and the party conducting the remediation will still occur prior to the initiation of enforcement action. The re-submittal must comply with the remediation regulations and the case manager's comments, or the Department will take the necessary enforcement action (e.g., an NOV). The process includes the adequate notice and opportunity to cure that the commenters seek prior to the assessment of penalties. The Department anticipated that this streamlined approach to its oversight of the remediation process will result in case managers being able to process more cases in a shorter period of time.

The Department disagrees with the commenters' assertion that the Department cannot fine a party for failure to properly conduct a preliminary assessment. The requirements for conducting a preliminary assessment are codified in the Technical Rules at N.J.A.C.

7:26E-3.1 and 3.2. Site Remediation rules require sites to be remediated pursuant to the Technical Rules. Therefore, the Department can penalize a party for failure to properly conduct a preliminary assessment.

Finally, the Legislature through the Grace Period Law required the Department to identify all violations of rules and apply the criteria found at N.J.S.A. 13:1D-129 to determine whether a violation is minor or non-minor. One of the criteria was an assessment of risk posed by the violation. If the violation poses a minimal risk, and if all of the other statutory criteria warranted a minor determination, the Department designated the violation as minor. In designating a violation as minor or non-minor in N.J.A.C. 7:26C-10.4, the Department closely followed the direction of the legislature and considered risk as required by the Grace Period Law.

99. COMMENT: Remediation is a process and a program historically different than the Department's other programs. The Department's own structure and organization has usually recognized the distinction between remediation and traditional regulatory programs. Remediation management and support has usually been separate from, for example, air permitting or water permitting or waste permitting. Remediation enforcement has often been separate from other enforcement. The Department's remediation program is not a typical regulatory program or process concerned with maintaining ongoing and future compliance (such as the need to register as a major facility, or to have a NJPDES permit for a discharge to a surface water body). The Department's remediation programs are not typical enforcement programs or processes concerned with deterring or punishing violations (in those programs when someone has violated one of the regulatory programs, as a result, it is susceptible to fines and penalties until they come into compliance). Instead, while there is some cross-over (ISRA requires filings to be made before transactions; cleanups of discharges must occur) the very nature and extent of remediation is corrective of past and existing problems (investigative, remedial, iterative, uncertain), often irrespective of whether the problem arose in compliance with regulatory requirements, regardless of the enforcement posture of a site,

and sometimes without regard to the role of the owner or operator in the creation of the problem (as in ISRA). The distinctions between remediation programs and regulatory programs makes enforcement comparisons to regulatory approaches largely inapplicable. Accordingly, the Department should not take the rigid approach that it proposes, namely singling out so many violations and then applying grace period to them, as this approach is not workable within the site remediation context. (3, 4, 8, 12, 13)

100. COMMENT: Remediation is fundamentally different from the other programs subject to the Grace Period Law and should be treated very differently. Specifically, only limited, high-level deviations from the Technical Rules which can be objectively measured and that result in harm or undermine the goals of the Site Remediation Program should result in NOVs and fines. (7)

RESPONSE to 99 and 100: The Department acknowledges that in some instances the goal of remediating a contaminated site is to correct past discharges as opposed to current operational issues and that it is therefore different from Department programs (such as permitting) to which the commenter believes grace period can more readily be applied. However, the Grace Period Law specifically includes the Department's remediation regulations (such as the Technical Rules) as being subject to grace period provisions. Additionally, the Department has accounted for the flexibility that may be required in enforcing remedial regulations by accounting for the communication between the person responsible for conducting the remediation and the Department prior to enforcement action being taken.

The Department points out that there are remediation violations that are similar to other Department programs mentioned by the commenters. For instance, many of the violations included in the proposal deal with document submittal, notification, certification, and other administrative issues. However, as stated above, the Grace Period Law requires that the Department apply grace period provisions to its remediation regulations, such as the Technical Rules.

Case manager utilization of the adopted penalty provisions

101. COMMENT: The Department underestimates the reaction its conversion of the Technical Rules into a strict compliance enforcement-oriented weapon will have on at least some in the regulated community, as they perceive little gain from generally fruitless one-way communications with Department personnel who may blindly apply both the Technical Rules and the associated penalty provisions. For example, if a party pushes to initiate or complete a task before a local ordinance that imposes a moratorium on activities goes into effect, but as a result fails to meet the prior notice requirement, should the Department be able to impose a violation as proposed? If the Department cites the violation, the Proposal will have had a result quite the opposite of the Department's purported purpose. The commenters suspect there are a large number of other effects, like the example that will occur as the regulated community focuses on the process more and more to avoid the threats made by the Department. The resulting delays will be largely due to the increased layers of process and procedure imposed by the Department. (3, 4, 8, 12, 13)

RESPONSE: The Department intends that the amendments will improve its ability to ensure that contaminated sites are remediated so that they are protective of human health and the environment by requiring compliance with its rules. Diligent attention to requirements and schedules is expected of those responsible for conducting remediation. If a party fails to make a required submission at all, and if that violation is minor, they will receive a notice of violation prior to the assessment of penalties and will be afforded an opportunity to correct the violation. For parties who make submittals, the Department will apprise parties of the deficiency through a notice of deficiency and the parties will have the opportunity to address the deficiency in accordance with a schedule developed through discussion with the case manager. Whether a violation occurs in the first instance is entirely in the hands of those responsible for conducting remediation.

The Department has discretion as to whether to assess a penalty in response to a violation. To use the commenter's example, a party may fail to meet the prior notice requirement at N.J.A.C. 7:26E-1.4 because of the need to initiate or complete a task before the effective date of a local ordinance that imposes a moratorium on that task. The Department may use its enforcement discretion to decide if the circumstances of the failure to make the notifications required by N.J.A.C. 7:26E-1.4 warrant penalty assessment. For example, the Department may consider whether the party notified the Department immediately upon the change in circumstance that moved up the date of the task or whether the party requested a variance from the 45-day notification requirement of N.J.A.C. 7:26E-1.4.

102. COMMENT: The commenter questions whether the Department Case Managers will have the authority to issue NOVs with penalties under the Grace Period Rule. The Department must avoid the situation arising under the Grace Period Rule where the Department's Case Manager takes as long as he or she wants to review and respond to technical submissions while, at the same time, assessing heavy penalties against the submitting party after the Case Manager finally reviews the technical submission. Case Managers are not the proper parties in the Department to issue Notices of Violation with penalties for violations of the Department's technical requirements. If Notices of Violations are to be issued they should be issued by Senior Department Staff not directly involved in the management of the brownfields site. Department Case Managers who feel penalties are warranted in a specific case should be required to explain their position to Department Senior Staff who can make an objective appraisal of the facts and an objective determination concerning whether to issue a Notice of Violation with penalties in the particular case. (9)

103. COMMENT: The commenter is concerned about putting case managers in the position of issuing penalties or issuing notices of violation if certain of the regulatory or technical aspects are not complied with. The rules are silent about that. The commenter is concerned that since the case manager is essentially the first point of contact between

the regulated party and the Department, it will be effectively the case manager who would be issuing or making the call as to whether the violations trigger various penalties, and that's a source of great concern. (9)

RESPONSE to 102 and 103: Generally the Department anticipates that the Case Manager will identify the occurrence of violations and provide notice of the violations to the person responsible for conducting remediation, and that penalty assessment will be centralized within the Department and will not be the responsibility of the Case Manager. The Department may reassign responsibility for these functions as the need arises. Regardless of who within the Department has the responsibility for these tasks, the Grace Period Law at N.J.S.A. 13:1D-127b tolls the compliance period if compliance is not achieved within that period due to a lack of action or response on the part of the Department. Under no circumstances will a penalty be assessed against a party who fails to meet a scheduled requirement due to the Department's failure to respond.

The effect of the amendment on the cost of remediations and the length of time to complete them

104. COMMENT: The commenters are particularly concerned if the Department's proposal is a declaration that strict compliance with the Technical Rules will now be the touchstone for judging whether a remediation is progressing with full commitment. Such an approach will have serious repercussions. Case managers and technical staff may now feel compelled to require compliance with the details of the Technical Rules rather than the substance and the result. Some in the regulated community will respond in kind, focusing on the rules. A bureaucracy of process will consume remediation. Costs of remediation will increase, and delays in results, will inevitably ensue. The emphasis should be on the result – the cleanup – versus the process to get there. (3, 4, 8, 12, 13)

RESPONSE: All remediations of contaminated sites, regardless of whether they are being remediated pursuant to an MOA, ACO, the Underground Storage Tank Rules, the

ISRA rules, or by the state using public funds, must be in full compliance with the Technical Rules. As described in the summary to the 2002 proposed readoption with amendments to the Technical Rules (see 34 N.J.R. 171), the Technical Rules are the Department's minimum technical requirements, designed to provide predictable, yet flexible, procedures for investigating and remediating sites that are contaminated or at which contamination is suspected, in a manner that will ensure that the remediation is protective of human health and the environment by reducing a receptor's exposure to contaminated media. The remediation requirements of the Technical Rules, applied in concert with the Oversight Rules, have enabled the regulated community to conduct remediations without the Department's step-by-step involvement. Thus, the regulated community has been not only encouraged, but required to be fully committed to conduct remediation activities in compliance with the Technical Rules. The commenter's assertion that these rules will result in increase in the time and cost of conducting remediation is unfounded. Since there are no amendments to the remediation requirements of the Technical Rules, the cost of remediating sites pursuant to them will not increase. Adoption of the grace period provisions may even reduce the cost of compliance by providing time to cure a violation so that a penalty is not assessed.

105. COMMENT: The Department should do everything it can to clarify its purposes and approach as consistent with the clear ameliorative and encouraging intent behind the Grace Period Law and so prevent the interpretation of the law as requiring case managers to penalize the regulated community more frequently, perhaps in every instance of deviation. If the Department fails to be encouraging, such enforcement-oriented interpretations will not encourage remediation; they will encourage fear, hesitancy, delay, reluctance, defensiveness and distance. In that instance the Proposal converts the remediation program into an automatic enforcement program, with multiple NOVs, and multiple certified responses or enforcement actions, or even litigations, appeals and challenges, during which it is unlikely that remediation will accelerate or the Department will be able to apply its resources to remediation. This approach and result is unwise and unauthorized: but perhaps as importantly, scarce Department resources, and those of the

regulated community, will be dedicated to the preparation and handling of the NOV process, the responses thereto, the defenses against same (before and after their issuance) and all the interactions that flow therefrom (including from other interested parties not directly involved in the NOV itself, such as lenders, tenants, neighbors, municipalities, former owners, and current owners). Overall costs will increase, but less money will be spent on actual cleanup, not more, if only as overcautious regulated parties decline to take any risks, and seek clarity as to Department requirements so that they can either comply, or have defenses in the event that later the Department asserts a violation. As costs increase, delays increase, and unfavorable sentiment in the regulated community increase, New Jersey will be less attractive to new investment by that community, not more. (3, 4, 8, 12, 13)

RESPONSE: The Department is promulgating these regulations in order to meet the purpose and intent of the Grace Period Law as directed to do so by the New Jersey Legislature. As stated in the Grace Period Law at N.J.S.A. 13:1D-125, “establishing and employing grace (compliance) periods for minor violations will ensure the administration of an effective, consistent, sensible and fair enforcement program by the Department . . . , and promote the health and safety of the public and the protection of natural resources.”

The legislature included in the Grace Period Law a notice provision intended to encourage compliance and therefore reduce the number of penalties. As discussed above, the Department will exercise discretion concerning when to assess penalties on a case by case basis.

106. COMMENT: The commenters observe that for some, the potential amount to be expended in avoiding deviations, addressing the threatened issuance of notices of violation, responding and defending such notices, paying or resolving the violations after a successful defense, and then thereafter re-initiating remedial efforts that may result in further rounds of confrontation, may consume such scarce resources that the quality of remediation itself may suffer and insolvency be accelerated. (3, 4, 8, 12, 13)

RESPONSE: The rules implement the Legislature's direction, as described in the Grace Period Law, to provide for grace periods to allow correction of minor violations. Any additional burden that may be perceived by the regulated community as a result of the implementation of the statute and rules will be the result of a person's decision not to correct the violation within the grace period. The site remediation process provides a party with ample opportunity to avoid penalties. Case Managers will advise remediating parties of deficiencies in submittals, and any concerns may be raised to the case manager, his or her supervisor, or to the Technical Review Panel, prior to the issuance of an NOV and start of the grace period. In addition, the Department will use its enforcement discretion when taking enforcement actions against parties that are in violation of the Technical Rules and other remediation rules.

107. COMMENT: The commenters note that in ISRA, N.J.S.A 13:1K-7 the Legislature stated: "it is in the interest of the environment and the State's economic health to promote certainty in the regulatory process by incorporating that knowledge to create a more efficient regulatory structure and to allow greater privatization of that process where it is possible to do so without incurring unnecessary risks to the public health or the environment." The Legislature continued: "The Legislature therefore declares that it is the policy of this State … to promote efficient and timely cleanups, and to eliminate any unnecessary financial burden of remediating contaminated sites; that these policies can be achieved by streamlining the regulatory process, … and by reducing oversight of those industrial establishments where less extensive regulatory review will ensure the same degree of protection to public health, safety, and the environment; and that the new procedures established pursuant to this act shall be designed to guard against redundancy from the regulatory process and to minimize governmental involvement in certain business transactions." In N.J.S.A 13:1K-10, the Legislature stated, "In establishing criteria and minimum standards for these terms, the Department shall strive to avoid duplicate or unnecessarily costly or time consuming conditions or standards…." See also N.J.S.A. 58:10B-2.a. (to the same effect).

In the commenters' view, the Department's approach in this proposal does not encourage privatization and does not create a more efficient regulatory structure and does not avoid unnecessarily costly or time consuming conditions. It appears to achieve the opposite as the Department embraces more extensive regulatory review (illustrated by the Department's treatment of a failure to call 14 days in advance of a field sampling event as a non-minor violation), and costly and time consuming processes (such as the likely increase in NOVs and the processes for exercise of Grace Periods, and the new enforcement oriented provisions in remediation agreements, and the perpetual enforcement for those who do not remediate to permanent unrestricted standards). (3, 4, 8, 12, 13)

RESPONSE: The Department appreciates the legislative intent of ISRA and the Brownfields Act and believes that the grace period amendments to the Oversight rules marry the legislative intent of those acts with that of the Grace Period Law. In clearly indicating minor and non-minor violations, the associated penalty and procedures related to correcting violations, the Department has provided clarity for the regulated community in furtherance of the intent of ISRA and the Brownfields Act. In changing the structure of the penalty provisions, the Department has streamlined its own internal enforcement procedures. Additionally, allowing pre-termination grace periods on MOA cases will enhance the Voluntary Cleanup Program.

Furthermore, the commenters' examples do not support the contentions for which they are offered. For example, identifying a failure to call 14 days in advance of field sampling as a minor violation does not "result in more extensive regulatory review." The obligation to call is independent of the Grace Period rule. In addition, the issuance of NOVs and the requirement to take action within the grace period is not a more costly and time-consuming process. The person conducting remediation is afforded more time to expend the same amount of money to conduct the required activities, in order to avoid a penalty as the Legislature intended. Finally, the person responsible for conducting

remediation must spend the same amount of time and money to comply with engineering and institutional controls associated with restricted use remedies whether or not the ISRA RAs continue beyond the issuance of a no further action letter.

Amendments to the model RA and ACO

108. COMMENT: The proposed changes to the model RA create major disincentives for the entry of the regulated community into RA with the Department. Without a "user friendly" RA, many transactions subject to ISRA will be lost due to timing issues. As a result, the economy of the State of New Jersey will lose businesses, jobs and tax revenue. (11)

109. COMMENT: Without the "safety-valve" of the present version of the model ISRA RA, many future business transactions will not close due to practical, timing issues and the reluctance of the regulated community to enter into a more onerous ISRA RA as proposed. The Department developed the ISRA RA in order to allow business transactions to take place prior to full compliance with ISRA. The ISRA RA program and the present model ISRA RA have been very successful in furthering the interests of the Department and the regulated community. The regulated community needs a model ISRA RA with reasonable terms and conditions or the ISRA RA process will not be used and business transactions will not close. As a result, the economy of the State of New Jersey will lose business, taxes and job opportunities. Many brownfields and other contaminated New Jersey sites would not undergo ISRA-driven investigation and, if necessary, remediation (no transaction; no ISRA triggered cleanup). The model ISRA RA should encourage rather than discourage the use of this valuable tool to promote both business transactions and ISRA compliance. The present form of the ISRA RA at Appendix A of N.J.A.C. 7:26B successfully serves these dual objectives. The present form of the ISRA RA provides the Department will the assurance that an ISRA remediation will be completed in accordance with the Technical Rules. That is the only

legitimate interest that the Department has in issuing an ISRA RA. No amendment or revision is needed to the model ISRA RA. (11)

110. COMMENT: The proposed revisions to the model ISRA RA at Appendix A of N.J.A.C. 7:26B include too many "blank check" provisions that impose an unfair burden on ISRA RA cases as compared to non-RA ISRA cases (see Section I; Paragraphs 2, 5, 6, 8, 12 and 13). Instead of relying on compliance with the Technical Rules, the Department's Proposal turns the model ISRA RA into a virtual contract of adhesion. The proposed model ISRA RA form requires an ISRA RA applicant to make a blind, pre-commitment to accept every Department decision or interpretation on remedial actions. For example, the ISRA RA applicant is required to modify and revise an RI Work Plan, RI Report, Remedial Action Work Plan and RA Report in order to "conform to the Department's comments." The ISRA RA applicant pre-agrees that the decision about whether the various written submissions comply with the Technical Rules is made "solely" by the Department. Open-ended requirements to conduct "additional remediation as the Department directs" unfairly locks the ISRA RA applicant into acceptance of every decision and interpretation of the Technical Rules. Non-RA ISRA cases are not subject to these onerous requirements. In addition, under the proposed model ISRA RA form, in order for a transaction to be consummated, an applicant would be required to make an enforceable commitment to conduct "additional remediation" whenever the Department determines that prevailing standards are not being achieved (an open-ended, perpetual commitment that is not imposed upon non-RA ISRA cases). All of these proposed revisions lead to an inevitable conclusion: the regulated community will be less likely to enter into an ISRA RA and, therefore, transactions, businesses, taxes and jobs will be lost to the State of New Jersey and its citizens. (11)

111. COMMENT: The proposed revisions to the model ISRA RA create two classes of ISRA cases with different requirements, obligations and burdens: ISRA non-RA cases

and ISRA RA cases. The adoption of the Proposal would lead directly to this discriminatory and unauthorized result. (11)

112. COMMENT: The proposed revisions treat ISRA cases differently. This is a violation of ISRA. The Department has no authority to create two classes of ISRA cases with different requirements, obligations and burdens: non-RA ISRA cases and ISRA RA cases. The adoption of the Department's proposed revisions to the model ISRA RA would insure exactly this discriminatory and unauthorized result. (11)

RESPONSE to 108 through 112: The Department disagrees that the proposed changes to the RA will have a negative impact on ISRA-subject transactions, including the redevelopment of brownfield sites. The amendments to the RA do not change the fact that ISRA-subject parties who choose to sign an RA gain the benefit of being able to consummate their transaction prior to full ISRA compliance. Similarly, the amendments do not contain any modifications to the timing of entering into an RA and thus do not affect the timing of the closing of any related real estate transactions.

The key to consummating a transaction prior to full ISRA compliance is the commitment on the part of the RA signatories to clean up the site that is the subject of the transaction. That commitment must be equivalent to a commitment made by a party who signs an ACO to conduct the remediation in the Department's stead. Regardless of the reason that remediation is triggered and the document that is used to govern that remediation, both the ACO and the RA are oversight documents that contain the signatory's legally enforceable commitments to remediate the site to a level that it is protective of human health and the environment and ensure that protection over time.

ISRA requires industrial establishments to be remediated. N.J.S.A. 13:1K-9.b(1). "Remediate" is defined as taking "all necessary actions to investigate and clean up or respond to any known, suspected, or threatened discharge of hazardous substances or hazardous wastes, including, as necessary, the preliminary assessment, site investigation, remedial investigation, and remedial action." N.J.S.A. 13:1K-8. "Remediation

standards" are any standards promulgated by the Department pursuant to the Brownfields Act at N.J.S.A. 58:10B-12.

The remediation standards are codified in part in the Technical Rules, N.J.A.C. 7:26E. Accordingly, the remediation of all industrial establishments, whether remediated pursuant to the ISRA rules or through the execution of an ISRA RA is subject to Departmental review and approval because, as stated above, the Department has the ultimate responsibility to assure the implementation of protective remedies.

113. COMMENT: While the commenters share the Department's interest in ensuring the long term protectiveness and effectiveness of engineering and institutional controls, the Department's position on ACO's and, as illustrated by this Proposal, RAs, will have unintended adverse consequences. If a party will be subject to perpetual Department enforcement at a site, for example, that it may no longer even own, what is that party's incentive to remediate and revitalize that property? This effort will compound an already complex matter, and, that if the Department is indeed concerned about the long term protectiveness of engineering and institutional controls, it should review alternatives to the program in its entirety (such as the Uniform Environmental Covenants Act) versus placing another administrative and enforcement burden on an already burdened system. (3, 4, 8, 12, 13)

114. COMMENT: The Department does not have the statutory authority for the requirement at Appendix A of N.J.A.C. 7:26B to impose the continuing requirement on an ISRA RA applicant to maintain a Remediation Funding Source and pay an annual one percent surcharge for sites already remediated to Department approved restricted use standards (see Section XIII; Paragraphs 63 and 64). The Department does not impose these burdensome and discriminatory requirements on non-RA ISRA cases (or other remediation cases under the Technical Rules).

The use of restricted use remedial action is an accepted remedial alternative under the Technical Rules. Under the Technical Rules, the party conducting a remediation is free

to select its own remedy as long as the remedial action is consistent with the requirements of the Technical Rules (see N.J.S.A. 58:10B-12(g)1). The Department's attempt to saddle ISRA RA cases with a perpetual financial assurance requirement and 1% surcharge payment for the life of engineering and institutional controls will create a major disincentive for ISRA RA applicants to use these cost-effective remedial options. As a direct result, fewer transactions will be completed and fewer brownfield and contaminated properties will be cleaned up and reused in New Jersey. Businesses, jobs and taxes will inevitably be lost. Moreover, such a burden would not be placed on a non-RA ISRA case. (11)

RESPONSE to 113 and 114: The adopted amendments do not amend the requirements concerning engineering and institutional controls in the Technical Rules at N.J.A.C. 7:26E-8; thus the commenters' suggestion that the Department should review alternatives to the program are not relevant to this rulemaking. Moreover, although the Uniform Environmental Covenants Act provides model language concerning the use of engineering and institutional controls, it is actually a model for legislation and not for rulemaking. Nevertheless, the Department has reviewed the Model Uniform Environmental Covenants Act as suggested by the commenter and has determined that the Department's requirements for institutional controls in the Technical Rules embody the spirit and intent of the Model Act.

The party's incentive to remediate the property is as it always has been: to proceed with an ISRA-triggering transaction prior to remediating the site. The amendments do not change the requirement to conduct and report on biennial certifications and pay the required one percent remediation funding source surcharge at sites at which the person responsible for conducting the remediation chose a restricted use remedial action. This requirement existed in the RA at paragraph 7 (recodified at paragraph 21 with no change in text) and is clarified at new paragraph 63. The statutory authority for this requirement is at N.J.S.A. 58:10B-3.

115. COMMENT: The model RA should not be modeled after or made consistent with the Department's model Administrative Consent Order ("ACO"). An RA and an ACO serve separate and distinct regulatory purposes**.** The Department must approve an RA (see N.J.S.A. 13:1K-9(e)). An ACO is completely discretionary and routinely used by the Department to resolve situations of non-compliance (with punitive overtones). In fact, the Department uses ACOs as part of the "exercise of its enforcement discretion" to allow selected persons to conduct remediation at a property scheduled for publicly funded remediation (see N.J.A.C. 7:26C-2.3(b)). The ACO is also envisioned by the Department as the oversight document for a court ordered remediation (see N.J.A.C. 7:26C-2.3(c)). The incorporation of the ACO provisions into the model ISRA RA is unnecessarily onerous and counter-productive to the goals and objectives of the Department's ISRA RA program. (3, 4, 8, 11,12, 13)

116. COMMENT: The commenters disagree with the Department's determination that an RA is like an ACO. The purpose and effect of an RA in ISRA is clear. Many of the proposed provisions of the RA are unnecessary and inconsistent with the Legislature's intent in ISRA itself. The Legislature expressly rejected consent orders as the technique for postponing the need for a negative declaration, a no further action letter, or a remedial action workplan approval prior to the happening of transactions or events that trigger the need for ISRA compliance. There is no legislative support that a party closing under an RA was intended to have a greater liability for doing so than it would otherwise have had, and ample evidence that the Legislature was seeking a more business friendly approach, more efficient, less conservative and redundant, than before. The Department cannot use the RA, allowed by the Legislature under the 1993 changes to ISRA, to serve as the technique for cleaning up a site after the occurrence of a transaction instead of before, to impose additional exposures and burdens, whether previously adopted in prior Department forms but masking the Department's quest to make an RA an order, or as revised pursuant to this Proposal. (3, 4, 8, 12, 13)

117. COMMENT: The Department proposes to add RA paragraph 53 which states that the person agrees to comply with the RA which shall be fully enforceable as an Order in the New Jersey Superior Court pursuant to the Department's statutory authority. This paragraph corresponds to existing paragraph 60 (recodified as paragraph 56) of the ACO. The commenters disagree that an RA should be so enforceable. In 1993 the Legislature changed the prior terminology under ECRA, rejecting the use of ACOs as mechanisms for permitting transactions to occur, in favor of a consensual contract - an RA. In view of this conscious choice it does not appear supportable that the Department can force those seeking remediation agreements to agree to the same results as previously available for orders. (3, 4, 8, 12, 13)

RESPONSE to 115 through 117: The Department agrees with the commenter that the RA and the ACO have separate statutory pedigrees. As discussed above, ISRA expressly provides for RAs. See N.J.S.A. 13:1K-9.c and e. The Department's authority to enter into ACOs can be inferred from various provisions of the Spill Act and the Brownfields Act (for a definitive discussion of this authority, see E.I. Du Pont de Nemours and Company and the General Electric Co. v. State of New Jersey, Department of Environmental Protection and Energy, 283 N.J. Super. 331, 661 A.2d 1314 (App. Div. 1995). However, RAs and ACOs serve similar purposes; they are both oversight documents under which the Department secures commitments to remediate sites to a level that is protective of human health, safety, and the environment.

The Department agrees with the commenters that the rules implementing the former Environmental Cleanup Responsibility Act (ECRA) included an ACO, and that the model RA codified in response to ISRA (which amended ECRA and changed its name to ISRA) replaced the former ECRA rules' ACO and incorporated the new modifications mandated by ISRA. (See proposal concerning the repeal of N.J.A.C. 7:26B and codification of new rules at the same chapter, 29 N.J.R. 16(a) (Jan. 6, 1997)). However, while ISRA changed the process by which contaminated sites are remediated under Department oversight, it

did not alter the basic tenet of the original ECRA legislation; that is, that as a precondition on the transfer or closure of industrial properties, the industrial establishment must be investigated and any discharges of hazardous substances remediated to protect the public health, safety, and environment. *Id.*

The Department notes that many of the revisions to the RA are intended to clarify requirements that are already in the existing RA, or are already existing requirements under the Technical Rules, and to change the document so that it better reflects the process of conducting remediation under the oversight document

As acknowledged by the commenters in Comment 197 below, all oversight documents are contracts. Under New Jersey law, contracts are enforceable in Superior Court.

118. COMMENT: The definition of "site" in the proposed ISRA RA in Appendix A of N.J.A.C. 7:26B, including off-site contamination, is unworkable and overbroad (see Findings; Paragraph 1 of proposed ISRA RA). The new definition creates many problems that non-RA ISRA cases do not face. For example, will an ISRA RA applicant now be required to obtain the signature of an adjacent property owner as part of the ISRA RA application process where off-site contamination exists? It will be difficult (if possible at all) to obtain such a signature from a party not involved in the ISRA transaction. Certainly, in many cases the ISRA RA applicant will not be able to obtain the adjacent property owner's signature within the timeframe required for the transaction. In addition, the new definition of "Site" is inconsistent with the definition of "industrial establishment" as "any place of business or real property at which such business is conducted" (see N.J.A.C. 7:26B-1.6). The current definition of "Site" should remain in the model ISRA RA. (11)

RESPONSE: The RA at paragraph 1 of the Findings section defines site as the property that is the subject of the RA, and all other areas to which hazardous substances

discharged on the property have migrated. Parties who conduct remediation without executing an RA are subject to the same requirements to address contamination that has migrated onto adjacent property as parties who do execute RAs. The definition of industrial establishment identifies those entities that are subject to the requirements of ISRA and which must conduct remediation pursuant to N.J.A.C. 7:26E. All remediation conducted pursuant to N.J.A.C. 7:26E must address both the location where the discharge occurred and any areas to which it may have migrated. Accordingly, adding the concept of "all other areas to which hazardous substances discharged on the property may have migrated" to the definition of "site" merely emphasizes the requirements existing at N.J.A.C. 7:26E regarding remediation of adjacent properties.

119. COMMENT: New paragraph 6 to the RA at N.J.A.C. 7:26B, Appendix A clarifies that the scope of the RA includes contaminants at the site that is the subject of the agreement as well as contaminants that have or will emanate from the subject site. This change was made to make the RA consistent with paragraph 5 of the Findings Section of the ACO. This change should be further clarified that the emanation is unlawful and from contaminants existing during the period prior to the execution of the RA or ACO. A person responsible for one discharge is not thereby forever liable for all contaminants that emanate from the site thereafter. The contaminants may emanate lawfully emanate, for example, as a result of materials discharged pursuant to a NJPDES permit or Air permit. The contaminants also may arise from the operations of others (a new owner or operator) for whom the person subject to the RA or ACO have no responsibility and therefore for which they are not liable. The language should be revised in both the RA and ACO to so provide. (3, 4, 8, 12, 13)

RESPONSE: Certain permits authorize the legal discharge of hazardous substances. However, cleanup liability is based on the presence of contaminants in the environment. Cleanup liability under ISRA RAs is governed by ISRA and the Spill Act. The Department recognizes remediators' desire for finality; however, the legislatively-

imposed liability under the Spill Act continues even if the department issues an NFA for the site. For example, the remediator is still liable for additional remediation if a remediation standard changes by more than an order of magnitude.

120. COMMENT: The definition of "scope of remediation" at Appendix A of N.J.A.C. 7:26B is unworkable and overbroad (see Findings; Paragraph 6). The introduction of the concept of "contaminants" as a defined term is inappropriate and confusing. ISRA deals with the defined terms of "hazardous substances" and "hazardous wastes" not "contaminants." "Contaminants" is not defined or used anywhere in ISRA or the relevant site remediation statutes. The terms "hazardous substances" and "hazardous wastes" have been defined and used by Department regulatory programs for more than twenty years. It makes no sense to add a new term to the model ISRA RA. The inclusion within the definition of "scope of remediation" of "all contaminants which are emanating from or which have emanated from the Site" could force an ISRA RA applicant to be "responsible" for more investigation and remediation than otherwise legally required under ISRA. For example, a tenant operating as an "industrial establishment" is only responsible for contamination at, on or migrating from its leasehold. In addition, pursuant to the Proposal an ISRA RA applicant could be responsible for non-commingled contamination located at a neighboring property which it had nothing to do with and no legal responsibility for. The new definition of "Site" appears to assign such responsibility to the applicant under an ISRA RA in contradiction to the Department's long standing policy and applicable statutory authority. Under the proposed expansive definition, the obligations and requirements of a person complying with ISRA under an ISRA RA would potentially far exceed the requirements for a non-RA ISRA case. (11)

RESPONSE: The ISRA rules are promulgated under the Spill Act and ISRA. Any party that has liability to remediate an industrial establishment pursuant to ISRA also has liability under the Spill Act, regardless of whether the remediation is conducted under an RA. The Brownfield Act defines "contaminant" to include pollutants and further applies

its term to all New Jersey remediation rules. Therefore, the person that signs an RA is liable to remediate all contaminants including pollutants. Accordingly, the use of the term "contaminant" in the RA is appropriate. The requirements for remediating an industrial establishment pursuant to an RA are found in the Technical Rules. A person who enters into an ISRA RA with the Department is liable for remediating all discharges that occurred at the industrial establishment, including all contaminants that have migrated to neighboring properties. The Department is not expanding a party's liability as the commenter suggested.

Classification of specific violations as minor or non-minor

121. COMMENT: Many of the offenses labeled as non-minor should be relabeled as minor. Only those provisions that are key to the Department's ability to effectively administer a protective and effective remediation program should be non-minor, including, failure to report a discharge, failure to register an UST, failure to notify the Department of an ISRA subject transaction, or failure to reduce or eliminate a threat to human health and the environment that exists as a result of an immediate environmental concern. Because there is nothing to prevent the Department from taking enforcement action when a minor violation is not cured within the allowed Grace Period, this alternative will meet the intent of the Legislature, as well as the needs of the Department and the regulated community. (3, 4, 8, 12, 13)

RESPONSE: To determine whether each enforceable provision of the Department's remedial regulations is minor or non-minor for purposes of this proposal, the Department considered the criteria identified in the Grace Period Statute. Three of the criteria listed in the statute apply to all violations of the enforceable provisions identified in the proposal. In applying these criteria, the Department designated violations that pose minimal risk to public health and safety, do not undermine the goals of the program, and can be corrected within a designated grace period, as minor. As a result of that analysis,

approximately 75% of the violations considered were determined to be minor. However, this comment suggests that, "Only those provisions that are key to the Department's ability to effectively administer a protective and effective remediation program should be non-minor. . . ." This statement does not conform to the criteria set forth in the statute. The Department has met the intent of the legislation to allow a grace period only for those violations which meet the criteria set forth in the statute.

122. COMMENT: Most of the regulations classified by the Department as worthy of a fine, are not appropriate for fines at all, absent imminent or material harms arising from the breach. Remediating sites is difficult and uncertain and, so long as the effort continues the pursuit of the remedial goal, tolerant of a breadth of effort [sic] to achieve the result. The Department focuses too much on process and enforcement, and too little on results and risks, and thereby determines too many offenses are non-minor (or even minor) because it classifies violations without regard to the actual seriousness of the error, omission or deviation, and without regard to the harm or result from the deviation. (3, 4, 8, 12, 13)

RESPONSE: In designating violations as minor or non-minor the Department carefully considered the criteria established in the statute. The majority of violations received a minor designation in recognition of the fact that they could be remedied within a grace period, did not substantively undermine program goals or did not pose a significant risk to public health, safety and natural resources. However, the violations that the Department designated as non-minor were so designated because these criteria were not met. Approximately 25 percent of the violations are non-minor because they do pose a threat, undermine the program, or cannot be remedied within a grace period.

123. COMMENT: The table below offers a simplified approach to assessment and classification of violations for the Department's consideration, in lieu of the many pages of violations proposed by the Department. The table is an example of one possible alternative, generated by the commenters in the limited period available to them since the

Proposal became available. The commenters recommend that the Department not adopt its own list and classification at this time; the Department consider the approach and comments the commenters and others make; and thereafter the Department issue a new proposal based largely on this alternative approach so as to permit the regulated community to consider and comment on that new proposal thereafter.

Violation	**Citation**	**Type**	**Grace Period**
Failure to conduct a preliminary assessment(1)	7:26E-3.1	Minor	30 days
Failure to complete and submit a preliminary assessment report(1)	7:26E-3.2	Minor	30 days
Failure to conduct a site investigation(1)	7:26E-3.3	Non-minor	
Failure to complete and submit a site investigation report(1)	7:26E-3.13	Minor	30 days
Failure to prepare a remedial investigation workplan	7:26E-4.2	Minor	30 days
Failure to conduct a remedial investigation	7:26E-4.1	Minor	90 days
Failure to complete and submit a remedial investigation report	7:26E-4.8	Non-minor	
Failure to prepare a Remedial Action Selection Report (1)	7:26E-5.2	Minor	60 days
Failure to submit a remedial	7:26E-6.2	Non-minor	60 days

action workplan[1]			
Failure to conduct a remedial action	7:26E-6.1	Non-minor	90 days
Failure to submit a remedial action report	7:26E-6.7	Minor	30 days
Failure to record a Department approved deed notice with all applicable agencies	7:26E-8.2	Non-minor	30 days
Failure to implement or maintain the engineering controls specified in the Deed Notice	7:26E-8.2	Non-minor	
Failure to establish or record a classification exception area for contaminated groundwater in an actual potable water use area	7:26E-8.3	Non-minor	
Failure to establish or record a classification exception area for contaminated groundwater in a non-potable water use area	7:26E-8.3	Minor	60 days
Failure to perform monitoring or biennial certification for deed notices	7:26E-8.5	Minor	60 days
Failure to perform maintenance of an engineering control	7:26E-8.5	Mon-minor	

Failure to perform monitoring, maintenance or biennial certifications for classification exception areas in an actual potable water use area	7:26E-8.6	Non-minor	
Failure to perform monitoring, maintenance or biennial certifications for classification exception areas in a non-potable water use area	7:26E-8.6	Minor	30 days

(1) This phase may not be required for all sites and all areas of concern. (3, 4, 8, 12, 13)

RESPONSE: The Department's approach includes specific requirements in the violation table at N.J.A.C. 7:26C-10.3 whereas the commenter's suggested table is more general. By including more specific requirements, the Department is able to zero in on specific violations and assure that the consequence, depending on whether the violation is minor or non-minor, is appropriate to the violation. The following example is meant to demonstrate why the Department's approach is preferable to the more general approach suggested by the commenters. If a party submitted a remedial action report that did not include the required certification, but that was acceptable in all other ways, using the suggested table, the Department could only cite a failure to submit a remedial investigation report, which is non-minor, and the violation would probably be penalized. If a party failed to conduct a remediation at all, the violation cited would be failure to conduct a remedial investigation, which would be minor. The suggested approach deals more harshly with a party who attempts to comply (i.e., conducted a remedial investigation that was for the most part acceptable) than with a party who fails to comply at all. The suggested table does not include base penalty amounts and the commenters

provide no alternative for how penalties would be determined. The Department's inclusion of specific penalties for specific violations allows it to identify a penalty that is commensurate with the violation. The commenter does not provide comments on why the suggested table is an improvement over the proposed table and why the proposed table should not be adopted.

124. COMMENT: The Department proposes to treat any violations of the Technical Rules that involve failure to conduct required remediation at a site that poses an immediate environmental concern (IEC) as defined at N.J.A.C. 7:26E-1.8 as non-minor violations. We disagree. If a site has an area of concern that is defined as an IEC, perhaps in some settings the failure to address the IEC may be non-minor but (a) only if the failure pertains to the IEC and (b) only if the failure increases or maintains the actual threat of the IEC itself. In no other instance should the failure be non-minor. (3, 4, 8, 12, 13)

125. COMMENT: The commenters disagree with the Department's proposal to treat violations that generally qualify as minor as non-minor when they occur at a site that is an IEC site and the violations are related to the IEC condition, because in those circumstances, the Department concludes that those specific violations do not meet the statutory criteria for minor designation. The Department does not explain how such circumstances do not meet the statutory criteria. There are circumstances when such circumstances and deviations can be minor - specifically if: the violations meet all of the Grace Period Law criteria; then in such circumstances the violation is classifiable as minor. In some cases a violation may not meet these tests; but in others it will. For the Department to determine that merely because an IEC is involved a violation otherwise meeting the criteria must be non-minor is inconsistent with legislative intent and therefore is arbitrary and unreasonable. (3, 4, 8, 12, 13)

126. COMMENT: The Department is without statutory authority to treat IEC sites, as defined at N.J.A.C. 7:26E-1.8, differently from other sites. The Act does not discriminate against IEC sites. A paperwork violation at an IEC site should be a Minor violation eligible for a grace period in the table at N.J.A.C. 7:26C-10.4(e). The Department needs to revise the sections of the Proposal dealing with alleged violations at IEC sites. (11)

RESPONSE to 124 through 126: As stated in the summary at 37 N.J.R. 2924, the Department has the discretion to treat a violation that has been designated as minor in the table at N.J.A.C. 7:26C-10.4(c) as non-minor if the specific violation as it occurs poses a greater than minimal risk to public health safety and natural resources. If the violation of a regulation that has been designated as minor occurs at a site which meets the definition of an IEC at N.J.A.C. 7:26E-1.8 and results in a more than minimal risk to public health safety and natural resources, the Department has the authority to treat that violation as non-minor. By definition, IEC conditions are those that pose a significant risk to public health, safety and natural resources. Additionally, any violation that occurs in the course of addressing an IEC condition may be considered non-minor if it delays or prevents the necessary remediation, because of the immediate nature of the IEC. Minor violations that occur in relation to an IEC condition, but which do not delay or prevent the necessary remediation will continue to be considered minor.

127. COMMENT: Under the proposal, a non-minor violation can be asserted for instances of "Failure to initiate and vigorously pursue site access via legal action" referencing N.J.A.C. 7:26C-8.2(e). This is a far too subjective an issue for the use of an objective penalty scheme and, if applied as drafted, is certain to cause substantial difficulties for all concerned. The determination of what constitutes “vigorous” pursuit of site access is not objectively clear, nor determinable by a case manager who may have little to no training on property and legal rights, nor determinable by a remediating party and its advisors.

Access issues often arise because the target site for the desired work is owned or

occupied by a stranger to the remediation. Such strangers denying or withholding access are, by definition, opposed to allowing the work for which access is sought for some reason. Such issues may arise because (i) they are unfamiliar with the complex nature and requirements of investigation, remediation, the Department, technical issues and/or law; they may need significant effort to become educated, and in some cases they may remain confused and uncertain despite initial efforts to educate; (ii) they may be distrustful of using advisors, or even of the Department, or they may use lawyers or advisors or consultants who are not familiar with the matters involved in the effort; (iii) they may be fearful or reluctant, of the work or the results of the work, and the consequences of the results on their interests, and after all, it is their property, and ordinarily they have the right to determine what happens on their property, and they may not believe a Judge will override their interests; (iv) confrontation may be undesirable for many reasons, including that a Judge may rule that the effort to negotiate access did not occur in sufficient good faith and thereby deny access in litigation, or it may create a unnecessarily and prematurely adversarial relationship in which future efforts may become more difficult or complicated because of the antagonism generated by a confrontational approach (such as if municipal approvals or permits are needed for future work, or if a remedial approach requires further cooperation); (v) the persons involved may not even be readily available because, for example, they may be located elsewhere than on the site, or there may be multiple individuals whose attitudes or decisions vary, or they may not be readily found or identified, or they may be available on a schedule different than the Department's or the remediating parties, or they may be retired, ill or impaired in some way that affects the ability to proceed, and as to which the Department may have little concern, but the remediating party and a Court would.

No statute requires "vigorous" pursuit of site access and both the standard and the treatment of the absence of "vigor" as a violation is improper. The implementation of such a policy will force administrative reviews to assess the "vigorousness" to a much higher degree than at present. It and similarly subjective provisions should not be adopted. (3, 4, 8, 12, 13)

RESPONSE: The referenced requirement, N.J.A.C. 7:26C-8.2(e), is designated as minor in the proposal, not non-minor as the commenter indicates. A person responsible for conducting remediation will be afforded a period of time to correct the violation prior to the imposition of penalties. If the violation is not corrected and the Department takes enforcement action for the violation, the party may challenge the enforcement action. Note that N.J.S.A. 58:10B-16 requires that the person conducting the remediation negotiate access with adjoining property owners and if the access agreement cannot be negotiated after good faith efforts, the person ". . . shall seek an order from the Superior Court directing the property owner to grant reasonable access. . . ."

128. COMMENT: Under the proposal, a non-minor violation can be asserted for instances of "Failure to conduct further ecological investigations ... when the baseline evaluation indicates such investigation is warranted." N.J.A.C. 7:26E - 3.11(a)4. This is an extremely complex evaluation that is open to much uncertainty. A disagreement on the need for, and scope of, additional ecological investigations should not be the subject of administrative enforcement, but should be part of a reasoned discussion among technical people. The Department itself has not fulfilled the obligations imposed on it by the Legislature in a number of respects, including with respect to ecological standards, further compounding the difficulty. The determination of when further investigation is required is not objective. It and similarly subjective provisions should not be adopted. (3, 4, 8, 12, 13)

RESPONSE: The Department agrees that N.J.A.C. 7:26E-3.11(a)4 was inappropriately designated as non-minor in the proposal. The description of the requirement at that citation in the "subchapter and violation" column was inaccurate. The "subchapter and violation" column should have read, "Failure to draw accurate conclusions regarding the need for further ecological investigation based on the requirements in this section." The "subchapter and violation" column summary are adjusted and this violation designated as

minor upon adoption, with a grace period of 60 days and a base penalty of $4000. The Department does not have the option under the Grace Period Law of excluding this requirement as suggested by the commenter. Further, the Department believes that, as a critical part of the remediation process, the requirements related to the evaluation of ecological impacts should not be excluded from the enforcement process. The Department disagrees that this is a subjective requirement. Section N.J.A.C. 7:26E-3.11(a)1-3 set forth objective criteria that define whether a person must conduct further ecological investigation. N.J.A.C. 7:26E-3.11(a)4 requires the person to draw conclusions based upon whether all three criteria in 7:26E-3.11(a)1-3 occur. Reasoned technical discussions will not be eliminated based upon the inclusion of this requirement in the rule. A person who fails to draw appropriate conclusions regarding the need for further evaluation will have the opportunity to fix the violation and avoid a penalty.

129. COMMENT: A non-minor violation can be asserted for instances of "Failure to include in the RI workplan other sampling proposals for treatability, bench scale or pilot studies" referencing N.J.A.C. 7:26E-4.2(b)8. Yet there is no requirement to conduct treatment studies in RI workplans; nor is there in most instances any need to conduct such tests. Why should it be a finable offense not to include something that's already not required? This is a complex evaluation that is open to much uncertainty. A disagreement on the need for and the scope of additional investigations of this type should not be the subject of administrative enforcement, but should be part of a reasoned discussion. It and similar provisions should not be adopted. (3, 4, 8, 12, 13)

RESPONSE: The referenced violation, N.J.A.C. 7:26E-4.2(b)8, is designated as minor in the proposal, not non-minor as the commenter indicates. While the Department agrees that such tests may not always be required, the Department included these violations in the rule to address those instances when such tests are required but not included in the RI workplan.

130. COMMENT: Under the proposal a violation of N.J.A.C. 7:26E-4.4(h)3ix which requires a party to properly evaluate current and potential groundwater uses for the 25 year planning horizon is non-minor. It is not appropriate to penalize a failure to predict groundwater uses 25 years in the future. This is a complex evaluation that is open to much uncertainty. A disagreement on the need for and the scope of additional evaluations of this type should not be the subject of administrative enforcement, but should be part of a reasoned discussion. Errors in predictions shall never be finable. It and similar provisions should not be adopted. (3, 4, 8, 12, 13)

RESPONSE: The referenced requirement, N.J.A.C. 7:26E-4.4(h)3ix, is designated as minor in the proposal, not non-minor as the commenter indicates. The Department assigned a minor designation to regulatory requirements related to the 25 year planning horizon that concern information gathering required for the Department to make an informed decision on a remediation action submitted by a person responsible for conducting the remediation. For example, N.J.A.C. 7:26E-4.4(h)3ix is minor because it is a requirement to gather data during the Remedial Investigation that the Department will use to develop an appropriate remedy. The Department assigned a non-minor designation to regulatory requirements that are related to assuring the continued protectiveness of an approved remedy. For example, N.J.A.C. 7:26E-8.6(a)2 is non-minor because it is a requirement related to assuring the continued protectiveness of an approved remedy that includes a Classification Exception Area. A CEA is an area within which one or more constituent standards and designated uses are suspended in accordance with the Ground Water Quality Standards, N.J.A.C. 7:9C-1.6. It is important to consider the planned ground water use for the area of the CEA in order to ensure that the CEA will not adversely impact the future use.

131. COMMENT: A non-minor violation can be asserted for instances of "Failure to contain and/or stabilize contaminants in all media to prevent receptor exposure and/or contaminant migration as a first priority." This is an example of a non-minor violation of

the "Bias for Action" requirements at N.J.A.C. 7:26E-1.11. This is a complex evaluation that is open to much uncertainty. A disagreement on the need for and the scope of additional evaluations of this type should not be the subject of administrative enforcement, but should be part of a reasoned discussion. (3, 4, 8, 12, 13)

RESPONSE: The Department disagrees with the commenter. The longer a person or other sensitive receptor is exposed to a contaminant, the greater the adverse effects from the discharge. The failure to contain or stabilize contaminants in order to prevent exposure and migration of contaminants materially and substantially undermines and impairs the goal of the Department to protect human health and the environment. The Department requires parties responsible for remediation to proactively address contaminants. The designation of this violation as non-minor complies with criteria in the Grace Period Law at N.J.S.A. 13:1D-129 as the violation of N.J.A.C. 7:26E-1.11 poses more than a minimal risk to public health, safety and natural resources.

132. COMMENT: The Legislature never suggested that the rules governing investigation or remediation, perhaps sensible in providing rules for proceeding with remediations towards the goal of a no further action letter, should serve as the basis for causing enforcement and imposing fines and penalties in the manner that the Department has recently proposed. The Legislature did not intend to punish every deviation from the Technical Rules. Accordingly, the Department should classify all violations of its Technical Rules as minor except, perhaps, those few instances which clearly and actually result in the kind of harm that the Legislature requires be classified as major. (3, 4, 8, 12, 13)

RESPONSE: The Grace Period Law specifies which laws, and rules promulgated thereto fall under the purview of the grace period requirements. It specifically identified the statutes that compel site remediation. Accordingly, the Department may not selectively

implement only a portion of the legislature's direction to identify minor violations of only some of the identified environmental laws.

The Department used the criteria at N.J.S.A. 13:1D-129 to designate violations as minor or non-minor. The Department disagrees with the commenters' suggestion that all violations of its Technical Rules should be classified as minor except, perhaps, in those few instances which clearly and actually result in the kind of harm that the Legislature requires be classified as non-minor since this does not follow the explicit criteria set forth in the Grace Period Law.

133. COMMENT: The treatment of non-compliance should be distinguished from the clearly defined legislatively established regulatory aspects of remediation programs. The commenters acknowledge that those aspects can and have been subject to enforcement (and the Grace Period Law clearly applies to mitigate such enforcement). Yet the commenters are concerned that the Department has exceeded legislative goals in this Proposal. For example, a failure to file a general information notice within the ISRA required 5 day period is a violation of ISRA, and therefore an appropriate subject of a fine, a determination of the character of the violation, and the Grace Period Rule. But different levels of significance can be readily distinguished based on the possibility, for example, that the failure is inadvertent, is cured or curable, or is delayed for only a few days, as opposed for example to never occurring: these distinguishing characteristics allow better separation into minor and non-minor (for example perhaps a failure to file is minor so long as closing has not occurred and the filing occurs within sixty days after the triggering event). Similarly, the happening of a transactional closing for sale of real estate on which operates an industrial establishment without any effort to comply with ISRA, may be non-minor but distinguishable from the happening of a cessation of operations by reason of a steady decline of employment, with compliance initiated on a full cessation, which should be minor, or even from such a sale if the site sold is eligible for a remediation in progress waiver or an expedited review waiver so long as those are pursued within some reasonable period (say six months) after that sale, in which event

they should also be minor). The failure to report, or the delayed reporting, of a discharge of one percent solution of ammonia onto a lawn is certainly distinguishable from the release of 200 gallons of VOCs into the Raritan River with no reporting or the release of massive quantities from a ship onto the New Jersey shore. But the Legislature did not intend that a failure to call a project manager before doing field work, or the failure to collect samples in a particular place, or with particular QA/QC, or in particular depths, or the failure to perform a well search in exactly the way the Department specifies by rule, as being worthy of any fine or penalty, much less classification as non-minor, except only in the most serious circumstances. (3, 4, 8, 12, 13)

134. COMMENT: Many of the proposed "non-minor" violations fail to distinguish between violations that may have a substantial impact on the environment and violations that have no substantial impact on the environment particularly if corrected within 30 to 90 days. (6)

RESPONSE to 133 and 134: The Department acknowledges that whether a violation warrants a penalty may be tempered by the specific circumstances of the violation. The Department agrees with the commenter that in some circumstances, violations that it has designated as non-minor may not warrant a penalty. Accordingly, even though the Grace Period Law requires the Department to provide certainty by identifying violations and classifying them as minor or non-minor, the Grace Period Law also confirms that the Department maintains its discretion regarding whether to assess a penalty for failure to correct minor violations within the grace period. Further, the statute does not compel penalty assessment upon the occurrence of non-minor violations. In circumstances where a non-minor violation occurred because an action or submittal was late or incomplete, but where risks posed were minimal, the Department, in its discretion, may forgo penalty assessment.

135. COMMENT: The Department proposes classifying as non-minor "any violation of requirements to notify the Department's Environmental Action Hotline of the discharge of a hazardous substance. Failure to notify the Department upon the discovery of a discharge undermines the program's goal to protect public health, safety and the environment." The commenter acknowledges that there are circumstances in which the Department's statement is true, and in those instances treatment of the violation as non-minor is appropriate. However, in many other instances the failure to report or notify the Department of a discharge should be designated as minor. The failure to report, or the delayed reporting, of a discharge of some hazardous substances, in some amounts and circumstances, and in some locations, does not pose the kind of threat to public health, safety or the environment that warrants treatment as a non-minor violation under the standards established in the Grace Period Law. Precisely because of the absence of harm the proper application of the Grace Period Law would be to treat the violation as minor. Thus the Department should not adopt its proposed approach. It should instead carefully review the requirements for reporting of Discharges, the history of non-reporting experienced by the Department, and make a determination of which of the reporting requirements, and likely consequences, might have the impacts concerning the Department beyond those deemed minor in the Grace Period Law, and then re-propose a revised proposal with an explanation of that determination and reasoning, so the regulated community can consider the Department's view. (2)

RESPONSE: The failure to notify the Department of a discharge of a hazardous substance in all circumstances undermines the Department's goal to protect public health, safety and the environment. The Department acknowledges that, in some instances, the discharge that is the subject of notification may not in fact pose a significant threat. However, the duty to notify does not hinge on the nature or circumstances of the discharge. Rather, it hinges on whether the discharger has provided the Department with sufficient, timely information to enable it to assess the threat and protect public health and safety and the environment. This makes the notification critical. Contrary to the commenter's assertions, even an old discharge that is newly discovered may pose a

significant threat if a route of exposure exists. Allowing the discovering party to rely on the scope or volume of the discharge is not a solution since what a person perceives as a minor discharge is subjective. Note that the Grace Period Law does not compel penalty assessment upon the occurrence of non-minor violations. The statute confirms that the Department maintains its discretion regarding whether to assess a penalty. If a notification violation occurs but the risks posed are minimal, the Department, in its discretion, may forgo penalty assessment.

The history of discharge non-reporting is not relevant to the analysis of whether failure to report should be a minor or a non-minor violation. This is because any violation that undermines the goals of the Department is per se non-minor pursuant to the Grace Period Law. Notification of discharges goes to the heart of the Department's site remediation program; it is the critical first step in the Department's assessment of the threat posed by the discharge and its determination of the necessary action to be taken to ensure that public health and safety and the environment are protected.

136. COMMENT: In view of the large number, and overly general, specific violations labeled as non-minor the Department should expressly allow the assertion of defenses against the assessment of a violation as either a violation at all or as a non-minor violation. For example, if the circumstances that led the Department to label a violation as non-minor do not exist in a particular case, then the violation should not be assessed as non-minor and a cure should be permitted and the fine abated. As another example, some of the violations may arise by reasons of events not within the control of the person fined (e.g., in the event of force majeure). The Department should permit assertion of extenuating and mitigating factors that would reduce a non-minor violation to a minor violation, including the non-existence of the factors that led the Department to classify the violation in general as non-minor, and a minor violation to a non-violation. In those instances, the violation should not be assessed as non-minor and a cure should be permitted and the fine abated. (3, 4, 8, 12, 13)

RESPONSE: The Grace Period Law clearly outlines the criteria for identification of minor violations and does not provide for defenses or mitigating factors. A person responsible for conducting remediation would have an opportunity to raise defenses and identify mitigating factors, to the extent allowed by law, during a hearing to contest a penalty, or during settlement negotiations with the Department prior to such hearing. The statute confirms that the Department maintains its discretion regarding whether to assess a penalty for failure to correct minor violations within the grace period, and it does not compel penalty assessment upon the occurrence of non-minor violations. In circumstances where mitigating factors prevented correction of a minor violation within the grace period, or caused the occurrence of a non-minor violation, the Department, in its discretion, may forgo penalty assessment.

Authority to promulgate the grace period amendments and compliance proposal with the Administrative Procedures Act.

137. COMMENT: Adoption of these rules will result in additional appeals to the Office of Administrative Law, which is already backlogged with dealing with appellate issues on other matters for the Department. Additionally, these rules will be challenged in court. (9)

RESPONSE : The Department believes that the number of appeals to the Office of Administrative Law may actually decrease as violators have the opportunity to cure violations during the grace period and avoid penalty assessment all together. The Department is confident that the rule complies with the scope and intent of the Grace Period Law and the requirements of the Administrative Procedure Act.

138. COMMENT: The proposal for these regulations was published in August, which is a time when many people are on vacation. The Department should rescind this proposal and re-propose them to ensure that they are seen by a large number of people. The

commenter cites the fact that only four people attended the public hearing as evidence that the proposal was not read by many people. (10)

RESPONSE: The proposal was published in the August 15, 2005 N.J.R. and additional notice was published in several newspapers of general circulation. The Department provided a 60-day comment period, which closed on October 14, 2005, well after the typical summer vacation season. The Department also posted the full proposal on its web site. In addition, the proposal was discussed at several Site Remediation Advisory Group meetings, which were attended by representatives of the regulated community and the attorneys and consultants that represent them. The Department therefore believes that it provided adequate notice and opportunity for comment on the proposal.

139. COMMENT: Historically the Department has not used the threat or assessment of fines and penalties as a major tool in seeking and achieving remediation, especially since approximately the time of the adoption of the Grace Period Law. The commenters see no assessment or citation by the Department to the contrary. The Department does not explain either the need to change its past practices, or of any effect of any change now proposed. The changes proposed by the Department are increasing enforcement, in remedial programs, therefore is ill advised and should not be adopted. (3)

RESPONSE: N.J.A.C. 7:26C-10, Civil Administrative Penalties and Requests for Adjudicatory Hearings, sets forth the procedure by which the Department may assess penalties for a person's failure to remediate a discharge as required by the orders and rules listed at N.J.A.C. 7:26-10.1(a) and the procedure for requiring an adjudicatory hearing on enforcement actions that the Department takes pursuant to the Oversight rules. The Department's ability to assess penalties remains unchanged. As discussed at length in the proposal, the reason that the Department proposed the grace period amendments is that the Grace Period Law requires it to do so. See N.J.S.A. 131:1D-127. This particular rulemaking effort complies with an agreement entered into between the Chemical Council of New Jersey and the Department in January 2004 in settlement of the lawsuit

brought by the Chemistry Council of New Jersey to compel the Department to propose rules implementing the Grace Period Law. As a result of the grace period amendments, there will be a stronger enforcement program for remediation programs. However, the only parties that will be affected will be those who do not comply with the remediation regulations even after the Department provides several opportunities to cure deficiencies (notice of deficiency, dialogue with the Department, and a grace period for minor violations.)

140. COMMENT: In the Grace Period Law, the Legislature clearly intended to provide regulatory relief, by streamlining environmental protection efforts, and making them more efficient. Instead, the Grace Period proposal seems to offer more regulations and potentially more legal liability to an already complicated remediation process. Furthermore, in the case of other programs such as RCRA, the Grace Period Law was used to provide grace periods relative to already established violation matrices in the regulations. In contrast, DEP is now misusing the Grace Period Law as an opportunity to develop a detailed violation matrix that did not exist before. (7)

141. COMMENT: The commenter opposes the Department's efforts in the Grace Period Rules to create penalties for alleged violations of the Technical Rules for Site Remediation, N.J.A.C. 7:26E ("Technical Rules"). The purpose of the Technical Rules is clear. The Department adopted the Technical Rules to establish "the minimum technical requirements to investigate and remediate contamination at any site" (see N.J.A.C. 7:26E-1.1(a)). The current Technical Rules do not contain any penalty provisions and should not. They are nothing more than the Department's promulgated minimum guidance for site investigations and remediations in New Jersey. The Department, however, appears to be attempting to create penalty provisions for the Technical Rules under the guise of complying with the Grace Period Law. (11)

142. COMMENT: If the Department insists on adding a penalty element to the Technical Rules, it should not do so under the guise of complying with the Grace Period

Law. Rather, it should attempt to do so by openly acknowledging that it intends to add a penalty component to the Technical Rules, identifying all of the statutory bases for doing so, explaining in plain language the necessity of doing so and inviting the public to comment on its proposal to create such a Technical Rules penalty component. (11)

143. COMMENT: The underlying remedial statutes authorize the Department to impose fines or penalties for all or even most of the breaches included in the Proposal or the Technical Rules. There is ample authority that the Department can require additional work before issuing its approvals. For example, the underlying statutes often allow fines or penalties in only more limited cases. The Grace Period Law was intended to provide relief against even those. See e.g., N.J.S.A. 13:1K-13 (“Any person who knowingly gives or causes to be given any false information or who fails to comply with the provisions of this act is liable for a penalty of not more than $25,000.00 for each offense. If the violation is of a continuing nature, each day during which it continues shall constitute an additional and separate offense. Penalties shall be collected in a civil action by a summary proceeding under "the penalty enforcement law" (N.J.S.2A:58-1 et seq.). Any officer or management official of an industrial establishment who knowingly directs or authorizes the violation of any provisions of this act shall be personally liable for the penalties established in this subsection.”) It important, for example, that there is no penalty section in N.J.S.A. 58:10B-1 et seq. Accordingly, the Legislature intended deviations from remediation procedures, such as under the Technical Rules, to result in no penalties at all. (3, 4, 8, 12, 13)

144. COMMENT: The purpose of the Grace Period Law was to rationalize existing administrative penalties. Its purpose very clearly was not to authorize the promulgation of new penalties. As noted above, the Grace Period Law directed the Department to adopt policies that will avoid "costly litigation and the payment of punitive monetary sanctions" (see N.J.S.A. 13:1D-125). The attachment of penalties to alleged violations of the subjective guidance requirements of the Technical Rules is contrary to both the letter and

spirit of the Grace Period Law. Clearly, the addition of penalty provisions to the very subjective minimal site investigation and remediation requirements of the Technical Rules should not be part of any proposed regulation purportedly adopted under the auspices of the Grace Period Rules. It is just as clearly inappropriate, and perhaps ultra vires, for the Department to include penalty provisions as part of the Technical Rules. (11)

145. COMMENT: The Legislature, in enacting the Grace Period statute, did not intend to punish every deviation from the Technical Rules, especially as they then existed. The commenters do not see, as the Department does, the clear authority to do so under the various statutes requiring remediation. It seems unlikely to us that the Legislature would agree to the Department's parsing of minor and non-minor offenses for every provision of the Technical Rules. (3, 4, 8, 12, 13)

146. COMMENT: The Department's proposed "one size fits all" approach to enforcement in the Oversight Rules is inconsistent with the very nature of the Department's remediation program and the Grace Period Law. The Legislature, in enacting the Grace Period statute, did not intend to punish every deviation from the Technical Rules, especially as they then existed. (3, 4, 8, 12, 13)

147. COMMENT: The Legislature expressly rejected the Department's historical view, in this Proposal seemingly revived and re-asserted, that "the threat or imposition of monetary sanctions is the sole economic incentive inducing compliance and the dominant force driving corporate compliance decisions and investments." See N.J.S.A. 13:1D-125. Instead the Legislature wanted to encourage the regulated community to "invest private capital in … measures which will yield long-term environmental benefits, instead of in costly litigation and the payment of punitive monetary sanctions…. Environmental enforcement policies should promote and encourage the initiation of environmental audits, the diligent remediation of violations so discovered and the immediate and voluntary disclosure of such violations to the Department of Environmental Protection."

See N.J.S.A. 13:1D-125. The Legislature did not mandate the approach pursued in this Proposal. The Department's Proposal is more threatening than necessary or appropriate. The Proposal misses the mark set by the Legislature and, to that extent is improper and unauthorized. (3, 4, 8, 12, 13)

RESPONSE to 140 through 147: The purpose of the Grace Period Law, as stated in N.J.S.A. 13:1D-125, was to promote the rapid response to minor violations and to facilitate their remedy by allowing for a grace period during which a violator could correct a minor violation before the Department would assess a penalty for that violation. As stated in the legislative findings and declarations section of the Grace Period Law, "there are alternative methods to promote compliance with environmental laws [other than the imposition of monetary penalties]" N.J.S.A. 13:1D-125. Additionally, the Grace Period Law specifically exempts from penalty those minor violations that are voluntarily disclosed by the person responsible for the minor violation provided that the violation is disclosed within 30 days of its discovery, and the person responsible immediately ceases any continuation of the violation and promptly remedies the violation and achieves compliance within the timeframes established in the applicable grace period. N.J.S.A. 13:1D-130. However, where a violation is not remedied within the applicable grace period, the Grace Period Law permits the Department to not only assess a penalty, but to assess it retroactively to the date on which the notice of violation was first issued to the person responsible. N.J.S.A. 13:1D-128.

The Department's authority to assess penalties for violations of its rules is derived from the underlying statutes. See, for example, the Spill Act at N.J.S.A. 58:10-23.11u(a)(1), which provides the source of the Department's authority to assess, among other things, civil administrative penalties for violations of the Spill Act and any rule promulgated thereto. The Spill Act is one of the authorities for the Technical Rules. The Technical Rules are the Department's promulgated minimal requirements for remediating a contaminated site so that the remediation is protective of human health and the environment by reducing a receptor's exposure to contaminated media.

The Department is not using the requirement to implement the Grace Period Law as an opportunity to impose new liabilities or include additional compliance requirements. The Department has enumerated violations in the rule, as the Grace Period Law requires, and changed the procedure for penalty calculation to a set base penalty. The Grace Period Law at N.J.S.A. 13:1D-129 mandates that the Department designate violations of the statutes listed in the definition of "environmental law" at N.J.S.A. 13:1D-126 as minor or non-minor. Among the statues listed in this definition are statutes pursuant to which the rules listed in the Oversight Rules at N.J.A.C. 7:26C-10.4 were promulgated. These statutes and corresponding regulations are as follows:

- Solid Waste Management Act - N.J.S.A. 13:1E-1 et seq.

Department Oversight of the Remediation of Contaminated Sites, N.J.A.C. 7:26C

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

- Industrial Site Recovery Act (ISRA), N.J.S.A. 13:1K-6 et seq.

Industrial Site Recovery Act Rules, N.J.A.C. 7:26B

Department Oversight of the Remediation of Contaminated Sites, N.J.A.C. 7:26C

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

- Spill Compensation and Control Act - N.J.S.A. 58:10-23.11 et seq.

Industrial Site Recovery Act Rules, N.J.A.C. 7:26B

Department Oversight of the Remediation of Contaminated Sites, N.J.A.C. 7:26C

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

- Water Pollution Control Act - N.J.S.A. 58:10A-1 et seq.

Department Oversight of the Remediation of Contaminated Sites, N.J.A.C. 7:26C

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

- Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1 et seq.

Industrial Site Recovery Act Rules, N.J.A.C. 7:26B

Department Oversight of the Remediation of Contaminated Sites, N.J.A.C. 7:26C

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

- New Jersey Underground Storage of Hazardous Substances Act, N.J.S.A. 58:10A-21, et seq.

Underground Storage Tanks, N.J.A.C. 7:14B

Department Oversight of the Remediation of Contaminated Sites, N.J.A.C. 7:26C

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

The list of violations at N.J.A.C. 7:26C-10.4 implements the mandate of the Grace Period Law at N.J.S.A. 13:1D-129 to promulgate regulations designating specific types or categories of violations within each regulatory and enforcement program of each environmental law. As shown above, the rules included in the Oversight Rules at N.J.A.C. 7:26C-10.4 are all promulgated pursuant to an environmental law as defined by N.J.S.A. 13:1D-126.

Finally, the Department disagrees that the absence of penalty provisions in the Brownfields Act at N.J.S.A. 58:10B-1 et seq. implies that the Legislature intended that deviations from the Technical Rules should result in no penalties. As stated above, the Technical Rules are grounded in the authority of multiple statutes that contain provisions granting the Department penalty assessment authority.

148. COMMENT: The Department has provided no information supporting the conclusion that the changes made in the proposal from present practices are required to prevent existing and unnecessary risks to the public health or the environment. Therefore, the portions of the Proposal imposing more burdens, equating remediation agreements to administrative consent orders, and entrapping the regulated community before the Department for the choice of remediating to restricted use remediations are inappropriate, invalid and should not be adopted. (3, 4, 8, 12, 13)

RESPONSE: The Department described in the summary of the proposal the reasons for the amendments to the rules. The majority of the amendments in the proposal are dictated by the Grace Period Law. Other amendments either clarify existing rule

provisions or improve the efficiency of the remediation program. For example, the amendments to make the ACO and the RA mirror each other stems from confusion that was often voiced by the regulated community as to differences in these documents, even though the intent and purpose of the two documents are the same, namely, to set forth the terms by which parties agree to remediate contaminated sites. Therefore, the amendments merely clarify the meaning and intent of these documents. (See 37 N.J.R. 2926 through 2929.) The amendments concerning the application and implementation of MOAs will make the Voluntary Cleanup Program more efficient by ensuring that only parties who are committed to complying with the terms of the MOA (many of which were dictated by the person responsible for conducting the remediation) apply for MOAs, thereby freeing limited Department resources to concentrate on overseeing the actual remediation of contaminated sites. (See 37 N.J.R. 2930 through 2931)

The comment is unclear as to which provisions of the rule it believes imposes more burdens or entraps the regulated community for the choice of remediating to restricted use remedial actions. The rules governing the choice of the remedial action to be implemented at a contaminated site are in subchapters 5 and 6 of the Technical Rules. This proposal does not affect those provisions. The decision as to the standard to which a contaminated site will be remediated is made by the person responsible for conducting the remediation.

149. COMMENT: The commenters disagree with classifying "those categories of violations that materially and substantially undermine or impair the goals of the regulatory program as non-minor. Specifically, the requirement to conduct site investigations in certain situations (for example, the requirement at N.J.A.C. 7:14B-7.2(b) to confirm or disprove that a release of a hazardous substance occurred), to conduct remedial investigations, and to conduct remedial actions, are proposed to be classified as non-minor. These violations will be cited as non-minor when a party fails to conduct the required actions at all." The Department should not adopt the proposed approach without

a careful review of the requirements and a determination of which of the requirements might have the impacts complained, and an explanation of that determination and reasoning, so the regulated community can consider the Department's view. If the complained of events have minor to no impacts, or relate to an issue under dispute (perhaps the existence of a defense, or the existence of an offsite contribution) the Department's position is erroneous. The blanket statements made by the Department in support of its position fail both the requirements of the Legislature under the Grace Period Law itself and under the Administrative Procedure Act and do not support or justify its decision. (3, 4, 8, 12, 13)

RESPONSE: As described in the proposal summary, the Department reviewed each enforceable provision of its remediation rules and compared them against the criteria contained in the Grace Period Law at N.J.S.A. 13:1D-129. For example, failure to submit a remedial investigation report in violation of N.J.A.C. 7:26E-4.8, is designated as non-minor. Without the required remedial investigation report, the Department cannot determine if the extent of the contamination at the site that is the subject of the remediation has been fully delineated. If the extent of the contamination at a site is unknown, the Department cannot ensure that the contaminated site is being remediated so that it is protective of human health and the environment. Thus the Department's goal of protecting the environment is materially and substantially undermined. The proposal summary at 37 N.J.R. 2924 details the process that the Department used to determine the designation of a regulatory provision, in compliance with the explicit mandate of the Grace Period Law.

150. COMMENT: The blanket statements made by the Department in support of its position (that in every instance "[f]ailure to notify the Department upon the discovery of a discharge undermines the program's goal to protect public health, safety and the environment") fail both the requirements of the Legislature under the Grace Period Law itself (by not considering the factors articulated in that Law) and under the

Administrative Procedure Act (by not providing the basis for the Department's conclusion) and do not support or justify its decision. (2)

151. COMMENT: Many of the Department's goals and objectives behind its Proposal are unexplained and in the absence of explanation unjustified. While some explanation is provided in some sections, the explanation is inadequate in that the regulated community cannot understand the explanation. For example, that the Department's purpose of implementing the Grace Period Law does not explain the basis for many of its Proposals (e.g., the search for full commitment by Volunteers, and the basis for classification of minor and non-minor offenses.) In the absence of better explanations, the commenters cannot understand, comment on or provide alternate suggestions that could address the Department's reasoning, and its plan for future actions based on the Proposal. In the absence of better explanations, the sections of the Proposal that do not mitigate against future enforcement should not be adopted and may be unenforceable. (3, 4, 8, 12, 13)

RESPONSE to 150 and 151: The Department disagrees that the explanation for designating certain violations as minor or non-minor is so vague as to be in violation of the Administrative Procedure Act. The Department acknowledges that Administrative Procedure Act at N.J.S.A. 52:14B-4(a) requires that an agency shall provide notice of "the terms or substance" of its intended action, including "a summary of the proposed rule, a clear and concise explanation of the purpose and effect of the rule, the specific legal authority under which its adoption is authorized, [and] a description of the expected socioeconomic impact of the rule. . . ." Federal Pacific Electric Co. v. New Jersey Department of Environmental Protection, 334 N.J.Super. 323, 340, 759 A.2d 852, 860 (App. Div. 2000). The purpose of this notice is to provide interested parties with the opportunity to present their views on a proposed regulation. D.I.A.L., Inc. v. N.J. Dept. of Community Affairs, 254 N.J.Super. 426, 438, 603 A.2d 967, 973 (App. Div. 1992). However, the Administrative Procedure Act does not provide for a right to information used by the Department in rule making at the level of detail sought by the commenter. See Matter of Order of Com'r of Ins. Dated Oct. 19, 1992, 273 N.J.Super. 181, 188, 641

A.2d 562, 565 (App. Div. 1994). In fact, administrative rulemaking does not require specific findings of fact in support of each regulatory provision subsequently adopted. Consolidation Coal Co. v. Kandle, 105 N.J. Super. 104, 113-120 (App. Div. 1969), aff'd o.b. 54 N.J. 11 (1969). Rather, New Jersey Courts long ago established that facts sufficient to justify a regulation are presumed to exist. Id.; see also D.I.A.L., Inc. v. N.J. Dept. of Community Affairs, 254 N.J.Super at 438, citing City of Elizabeth v. State of N.J. Dep't of Envtl. Protection, 198 N.J.Super. 41, 47, 486 A.2d 356 (App.Div.1984). Moreover, where, as here, the general public was given notice as to the reasons for the proposed amendment and was capable of presenting arguments and facts countering the reasons advanced by the Department, and where the Department received numerous comments on the proposal, both for and against it, it would be difficult to conclude that the vagueness of the notice prevented meaningful comment. D.I.A.L., Inc. v. N.J. Dept. of Community Affairs, 254 N.J.Super. at 438.

152. COMMENT: While the Legislature, when it adopted the Grace Period Law, cited certain remediation statutes (e.g., ISRA and the Spill Act) and granted relief against enforcement under those laws, it was not then the intent of that law to encourage the Department to initiate enforcement for assessment of fines and penalties under the remediation programs outside the regulatory aspects of those laws. In particular, the commenters do not believe that the Legislature intended to encourage the Department to apply prescriptive rules and then punish deviations from those rules. The Legislature has always recognized the differences between conventional regulatory programs and the remedial programs. The proposal, however, does not recognize the distinctions and should not be adopted to that extent. (3, 4, 8, 12, 13)

153. COMMENT: Nothing in the Grace Period Law supports the Department's comprehensive effort in this Proposal to squeeze remediating parties into the constraints of enforcement oriented, deterrent based, programs. The Legislature gave the remediating party flexibility and authority in the remedial process. (3, 4, 8, 12, 13)

154. COMMENT: The Department should not initiate enforcement for every or most deviations of the Technical Rules. Many deviations can and should be treated, at worst, as minor with appropriate grace periods, but as non-minor only when the requisite level of harm or deviation occurs. The commenters accept that intentional and repeated violations by the same party can be worthy of enforcement to deter repeat offenses and improve future submissions. Grace Period Law does not support this Proposal as a message by the Department that any and every deviation from the Technical Rules will result in a penalty and enforcement. If despite deviations remediation is occurring and conditions are improving then those results are more pertinent than the deviations. Yet the Department's Proposal focuses more on the deviations regardless of whether there is no harm or much good. (3, 4, 8, 12, 13)

RESPONSE to 152 through 154: The Grace Period Law at N.J.S.A. 13:1D-126 specifies that the Department must apply the statute to the remediation process by listing site remediation statutes to which the Grace Period Law applies. Rather than absolving a violator of its obligations to comply with the rules that implement these statutes as the commenters imply, the Grace Period Law states that a violator should be given a grace (compliance) period during which to come into compliance if the violation meets the conditions enumerated in the statute. Accordingly, the Grace Period Law mandates that the Department clearly set forth the rules with which the regulated community must comply, set forth grace periods within which minor violations are to be corrected, and to encourage compliance with underlying site remediation rules. The source of the prescriptive violations included in these rules is the underlying statutes as listed in the Grace Period Law.

155. COMMENT: The Department notes that "[t]he Grace Period Law does not affect the Department's enforcement authority, including the exercise of enforcement discretion, to treat a violation as non-minor." The Department should also note and confirm that the

Grace Period Law does not affect the Department's enforcement authority, including the exercise of enforcement discretion, to treat as minor a violation otherwise classified in its Proposal as non-minor. The Department has authority to treat violations as minor despite their classification. (3, 4, 8, 12, 13)

156. COMMENT: The Department should note and confirm that the Grace Period Law does not disturb the Department's enforcement authority, including the exercise of enforcement discretion, to decline to treat an action, error, omission or event as a violation. This is fully consistent with the legislative intent of the Grace Period statute, which was designed to deemphasize enforcement as the only mechanism available to DEP to get compliance. There is no evidence that the Legislature intended to impose mandatory penalties for minor or non-minor offenses (knowing that the Legislature has imposed mandatory fines and penalties in certain rare instances, and yet elected not to repeat that choice in this law). (3, 4, 8, 12, 13)

157. COMMENT: The intent of the Grace Period Law is not to make pursuit of enforcement or notices of violation the norm in the remediation program. It is not its intent to eliminate the exercise of enforcement discretion and compel the issuance of series of notices of violation. The clear intent of the Legislature was to make enforcement less capricious for minor violations. Nothing in that or any other law requires the Department to impose penalties in every instance, or abrogates the Department’s enforcement discretion, or encourages or requires Department staff to issue notices of violations or penalties upon every disagreement or disapproval of, or error or omission in, a submission or effort under the Technical Rules. (3, 4, 8, 12, 13)

RESPONSE to 155 through 157: As discussed in the proposal summary, the Department has the discretion, after promulgation of these rules, to treat a designated minor violation as a non-minor violation should fact-specific circumstances warrant. However, the Grace Period Law mandates that the Department determine through rulemaking which violations of the listed statutes and their implementing rules are non-minor and which are

minor. As a part of this regulatory effort, the Department has determined which of those violations do not meet these criteria and must, therefore, be classified as non-minor pursuant to the Grace Period Law. Only those violations which (1) pose minimal risk to public health, safety, and the environment; (2) do not undermine or impair the goals of the program; and (3) can be corrected within a time period of up to 30 days, may be designated as minor. After promulgation of these rules, the Department must consider the statutory criteria that concern the intent of the violator, the duration of the violation, and previous enforcement history, fact specific for each violation, on a case-by-case basis, and will treat otherwise minor violations as non-minor if the circumstances warrant. While the Department may not change the designation of a violation from non-minor to minor the Department has enforcement discretion to penalize for a non-minor violation based on case specific circumstances.

Addressing Technical Differences of Opinion during Site Remediation

158. COMMENT: Assessing penalties in instances where there have been true technical differences of opinion regarding subjective terms within the Technical Rules will only lead to excessive administrative burdens as these violations are challenged and the work slows further. It and similar provisions should not be adopted. (3, 4, 8, 12, 13)

RESPONSE: The Department understands that there are provisions in the Technical Rules that may be subject to site specific conditions, and that there may be differences of opinions between the Department and the person responsible for conducting the remediation. The flexibility required for remediation pursuant to the Technical Rules is built into the remediation rules by allowing for Department review and comment on a submission prior to the imposition of penalties or the termination of MOA. See N.J.A.C. 7:14B-8.3, N.J.A.C. 7:26B-1.7, the RA at N.J.A.C. 7:26B, Appendix A, Agreement paragraph 2, N.J.A.C. 7:26C-3.3(c)1iii, and N.J.A.C. 7:26C, the ACO at Appendix A, Agreement paragraph 7. These provisions require any document on which the Department has commented to conform to the Technical Rules and the Department's comments. The Department's remediation process allows for several opportunities for

parties to comply with the Technical Rules and address questions concerning the Department's comments on a submission prior to penalties being assessed, including the issuance of a notice of deficiency, which is not an enforcement document, dialogue with the Department and, in the case of minor violations, an opportunity to cure any deficiency prior to a penalty being imposed. The Department assumes that challenges concerning Technical Rules application are "true" technical differences, and not merely attempts to slow down the remediation process through frivolous challenges. Parties that are committed to remediating a site without administrative delay will continue with the remedial activities at a contaminated site, even after the Department has issued an Administrative Order/Notice of Civil Administrative Penalties.

159. COMMENT: It may be appropriate to discuss, negotiate and sometimes dispute with the Department the appropriateness of any number of matters addressed in the Technical Rules and Department communications. The Department itself allows dispute resolution in recognition that sometimes the regulated community has a point to be made and the process may produce better results than simple intransigence. In the face of these complex interactions and interrelationships it is inappropriate to determine to treat so many "violations" of the Technical Rules applicable to remediation as minor or non-minor, or even to limit the resolution process as the Department endeavors in its Proposal. (3, 4, 8, 12, 13)

160. COMMENT: Cleanup and remediation approaches are often the subject of disagreement between DEP case managers and technical and legal experts for the parties. The Department instituted its internal Technical Review Panel Program to deal with such disagreements. The Department's proposed Grace Period Rule would apparently give DEP case managers the authority to recommend and/or issue penalty assessments for violation of DEP technical rules which could be the subject of fair disagreement. No indication is given in the proposed rule concerning how the new penalty enforcement scheme will affect DEP's Technical Review Panel program. (6, 9)

161. COMMENT: Cleanup and remediation approaches at brownfield sites are often the subject of disagreement between the Department Case Managers and technical/legal experts for builders/developers and others. The Department instituted its internal Technical Review Panel (Technical Review Panel) Program to deal with such disagreements. The Department's Proposed Grace Period Rule will apparently give the Department Case Managers the authority to recommend and/or issue penalty assessments for violation of the Department technical rules which could be the subject of fair disagreement. No indication is given in the Proposed Grace Period Rule concerning how the penalty enforcement scheme relates to and affects the Department's Technical Review Panel Program. Will Notices of Violation issued by the Department Case Managers for violation of the Grace Period Rule be stayed pending internal Department Technical Review Panel appeals? Will penalties assessed under Notices of Violation issued by Department Case Managers be rescinded if a Department Technical Review Panel reverses or modifies the decision of the Department Case Manager on technical issues? These questions need to be answered by the Department and addressed in the Proposed Grace Period Rule. (9)

162. COMMENT: The Department did not address the interplay between these proposed rules and the Department's own Technical Review Panel Program, which has been very successful. The Technical Review Panel was set up to provide a vehicle of resolution of reasonable disagreements between the regulated party and the case manager. The Technical Review Panel program has gone a long way to eliminate disputes between the regulated parties and the Department. The rules are unclear as to how the rules interrelate with the Technical Review Panel procedure. Will a stay of deadlines be granted if there is a request for a Technical Review Panel review? What happens upon resolution? If there's a dispute about whether the penalty should be issued, is that going to be handled by the Technical Review Panel or is that going to be something that's going to be handled in the context of an appeal to the Office of Administrative Law. (9)

RESPONSE to 159 through 162: It is not the Department's intent to limit the necessary dialogue that facilitates the best decisions regarding remediation. The Department will continue to provide informal feedback on work plans and reports, and will continue to engage in productive technical dialogue. However, the Department expects that the existence of the grace period rule will limit the unproductive "back-and-forth" that sometimes delays remediation.

Should a party wish to formally dispute the Department's position, prior to the initiation of enforcement action, the Technical Review Panel will continue to be available. The Department's Technical Review Policy procedure is detailed at http://www.nj.gov/dep/srp/guidance/techreview/.

The compliance deadline will be stayed pending a decision from the Technical Review Panel as to whether the Panel will consider the issue. Additionally, according to the Department's Technical Review Policy, the Department's transmission of a Notice of Convening of a Technical Review Panel to the party responsible for remediation may stay Site Remediation Program and Division of Solid and Hazardous Waste-imposed deadlines and schedules relating to the subject of the technical dispute, if requested, until the date that the Technical Review Panel transmits its determination respecting the technical dispute to the remediating party. However, irrespective of the pendency of a technical dispute, the Department may, at any time, require the person responsible for remediation to take any measures necessary for the protection of public health, safety or the environment. Additionally, deadlines or schedules expiring prior to the remediating party's submission of a Technical Review Panel request are not stayed.

The grace period does not begin to run until after an NOV is issued. Since the compliance deadline is stayed pending a decision from the Technical Review Panel, the Department must give the person responsible for remediation an opportunity to comply with the Technical Review Panel's decision before it issues an enforcement document.

Note that the Technical Review Panel is not available with regard to issues that are the subject of an enforcement action that has already been taken.

Economic Impact of Adopted Amendments Generally

163. COMMENT: The commenters see no clear explanation of the likely economic effects of the application of the proposed fines and penalties as the Grace Period Law is implemented under this Proposal, and in the absence of that analysis we neither comprehend the Department's reasoning, nor understand the economic effects intended and/or likely to flow from the Proposal. In the absence of such information the changes which do not mitigate against enforcement should not be adopted, and they should be withdrawn, re-written and re-proposed with appropriate support. (3, 4, 8, 12, 13)

RESPONSE: The Economic Impact Statement in the proposal at 37 N.J.R. 2931 explains that the amendments to subchapter 10 of the Oversight Rule concerning penalties will have no economic impact on persons who comply with the rules concerning the remediation of contaminated sites. Parties that comply with the regulations governing the remediation of contaminated sites, or with the regulations governing regulated underground storage tanks or transactions involving industrial establishments subject to ISRA, will not be subject to a fine, thus will not suffer any economic consequence from the promulgation of amendments to the Oversight Rule. However, parties that do not comply with the regulations might be subject to a penalty. If a penalty is imposed by the Department, it will have an economic impact on the party required to pay the fine.

No Further Action Letters

164. COMMENT: If a deviation from the Technical Rules affects a remedial decision, the Department should adjust that decision (e.g., in proper circumstances requiring new, better, or different work and/or denying an approval such as a no further action letter). (3, 4, 8, 12, 13)

RESPONSE: The Department agrees with the commenters' assertion that if a party's deviation from the Technical Rules results in a remedial decision that is not protective of human health and the environment, it can deny approval of the decision and not issue a no further action letter. The amendments do not interfere with this process.

165. COMMENT: The bulk of the Technical Rules and Oversight Rules are intended to instruct remediating parties how to meet their obligation to remediate in a manner satisfactory to the Department in the search for a no further action letter, on failure of which it may be appropriate for the Department to deny that result, but rarely should errors or omissions or noncompliance with the instructions be the subject of an enforcement action unless there is some actual imminent or material harm to health or the environment. (3, 4, 8, 12, 13)

166. COMMENT: The Department clearly can withhold its approvals for no further action letters when appropriate. The commenters do not understand, and the Department does not explain, why this remedy, coupled with its other enforcement tools (for example, directives) are not adequate in lieu of other enforcement approaches. (3, 4, 8, 12, 13)

167. COMMENT: A real alternative deterrent to non-compliance with MOAs is that the Department advise the volunteer that it will not issue a no further action letter if the Department is dissatisfied with the investigation or remediation. The commenters agree that remedial programs are about remediation. While there is a legitimate debate concerning the Department's rules and standards for remediation, the commenters are in agreement that if a volunteer wants a no further action letter then it must remediate. (3, 4, 8, 12, 13)

168. COMMENT: The primary mechanism (i.e. the "stick") for keeping remediation projects on track should be the withholding of DEP approval, such as a no further action letter. One powerful incentive for parties to conduct remediation in a manner satisfactory to the DEP is the avoidance of costly delays and unnecessary work. (7)

RESPONSE to 165 through 168: The Department agrees with the commenters' assertion that the Technical Rules and the Oversight Rules are intended to instruct remediating parties how to meet their obligation to remediate sites so that they are protective of human health and the environment by reducing a receptor's exposure to contaminated media. The Department does and will continue to withhold its approvals of no further action letters when issuance of the letter is not warranted (for example, when the remedy chosen by the person responsible for conducting the remediation is not protective of human health and the environment). The issuance of no further action letters is not an enforcement tool, but a means for the Department to provide finality to a party's participation in the remedial process.

The Department agrees that obtaining Departmental approvals, and ultimately, receiving a no further action letter, provide remediating parties with incentive to remediate sites quickly and thoroughly. However, the Grace Period Law and the existing site remediation rules by which persons responsible for remediation may obtain required Departmental approvals are not mutually exclusive. The Department may not ignore the mandate of the Grace Period Law simply because other site remediation rules are in place. As explained above, the Grace Period Law requires the Department to identify all of the enforceable provisions of certain enumerated environmental statutes and to designate them as minor or non-minor based on factors articulated in the statute. The statute further directs the Department to take certain enforcement action for violations of these enforceable provisions. The promulgation of these rules implements this legislative direction.

To fulfill its legislative mandate of ensuring that contaminated sites are remediated to levels that are protective of human health and the environment, the Department will continue to issue no further action letters when appropriate pursuant to N.J.A.C. 7:26C-2.6, and to use all of the enforcement tools at its disposal, including directives, notices of violations, administrative orders and notices of civil administrative penalty assessment, to

encourage compliance with the environmental laws and regulations. Please note that the requirements of N.J.A.C. 7:26C-2.6 are not subject to the Grace Period Law as these are not enforceable requirements, but rather contain the provisions for when and how the Department issues a No Further Action letter. The Department is unclear as to the commenters' reference to "errors or omissions or noncompliance with the instructions" of No Further Action letters, thus is unable to address this comment.

The no further action letter is neither an enforcement tool nor a "stick" for keeping remediation projects on track. Rather it is a document issued pursuant to N.J.A.C. 7:26C-2.6 to indicate that a site has been remediated pursuant to the Technical Rules and does not pose a threat to human health and the environment. No further action letters are documents that are separate and distinct from enforcement actions.

169. COMMENT: The dispute resolution provision in the ISRA RA at Appendix A of N.J.A.C. 7:26B is nullified and rendered void as a result of the various "blank check" provisions proposed for inclusion in the model ISRA RA (See Section XII; Paragraph 45). A person under a non-RA ISRA case (and all other remediations under the Technical Rules) is not required to give up its rights to dispute a Department decision. Unlike a non-RA ISRA case, an ISRA RA applicant would not have meaningful access to the Department's dispute resolution process as a result of the boiler-plate, "blank check" provisions of the Proposal. All that is needed is for the ISRA RA applicant to agree to comply with the Technical Rules, just like any other responsible party undertaking a remediation in New Jersey. (11)

RESPONSE: The commenter does not specify which provisions of the amended model ISRA RA would nullify the dispute resolution provisions of this document. The amendment at paragraph 45 indicates that the person responsible for the remediation may initiate the Department's dispute resolution process. This process is outlined at N.J.A.C. 7:26C-1.4, and paragraph 45 points the person responsible for the remediation to this

section of the rules for clarity. This is in addition to the informal exchange that remains a part of the process of remediating sites with Department oversight, which is unchanged by the proposal. A party submits a document to the Department, the Department reviews the document and sends comments to the party. If the party disagrees with the Department's comments, there is a dialogue between the Department's case manager and the party. If an agreement cannot be reached at that level, the dispute is taken up the chain of command either through the formal dispute resolution procedure found at N.J.A.C. 7:26C-1.4 or through the Technical Review Panel. Accordingly, the amended model RA does not deprive a person responsible for remediation of any right to dispute Departmental decisions.

170. COMMENT: The blanket requirement for the submission of quarterly reports at Appendix A of N.J.A.C. 7:26B is inappropriate and unauthorized (see Section IV; Paragraph 15). Quarterly reporting is not uniformly required for non-RA ISRA cases. The need for quarterly reports should be a case management decision under the Technical Rules and not a strict requirement imposed by an ISRA RA. (11)

RESPONSE: Section IV, paragraph 15 does not contain a blanket requirement for submittal of quarterly progress reports. Rather, it states that quarterly progress reports must be submitted in accordance with N.J.A.C. 7:26E-6.6. Remediation conducted on both ISRA RA cases and non-RA cases must be conducted pursuant to N.J.A.C. 7:26E. N.J.A.C. 7:26E-6.6 specifies that progress reports be submitted in accordance with the approved schedule. N.J.A.C. 7:26B-6.2(f) exempts parties conducting a soil remedial action pursuant to N.J.A.C. 7:26B-6.2(b) from the requirement to routinely submit progress reports in accordance with N.J.A.C. 7:26E-6.6, indicating that for this type of remediation progress reports need only be submitted when specifically required by the Department. The Case Manager does have the discretion to reduce the frequency of progress report submittal depending upon site specific conditions. Additionally, paragraph 15 permits the person responsible for conducting the remediation to request that the Department allow progress reports to be submitted semi-annually or annually.

171. COMMENT: Two weeks prior notice to extend any applicable deadline for submissions under an ISRA RA at Appendix A of N.J.A.C. 7:26B places an unfair burden on ISRA RA cases (see Section V; Paragraph 20). The Department does not place a similar burden on non-RA ISRA cases. (11)

RESPONSE: Paragraph 20 of the model ISRA RA parallels N.J.A.C. 7:26B-6.5(b), with which all ISRA remediations, RA and non-RA, must comply. This section requires an ISRA-subject party conducting remediation to provide written notice to the Department at least 15 days prior to expected non-compliance with the applicable schedule.

172. COMMENT: The proposed ISRA RA affirmative requirement to pay interest on all overdue oversight cost payments to the Department at Appendix A of N.J.A.C. 7:26B places an unfair burden on ISRA RA cases that the Department does not place on non-RA ISRA cases (see Section VIII; Paragraph 29). Although the Department has the option of charging interest, an ISRA RA applicant should not be singled out as the only ISRA party conducting remedial activity under the Department's oversight that agrees in advance to pay such interest payments. (11)

RESPONSE: ISRA RA applicants are not singled out relative to the requirement to agree in advance to pay interest on unpaid Department oversight cost. The Department's procedures for payment of oversight costs are set forth at N.J.A.C. 7:26C-9. These procedures apply to all cases for which the Department provides oversight, regardless of whether that oversight includes the execution of a RA. N.J.A.C. 7:26C-9.3(e) specifies that interest will accrue on the unpaid balance of oversight costs. All parties conducting remediation with the Department's oversight are subject to this requirement.

173. COMMENT: The proposed access provisions at Appendix A of N.J.A.C. 7:26B are unworkable and unfair to ISRA RA applicants (see Section XIII; Paragraph 47). The Department should not be allowed access "at all times" but only during "reasonable times during normal business hours" (except for emergency situations). Due to the expanded definition of "Site," an ISRA RA applicant would be required to provide access to

adjacent property that it does not own or control. This is yet another disincentive for the use of the ISRA RA process. Indeed, it may mean that in some cases an ISRA RA would not be available. (11)

RESPONSE: This language was included in order to gain the party executing the RA's agreement with respect to the Department's right to enter and inspect the industrial establishment that is the subject of the RA. The language does not expand the Department's current authority but its inclusion assures that the party agrees. The commenter's concern about not being able to assure access to property it does not own which may be contaminated as a result of contaminant migration is not a concern to the Department due to the fact that the Department's authority to enter and inspect applies to the adjacent property. Should the Department require access to property not under the control of the party executing the RA, and the party is unable to acquire access, the Department will pursue such access directly from that property owner.

174. COMMENT: The requirement to submit all data and information to the Department at Appendix A of N.J.A.C. 7:26B, including "contractual documents," and the agreement not to "assert any confidentiality or privilege claim with respect to any data related to site conditions, sampling or monitoring" places a greater burden on ISRA RA cases than non-RA ISRA cases (see Section XIII; Paragraphs 52 and 65). (11)

175. COMMENT: The ten year document retention policy at Appendix A of N.J.A.C. 7:26B is burdensome and unwarranted for ISRA RA cases (and not required for non-RA ISRA cases) (see Section XIII; Paragraph 61). (11)

176. COMMENT: The requirement at Appendix A of N.J.A.C. 7:26B for submitting a "cost review" to the Department upon the corporate dissolution of an ISRA RA applicant places a burden on ISRA RA cases that the Department does not impose on non-RA ISRA cases (see Section XIII; Paragraph 62). (11)

RESPONSE to 174 through 176: The RA requirements noted by the commenter were added to the RA in order to make the language consistent with the ACO since

remediating a site with Department oversight has the same requirements regardless of the program pursuant to which the remediation is being conducted. Again, the commenter is reminded that the terms of the RA are defined by the Department in order for it to gain assurance that remediation will be conducted in a timely and protective manner, in exchange for allowing the transaction to proceed. Should parties feel that the RA terms are not reasonable they maintain the option of completing remediation without entering into a RA, prior to the transfer of property or operations. The Department will consider adding to the ISRA rule, upon readoption of those rules, the requirement to submit a cost review for non-RA ISRA cases.

177. COMMENT: The requirement at Appendix A of N.J.A.C. 7:26B to record the ISRA RA with the County Clerk's office imposes an unnecessary burden on potential ISRA RA applicants that the Department does not impose on non-RA ISRA cases (see Section XIII; Paragraph 53). The recording requirement may well be the last straw in many cases as parties decide against entering into the new model ISRA RA. As a result, many transactions will not close as the parties reject the former "safety-valve" of an ISRA RA as unworkable and overly burdensome.

Only the owner of a property can record an instrument on a New Jersey property. As a result of the proposed amendments, a tenant or other ISRA RA applicants without an ownership interest in a property will not be able to enter into an ISRA RA (or, alternatively, be forced to enter into an ISRA RA knowing that it will be in violation of the recording requirement). Also, if the definition of "Site" includes adjacent properties not owned by the ISRA RA applicant, the party will not be able to enter into an ISRA RA. Recording an ISRA RA is not warranted in the case of a corporate acquisition involving indirect owners in which the direct corporate owner of the industrial establishment does not change. The "cloud on title" created by filing an ISRA RA with the County Clerk is unnecessary to accomplish the objectives of the ISRA program. The recording requirement will undoubtedly cause many potential ISRA RA applicants to walk away from New Jersey transactions or prevent them from applying for an ISRA RA.

In addition, the proposed amendments are silent on the procedure for the removal from the county deed records of the ISRA RA upon termination of the underlying ISRA case. Will an ISRA applicant need to file each Department submission and response with the County Clerk? Will an ISRA RA applicant need to file the No Further Action/Covenant Not to Sue approval? The recording requirement creates an unnecessary burden on the county recording system and an ISRA RA case that is not required for a non-RA ISRA case.

Due to transactional timing issues, an ISRA RA is often needed to allow a transaction to close that ultimately will be resolved by an ISRA waiver in accordance with N.J.A.C. 7:26B-5. The recording of an ISRA RA for the short time period necessary for the Department to process an ISRA Waiver application is not warranted and burdensome. (11)

RESPONSE: The requirement to record the RA with the County Clerk's office was added to the RA in order to make the language consistent with the ACO since remediating a site with Department oversight has the same requirements regardless of the program pursuant to which the remediation is being conducted. Specifically, regardless of whether the site is being remediated pursuant to an RA or not, every person responsible for remediation must comply with the Technical Rules, including N.J.A.C. 7:26E-8, Engineering and Institutional Controls. Pursuant to this subchapter, the person responsible for conducting the remediation that includes a soil remedial action that includes a proposed deed notice shall: "1. If that person is the owner of the site, record a deed notice for the site . . . ; or 2. If that person is not the owner of the site, provide the Department documentation of the owner's consent to record the necessary deed notice . . . ." N.J.A.C. 7:26E-8.2(a). The Department refers the commenter to the remaining provisions of subchapter 8 for instructions on how non-property owners should proceed to ensure that the property owner properly records the deed notice.

178. COMMENT: New paragraph 31 to the RA allows the Department to reserve the right to unilaterally terminate the RA. The commenters disagree with this change. If

termination is to be retained as a threat or deterrent, again a strategy not consistent with the legislative intent in the Grace Period Law, then the Department needs to specify a separate procedure for termination. For example, no termination should occur without notice to all the affected parties and some opportunity to cure the breach which is the basis for the terminations. Further, the Department should provide that the termination of an RA is effective only as of the day of termination, is not retroactive, and does not have the effect of invalidating the happening of the transaction authorized by the RA, or exposing anyone for fines or penalties retroactive to the date of the transaction, for which the remediation agreement was obtained. The commenters note, however, that even these changes would not alter our opposition to this part of the Proposal. (3, 4, 8, 12, 13)

179. COMMENT: New paragraph 31 to the RA allows the Department to reserve the right to unilaterally terminate the RA. An RA should not be terminable under any circumstances because there are other parties who have relied on the permission given by the Department in the Remediation Agreement for the triggering event occurring under ISRA to occur. We disagree with this change. The need and benefit of this change is unexplained and unjustified. A termination of the Remediation Agreement is not authorized under ISRA. It would have an uncertain effect on the underlying transaction and parties relying on the remediation agreement; certainly the Department has not analyzed or explained the effect, either legal or economic, of such a termination. The commenters note that prior to the 1993 amendments to ECRA the Department had a right to void transactions for violations, and in pre-1993 ACOs the Department sometimes waived, and sometimes preserved that right. To the best of our knowledge, the Department never endeavored to void a transaction. Accordingly, in 1993 the Legislature removed this power from the Department, because: (i) it had never been exercised; (ii) it was inconsistently reserved in ACOs by the Department as a threat, (iii) the consequences of a voiding were not predictable to anyone, (iv) the uncertainties associated with the power had an adverse and unnecessary effect on business transactions; and (v) the Department otherwise had adequate enforcement powers. For all these same reasons the Department should not make this change and indeed cannot do so because it approaches a

restoration by the Department to itself the power to void any transaction that occurs in compliance with and in reliance on the RA in question. (3, 4, 8, 12, 13)

180. COMMENT: The commenters disagree that the Department can or should have the power to terminate an RA under any circumstance. The commenters see no authority for this change. There are adequate remedies for breaches of the remediation agreement. Also the Department does not analyze or explain the effect of a terminated remediation agreement on the parties to the agreement and others. The economic consequences have not been considered or discussed. Will the termination alter the rights and liabilities of the parties to the transaction or transactions subject of the remediation agreement? Will the termination affect prior approved remediation in progress waivers? Is the effect the equivalent of the 1983 voiding power in ECRA removed from the Department by the Legislature in 1993? If not, what is its effect? If the Department cannot predict the effect, then it should not create this enforcement mechanism precisely because it introduces further uncertainty and complexity without Legislative authorization. If the effect is equivalent to the Legislatively removed power, then it also cannot be adopted. It is unrelated to the Grace Period Law and is not the appropriate subject of this Proposal. This should not be adopted. (3, 4, 8, 12, 13)

RESPONSE to 178 through 180: The addition of paragraph 31 to the RA is to ensure consistency between the RA and the ACO since the documents have the same purpose, namely, to set forth the terms by which parties agree to remediate contaminated sites. Paragraph 31 states that the Department reserves its right to unilaterally terminate a RA if the Department determines that the person violated the terms of the agreement. For example, in a situation in which the person responsible for conducting the remediation pursuant to the RA failed to implement the Department-approved remedy at a site where the contamination poses an imminent threat to public health, the Department could exercise its option to enforce as pursuant to paragraph 53; however, getting a judgment compelling the person to implement the remedy could take weeks or longer. The more

expeditious way to remediate the site so that it no longer poses a threat to public health is if the Department terminates the RA and conducts the remediation using public funds, which it could recover in a later action against the person responsible for conducting the remediation, the responsible party and/or the owner and operator of the industrial establishment.

Terminating an RA is not the same as voiding an ISRA subject transaction which may have taken place based on the RA; therefore the commenters' assertion that the addition of the paragraph "approaches a restoration of the Department … the power to void any transaction that occurs in compliance and reliance on the RA" is unfounded.

Note that the language in this provision is discretionary. The Department is reserving its right to terminate the RA. The Department recognizes that transactions rely on the RA and expects that it will not often use this provision.

181. COMMENT: The Department proposes to amend existing paragraph 27 of the RA (relocated as paragraph 42) by replacing the phrase "violations of" with the phrase "failure to implement and maintain institutional controls including by way of example" in referring to penalties for failure to comply with deed notice or declaration of environmental restriction requirements in order to clarify the violation that is intended by this paragraph. The Department proposes the same amendments to existing paragraph 43 of the ACO (recodified as paragraph 45). In addition, the Department proposes to add Paragraph 51 of the RA which states that all work plans, schedules and other documents required by the RA and approved by the Department are incorporated into the RA. The commenters disagree with these changes. The need and benefit of these changes is unexplained and unjustified. To the extent the Department has the right to impose such obligations under the Technical Rules and the applicable laws, the change is unnecessary and constitute surplusage. To the extent that the Department does not have the power to impose such obligations, the inclusion of such requirement is unauthorized. (3, 4, 8, 12, 13)

RESPONSE: In the summary to the proposal, the Department explained that it is replacing the phrase "violations of" with the phrase "failure to implement and maintain institutional controls including by way of example" in paragraph 27 of the RA (recodified as paragraph 42) and in paragraph 43 of the ACO (recodified as paragraph 45) in order to clarify what the violation is that is referred to in this paragraph. The summary also explains that paragraph 51 of the RA was added in order to make the RA and the ACO consistent. (See 37 N.J.R. 2929). The requirement at Paragraph 51 of the RA which states that all work plans, schedules and other documents required by the RA and approved by the Department are incorporated into the RA is necessary so that they are enforceable as part of the RA, including as an Order in Superior Court if necessary.

182. COMMENT: N.J.A.C. 7:26C-3.2(b) offers the alternative or requirement for some whose prior efforts under an MOA failed, to return under an ACO. The many harsh provisions of the ACO will discourage this approach and make re-entry by some volunteers far less likely. This provision seems more focused on “punishing” than encouraging a party that may have had previous financial or other difficulties that result in non-completion of a remedial activity under a prior MOA and who is now willing to re-enter the voluntary program and pursue or complete further remediation work. If a site does not pose risk to human health or the environment, and would otherwise not be the subject of Department enforcement through the issuance of a directive, we do not see why a party could not be permitted to pursue or complete the remediation under an MOA. While the commenters acknowledge in some instances the Department may be right to require use of an ACO in view of prior history, they also think that the Department should be more flexible and permit re-entry under an MOA when prior difficulties are explained and changed circumstances make future compliance more likely. (3, 4, 8, 12, 13)

RESPONSE: If the Department terminates a person’s MOA and receives another MOA application, the Department will evaluate the subsequent application in light of the person’s compliance history under the prior MOA(s). If the Department determines that

the MOA is not appropriate the person may conduct remediation at peril or may execute an ACO to gain Department oversight. There is no requirement to execute an ACO simply because a prior MOA was terminated, unless the site is scheduled for publicly funded remediation. See N.J.A.C.7:26C-3.4(c).

If a party has financial or other difficulties that might result in non-completion of a remedial activity under an MOA, that party should request that the Department terminate the MOA pursuant to N.J.A.C. 7:26C-3.3(b). If MOA termination is initiated by the party, not the Department, there are no negative consequences from the Department.

183. COMMENT: The Oversight Rules at 7:26C-3.2(a)6 should only require a $ 1,000 fee for a MOA if the Department has terminated a prior MOA "for the subject site" and not "for any other site." (11)

RESPONSE: As explained in response to previous comments, the submission of $1,000 along with an MOA application for parties who had had one or more MOAs terminated by the Department is to discourage frivolous applications for MOAs by that party. The requirement to pay $1000 is not related to the site conditions but to the party's history of non-compliance with the terms of the prior MOA.

184. COMMENT: The Department should encourage the voluntary cleanup process to the greatest extent possible. Instead, N.J.A.C. 7:26C-3.2(b)2 and 4 and 7:26C-3.4(c) the Department proposes to force an applicant for a voluntary cleanup into an Administrative Consent Order ("ACO") as a result of some prior actions by an entity that fits within an expanded definition of "applicant" at another site. (11)

RESPONSE: The purpose of N.J.A.C. 7:26C-3.2(b)4, which defines the term applicant, is to clarify the persons or entities that the Department includes in its use of the term "applicant." Further, defining the term "entity" will enhance the Department's ability to assess the compliance history of a party applying for an MOA. The applicant's compliance history is important in the Department's effort to increase the efficiency of

the Voluntary Cleanup Program by discouraging parties that have a history of non-compliance with MOAs to apply for another MOA.

185. COMMENT: N.J.A.C. 7:26C-3.2(b)4 defines the term "applicant" to include any sibling, spouse, child, parent, grandparent, spouse of the child, child of a sibling, or sibling of a parent of the applicant. Similar concepts are included for entities. The Department states that the clarification is necessary to ensure that a party who has entered into prior MOAs, two or more of which were terminated by the Department, does not try to apply for a third MOA (instead of an ACO as required by proposed N.J.A.C. 7:26C-3.2(b)1) by making the application in the name of a business associate or family member. The commenters disagree with this change in that a number of obligations are imposed in the regulations upon applicants that, by reason of this change, now seemingly apply to affiliates of the actual applicant. This is an unintended result of this drafting change and can be avoided by adopting a new term (e.g., “affiliates”) and then using the term only for the specific instance stated (to disable the ability of a prior applicant’s affiliates to do what the prior applicant cannot) without confusing the meaning or effect of the word “applicant.” (3, 4, 8, 12, 13)

RESPONSE: N.J.A.C. 7:26C-3.2(b)4 states that the definition of applicant contained therein is “for the purposes of this section.” Since the definition is limited to the term “applicant” as it is used only in N.J.A.C. 7:26C-3.2, the Department does not agree that obligations may be imposed on any affiliate of the applicant. The term applicant is only used in N.J.A.C. 7:26C-3.2 at N.J.A.C. 7:26C-3.2(b)1 which describes whether or not the Department is going to accept the applicant’s offer to conduct remediation. When read in this context, it is clear that the reference to applicant does not apply to any affiliates of the applicant as described in N.J.A.C. 7:26C-3.2(b)4. Thus, the Department will not adopt the new term as suggested by the commenters.

186. COMMENT: The proposed definition for “applicant” at N.J.A.C. 7:26C-3.2(b)4 is vague, broad and confusing. The proposed definition should be deleted. In the

alternative, the definition should clarify that an applicant does not include property owners when a prospective purchaser submits the application. (6, 12)

RESPONSE: The Department believes that the definition of "applicant" at N.J.A.C. 7:26C-3.2(b)4 is detailed and clear. The Department disagrees that the definition can be read to include property owners when it is a prospective purchaser that is submitting the application, unless the prospective purchaser is either a relative of the property owner as described in 3.2(b)4 or a part of the corporation, company, firm, partnership, joint stock company, or any other entity related to the property owner in a manner described in 3.2(b)4.

187. COMMENT: The requirement at 7:26C-3.3(a)3ii for the submission to the Department by an MOA recipient of all data "concerning the site and the contaminants at the site" is burdensome and overbroad. The party need only submit the information required under the Technical Rules related to the investigation and, if necessary, the remediation of a site. The proposal for the continuation of the obligation to submit data "after the termination of the memorandum of agreement" is unclear and suggests that the submission of information to the Department constitutes a continuing and perpetual obligation. (11)

188. COMMENT: N.J.A.C. 7:26C-3.3(a)3ii adds the requirement for the applicant to submit all data generated or collected concerning the site. The Department has record keeping and delivery requirements itself, including under the Open Public Records Act. It is inappropriate for the Department to require an applicant to submit all information in the Department's own possession and control. Further, the submittal of multiple paper copies of substantial reports is wasteful, and inconsistent with other Department programs to encourage source reduction of wastes and recycling. (3, 4, 8, 12, 13)

189. COMMENT: N.J.A.C. 7:26C-3.3(a)3ii adds a new requirement for the applicant to continue to submit all data generated or collected concerning the site even after the Department's termination of the MOA. We disagree with this new idea. MOAs are

voluntary cleanup oversight documents. They are not intended to be perpetual or all encompassing. Once terminated, the only obligation that should survive is the payment for pre-termination Departmental charges. All other obligations should cease. The Department does not have authority to impose this new obligation. Further it is not explained or justified. If adopted it will have a deleterious effect on the willingness of some to enter into the Voluntary Cleanup Program. (3, 4, 8, 12, 13)

190. COMMENT: N.J.A.C. 7:26C-3.3(a)3ii unnecessarily discourages entry into the Voluntary Cleanup Program. It is unclear how the Department will administer this program if the MOA has been terminated given that there would no longer be a case manager assigned to the matter. (6)

191. COMMENT: N.J.A.C. 7:26C-3.3(c)3 creates a substantial obstacle discouraging the use of the Voluntary Cleanup Program. For example, prospective purchasers seeking to investigate a property but then later choosing not to acquire that property would apparently have the obligation to continue submitting data even though they would have no control of the property. Part of the advantage of the Voluntary Cleanup Program is that the applicant can terminate the activities so that their exposure and cost can be both predictable and finite. With this proposed requirement in place, parties seeking to investigate properties for prospective purchase would be strongly discouraged from entering into the Voluntary Cleanup Program. The Department statement that “this proposed amendment will enhance the efficiency of site remediation by limiting the need to recollect data at a site for which data had already collected under previous MOA” is based on faulty assumptions. Further, it is unclear how the Department will administer this program if the MOA has been terminated given that there would no longer be a case manager assigned to the matter. (12)

RESPONSE to 187 through 191: The intent behind the Voluntary Cleanup Program is twofold. The first is to provide an alternate to remediating a site pursuant to an ACO for parties who wish to work with the Department to remediate non-priority contaminated sites that pose no immediate threat to human health or the environment. The second was

to allow the Department to obtain data about a site that was not a Department priority, and thus was not being remediated. The mechanism by which the person responsible for conducting the remediation was required to submit the data was an MOA.

The addition of N.J.A.C. 7:26C-3.3(a)3ii, which makes the obligation to submit all data generated or collected concerning contaminants at the site a part of the MOA, serves the second purpose of the Voluntary Cleanup Program. This requirement enhances the efficiency of site remediation by eliminating the need to re-collect data at a site for which the data was already collected by a person conducting remediation pursuant to a previous MOA. The requirement that the applicant submit all data to the Department is not new. This requirement is in N.J.A.C. 7:26C-3.3(b)1ii, which requires that a party that wishes to terminate his or her MOA must submit all data that the person has generated or collected concerning the site and contaminants at the site. Thus, the Department has always intended that the data be collected. The addition of N.J.A.C. 7:26C-3.3(b)1ii merely clarifies this intent.

Another reason for N.J.A.C. 7:26C-3.3(b)1ii is to ensure that a subsequent person that conducts additional remediation pursuant to another MOA at the same site won't have to repeat the work done by a previous person to obtain the same data. This will avoid redundancy of effort, and thus save the regulated community time and money and encourage source reduction.

The requirement to submit data to the Department after it has terminated an MOA in N.J.A.C. 7:26C-3.3(s)3ii only applies to data collected prior to the termination. Therefore, the requirement to submit data is not a perpetual one. A case manager remains assigned to the case until there is full compliance with all aspects of the MOA.

Finally, the Department agrees with the commenters that the phrase "all data generated or collected concerning the site…" in this provision may be overbroad. The data which the Department seeks from the person responsible for conducting the remediation is the data that is collected for the remediation done under the MOA. Therefore, the Department is

modifying N.J.A.C. 7:26C-3.3(a)3ii on adoption by adding the phrase "while conducting remediation pursuant to the MOA" after the phrase "all data generated or collected."

192. COMMENT: N.J.A.C. 7:26C-3.3(c)1i, even as amended, is unnecessary. The Department's primary purpose for "unilateral" termination of an MOA appears to be based on adverse impacts to the Department's workload for inactive Voluntary Cleanup Program cases. It is unclear as to how the lack of submissions affects workload. The Department instead should provide notification to all the appropriate parties that the matter will be identified as "inactive" and will be removed from its current case manager or, alternatively when the site is high priority, assigned for enforcement. The use of an "inactive" category would allow for the Department to retain oversight and reassignment without significant complication. The Department could impose a limited fee consistent with the time involved in reactivating the case and reassigning a case manager. (6, 12)

RESPONSE: The requirement to comply with the schedule submitted by the person responsible for conducting the remediation is part of the MOA. In order for the Department to maximize its limited personnel resources, it must have an idea as to when to expect submittals from a person conducting remediation pursuant to an MOA so that it is able to plan its workload so that it can assign those resources in an efficient and effective manner. If a person does not believe that it can meet the schedule that it submitted, the person can either request that the schedule be adjusted, or request that the MOA be terminated pursuant to N.J.A.C. 7:26C-3.3(b). However, if the Department receives no communication from the person, the assumption has to be made that the person is no longer conducting the remediation and the MOA will be terminated.

Designating the case as inactive, as suggested by the commenter, will result in additional work for the Department (for example, the Department will have to notify the person, and develop a database to maintain a list of inactive cases and then reactivate the case when the person responsible for remediation decides to continue with the remediation). The Department will consider the commenter's suggestion to charge a fee to maintain a case as inactive for future rulemakings.

193. COMMENT: The Department proposes to delete the phrase "for any six-month period or more" from N.J.A.C. 7:26C-3.3(c)1i. This provision was originally included in the Oversight Rules to allow a person responsible for conducting the remediation pursuant to the schedule submitted by the person as part of his/her MOA application to get back on schedule prior to the Department terminating the MOA. The Department does so because it concludes that the six-month period to allow the person to come into compliance with the schedule which is part of the MOA is no longer necessary. The commenters are unable to come to the same conclusion as the Department. If the Department reaches its conclusion because with its proposal the responsible person will have at least the same cure opportunities and periods as it has under the current rules, then the commenters do not oppose the change. But if the restructuring by the Department reduces the opportunities and periods, and the Department is opining that despite the reductions the original opportunities and periods are somehow not necessary, the commenters disagree. The Department itself is often unable to timely respond to a number of inquiries and submissions and believe that the six month minimum is a reasonable minimum cure period and prefer that it be retained as such a minimum. In this regard, the Department's statement "Similarly, as a matter of policy, the Department intends to allow a period of time to correct two other deficiencies prior to initiating termination of the MOA. These deficiencies are: failure to pay oversight costs and failure to submit documents that comply with the Technical Requirements for Site Remediation. Again, such allowance is intended to create parity for persons remediating sites pursuant to an MOA and persons remediating sites in non-MOA circumstances." is acceptable if it expands the cure opportunities and periods available to those in the voluntary cleanup program, rather than reducing them. Reducing those rights and flexibility to achieve parity with those not voluntarily remediating (those remediating under ACOs are rarely volunteers) is undesirable. (3, 4, 8, 12, 13)

RESPONSE: When the Department established the six-month delay in the existing rules, it did not consider potential conflicts with the grace periods it would be required to establish under the Grace Period Law. In proposing the amendments to be adopted

herein, the Department evaluated how to best manage the universe of cases for which it provides oversight and concluded that parity was necessary in order to consistently manage the pace of remediation. The Department's deletion of "for any six month period or more" from N.J.A.C. 7:26C-3.3(c)1i allows the responsible person to have the same cure opportunities and periods as those remediating sites under other oversight mechanisms.

194. COMMENT: The provisions for providing notice for "termination" at N.J.A.C. 7:26C-3.3(c)3 should require that the notification be sent to all of the parties involved. Frequently, communications are currently mailed to the applicant rather than the consultant or other designated agent or contact resulting in miscommunication. The regulations should specifically state the notification is to be provided to the applicant, the property owner and all parties designated as a contact on the MOA application or amendments thereto. If the purpose of notification is to provide communication of its intent to alter the status of the MOA (whether it is to terminate or to place on an inactive list), the regulation should require the maximum effort to effectuate that communication. (6, 12)

RESPONSE: The Department agrees with the commenters' suggestion and has amended N.J.A.C. 7:26C-3.3(c)3 upon adoption to require that notification of the termination will be sent to the MOA applicant, property owner and all parties designated as a contact on the MOA application or amendments thereto, if any of theses parties are different from the person responsible for conducting the remediation.

195. COMMENT: N.J.A.C. 7:26C-3.3(c)4 is both confusing and unnecessary. The Department already has the authority to pursue enforcement actions against responsible parties for violations of any statute or implementing rule. The addition of this provision can be interpreted as imposing a new basis of enforcement related to the termination of an MOA. Hence, parties would become less willing to allow prospective purchasers or other parties interested in remediating sites to enter the Voluntary Cleanup Program through the use of a MOA. (6, 12)

196. COMMENT: N.J.A.C. 7:26C-3.4(c) improperly elevates the enforcement priority for a site simply due to a termination of a MOA. Adoption of this amendment would discourage use of the Voluntary Cleanup Program. (6)

RESPONSE to 195 and 196: As the commenter notes, the Department already has the authority to pursue enforcement actions against responsible parties for violations of any statute or implementing rule. The Department is merely clarifying this enforcement ability to encourage parties to comply with the terms of their MOAs since the Department has made the policy decision not to take enforcement action against parties (even responsible parties) that are conducting remediation activities at sites in compliance with a MOA.

Amendments to N.J.A.C. 7:26C-10

197. COMMENT: MOAs and other oversight documents (such as administrative consent orders and remediation agreements) constitute contracts between the Department and the party or parties subject to those existing oversight documents. The Department cannot unilaterally alter any such contract through subsequent adoption of a regulation, at least to the detriment of the regulated party. The very terms of the signed instruments do not permit such a change. Many parties entered into such oversight documents relying on their very terms and the contract rights flowing from the agreement with the Department. If the Department intends by the Proposal to impose deleterious or more stringent requirements, as opposed to less stringent or ameliorative measures, on those existing agreements and parties without their consent, then the commenter opposes the effort to do so and believes it cannot be effective. (3, 4, 8, 12, 13)

198. COMMENT: Proposed N.J.A.C. 7:26C-10.2(d) offers remediators who are parties to either an RA or an ACO the opportunity to reopen these documents and include in them provisions that will enable them to take advantage of the penalty provisions, including applicable grace periods, that are included in the proposed amendments to the penalty provisions of the Oversight Rules at N.J.A.C. 7:26C-10.3. Such a process is not

required in that the Department is bound to offer those parties the ameliorative benefits of the Grace Period Law without necessity of those parties to agree to any more harsh provisions of the Proposal. The legislative intent, and the necessary effect of the Grace Period Law, was to waive the harsh stringent provisions of any ACO or RA inconsistent with that law, and was not to otherwise require a change in the contract to the detriment of the remediating party. There was no price specified in the Grace Period Law for a regulated party to obtain the protection it affords. The Department cannot unilaterally demand a price in exchange for the applicability of the law. The Department cannot act in a manner inconsistent with legislative intent. The Department cannot make an agreement that is inconsistent with the Grace Period Law - to the extent an RA or ACO is inconsistent to the detriment of the remediating parties, that inconsistency is corrected automatically by operation of law. (3, 4, 8, 12, 13)

RESPONSE to 197 and 198: The Department has acknowledged in the rule summary that the grace period law does apply to cases with existing oversight documents. For cases with existing, non-MOA oversight documents, the Department intends to allow a grace period for the correction of minor violations prior to the assessment of any penalty, whether they be penalties stipulated in the oversight document or penalties assessed pursuant to N.J.A.C. 7:26C-10. Parties conducting remediation under an existing oversight document will not have to request that the Department amend the existing document in order to realize the benefits of a grace period. Thus the Department is providing the relief intended under the grace period statute by applying ameliorative measures to existing oversight documents where they might not otherwise exist.

As the commenters note, oversight documents such as ACOs and RAs are contracts between a party and the Department, which define the terms of an agreement to conduct remediation. The proposed regulations do not make any unilateral changes to the ACO. However, some oversight documents executed prior to the effective date of these rules contain stipulated penalty provisions that may result in penalties that are higher than penalties that would be assessed under these new rules. Accordingly, in order to provide

the ameliorative effects of the Grace Period Law to a party that has executed an ACO or RA prior to the effective date of these rules, the Department has included the option for parties under an existing ACO or RA that includes stipulated penalties to amend their existing documents such that the penalty calculation procedures in N.J.A.C. 7:26C-10 will apply instead of the stipulated penalties. Should a party choose not to amend its oversight document, the penalties stipulated in the oversight document will continue to apply. In this way the Department has accommodated those parties who prefer the new penalty scheme, yet avoided imposing that scheme on those who prefer the penalty scheme stipulated in their oversight document.

199. COMMENT: The Department's proposed conditions at N.J.A.C. 7:26C-10.3(c)1 through 4 for determining whether a violation is "Minor" misses an important statutory requirement. In particular, the proposal omits the following statutory criteria from the regulatory determination of a Minor violation:

The violation poses minimal risk to the public health, safety and natural resources; (see N.J.S.A. 13:1D-129(b)(2)).

Interestingly, the Department parrots the statute in the "Summary" section of the proposal, but fails to include the key condition in the relevant regulatory section (see 37 N.J.R. 2924).

The omission can not be explained as a mere oversight by the Department. The Proposal underscores the fact that the Department never fully considered this key provision of the Act as it determined the type of violations to be defined as minor and the length of the grace period to be granted for each designated minor violation. Under the "minimal risk" criteria, procedural, paperwork and other administrative violations should be considered minor under the Act. As a result of this serious omission, the Department should reassess each of the violations listed in the proposal in order to fully and completely implement its statutory mandate under the Act. (11)

RESPONSE: As explained in the proposal at 37 N.J.R. 2924, the Department classified all violations that meet the criteria at N.J.S.A. 13:1D-129.b(2), (3) and (6) as minor. This is how the Department determined which of the violations listed in the table at N.J.A.C. 7:26C-10.4 would obtain the "minor" designation. The remaining criteria at N.J.S.A. 13:1D-129.b depend on the conduct of the violator. Accordingly, the Department included in its rules at N.J.A.C. 7:26C-10.3(c) the remaining Grace Period Law criteria iterated at N.J.S.A. 13:1D-129.b so that, in the event that a violation that is designated as minor in the grace period tables at N.J.A.C. 7:26C-10.4 fails to meet the additional criteria listed at 10.3(c), the Department may treat that violation instead as non-minor.

200. COMMENT: The Department proposes new N.J.A.C. 7:26C-10.3(d)3 in order that it can verify that the person responsible for a minor violation has taken appropriate measures to achieve compliance within the grace period. The responsible person must submit, in writing, confirmation, certified and signed by the person responsible for conducting the remediation, information detailing the corrective action taken or compliance achieved. The Department may perform an investigation to determine that the information is accurate and that compliance has been achieved. Nothing in the Grace Period Law supports the requirement for such a process. It is both ill advised and inappropriate. The Grace Period Law requires that its benefits be made available on the terms and conditions provided by the law. The imposition of a detailed certification, with the time and expense and other issues associated with its preparation, execution and submission, particularly as to remediation projects sometimes being managed from elsewhere than in New Jersey, are significant and unauthorized impediments to the achievement of the goals adopted by the Legislature. If the required steps and conditions under the Grace Period exist, the failure to follow these added steps and requirements should not and can not deny the benefits of the Grace Period Law to the remediating party. (3, 4, 8, 12, 13)

RESPONSE: N.J.A.C. 7:26C-10.3(d)3 contains the steps that a party must take in order to document that the violation has been corrected within the grace period. This section of

the rule implements the Grace Period Law mandate at N.J.S.A. 13:1D-127 that "upon identification of a violation . . . the department shall issue an order, notice of violation, or other enforcement document to the person responsible for the violation which: (1) identifies the condition or activity that constitutes the violation and the specific statue, rule or regulation, or permit condition violated; and (2) notifies the person responsible for the violation that a penalty may be imposed unless the activity or condition constituting the minor violation is corrected and compliance is achieved within the period of time specified in the order, notice of violation, or other enforcement document, as the case may be." Moreover, as a practical matter, including this information in the rule clearly identifies the procedure by which the regulated community may correct the violation and avoid penalties. If the Department did not include the procedures identified in N.J.A.C. 7:26C-10.3(d)3, confusion would result regarding how a party who corrected the violation must communicate compliance to the Department and, on the part of the Department, whether the violation had been corrected within the grace period or whether a penalty action is warranted. The procedure is also consistent with that followed in other Department programs.

201. COMMENT: Under proposed N.J.A.C. 7:26-10.3(d)4, if a person responsible for a minor violation seeks additional time beyond the grace period to achieve compliance, the Department may extend the grace period for up to an additional 90 days. The commenters agree with this. When the purported violation is related to problems resulting from actions or omissions of third parties not in the control of the remediating party, the Department should be particularly lenient. At present there are many matters in which it has taken years for the Department to respond to submissions by the regulated community. As a result, it is not surprising that the existence of errors or omissions, apparently treatable by the Department as violations, may not have been (or hereafter be) identified for lengthy periods, sometimes years. After such long periods, and the compounding effect of changes in facts and circumstances occurring in those periods (examples of which are provided elsewhere in these comments), the alleged violation may in fact take longer periods to cure than if it had been earlier identified. In that

instance, the Department should allow sufficiently long periods to identify and/or cure violations as relate to the entire facts and circumstances of the remediation matter. N.J.S.A. 13:1D-127 expressly tolls the grace period for delays by reason of Departmental delays. The Department should be clearer about the effect of its own delays on the identification and correction of violations. (3, 4, 8, 12, 13)

202. COMMENT: Many of the events identified as violations in N.J.A.C. 7:26-10.3(d)4 should not be treated as fines because of the many and lengthy delays in so many matters for the Department to respond to submissions by the regulated community. As a result, it is not surprising that the existence of errors or omissions, apparently treatable by the Department as violations, may not have been (or hereafter be) identified for lengthy periods, sometimes years. After such long periods, and the compounding effect of changes in facts and circumstances occurring in those periods, and the problems posed by these delays, and the other unique aspects of remediation, support our view that the Department should not treat as many of the errors and omissions it identifies as subject to enforcement at all. (3, 4, 8, 12, 13)

RESPONSE to 201 and 202: The Grace Period Law at N.J.S.A. 13:1D-127b tolls the compliance period if compliance is not achieved within that period due to a lack of action or response on the part of the Department. Therefore, if inaction by the Department results in a party's inability to comply, penalties will not be assessed.

N.J.S.A. 13:1D-127b also addresses the issue of requesting an extension of a grace period. The process for requesting an extension and the criteria the Department will use to determine if it will grant the extension request are described in N.J.A.C. 7:26C-10.3(d)4. The criterion at N.J.A.C. 7:26C-10.3(d)4ii states that the Department may consider if the delay was caused by circumstances beyond the control of the violator. This addresses the commenters' concern about a violation that is a caused by "actions or omissions of third parties not in the control of the remediating party."

203. COMMENT: Under proposed N.J.A.C. 7:26-10.3(d)4, if a person seeks additional time beyond the grace period, in order to obtain an extension, the person responsible for the violation must submit a written request for an extension one week prior to the expiration of the initial grace period, and explain why additional time is needed. A written request for an extension need not always be made within this period. Nothing in the Grace Period Law requires that degree of notice. Indeed, there may be circumstances where both the applicant and the Department would allow a late request for an extension, perhaps even an after the fact extension. The commenters understand the Department's preference for a minimum prior request and suggest that all concerns can be addressed by introducing the time period with language such as, "Except for good cause shown for a later request. . . ."

In addition, N.J.A.C. 7:26-10.3(d)4 requires that the extension request be signed and certified. This is not required by the Grace Period Law and is both ill advised and inappropriate. The imposition of a required detailed certification as a condition of an extension under the Proposal, with the time and expense and other issues associated with its preparation, execution and submission, particularly as to remediation projects sometimes being managed from elsewhere than in New Jersey, are significant and unauthorized impediments to the achievement of the goals adopted by the Legislature. If the required steps and conditions under the Grace Period Law exist, the failure to achieve these added steps and requirements should not and cannot deny the benefits of an extension under the Grace Period Law to the remediating party. (3, 4, 8, 12, 13)

204. COMMENT: The Grace Period Law allows for the extension of a grace period of Minor violations for an additional time period not to exceed 90 days (see N.J.S.A. 13:1D-127b). The law provides the Department with the guidance that should lead to a willingness to grant additional grace periods for Minor violations. Unfortunately, the Department's proposal makes it too difficult to receive an additional grace period. The Department's proposed criteria for an additional grace period should promote rather than discourage the objectives of the Act. For example, an applicant for an additional grace

period should not be required to make such a request "no later than one week before the end of the specified grace period." Also, as set forth in the Act, "one of the goals of the [Department's] regulatory program" should be to implement the Act's objectives of promoting compliance for Minor violations within grace periods rather than the "threat or imposition of monetary sanctions" (see N.J.S.A. 13:1D-125). To that end, the Department should propose a rebuttable presumption that an additional grace period will be granted. (11)

205. COMMENT: Not all of the procedures imposed under the Proposal that were intended by the Legislature to perfect a cure within a grace period, and/or to avoid repeat occurrences, are appropriate or justified. For example the cure does not need to be accompanied by a certified statement under the statute and it is inappropriate to require such in every instance. As another example, the procedures for requesting an extension of a grace period need not be observed, filed by the date, or pursued in the manner provided. In some instances these procedures add difficulty, time and expense to a process unnecessarily and without explanation by the Department as to the need for same. The Legislature did not authorize or require all such procedures, and they should be greatly simplified. (3, 4, 8, 12, 13)

RESPONSE to 203 through 205: The Grace Period Law grants the Department discretion in codifying rules to implement the statute. The Department determined the procedure to ensure that the grace period requirements are implemented in an expeditious and efficient manner. For example, the requirement at N.J.A.C. 7:26E-10.3(d)3 to certify the corrective actions taken to cure the violation cited by the Department within the specified grace period allows for a reasonable amount of certainty that the violator corrected the violation in a timely manner without having to expend the Department's limited resources to visit the violator's site to ensure compliance. In fact, the Grace Period Law at N.J.S.A. 13:1D-127c gives the Department the discretion to require written certification or other documentation to verify that compliance has been achieved.

The requirement that a request for an extension be submitted one week prior to the expiration of the initial grace period is necessary in order to assure that the Department does not assess penalties when an extension would be warranted instead. Parties addressing violations will frequently be aware well ahead of the expiration of the grace period that an extension will be needed. The Department also needs time to consider the extension request and respond. Therefore, the Department does not agree that the requirement that a request for an extension be received prior to the applicable compliance date is unreasonable.

However, the commenters point out that there may be times when a party is unable to submit the extension request in advance of the grace period expiration date. The Department has the discretion to accept and approve those requests submitted closer to or beyond the compliance date and the discretion to refrain from penalty assessment. Therefore, the Department has added the following language to N.J.A.C. 7:26C-10.3(d)4 upon adoption: "If the person is unable to meet this deadline due to extenuating circumstances, the person may still request the extension, which request shall explain the reason for the delay in requesting the extension."

206. COMMENT: In regard to the penalty table, there are circumstances where delayed compliance with ISRA should be classified at N.J.A.C. 7:26C-10.4(c) as a minor violation curable within some period without imposition of a penalty, and not treated in each instance as a non-minor violation. In many cases the base penalty assessed for such violations will be excessive precisely because the harm from the violation is minor or non-existent. There is a distinction between a late filing of a general information notice prior to the occurrence of a closing of a sale, and the failure to file at all before the closing of a sale or between a late or absent filing on a site that has never been before the Department in a prior ECRA or ISRA case and failure where the site would be eligible for an expedited review or a remediation in progress waiver. The penalty matrix should be revised to similarly distinguish different levels of violation, and be more tolerant of such issues, and allow a grace period more often. The Legislature intended the

Department to more finely distinguish between minor procedural violations and those that pose major threats to health, safety and the environment than the Department distinguishes in this instance. A late filing does not always have that result, and yet the Department fails to recognize that fact. The Proposal's treatment of every such violation as non-major is erroneous. The Department has identified too many violations altogether, classified too many violations as non-minor, imposed excessive base penalties and failed to focus or implement the ameliorative aspects of the Grace Period Law. (2)

RESPONSE: The ISRA violations that the commenter focuses on, which have been designated as non-minor, have been designated as such not because their occurrence poses an impact or threat to human health and the environment. Instead, many of the ISRA violations designated as non-minor were so designated by the Department because they failed to meet the other criteria of "the violation undermines the intent of the program and/or cannot be corrected within a grace period." The intent of ISRA is to compel remediation prior to the cessation or transfer of subject industrial establishments. Multiple options exist to accommodate cessation or transfer of uncontaminated or minimally contaminated properties, to allow transfer prior to the completion of remediation or to acknowledge prior remediation. When parties fail to comply, and fail to take advantage of these options, they undermine the intent of ISRA. Additionally, when a party ceases operations or proceeds with a transaction in violation of ISRA, that violation cannot be corrected since the cessation or transaction has already occurred. In some instances the Department designated as minor violations that could not be corrected within a grace period where the Department felt the violation clearly did not warrant an immediate penalty (such as some notification violations), even though the statute indicates that they should be non-minor. However, if such a violation also met the criteria of undermining the intent of the program the Department designated it as non-minor. The Department maintains its discretion regarding penalty assessment for the violations of concern to the commenter and, in deciding whether to assess a penalty and if so how much the penalty should be, can take into consideration whether an ISRA-subject party was simply late or completely delinquent in meeting their ISRA obligations, for

example such as filing a General Information Notice after a transaction versus failing to file the General Information Notice at all.

Miscellaneous Comments

207. COMMENT: Declarations of environmental restriction and deed notices constitute recorded documents and/or contracts burdening real property, affecting the owners and occupants of that real property, and affecting the rights and interests of others, such as lenders. Such existing recorded documents were approved by the Department and relied on by those parties and others, such as the remediating parties, subject to those documents and associated Department approvals (such as no further action letters). The Department cannot unilaterally alter any such recorded document or approval, in a manner deleterious to the parties burdened or benefited thereby, through subsequent adoption of a regulation. The very terms of the documents and approvals do not permit such a change, although the Department can waive its rights, or correct some errors, or alleviate some harshness, unilaterally because it benefits those other parties, and does not harm them. To the extent that the Proposal purports to unilaterally act to their detriment it is both inappropriate and invalid to do so. (3, 4, 8, 12, 13)

208. COMMENT: It is unclear to what extent the Department believes this Proposal applies to existing documents and cases. Certainly to the extent it is ameliorative, it should be applied for the benefit of those remediating parties as the Legislature intended it to be. But if the Proposal changes the rules to the detriment of those in or out of the process, worsening their obligations or exposure, it should not and cannot be made retroactive. For example, several of the amendments cannot be made to apply to recorded deed notices or declarations, or existing remediation agreements, to the extent that they impose exposure for violations, or new obligations that did not previously exist. (3, 4, 8, 12, 13)

RESPONSE to 207 and 208: The Department does not intend to apply the grace period requirements retroactively. It will not look for violations that occurred prior to the

adoption of these rules and apply grace period provisions. However, if a violation of a document that was in effect prior to the adoption of the grace period provisions occurs after effective date of these rules, the Department will cite the violation pursuant to the grace period provisions in effect when the violation occurs.

209. COMMENT: The Department should adopt a regulation effectuating the limitation imposed by the Legislature limiting oversight fees to 7.5 percent of the total cost of remediation. That regulation should establish a specific procedure for parties billed for oversight costs to limit any payment if the full payment will exceed that statutory limitation until such time, if any, when the oversight costs billed due not exceed 7.5 % of the total remediation costs. (6)

RESPONSE : This comment is beyond the scope of this rulemaking. The Department will consider the comment for future rulemakings.

Summary of Agency-Initiated Changes:

1. The Department has determined that the table at N.J.A.C. 7:26C-10.4 included an error in the Base Penalty column at N.J.A.C. 7:26E-4.3(a). The violation is a non-minor violation concerning failure to conduct a remedial investigation of soil. The violation is similar to N.J.A.C. 7:26E-4.4(a), failure to conduct a remedial investigation of ground water when required; N.J.A.C. 7:26E-4.5(a), failure to properly conduct a remedial investigation of surface water, wetlands and sediment; and N.J.A.C. 7:26E-4.6(a), failure to include in the remedial investigation an investigation of all landfills. These are all non-minor violations which have base penalties of $8,000. The Department has changed the amount of the penalty for a violation of N.J.A.C. 7:26E-4.3(a) from $5,000 to $8,000 upon adoption to make the penalty amount consistent with the other like violations.

2. The Department has determined that the table at N.J.A.C. 7:26C-10.4 included an error in the Base Penalty column at N.J.A.C. 7:26E-4.7(a). The violation of N.J.A.C. 7:26E-

4.7(a) is designated as minor concerning failure to conduct an ecological risk assessment. The violation is similar to N.J.A.C. 7:26E-4.4(a), failure to conduct a remedial investigation of ground water when required; N.J.A.C. 7:26E-4.5(a), failure to properly conduct a remedial investigation of surface water, wetlands and sediment; and N.J.A.C. 7:26E-4.6(a), failure to include in the remedial investigation an investigation of all landfills. These are all non-minor violations which have base penalties of $8,000. Therefore for a violation of N.J.A.C. 7:26E-4.7(a), the Department has changed the designation of the violation from minor to non-minor and changed the amount of the penalty from $5,000 to $8,000 upon adoption to make the penalty amount consistent with the other like violations.

3. The Department has determined that the table at N.J.A.C. 7:26C-10.4 included an error in the Base Penalty column at N.J.A.C. 7:26E-8.5(c)1. The violation of N.J.A.C. 7:26E-8.5(c)1 is designated as minor concerning failure to certify the protectiveness of the institutional controls of a deed restriction or declaration of environmental restriction. The violation is similar to N.J.A.C. 7:26E-8.6(c)1, failure to certify the protectiveness of the institutional control of a classification exception area; and N.J.A.C. 7:26E-8.7(c)1, failure to certify that engineering or institutional controls are being properly maintained. These are designated as minor violations but have base penalties of $3,000. Therefore for a violation of N.J.A.C. 7:26E-8.5(c)1 the Department has changed the amount of the penalty from $5,000 to $3,000 upon adoption to make the penalty amount consistent with the other like violations.

4. The Department has determined that the table at N.J.A.C. 7:26C-10.4 included an error in the Base Penalty column at N.J.A.C. 7:26B-3.3(a). The violation of N.J.A.C. 7:26B-3.3(a) concerns failure to submit a complete and accurate General Information Notice and is designated as minor. When proposing the penalty the Department mistakenly considered this as a violation to submit a General Information Notice within five calendar days after the occurrence of a transaction event. This violation is noted at N.J.A.C. 7:26B-3.2(a) and is designated as non-minor because it means that the person

did not notify the Department of the ISRA-triggering event, which undermines the goal of the program. The violation at N.J.A.C. 7:26B-3.3(a) means that the violator notified the Department of the ISRA-triggering event, but the notification was incomplete or inaccurate. The violation was accurately characterized as minor but the penalty established failed to reflect that this is a minor administrative violation and the penalty therefore should be $4,000, not $8,000 as indicated in the proposal. Therefore the Department has changed the amount of the penalty for a violation of N.J.A.C. 7:26B-3.3(a) from $8,000 to $4000 upon adoption.

5. The Department has determined that the table at N.J.A.C. 7:26C-10.4 included errors in the Type of Violation, Grace Period Days and Base Penalty columns at N.J.A.C. 7:14B-8.2(a)1 and 7:14B-8.2(a)2. In developing the violations table for the proposal, the Department identified some requirements in the UST rule that are duplicative of requirements in the Technical Rules. For example, in the violations table, the violation of the UST rule at N.J.A.C. 7:14B-8.2(a)1 is stated as failure to perform a remedial investigation in accordance with N.J.A.C. 7:26E-4. The violations for failing to perform a remedial investigation are in the Technical Rules at N.J.A.C. 7:26E-4.1(b) through 4.7(b). Initially the Department intended to defer the determination of violation type, grace period and base penalty for violations of N.J.A.C. 7:14B-8.2(a)1 and (a)2 by cross-reference to the related Technical Requirement violation. However, upon further deliberation, the Department decided that it may need to cite the UST rules in certain instances, such as if a party fails to perform a remedial investigation of a regulated underground storage tank at all, as opposed to implementing a remedial investigation that does not meet all the specifications included at N.J.A.C. 7:26E-4. The Department erred in not removing the cross-reference prior to publication and not including a type, grace period days and base penalty determination instead for this violation. This was the Department's intent, as evidenced by the numerous other violations listed in the rule which include a requirement to comply with another rule section, each of which has a type determination, grace period days, if applicable, and a base penalty. Upon adoption, the Department has deleted the phrase "Defer to specific 7:26E-4 violations" in the "Type

of Violation" and "Base Penalty" columns for N.J.A.C. 7:14B-8.2(a)1 and 2 and designated the violation as non-minor with an $8,000 base penalty in both of these instances.

6. The Department has determined that the table at N.J.A.C. 7:26C-10.4 included errors in the Type of Violation, Grace Period Days and Base Penalty columns at N.J.A.C. 7:14B-9.2(b). In developing the violations table for the proposal, the Department identified some requirements in the UST rule that are duplicative of requirements in the Technical Rules. The violation of the UST rule at N.J.A.C. 7:14B-9.2(b) is stated as failure to develop and implement a closure plan for a regulated underground storage tank pursuant to the procedures set forth in N.J.A.C. 7:26E-6.3(b). The procedures for properly closing a regulated underground storage tank are in the Technical Rules at N.J.A.C. 7:26E-6.3(b)1 through 6.3(b)6v. Initially the Department intended to defer the determination of violation type, grace period and base penalty for the violation of N.J.A.C. 7:14B-9.2(b) by cross-reference to the related Technical Rules violation. However, upon further deliberation, the Department decided that it may need to cite the UST rules in certain instances, such as if a party fails to keep the closure plan at the facility and make it available for inspection which is also a requirement of N.J.A.C. 7:14B-9.2(b), but is not a requirement of N.J.A.C. 7:26E-6.3(b). The Department erred in not removing the cross-reference prior to publication and not including a type, grace period days and base penalty determination instead for this violation. This was the Department's intent, as evidenced by the numerous other violations listed in the rule which include a requirement to comply with another rule section, each of which has a type determination, grace period days, if applicable, and a base penalty. Upon adoption, the Department has deleted the phrase "Defer to specific 7:26E-6 violations" in the "Type of Violation" and "Base Penalty" columns for N.J.A.C. 7:14B-9.2(b) and designated the violation as minor with a $5,000 base penalty.

7. The Department has determined that the table at N.J.A.C. 7:26C-10.4 included an error in the Base Penalty column at N.J.A.C. 7:14B-9.5(b). The violation is a minor

violation related to failure to have an individual certified in subsurface evaluation prepare a Site Investigation Report concerning a regulated underground storage tank. While the Department accurately designated the violation as minor, the Department incorrectly set the base penalty at $3,000. The penalty should be $8,000. The Department has determined that a higher penalty amount should apply to violations that involve a person's failure to involve certified contractors when required. Therefore the Department has changed the amount of the penalty for a violation of N.J.A.C. 7:14B-9.5(b) to $8,000 upon adoption.

Federal Standards Statement

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

The amendments to the Oversight Rules which implement the Grace Period Statute 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 Oversight Rules, the Spill Compensation and Control Act, N.JS.A. 58:10-23.11 et seq., is the only one that contains references to the National Contingency Plan, 40 C.F.R. 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 Department oversight. Therefore, there are no Federal provisions with which to compare the provisions of the Oversight Rule. Based on this analysis, the Department has determined that this adoption does not contain any standards or requirements that exceed those imposed by Federal law, and no further analysis under Executive Order 27 or N.J.S.A. 52:14B-1 et seq. is required.

The Department has conducted an analysis of the new grace period provisions in the adopted rules and has determined that the grace period provisions do not exceed any standard or requirement imposed by Federal law. The grace period provisions in the adopted rules are consistent with Federal law and Federal penalty assessment guidance. Accordingly, no Federal Standard Analysis is required with regard to the amendment of the rules to include a grace period.

Full text of the adopted rule with amendments follows (additions to the proposal indicated in boldface with asterisks *__thus__*; deletions from the proposal in brackets with asterisks *[thus]*:

CHAPTER 26C
DEPARTMENT OVERSIGHT OF THE REMEDIATION OF CONTAMINATED SITES

SUBCHAPTER 3. ADMINISTRATIVE PROCESS FOR VOLUNTARY CLEANUPS

7:26C-3.3 Memorandum of agreement by rule

(a) Upon the applicant's receipt of the Department's written acceptance of the applicant's offer to conduct the remediation, pursuant to N.J.A.C. 7:26C-3.2(b)I the applicant has a memorandum of agreement with the Department which includes:

1-2. (No change from proposal.)

3. The following provisions:

i. (No change from proposal.)

ii. The applicant shall submit all data generated or collected *<u>while conducting remediation pursuant to the MOA</u>* concerning the site and the contaminants at the site, and this obligation continues, for data generated or collected prior to termination, after the Department's termination of the memorandum of agreement.

iii.-v. (No change from proposal.)

(b) (No change from proposal.)

(c) The Department may unilaterally terminate a memorandum of agreement pursuant to this section as follows:

1. – 2. (No change from proposal.)

3. To terminate a memorandum of agreement pursuant to this section, the Department will issue a Notice of Termination to the person responsible for conducting the remediation *and to the MOA applicant, property owner and all parties designated as a contact on the MOA application or amendments thereto if any of these parties are different from the person responsible for conducting the remediation. The notification shall* *[that]* contain*[s]* the following:

i. – v. (No change from proposal.)

4. (No change from proposal.)

SUBCHAPTER 10. CIVIL ADMINISTRATIVE PENALTIES AND REQUESTS FOR ADJUDICATORY HEARINGS

7:26C-10.3 Grace period applicability; procedures

(a) Each violation identified in the penalty table at *[N.J.A.C. 7:26C-10.4(e)]* *N.J.A.C. 7:26C-10.4(c)* by an "M" in the Type of Violation column, for which conditions at (c) below are satisfied, is a violation and is subject to a grace period, the length of which is indicated in the column with the heading "Grace Period."

(b) Each violation identified in the penalty table at *[N.J.A.C. 7:26C-10.4(e)]* *N.J.A.C. 7:26C-10.4(c)* by an "NM" in the Type of Violation column is a non-minor violation and is not subject to a grace period.

(c) (No change from proposal.)

(d) For a violation determined to be minor under (c) above, the following provisions apply:

1. – 3. (No change from proposal.)

4. If the person responsible for the minor violation seeks additional time beyond the specified grace period to achieve compliance, the person shall request an extension of the specified grace period. The request shall be made in writing, certified in accordance with N.J.A.C. 7:26C-1.2, no later than one week before the end of the specified grace period and shall include the anticipated time needed to achieve compliance, the specific cause or causes of the delay, and any measures taken or to be taken to minimize the time needed to achieve compliance. *If the person is unable to meet this deadline due to extenuating circumstances, the person may still request the extension, which request shall explain the reason for the delay in requesting the extension. * The Department may, at its discretion, approve in writing an extension, which shall not exceed 90 days, to accommodate the anticipated delay in achieving compliance. In exercising its discretion to approve a request for an extension, the Department may consider the following:

i. – iv. (No change.)

5. – 6 (No change.)

(e) The provisions of this subchapter, including the penalty provisions of N.J.A.C. 7:26C-10.4, do not apply to persons remediating sites pursuant to a Memorandum of Agreement.

7:26C-10.4 Civil administrative penalty determination

(a) The amount of a civil penalty shall be determined as follows:

1. The Department shall identify the violation listed in the table in *[(d)]* *(c)* below;

2.-4. (No change from proposal.)

(b) (No change from proposal.)

(c) 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.

2. The Technical Requirements for Site Remediation N.J.A.C 7:26E					
	Subchapter & Violation	**Citation 7:26E-**	**Type of Violation**	**Grace Period (Days)**	**Base Penalty**
3	**Preliminary Assessment and Site Investigation**				
	* * *				
	Failure to *[conduct further ecological investigations as part of the remedial investigation when the baseline evaluation indicates such investigation is warranted.]* *draw accurate conclusions regarding the need for further ecological investigation based on the requirements in this section.*	7:26E-3.11(a)4	*[NM]* *M*	*60*	*[$8,000] * *$4,000*

	* * *				
	Failure to conduct a remedial investigation of soil at a contaminated site.	7:26E-4.3(a)	NM		*[$5,000] * *$8,000*
	* * *				
	Failure to conduct an ecological risk assessment according to general technical requirements.	7:26E-4.7(a)	*[M]* *NM*	60	*[$5,000] * *$8,000*
	* * *				
	Failure to certify to the Department that the deed notice or declaration of environmental restrictions, including all engineering controls, is being properly maintained, and the remedial action that includes the deed notice or declaration of environmental restrictions continues to be protective of public health and the environment.	7:26E-8.5(c)1	M	30	*[$5,000] * *$3,000*
	* * *				
3. The Industrial Site Recovery Act Regulations N.J.A.C 7:26B					
	Subchapter & Violation	**Citation 7:26B-**	**Type of Violation**	**Grace Period (Days)**	**Base Penalty**
3	**General Information Notice**				

	* * *				
	Failure to submit a complete and accurate General Information Notice.	7:26B-3.3(a)	M	30	*[$8,000] * *$4,000*
	* * *				

5. The Underground Storage Tank Regulations N.J.A.C. 7:14B

	Subchapter & Violation	**Citation 7:14B-**	**Type of Violation**	**Grace Period (Days)**	**Base Penalty**
8	**Remediation Activities**				
	* * *	7:14B-8.1(a) – 8.1(a)7			
	Failure to perform a remedial investigation in accordance with N.J.A.C. 7:26E-4.	7:14B-8.2(a)1	*[Defer to specific 7:26E-4 violations]* *NM*		*[Defer to specific 7:26E-4 penalties] * *$8,000*
	Failure to perform a remedial action in accordance with the requirements of	7:14B-8.2(a)2	*[Defer to specific		*[Defer to

	N.J.A.C. 7:26E-6.		7:26E-6 violations]* *NM*		specific 7:26E-6 penalties] * *$8,000*
	* * *				
	Failure to develop and implement a closure plan pursuant to the procedures set forth in N.J.A.C. 7:26E-6.3(b).	7:14B-9.2(b)	*[Defer to specific 7:26E-6 violations]* *M*		*[Defer to specific 7:26E-6 penalties] * *$5,000*
	* * *				
	Failure to have an individual certified in subsurface evaluation prepare the site investigation report required at N.J.A.C. 7:14B-9.5(a).	7:14B-9.5(b)	M	30	*[$3,000] * *$8,000*
	* * *				

Based on consultation with staff, I hereby certify that the above statements, including the Federal Standards Analysis addressing the requirements of Executive Order

27 (1994), permit the public to understand accurately and plainly the purpose and expected consequences of this adoption. I hereby authorize this adoption.

_____ _____

Date

Lisa P. Jackson,
Commissioner
Department of Environmental Protection