

**ENVIRONMENTAL PROTECTION**

**SITE REMEDIATION PROGRAM**

**Notification of the Remediation of Contaminated Sites and Public Outreach**

**Adopted Amendments:** N.J.A.C. 7:26C-10.4 and 7:26E-1.4, 1.11, 3.7, 4.1, 5.1, 8.2

**Proposed:** August 6, 2007 at 39 N.J.R. 2687.

**Adopted:** August \_\_\_\_, 2008 by Lisa P. Jackson, Commissioner

**Filed:** August \_\_\_\_, 2008 as R. 2008 d. \_\_\_\_, **with technical and substantive changes** not requiring additional public notice and comment (N.J.A.C. 1:30-4.3).

**Authority:** N.J.S.A. 13:1D-1 et seq., 13:1D-9, 13:1D-125 through 133; 13:1E-1 et seq., 13:1K-6 et seq., 58:10-23.11 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:** 16-07-07/570.

**Effective Date:** \_\_\_\_\_, 2008.

**Expiration Date:** \_\_\_\_\_

The Department of Environmental Protection hereby adopts amendments to the Department Oversight of the Remediation of Contaminated Sites rules (Oversight rules), N.J.A.C. 7:26C, and the Technical Requirements for Site Remediation rules (Technical Rules), N.J.A.C. 7:26E.

The Department published the proposed amendments in the New Jersey Register on August 6, 2007 at 39 N.J.R. 2687(a). The comment period for the proposal closed on October 5, 2007.

This adoption document may be viewed on the Department's website at [www.state.nj.us/dep/srp](http://www.state.nj.us/dep/srp).

**Summary of Hearing Officer's Recommendations and Agency Responses:**

The Department held a public hearing concerning the proposal on September 7, 2007 at the New Jersey Department of Environmental Protection, 401 East State Street, Trenton, New Jersey. Dr. Judith Shaw, formerly of the Site Remediation Program's Office of Community Relations, served as the hearing officer. Four persons presented oral comments at the public hearing; two of these persons also submitted written comments to the Department. After reviewing the oral testimony received, Dr. Shaw recommended that the Department adopt the proposed amendments and new rules as proposed with the changes described in the summary of public comments and agency responses, below. The Department accepts the recommendations of Dr. Shaw. A record of the public hearing is available for inspection in accordance with applicable law by contacting:

Department of Environmental Protection  
Office of Legal Affairs  
Attn: DEP Docket No. 16-07-07/570  
P.O. Box 402  
Trenton, New Jersey 08625-0402.

**Summary of Public Comments and Agency Responses**

The following people submitted written or oral comments on the proposal:

1. James Aversano III, Automotive Recyclers Association of New Jersey
2. Robert Baldisserot, Hoffman-La Roche
3. Robert A. Briant, Jr., Utility and Transportation Contractors Association of New Jersey
4. David H. Brogan, NJ Business & Industry Association
5. Raymond E. Cantor, NJ Apartment Association
6. Philip S. Drill, Drill Construction
7. Michael A. Egenton, NJ State Chamber of Commerce
8. Warren W. Faure, Marisol

9. Joan Fittz, NJ Manufactured Housing Association
10. Russell J. Furnari, PSE&G
11. Richard J. Gerbounka, City of Linden
12. Becca Glenn, New Jersey Sierra Club
13. Jarrod C. Grasso, NJ Association of Realtors
14. Joanne M. Harkins, NJ Builders Association
15. Alan J. Hirsch, Sea Gull Lighting
16. Jonathan T. Holt, Holt & Germann Public Affairs, L.L.C.
17. Kathleen R. Madaras, Fuel Merchants Assoc
18. John Maxwell, Site Remediation Industrial Network
19. Michael G. McGuinness, National Association of Industrial and Office Properties
20. David Pringle, New Jersey Environmental Federation
21. Lewis S. Ripps, Palmer Asphalt Company
22. Richard Rosera, Reckitt Benckiser, Inc.
23. Anthony Russo, Chemistry Council of New Jersey and Remediation Industrial Network
24. Barbara K. Schoor, Community Investment Strategies
25. Steven Senior, Newport Associates Development Company
26. Harry Slagle, JCP&L
27. Bill Wolfe, PEER

The timely submitted comments and the Department's responses follow. The number(s) in parentheses after each comment identifies the respective commenters listed above.

### **General Comments in Support of the Rules**

1. COMMENT: The commenters support meaningful public communication as a key component of the Site Remediation Program (SRP), and the underlying concepts which were the basis for both the most recent notification law (P.L. 2006 c.65) and the proposed rules. Under the existing rules, the Department often requires responsible parties to provide communication measures tailored to meet the diverse nature of sites and the communities within which they are

located. Based on the commenters' experience, remediation projects proceed more efficiently and with far more benefit to communities and responsible parties when the public understands the scope, nature and impact of remediation projects. The commenters appreciate the time and effort the Department has devoted to producing the proposed rule. (2, 7, 8, 10, 18, 22, 23, 26)

2. COMMENT: The commenter commends the Department's efforts to create a comprehensive and practical program for the remediation of sites in New Jersey. The commenter has a vital interest in the proposal because it has had and continues to have significant involvement with site remediation in New Jersey. (10)

3. COMMENT: The commenter recognizes that at many sites, notification to affected property owners of the investigation and remediation of contaminated sites is necessary and appropriate. (25)

4. COMMENT: The commenters support meaningful public communication as the key component of the Site Remediation Program, and support the underlying concepts, which were the basis for both the recent notification law and the corresponding rule proposal. (2, 4, 7, 8, 10, 18, 22, 23, 26)

5. COMMENT: The commenter is pleased that the Department is moving forward and will be requiring better notification to property owners, neighbors and tenants when contamination has migrated off site. The commenter appreciates that the Department went beyond the narrowness of the recent public notification law. (20)

RESPONSE to COMMENTS 1 to 5: The Department appreciates the support for its amendments

to the Technical Rules. The Department agrees with the commenters that informing the public and local officials of ongoing remedial activities will allow remediation projects to proceed more smoothly and will benefit all involved. The importance of ongoing dialogue between remediating parties and the communities where the sites are located cannot be over emphasized.

6. COMMENT: The commenter appreciates that the rule goes above and beyond the statutory minimum and that the Department did more than the bill mandated. This reflects an awareness that there needs to be better outreach to both the public and local officials. (27)

RESPONSE: The Department values the commenter's support for these rules. These proposed amendments reflect both the recommendations of the Public Participation Task Force convened by the Department in Spring 2005 to recommend rule amendments on this topic and the recent amendments to the Brownfield and Contaminated Site Remediation Act (the Brownfield Act) at N.J.S.A. 58:10B-24.1-24.5 that specifically address public participation.

### **Sensitive Population and Resource Checklist**

7. COMMENT: In the summary of the proposed rules, the Department stated that it will provide the sensitive population and resource checklist on its website. The Department must incorporate the checklist into the rules so that the public can provide comments. Not including the checklist in the rules make this requirement too vague and is a violation of the Administrative Procedures Act. (1)

RESPONSE: N.J.A.C. 7:26E-1.4(f) codifies all of the information that must be submitted as part of identifying sensitive populations and resources that are located within 200 feet of the site boundary and the public has been able to review and comment on these rule provisions. The Department is not required to include the checklist, per se, in the rule text because it is merely the form on which the required information is to be submitted. The Sensitive Population and Resource Checklist will be available on the Department's web site. The use of the Checklist will ensure the information submitted is organized and is easily accessible.

8. COMMENT: Unless a beneficial public purpose can be established, the Sensitive Population and Resource Checklist provision, which appears to provide no public benefit in exchange for added remediation cost, should be removed. The Department should clarify the definition of "sensitive populations and resources" in proposed N.J.A.C. 7:26E-1.4(f) and how this information will be used. The Department did not adequately describe the need or use for this

information. The Brownfield Act does not require the checklist and the requirement should be deleted from the rules.

The identification of sensitive populations and resources will be difficult, time consuming and expensive, and the information required is vague. Under the current rules if contamination has impacted an off-site property, the responsible party must notify that entity, regardless of whether it is a school, child care centers, residence or business. The purpose of the checklist is unclear. (2, 7, 8, 10, 13, 14, 18, 19, 22, 23, 24, 26)

9. COMMENT: The proposed rules include extensive requirements to identify and map sensitive populations and resources. This is not a requirement of the Brownfield Act, nor is the need for or use of this information established anywhere in the proposed regulations other than a requirement that it be submitted to the Department. (1, 14, 24, 13, 19)

RESPONSE: Although the Brownfield Act at N.J.S.A. 58:10B-24.3a and b directs the Department to adopt rules that set forth notice requirements, it does not explicitly mention the identification of “sensitive populations and resources.” However, those provisions do give the Department broad implementing authority. As explained in the proposal summary at 39 N.J.R. 2690, the Department anticipates that this information will be a valuable tool in helping the Department and local officials evaluate the real and perceived risks associated with the proximity of sensitive populations and resources to contamination at the site. Whether these risks are scientifically based or are perceived, they can pose an obstacle to site remediation. For example, administrators of grade schools, child care facilities and parks are often faced with making decisions based not only on scientific risk, but also on the perception of risk. Ensuring that sensitive populations and resources are identified and that the appropriate entities are notified can reduce the perception of risk. When administrators are informed, they are more able to provide information and address concerns of the people who use their facilities.

The Department has learned, based on its experience remediating contaminated sites over the last 20 years, that it is important to identify sensitive populations and resources that are in close proximity to a contaminated site. The Department is confident that this information will become

a valuable tool in helping both the person responsible for conducting the remediation and the Department to evaluate the real and perceived risks associated with remediation. For example, if a contaminated site has several areas of concern, the checklist may provide information that could affect the order in which the areas of concern are remediated. Specifically, if there are two leaking underground storage tanks at a site, one of which is within 100 feet of a child care facility and the other of which is within 50 feet of a parking lot, the person responsible for conducting the remediation might prioritize the remediation of the tank that is near the child care facility.

The Department does not believe that it is necessary to include a definition of “sensitive populations and resources” in the rule because the rule at N.J.A.C. 7:26E-1.4(f) codifies those sensitive populations and resources that it believes will most commonly be encountered. Please see the Department’s response to comment 11 below for suggested resources that may be useful in identifying sensitive populations and resources.

10. COMMENT: The requirement for the identification of sensitive populations and resources should be deleted from the proposal. If these requirements stay in the rule, the Department should clearly define all the terms used and identify public sources for all necessary data. The proposed fines for unwitting violations are extremely high. The regulations must establish specifically how sensitive populations and resources are to be identified and what actions constitute compliance.

Specifically, the terms residence, potable wells; child care facilities, and surface water must be defined and the Department should identify where remediating parties can obtain this information. (13, 14, 19, 24)

RESPONSE: The Department is confident that the sensitive population and resource checklist will be a valuable tool in helping both the person responsible for conducting the remediation and the Department to evaluate the real and perceived risks associated with remediation. The Department has provided guidance at <http://www.nj.gov/dep/srp/community/guidance/> to help remediating parties complete the checklist. The Department does not believe that these terms

need to be defined in the rules because they are commonly used terms. In the guidance referenced above, the Department will give examples of these terms and provide more direction regarding how the person responsible for conducting the remediation can obtain this information. Please see the Department's response to comment 11 below for suggested resources that may be useful in identifying sensitive populations and resources.

11. COMMENT: Under subsection N.J.A.C. 7:26E-1.4(f), the Department is proposing to require the identification of sensitive populations within 200 feet of the site boundary. Compliance with this requirement imposes a great economic burden and a drain of resources on the responsible party, yet does little to provide any actual additional benefit to the public. In fact, making such notification, absent any assessment of actual risk could cause harm to the public by creating a perception of risk that is out of proportion to the actual situation. The Department should develop a series of notification requirements that are linked to the actual level of risk to which the public is exposed. (10)

RESPONSE: The person responsible for conducting the remediation is required to collect much of the information needed to complete the checklist as a part of conducting the preliminary assessment. Moreover, many public sources of information are available. The person responsible for conducting the remediation is encouraged to obtain the information required to be included on the checklist from any reliable source. Some of those resources, which the Department will be including in the guidance document for these rules include, but are not limited to, the following:

- Location information (with a measuring tool) is available from the Department's "I-Map NJ DEP" webpage application (<http://www.nj.gov/dep/gis/newmapping.htm>) for wellhead protection areas, water bodies and streams, and surrounding land use/residences (through aerial photographs).
- A listing of Environmental Justice Petition Neighborhoods is available from the Department's Environmental Justice webpage (<http://www.nj.gov/dep/ej/pupdate.html>).

- Address/tax record information is available through public web pages such as the NJ Association of County Tax Boards (<http://www.njactb.org>). Radius search tools are available at some county clerk/tax board web pages.
- Information about the percentage of people in a given area is available by using the "Language Other than English Spoken at Home" tool on <http://factfinder.census.gov/home/saff/main.html>. By entering a zip code of interest, the percentage of overall non-English speaking, as well as percentages of those speaking Spanish, other Indo-European languages or Asian & Pacific languages, will be displayed. Maps displaying that information by census tract are also available. This tool allows “zooming in” on a particularly area of town revealing census information in the vicinity of the site of interest. The information is based on 2000 Census data.

Notification requirements are not, nor should they be, triggered by the risk of exposure to contaminants from a site. The primary goal of notification is to let people near any site know that a remediation is occurring and from where they can get information. The statute establishes the options of posting a sign or of sending notification letters, and these options are codified in these rules. The letters will provide remediating parties the opportunity to clearly explain any potential or actual risk posed by the site that may not be able to be included on the sign. The Department anticipates that more effort will be put into notification at sites that pose actual risk to their communities. Parties remediating high risk sites will probably choose to hold public meetings or conduct other outreach efforts.

### **Comments About the Notification Area**

12. COMMENT: Recognizing the difficulty in providing notice to tenants in high density housing areas, the Department has suggested that notifications in high density housing areas may be mailed to "Current Occupant." In many high-density areas, such as the large residential developments described by the Department, or other areas and the cities of the State where high-rise, multi-unit developments prevail, property owners and property managers are in the best

position to provide notice. These parties already have established relationships and reliable means of communication with tenant residents. Coupled with the other notification requirements, notification to property owners and property managers will meet the Department's notification objectives. Requiring a remediating party to assemble tenant lists under these circumstances and to mail notification to each tenant or to occupant is very burdensome. Although municipalities will provide a list of property owners within 200 feet of a property, they do not typically have tenant information. Requiring a remediating party to sort through these issues, identify tenants and residents in these multi-unit buildings and determine how to handle undeliverable mail will create an unnecessary burden and will likely give rise to many instances of inadvertent non-compliance; it is not likely to accomplish meaningful public notification. (25)

13. COMMENT: The proposed rule fails to provide specificity as to how all the intended recipients should be identified. The rule should specify that municipal property owner lists can be relied upon for property owners. It is well recognized that there are no official lists of tenants as a data source. For groupings of notice recipients, the rule should include a specific acceptable data source or a series of acceptable data sources. Otherwise, the manner of compliance will be subject to gross variation and inconsistency. (1, 9)

RESPONSE to COMMENTS 12 and 13: The Department is aware that it may be difficult to identify all the tenants located within 200 feet of a site, particularly when large housing complexes are adjacent to the site and it understands that flexibility will be needed to achieve the goals of notification. The Department is amending the rule on adoption to allow the person responsible for conducting the remediation to notify tenants by mailing notices using the Certificate of Mailing option offered by the United States Postal Service, and to address these notices to "Current Occupant" or "Current Resident." This amendment adds flexibility to the proof of mailing requirement, while still effectuating the intent and purpose of these rules. Please see the Department's response to comments 32 and 33 for a more information about the Certificate of Mailing process. There is nothing in the rules that prohibits working with property owners and property managers to facilitate the identification of tenants. In addition, the person responsible for conducting the remediation also has the option of posting a sign rather than providing notification by mailing letters.

The Department may not require a person conducting a remediation to send notification letters or post a sign if the remediation is being conducted with the Department's oversight, and the person has already conducted public notification and outreach prior to the promulgation of these rules. The person may submit to the Department, pursuant to N.J.A.C. 7:26E-1.4(n), an explanation of how their previous notification and outreach efforts meet or exceed the notification requirements established pursuant to N.J.A.C. 7:26E-1.4(g) and (h).

### **Notification Requirements Should Be Linked to the Proximity to Contamination**

13. COMMENT: Notifying property owners and tenants within 200 feet of the site boundary could lead to unnecessary angst for those who may be close to the site, but may be nowhere near the contamination, since many industrial or commercial facilities in New Jersey encompass hundreds of acres in a contiguous area. The Department should consider a different approach toward large sites with contamination that is a significant distance from any residences, buildings, parks, or sensitive receptors. (2, 7, 8, 10, 18, 22, 23, 26)

14. COMMENT: The Department should refine its definition of "site" to more accurately determine the geographic extent of impact related to identification and notification of affected parties. According to the USEPA, the National Contingency Plan *"on site"* means *the aerial extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action*. A "site," as used in the proposed rules, should be consistent with this definition and mean *the aerial extent of contamination*. At many large sites that will be subject to the new rules, contamination has been delineated and is not located within 200 feet of the site boundary. The notification provisions should apply to the area 200 feet from the *aerial* extent of contamination, rather than 200 feet from the property boundary as proposed by the Department. This change would ensure that those parties in proximity to the actual contamination would receive the required notification, but those who face no risk would not receive notification just because they are located 200 feet from the boundary of a contaminated property. (2, 7, 8, 10, 18, 22, 23, 25, 26)

RESPONSE to COMMENTS 13 and 14: In the Brownfield Act, the Legislature specifically directed the Department to require any person who is responsible for conducting a remediation of a contaminated site to provide written notification to any local property owners and tenants who reside within 200 feet of the contaminated site. The Department believes that the Legislature intended for the 200 feet to be measured from the property boundary. In addition, notification is required two weeks prior to the initiation of the remedial investigation or a single phase remediation. While the full extent of contamination is typically not fully delineated at this point in the remediation, the geographic extent of the property or site boundary is well established and easy to define. The residents living “just outside of the gate” are some of the people most likely to notice, be concerned with, and be potentially impacted by on-site remediation activities.

### **Non-English Speaking Notification Requirements**

15. COMMENT: The commenter is concerned about potential liability associated with the non-English speaking notification requirement at N.J.A.C. 7:26E-1.4-(g)1. The Department should describe what actions would constitute due diligence with regard to this requirement. It is important that the regulated community understand the conditions that would trigger violations and fines for non-compliance. In addition, the Department should clarify what the threshold is for non-English notification. Would one person, ten people, or a particular a percentage of the population in the surrounding area trigger this provision?

The commenter believes that this requirement is extremely onerous and could potentially expose remediation parties to fines, public relations problems, and litigation. The commenter respectfully requests that this provision be removed. (4)

16. COMMENT: The rule provisions addressing outreach to non-English speaking people are too broadly worded such that effective compliance could prove nearly impossible in densely populated, ethnically diverse areas. The commenters believe that the Department’s and the statute’s intent is to require notification in languages other than English in areas where non-English languages are *predominantly* spoken. The proposed rules require that responsible parties determine whether “any” non-English speaking people live, work or play near a remediation site.

In a state as diverse as New Jersey, one can easily see that this requirement, if taken literally, is infeasible to implement and would place undue burden on responsible parties.

In areas where large, contiguous groups of non-English speaking people reside, work or attend school/child care near a remediation site, the responsible party (who is likely to have/had operations at the site) is typically aware of the predominant language in these areas, it is feasible to translate communications into one or two languages other than English. The commenters stated that they are interested in meaningful and effective communications, and that they already provide notification in a language other than English where warranted.

The non-English language requirement should be clarified or removed. Removing the requirement would not prevent the Department from mandating non-English communications where it is needed. (2, 7, 8, 10, 18, 22, 23, 26)

17. COMMENT: It is not appropriate for landlords, property owners or their consultants to try to identify whether residents, occupants or attendees within a 200-foot radius speak English. Such inquiries could easily be misconstrued by non-English speaking people. (9)

18. COMMENT: Public notice should be provided in English. The law does not require that public notice be provided in any non-English language. If a municipality officially establishes and uses a non-English language for its public notices, then public notice of site remediation work should also be provided in that non-English language. It is unclear how remediating parties are to determine with any precision if non-English speaking people live in or utilize facilities within 200 feet of a contaminated site. Given the penalty provisions in this provision, any requirement to provide notification in a language other than English should be eliminated from the rules. (6, 13, 14, 19, 24)

19. COMMENT: The proposed rules require that the notice be provided in a non-English language when a non-English speaking population is identified within 200 feet of the property being remediated. Identification of a non-English speaking population is not required in the Brownfield Act. Therefore, this requirement must be removed from the rules. In addition, New

Jersey is a melting pot of different languages and cultures. Identification of a non-English speaking population would be difficult to accomplish and the Department has not provided any guidance on how remediating parties are to comply with this provision. Moreover, to actually provide the notice, the person performing the remediation would need to find someone to translate the notice. It may be relatively easy to find a translator for Spanish, given the number of Spanish speaking residents in New Jersey, but what about other lesser used languages in New Jersey? In addition, in urban areas, for example, there could be situations where the notice would need to be provided in multiple languages, including but not limited to, Spanish, Chinese, Hindi, Korean, Greek, Italian, Turkish, Polish, Persian, etc. The Department did not define what it means by the term “population” nor did it clarify how many non-English speaking people in the area would comprise a “population”? This type of investigation will drive parties away from brownfield and other volunteer remediation projects. Only in the instance where a municipality has adopted an official language, other than English, should notice in a language other than English be required. (1, 19)

20. COMMENT: The commenters are concerned about the potential liability related to the requirement that notification be provided in a language other than English when non-English speaking people are identified within 200 feet of a site. The Department should clarify what would constitute due diligence and what exactly the threshold or compliance would be. (2, 4, 7, 8, 10, 18, 22, 23, 26)

RESPONSE to COMMENTS 15 to 20: The Legislature mandated that public notification be conducted in the communities surrounding contaminated sites that are undergoing remediation. The Department strongly supports this requirement and has written these rules to ensure that the notification is conducted in a timely, clear and meaningful manner. It is important that the people receiving notification be able to read and understand the information being provided. For example, signs or letters provided in only in English to a community that predominantly speaks Spanish or Portuguese would not effectively communicate information about the site and the remediation that is taking place.

However, concerns about compliance with the requirements to identify and notify non-English speaking populations were raised by numerous commenters. Based on the comments received, the Department has decided to clarify the non-English notification requirements to ensure that the rules meet the intended goals. On adoption, the Department is modifying N.J.A.C. 7:26E-1.4(f)3 to delete the requirement that the person responsible for conducting the remediation must determine whether non-English speaking people inhabit any of the residences, attend any of the schools or child care centers, or use any of the parks, playgrounds, surface water or potable wells identified in the sensitive population checklist. In its place, the Department will require that the person responsible for conducting the remediation must determine “if a language other than English is predominantly spoken by property owners and tenants in the area within 200 feet of the property boundary” and record this information on the Sensitive Population and Resource Checklist.

The Department believes that, as revised, the requirement is more straightforward and compliance with this reworded provision will not be difficult. The Department anticipates that most remediating parties are already aware of whether a language other than English is predominantly spoken in the neighborhoods surrounding their sites. Neighborhoods where a language other than English is spoken can usually be identified by existing business and community-related signs. If the person responsible for conducting the remediation is unsure whether a language other than English is predominantly spoken by property owners and tenants, they could contact the municipality or the U.S. Census Bureau for information.

The Department believes that, as revised, the requirement is more straightforward and compliance with this reworded provision will not be difficult. The Department anticipates that most remediating parties are already aware of whether a language other than English is predominantly spoken in the neighborhoods surrounding their sites. Neighborhoods where a language other than English is spoken can usually be identified by existing business and community-related signs. If the person responsible for conducting the remediation is unsure whether a language other than English is predominantly spoken by property owners and tenants, they could contact the municipality or the U.S. Census Bureau for information.

The Department also believes that this amendment will be equally responsive to the non-English speaking neighbors who may reside and work within 200 feet of the property boundary as the proposed rule text because it encompasses the original intent of the proposed rule text, namely, to ensure that the notification is conducted in a clear and meaningful manner. The Department recognizes that there may be people within 200 feet of the property boundary who speak a language other than the predominant non-English language that has been identified by the remediating party. However, the rules as proposed and as are being adopted provide those residents the right to obtain information about the remediation of a site in their neighborhood. The Department believes that the existing provision for establishing substantial public interest pursuant to at N.J.A.C. 7:26E-1.4(o) provides the mechanism by which individual concerns may be addressed. Non-English speaking residents and workers within 200 feet of the site boundary that speak a language that differs from the predominant non-English language will be able to identify themselves and request that notification be provided in an additional language. Pursuant to at N.J.A.C. 7:26E-1.4(o) residents may submit a petition with 25 signatures or may have a local government official submit a written request to the Department for this purpose. This provision will also be helpful to neighborhoods that have many people that speak a language other than English, but make up only 20 or 30 percent of the population. The Department is similarly modifying N.J.A.C. 7:26E-1.4(g)1 and (k)4 on adoption, as well as the Sensitive Population and Resource Checklist on the Department's website to reflect this change.

The Department will advertise on its website that this provision is available to non-English communities.

### **Timing of Notification**

21. COMMENT: The rule states that notification is required “at the initiation of field activities associated with remedial investigation of a multiphase remediation, or initiating a single phase remediation.” The Department should be more explicit regarding when notification is required.  
(1)

RESPONSE: Under N.J.A.C. 7:26E-1.4(f)5, for a multi-phase remediation, notification is required two weeks prior to the initiation of field activities associated with the remedial

investigation. For a single phase remediation, notification is to be made two weeks prior to initiation of any field activities. At this phase in a multi-phase remediation, contamination has been confirmed and delineation of the contamination and characterization of the site is the next remediation phase that is required pursuant to the Technical Rules, N.J.A.C. 7:26E-4. The nature and extent of the contamination can only be delineated by conducting field activities. These on-the-ground investigations typically involve individuals or teams working in protective clothing who are collecting samples, utilizing field instruments and often using heavy equipment. The public's attention is often drawn to these activities; seeing workers in protective clothing utilizing heavy equipment is not an every day occurrence. If public notification is provided prior to commencing field activities, the community will have the facts, thereby avoiding any speculation and undue concern that may arise when field activities begin at a site. Providing notification two weeks prior to the commencement of field activities will allow time for people to receive and read the notification letters/sign, and to voice any questions and concerns that they may have to the person responsible for conducting the remediation, and will also allow the person responsible for conducting the remediation to adequately answer any questions and address any concerns.

### **Notice is Too Early in the Process**

22. COMMENT: In many circumstances, notification of nearby property owners and tenants at the end of the site investigation phase is premature because there is often insufficient information available to determine if a property has been impacted. This can create unnecessary public confusion and concern. Public notification should be required only after a remedial investigation has been completed and approved by the Department, or when a responsible party has information to indicate that contamination has migrated off-site. (2, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: Notification is required two weeks prior to either initiating field activities associated with remedial investigation or initiating field activities associated with a single phase remediation. The Department carefully considered when, during the remediation process, public notice should be required. As stated in the summary, "the Department chose to require the first

public notification at the onset of the remedial investigation phase. The Technical Rules define remedial investigation as “actions to investigate contamination and the problems presented by a discharge. The requirements of a remedial investigation are set forth at N.J.A.C. 7:26E-4.” See 39 N.J.R. 2690.

The remedial investigation phase is preceded by the preliminary assessment, the first phase in the process of identifying areas of concern pursuant to N.J.A.C. 7:26E-3.1 and 3.2, and the site investigation phase, which involves the collection and evaluation of data adequate to determine whether or not discharged contaminants exist at a site in excess of the applicable remediation standards. Thus, it is not until after the completion of the site investigation that there is sufficient information about the type and location of contamination to provide the public with meaningful information.

At the initiation of the remedial investigation, the person responsible for conducting the remediation will have sufficient information to inform the public about the type of contamination and the media affected at the site. It is at this point in the remediation that neighboring communities can become concerned about contamination at a site and planned remedial actions, which makes it an ideal time to establish a dialogue between the community and the remediating party. Providing notification two weeks prior to initiation of field activities associated with remedial investigation or initiating field activities associated with a single phase remediation will allow the public sufficient opportunity to voice its questions and concerns to the person responsible for conducting the remediation, and will allow the person responsible for conducting the remediation to adequately answer those questions and address those concerns.

23. COMMENT: Notification should be required at the end of the remedial investigation because the public is far more likely to be satisfied with information compiled at that point rather than during a site investigation because the site investigation is an iterative, multi-step process and can be skipped when detected contaminant concentrations exceed cleanup criteria. (N.J.A.C. 7:26E-3.3(d)). (2, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: Public notice is not required during the site investigation. It is, however, required no later than two weeks prior to either initiating field activities associated with remedial investigation of a multiphase remediation, or initiating a single phase remediation. The Department disagrees that the public is far more likely to be satisfied with information compiled at the end of the remedial investigation rather than at the phase proposed. It has been the Department's experience that early notification is preferable because it can foster dialogue between the community and the person responsible for conducting the remediation. Notification at that time may help avoid speculation that can arise when work begins at the site.

Note that where the person responsible for conducting the remediation elects to notify the public using letters, that person is obligated to periodically update the information contained in those letters. It would certainly be appropriate for those updates to include information learned through conducting the remedial investigation.

The commenter notes that there may be sites where a remedial investigation can be skipped. The Department understands that there may be some sites that will proceed to the remedial action phase after contamination is identified in the site investigation phase and intentionally included a provision that notice may be provided no later than two weeks prior to initiating a single phase remediation. If there is any question concerning when to conduct notification, a remediating party may either discuss the matter with their case manager or may propose alternative timing pursuant to N.J.A.C. 7:26E-1.4(n).

24. COMMENT: Notification should be required at the completion of the remedial investigation because prior to that, the extent of contamination has not been determined and disclosure of incomplete information that must be amended, discarded or qualified as facts change on the ground can foment distrust of both the responsible party and the regulatory agency. (2, 7, 8, 10, 18, 22, 23)

25. COMMENT: There will not be sufficient information and documentation to release an educated analysis of the site to the public at the onset of the remediation and, therefore, notification at that time will not serve the best interest of the public. It would be premature and

irresponsible to initiate public notification prior to conducting the remedial investigation. The nature and extent of contamination at the site and potential associated risks are not known until the remedial investigation is completed. Notification before this information is available will provide incomplete information, which will give rise to undue concerns at a point when the remedial action has yet to be undetermined. For these reasons, public notification should be required upon initiation of the remedial action. (17)

RESPONSE to COMMENTS 24 and 25: There is generally sufficient information about the type and location of contamination after the completion of the site investigation to provide the public with meaningful information about the site. At the initiation of the remedial investigation, the person responsible for conducting the remediation will have sufficient information to inform the public about the type of contamination and the media affected at the site. It is at this point in the remediation that potential impacts may arise as community issues, which makes it an ideal time to establish a dialogue between the community and the remediating party. It has been the Department's experience that the best way to inspire public trust is to notify the public early during the remedial process. Providing the community with notice that field activities are about to begin provides the public with the opportunity to ask any questions and voice any concerns to the person responsible for conducting the remediation. This will allow the person responsible for conducting the remediation to adequately answer the community concerns. Providing public notification prior to initiation of field activities should foster dialogue between the community and the person responsible for conducting the remediation.

### **Notification is Too Late in the Process**

26. COMMENT: Notification should not be required when remediation is about to occur, but should be required when a contaminated site is first identified. (20)

RESPONSE: The Department believes that notification two weeks prior to either initiating field activities associated with remedial investigation of a multiphase remediation, or initiating a single phase remediation is the most appropriate time for remediating parties to conduct notification. It is not until the completion of the site investigation that there is sufficient

information about the type and location of contamination to provide the public with meaningful information. At the initiation of the remedial investigation, the person responsible for conducting the remediation will have sufficient information to inform the public about the type of contamination and the media affected at the site.

## **Notification Signs**

27. COMMENT: Signs to provide public notice of impending site remediation activities should be allowed as a matter of right. The Department's proposal allows municipal ordinance to override, or to require permits and fees for public notice signs. The law requiring public notice should be regarded as a public health, safety, and welfare over-ride of any municipal ordinance establishing standards and requiring permits and fees for signs. To the extent the State is not prepared to support such a finding, the rule should be deferred until enabling legislation is adopted. (13, 14, 19, 24)

RESPONSE: The amendments to the Brownfield Act mandating public notice give the option of providing notice in the form of a sign. In these rules, the Department is establishing a reasonable framework for notification signs, in which it is balancing the mandate of the Act with the needs of municipalities, including maintaining an attractive appearance in the community, and generally protecting the character, property values, and public welfare through sign regulations. The Department is aware that the posting of a sign may be a sensitive issue for municipalities. Accordingly, the person responsible for conducting the remediation must comply with all local laws and requirements relevant to the posting of signs. Informational signs, such as those required under these proposed regulations, may or may not be regulated under municipal codes. However, if a particular municipal code prohibits the posting of signs, even though to post a sign would satisfy the notification requirements of these rules, the person responsible for conducting the remediation would be required to instead send notification letters.

28. COMMENT: A sign is too easily misused and devalues not only the subject property but also adjoining properties. The decline in resale prices has resulted in extreme financial hardship for

many New Jersey residents. It adds nothing to the understanding of the remediation process. (1, 9)

29. COMMENT: New Jersey residents will see their communities littered with signs advising them of environmental remediation areas while other residents will be receiving notifications by mail. This process will only desensitize the public, who will start to perceive the signs as unnecessary and intrusive in direct contravention of the proposal's intent. Above and beyond the lack of public interest, backlogs and delays to remediation, the municipalities will be inundated with sign permit applications. (1, 9)

RESPONSE to COMMENTS 28 and 29: While there are numerous contaminated sites in New Jersey, the Department does not anticipate that the State will be "littered with signs." As provided by the Brownfield Act, some remediating parties will choose to send letters instead of posting a sign. The remediating parties that choose to post signs will be required to put up signs when the remedial investigation is initiated and to take them down when a remediation is completed. Because many of the signs are likely to only be the minimum size, two by three feet, the Department does not believe that they will be intrusive.

The Department has provided a one year "phase-in" period for sites currently undergoing remediation to afford the person responsible for conducting the remediation, as well as municipalities administering sign applications, time to come into compliance with these new rules.

## Notification Letters

30. COMMENT: The notification requirements for “field activities” associated with a remedial investigation of a multi-phase remediation or initiating a single phase of remediation are entirely too broad. Remedial investigation activities may take several weeks or months to complete, and the Department should accept an alternative proposal that allows for a single notice letter with a proposed schedule in lieu of constant letters each time a field activity is commenced. (2, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: The Department determined that it is appropriate to require notification two weeks prior to the initiation of field activities associated with the remedial investigation. At this phase in the remediation, the person responsible for conducting the remediation must either post a sign or send out a letter.

If a sign is posted, repeated notification is not required. If the notification letter option is chosen, then notification letters must be sent no later than two weeks prior to either initiating field activities associated with a remedial investigation of a multi-phase remediation or initiating a single phase remediation. Additional notification letters that reflect the current condition and progress of the remediation are to be sent every two years after the initiation of the single phase remediation or the remedial action until a No Further Action and Covenant Not to Sue letter is issued by the Department. Letters each time a field activity is commenced are not required.

31. COMMENT: The proposed requirements for notification letters to tenants should be consistent with the Municipal Land Use Law (MLUL), and specifically, with the provisions for a wide variety of circumstances (including the notification of residents in condominium associations, horizontal property regimes and other associations). The MLUL’s approach is efficient and effective, and it avoids potential privacy violations. (19)

RESPONSE: The Department disagrees that the rules implementing the notice requirements promulgated under the Brownfield Act should mirror the public notification requirements promulgated in the MLUL at N.J.S.A. 40:55D-12, because notice under the respective statutes

serves entirely different purposes. Notification under the Brownfield Act must be given by the person responsible for conducting the remediation, and the purpose of this notice is to allow individuals, regardless of whether they are owners or tenants, to become aware of contamination and the efforts to remediate it. It is important that every individual, regardless of whether they have a legal interest in the property that they are inhabiting, be aware of the existence of contamination and the efforts to remediate it because this information can be critical in allowing these individuals to make informed decisions regarding their living/working situations, including determining any steps they might take to protect their health and the health of their family members.

Notice under the MLUL is to be given by an applicant who wishes to develop property to neighboring property owners, only. The purpose of that notice requirement is to inform neighboring property owners of the scheduling of a public hearing on the proposed property development and to inform those property owners of their right to be heard at that hearing. To that end, the MLUL contains detailed provisions as to how notice may be served on a variety of legal entities such as condominium associations and horizontal property regimes. The Department acknowledges that the MLUL states that notice to a condominium association, horizontal property regime, community trust or homeowners' association, may be made in the same manner as to a corporation without further notice to unit owners, co-owners, or homeowners. However, while this might effectuate the purpose of the MLUL, it is insufficient notice under the Brownfield Act precisely because of the owners on whom service of notice would not be required, and because it does not require that tenants be notified.

The Department agrees that one MLUL concept, namely that of using the current municipal tax duplicate as an effective means of identifying current property owners within a given area, is a good one, and thus, incorporated this concept into its notification rules at N.J.A.C. 7:26E-1.4(i)3i.

Note that if the person responsible for conducting the remediation cannot obtain the names and addresses of tenants from the property owner, they may send the notification letters addressed to current occupant or current resident. The Department believes that this will allow a simple but

effective means to notify tenants of the remediation of a nearby contaminated site. In cases where it is difficult to notify individuals, an alternative plan can be proposed (see N.J.A.C. 7:26E-1.4(n)). Posting a notice in a common area or in a community newsletter may be an acceptable alternative as long as it is approved by the Department prior to its use. These plans can be proposed on a case-by-case basis and will be approved if the plan meets the intent of the notification requirements.

32. COMMENT: Certified mail should not be required because the use of certified mail is precluded unless the exact name of the occupants is known. (13, 14, 19)

33. COMMENT: The requirement to utilize “Certified Mail” should be amended to add an option to utilize the “Certificate of Mailing” process instead because the Certificate of Mailing option provides proof that the notification was sent but there is no need to sign for delivery, which can be inconvenient. The “Certificate of Mailing” option is also less expensive than certified mail. (16)

RESPONSE to COMMENTS 32 and 33: The Department will modify N.J.A.C. 7:26E-1.4(i)3, (j)1, (k)3 and (l) upon adoption to allow the person responsible for conducting the remediation to use either “Certified Mail” or the “Certificate of Mailing” process for all required notification done by mail. The United States Postal Service requires completion of Form 3817 when using the “Certificate of Mailing” process. The name of the sender and the name of the recipient are presented to the Post Office when the notice is mailed. The Post Office stamps Form 3817 certifying that it has received the mail and the date it was presented for mailing to the listed recipient. The stamped Certificate of Mailing is retained by the mailer as proof that the piece was mailed. The “Certificate of Mailing” offers an appropriate means for recordkeeping and allows the person responsible for conducting the remediation to establish a paper trail to prove that letters were sent to those property owners appearing on the lists provided by the municipality. Since the “Certified Mail” option does not allow for “Occupant” transactions, the “Certificate of Mailing” would be appropriate in situations where there is a large tenant population.

The “Certificate of Mailing” does not require the recipient to sign for the mail, making it more convenient for both the recipient and the mailer. There is also a cost savings to person responsible for conducting the remediation who uses the “Certificate of Mailing.” The “Certificate of Mailing” currently costs \$1.05 per piece of mail, while the cost of “Certified Mail” is \$2.65 per piece of mail. The Department agrees that the end result is that both mailing methods provide equally adequate evidence of mailing to a list of recipients.

### **Change of Notification Method**

34. COMMENT: Department approval should not be required if a responsible party is changing between approved forms of notification (i.e., changing from signs to letters, or vice versa); Department approval is not required for the initial selection of a form of notification (unless an alternative plan is proposed), so it does not make sense to require Departmental approval upon a change. Instead, N.J.A.C. 7:26E-1.4(g)2 should be modified to require that the responsible party simply notify the Department that it is changing the form of notification. (2, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: The Department agrees with the commenters that prior approval should not be required when a remediating party changes the method of notification from the use of a sign to sending periodic notification letters, or vice versa. The Department will modify N.J.A.C. 7:26E-1.4(g)2 on adoption to allow the person responsible for conducting the remediation to change the form of notification without requiring the Department’s prior approval. Note that N.J.A.C. 7:26E-1.4(h)5 and (i)5 have requirements to send notification documentation to the Department, the municipality and health officials as prescribed in those paragraphs.

### **Fact Sheets**

35. COMMENT: When contamination is detected off-site, the responsible party should not be required to send out multiple fact sheets and print multiple newspaper displays when additional contamination is detected vertically and/or horizontally or fully delineated, if those activities take place within a year of each other. For instance, a responsible party might discover contamination

off-site and notify the public in the manner set forth in the Proposed Rules. Three months later additional contamination could be found vertically. The responsible party should not be required to send out an additional fact sheet and newspaper ad due to the short timeframe. The responsible party should send out an updated fact sheet when the remedial investigation is complete, and when the site is delineated horizontally and vertically, regardless of the timeframe. (2, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: The initial fact sheet must be prepared and distributed within two weeks after the person responsible for conducting the remediation determines that contamination has migrated off site. See N.J.A.C. 7:26E-1.4(k). The initial fact sheet is intended to alert neighboring owners and occupants and the community that the contamination has migrated off the property of the discharge. At this point in the investigation, information about the extent of the contamination is limited. A second fact sheet is required at the completion of the remedial investigation, when the extent of contamination has been determined. The second fact sheet is intended to update the surrounding property owners and occupants as to whether their property has contamination on or underlying it, and to inform the community that delineation is complete.

If the remediating party sends notification when he/she determines that contamination has migrated off site and subsequently determines that contamination has migrated from a different source or involves a different contaminant, a new fact sheet addressing that particular contamination would be required. In any case, regardless of when contamination has been first detected off site and when it is fully delineated at the end of the remedial investigation, both fact sheets are required.

36. COMMENT: The proposed rule requires the preparation and distribution of a fact sheet if the contamination is “discovered” to have migrated off-site. The term “discovery” is not defined in the Proposed Rule and it is not clear how it will be determined. The Department should revise the Proposed Rule to clarify the requirements for off-site contamination, which should only apply to concentrations in environmental media detected above applicable standards or criteria at off-site sampling locations. In addition, the proposed rule should be modified to require

notification that contamination has migrated off-site from within 200 feet of the site boundary to within 200 feet of an area of concern (AOC). (2, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: At N.J.A.C. 7:26E-1.4(k)1i, the term “discovery” is changed to “determined” upon adoption because the information required to be include on the fact sheet necessitates that some definitive means be used to determine that contamination has migrated from the area of concern, where a discharge has occurred to an area outside a property boundary. Determination of the nature and extent of contamination, including whether contamination has migrated off-site, is conducted during the remedial investigation phase, pursuant to N.J.A.C. 7:26E-4.1. Sampling and analytical confirmation that a contaminant is present in soil or water is the primary way that contaminant migration is demonstrated. Visual documentation, odor and field screening instruments are also used to document that contamination has migrated.

The Department considered requiring notification of off-site contamination to be sent to property owners and tenants within 200 feet of an area of concern because the Department recognizes that an area of concern can reach beyond 200 feet of a property boundary. The vast majority of offsite contamination occurrences involve migration of contaminated ground water. Accordingly, delineation of a contamination plume can be technically difficult and may take some time to complete because of the influence of competing hydrogeologic factors and the nature of individual contaminant chemistry. The Department believes that notifying people within 200 feet of the property boundary is the most efficient way to timely reach those who would be most likely impacted and that publishing a fact sheet in the newspaper will timely notify those people whose properties may eventually be determined to be within the boundaries of an area of concern.

37. COMMENT: The requirement for both the mailing and publishing of the fact sheet in a newspaper is redundant, results in unnecessary costs to the responsible party, and should be amended to allow for either mailing or publishing the fact sheet. (2, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: The Department disagrees that the requirements to both mail and publish the fact sheet are redundant. Mailing the fact sheet ensures that the owners and tenants in the vicinity of the site receive complete information. However, once the contamination leaves the property of the discharge, residents other than those in the immediate vicinity of the site, as well as people working in the area, may be interested, and newspaper publication will allow all interested parties to have access to this information.

38. COMMENT: It is our interpretation that when contamination is detected off-site, the notification requirements of N.J.A.C. 7:26E-1.4(k) (fact sheet and newspaper display) supersede the notification requirements in proposed N.J.A.C. 7:26E-1.4(h) and (i) (signs or notification letters, respectively). In other words, the signs/notification letters are no longer required after contamination has been found to migrate off-site, since fact sheets would be required. The fact sheets are apparently not required to be updated every 2 years prior to issuance of a No Further Action letter, since other updates will be provided and are likely to be more frequent. The Department should revise the Proposed Rule to clarify. (2, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: The requirement for a fact sheet does not supersede the general notification requirement (that is, to send letters or to post a sign) because each type of notice is required at a different time and serves a different purpose. Notification via sign or letter is required two weeks prior to the initiation of field activities associated with a remedial investigation or single phase remediation. A fact sheet must be prepared and distributed within two weeks after the discovery that contamination has migrated off site and must be updated and redistributed with the relevant information regarding the extent of the contamination at the completion of the remedial investigation, when the extent of contamination has been determined. Accordingly, a site that involves off-site migration of contamination would trigger both notification requirements. That is, notification via sign or letter must be made pursuant to N.J.A.C. 7:26E-1.4(h) and (i), and additionally, the distribution and newspaper publication of a fact sheet must be made pursuant to N.J.A.C. 7:26E-1.4(k).

### **Sites with Substantial Public Interest**

39. COMMENT: The Department should certify that the petitions necessary to trigger the substantial public interest requirements under N.J.A.C. 7:26E-1.4(o) are valid and are signed by people who live and work within 200 feet of the site to eliminate any outside influences. The petition provision could be used with malicious intent by groups or individuals who are not local or are not directly affected by the remediation activities at a site. (2, 4, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: The Department will review petitions of substantial public interest to ensure that there are a sufficient number of signatures and the signees' addresses or work locations are within the specified proximity to the site or extent of the contamination. The provisions of N.J.A.C. 7:26E-1.4(o) will allow local communities to have their specific concerns about a site in their community addressed.

40. COMMENT: The Department should revise the rules to require interested parties to directly contact the responsible party for additional information, public notification or outreach, and only if questions and comments are not addressed in a timely and sufficient manner through that direct dialogue, should a request for additional information, public notification or outreach be made to the Department. Members of the public resort to petitions only after other avenues of public action have been exhausted and therefore, petitions tend to be inherently adversarial and could create tension around a remediation project where little or no tension would otherwise exist. (2, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: As contemplated by the rules, the person responsible for conducting the remediation must provide the name of a contact person on all notices sent to residents within 200 feet of the property boundary. The purpose of this requirement is to allow neighboring community members the opportunity to direct questions and concerns to the person responsible for conducting the remediation. However, where there is broader community interest, the rules provide the petition as an additional means of requesting more detailed information. Petitions are a well established and widely used method of public input. It is the Department's experience that local communities are the most concerned about contaminated sites when they do not have information about conditions and activities at the site. This provision should help eliminate the

unknowns associated with the remediation of contaminated sites and aid local communities in obtaining the information that they need.

41. COMMENT: Additional public outreach requirements should be handled on a case-by-case basis by the Department, rather than mandating specific outreach activities in the regulation. (2, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: Specific requirements for additional public outreach are not mandated in the rules. In fact, N.J.A.C. 7:26E-1.4(o)3 explicitly states that the “The person responsible for the remediation shall develop and implement additional public outreach based on the needs expressed by the community,” and lists three possible options. Therefore, the implementation of this requirement will clearly be handled on a case-by-case basis.

### **Rule Impact Statements**

42. COMMENT: The Department’s Economic Impact Statement is not adequate. The Department assumes that the regulated parties all have sufficient and competent staff already on their payrolls to comply with the proposed amendments to the standard. The Department fails to mention the fact that smaller firms, without their own trained environmental staff members, will have to engage firms to assist them with compliance at costs that will be enormous. In addition, a small company will put itself at great risk of violation and penalty if it does not engage a consultant to assist it with the compliance with these new rule requirements. The Department neither recognizes, nor cares about, the cost for compliance by small manufacturing companies who have long been recognized as the backbone of business and labor employment in New Jersey. (21)

RESPONSE: The Department understands the economic pressures associated with the cost of conducting remediation, that are borne by all businesses including small businesses. However, the Legislature did not provide for reduced notification requirements for small businesses. In fact, the Department notes that there can be increased concern about remedial activities at small

businesses which may be due, in part, to the close proximity of other small businesses and residences in some neighborhoods.

The Department believes its Economic Impact Statement adequately reflected and discussed the anticipated economic impacts associated with these rules. The Department did not make any assumptions as to whether a person conducting remediation already had staff to comply with the additional notification requirements. In its economic impact analysis, the Department simply described the types of costs and estimated the range of costs that are likely to be associated with the increased notification requirements.

Over the last year, the Department has been implementing the notification requirements at publicly funded sites and is now in a better position to evaluate the costs associated with some of the notification requirements. In fact, the required signs have cost less than was estimated. The Department has paid \$55 for one notification sign that meets the requirements of N.J.A.C. 7:26E-1.4 (h) and has paid as little as \$40 for signs when they were ordered several at a time.

In the vast majority of cases, the Department does not believe that it will be necessary for the person responsible for conducting the remediation to hire firms that specialize in public relations or communications. The Department believes that preparation of the sensitive population and resource checklist, the notification letters and reports to the Department can be accomplished by the environmental or engineering consultants that are already retained to conduct other aspects of the remediation.

43. COMMENT: The Department did not undertake any studies to determine how many jobs might be lost when these rules are implemented. The Department's Jobs Impact analysis does not accurately reflect the impact of these rules on workers that will be adversely affected and the penalties that will apply to employers for failing to comply with each provision of the rules, such as the requirement to determine whether their "site is located in an Environmental Justice neighborhood." (21)

RESPONSE: As a general rule, the Department does not base its impact analyses on the assumption that the regulated community will fail to comply with the rule and incur penalties. As noted above, the cost of compliance has been even lower than was previously anticipated. Accordingly, the Department believes that the amendments to the Technical Rules and the Oversight Rules are anticipated to have a minor net impact upon jobs within the State.

### **Goals of the Requirements**

44. COMMENT: The specific goals and objectives the Department is seeking to accomplish through the proposed rule are unclear. The Department should conduct public opinion research to accurately assess public sentiment, make the results available publicly, and conduct a pilot program that will aid in implementation and help the Department to assess staff resources. (7, 15, 23)

RESPONSE: The Legislature, through amendments to the Brownfield Act, required the Department to codify rules to implement its prescribed public notification requirements; these rules implement the mandate of that statute. The Department believes that the goals and objectives of the notification requirements are clear and straightforward. Historically, members of the public and local government representatives expressed their frustration to Department representatives regarding lack of understandable and accessible information about contaminated sites in their communities. These rules represent a significant step towards making available to the public information about the presence of contaminated sites and the actions that are being taken at those sites to mitigate risks to human health and the environment.

The Department believes that the benefits of enhanced public notification far outweigh the costs, and the communication exchange generated by a more proactive public notification system will lead to more effective and efficient outcomes. In the Department's experience, early two-way communication with residents, business owners and local officials potentially affected by a remediation can be critical to a successful investigation and cleanup. This may be especially true when future uses include public recreation or residential housing. With an effective outreach

strategy, the person responsible for conducting the remediation can anticipate the needs and concerns of the community and deal with them proactively; the remediation can be accomplished more quickly, thus providing a positive impact to the environment.

Because the notification provisions set forth by these rules were established by the Legislature, it is not appropriate for the Department to conduct public opinion research or a pilot study at this time. However, since 2007, the Department has been conducting notification at publicly funded sites including posting signs and in some instances, sending letters to residents and tenants within 200 feet of the site boundary. In addition, some remediating parties have begun to conduct notification using the guidance currently available on the Department's web page. This recent notification has resulted in few inquiries from the public to the remediating party or the Department.

45. COMMENT: Communication programs should provide meaningful and accurate information to affected parties in a simple and easy to read format. The information required in the fact sheet is extremely detailed and specific, which directly contravenes the stated purpose of the rule, which is to communicate simply and clearly. The rule should be restructured to focus on goals, principles, and key components of successful communication programs, rather than providing significant detail regarding the remediation process. Too much technical detail is required to be included in the fact sheets. The regulations should allow responsible parties to produce crisp, accurate, timely, accessible and meaningful public communication materials that are tailored to the needs of an individual site and the community in which it is located.

If the fact sheet is to include all possible information regarding contaminants, and dates of different actions, the fact sheet would be several pages on a complex site, not likely to be publishable as a newspaper display, and not “clearly and simply written in plain English.” The information requested by the Department is redundant to the contents of a remedial investigation report (RIR). The fact sheet mailings/newspaper publication should only inform the public where the RIR can be accessed. This alternative will minimize misinterpretation of the information that is explained in the RIR. Interested parties can contact the responsible party or the Department if they desire further information. (2, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: Typically the reports that are submitted to the Department are complicated and highly technical. Simply referring the public to a repository containing these reports would not be an effective means of communicating information. Therefore, the Department requires remediating parties to prepare a summary, in the form of a fact sheet, using simple common language to the greatest extent possible. The Department recognizes that the nature of site remediation activities is technical and may be difficult for the public to understand, but believes that it is important to provide the public with access to information about contaminated sites.

### **The Department's Workload**

46. COMMENT: Notification signs will prompt concerned citizens to contact the Department prior to contacting the person performing the remediation. Even if the person performing the remediation is called first, the concerned citizen will still call the Department for confirmation of the information provided by the former. This would place a tremendous responsibility on the Department to field those calls. The Office of Community Relations (OCR), with a total of ten staffers, is woefully inadequate. Furthermore, those staffers will not have specific knowledge of the sites to provide adequate information to the callers and will have to call the case manager for answers. (13, 14, 19, 24)

RESPONSE: Although the purpose of these rules is to encourage dialogue between the public and the remediating party, the Department recognizes that some citizens will elect to contact the Department, rather than the remediating party. The Office of Community Relations staff will be able to provide callers with basic site information because the person responsible for conducting the remediation is required to submit a description of the site, the contamination and the actions being taken to that office. If the caller requires more detailed information, OCR staff will encourage them to contact remediating parties directly.

Also, the Department believes through proactive notification, communities will be receiving information that can allay the concerns of their citizens about sites being remediated nearby. This type of proactive outreach should result in fewer public inquiries from individuals in the

vicinity of a contaminated site because concerns due to lack of information will arguably be curtailed.

47. COMMENT: Unless a system is proposed to rank sites, placing more requirements on those that pose the greatest risk of impact to surrounding properties, every site could trigger hundreds of calls. Without an adequate number of Department staff, this will simply bring the site remediation program to a halt. (4)

48. COMMENT: The Department's Office of Community Relations and numerous responsible party designees will be inundated with inquiries on the nature of the environmental concern for which answers cannot be adequately provided. Elected officials at all levels will be called upon by the public to provide answers for which none will be readily available. (17)

49. COMMENT: The proposed requirements will cause the diversion of vital resources; i.e., manpower, time and finances from the Department, municipalities, elected officials and the responsible parties, from cleanups. It is unlikely that these rules will produce the desired benefit. Not only will an inordinate resource demand be placed on both the regulated community and the Department, but also the public will eventually ignore any postings related to the Site Remediation Program. The proposed amendments will not streamline the public notification process but will only inundate an already overburdened Site Remediation Program with a sea of costly and repetitive paperwork and initially create unnecessary public outcry over the perceived magnitude of statewide environmental impairment. (15, 17)

50. COMMENT: The proposed notification rules will increase the workload and cost imposed on responsible parties. Numerous additional electronic and paper submittals will be sent to already overburdened Site Remediation case managers and Office of Community Relations staff, municipal clerks, and local health officials. In addition, there are possible increased costs to municipalities, as many citizens may choose to first contact their mayor or other local officials with concerns. The Department should consider this extra cost and impact on local resources. The Department should articulate how it intends to address this issue. (2, 7, 8, 10, 18, 22, 23, 26)

51. COMMENT: The original intention of the legislation for public notification was to communicate and provide the public with correct and factual information in a clear and concise manner. If the proposed rule is adopted without the necessary changes and the much needed flexibility, the Department will be doing a disservice to itself, the responsible party and the public at large, as the magnitude of the program will backlog an already clogged system. Within twelve months of adoption, the responsible parties for some 14,000 open cases, along with the net caseload incurred over the period prior to adoption and each case which initiates remedial investigation after the date of adoption, will be required to initiate some form of public notification, whether by signage or by letter notification. The proposed rule will divert millions of dollars from actual remediation. (2, 4, 7, 8, 10, 17, 18, 22, 23, 26)

RESPONSE to COMMENTS 47 to 51: The Department appreciates the commenters' concerns about the amount of resources required by the Department to administer this rule. As Commissioner Jackson has testified before the Senate Environment Committee, she is very concerned about the caseload and the resulting backlog in the Site Remediation Program and its impact on the environment, the public and the regulated community. The Site Remediation Program is currently handling more than 20,000 cases. As the number of cases in-house grows each year, the Department is unable to provide a timely review of all submittals, which is frustrating not only to Department staff and managers, but also to remediating parties, local community activists, environmental groups, developers and local officials. The Commissioner believes that changes in how the Department manages and remediates contaminated cases are needed. Therefore, the program is actively working with a stakeholders group and the Legislature to identify issues and potential legislative reforms to help improve the site remediation process, including reducing the Site Remediation Program's caseload while still meeting the goals of environmental protection.

The Department understands the costs that will be associated with complying with these legislative mandates and believes that the benefits of enhanced public notification far outweigh the costs. The Department anticipates that there will be fewer delays caused by local concerns about the contaminated site and the remedial action chosen. Public outreach will serve to better inform local municipal officials and the public about contaminated sites and the efforts being

taken to remediate them. Local municipal officials and citizens will have the facts at their disposal to help them make decisions regarding the current and future uses of the site and of surrounding properties. Community leaders will also be able to use these facts to help them determine an appropriate and timely response to contamination that may have migrated off site, and will be better able to coordinate response actions with the Department and local authorities.

### **Rules Will Slow Down Remediation**

52. COMMENT: The notification rules are unreasonable and will not expedite the Department's ultimate goal to protect human health and the environment, and to put properties back into productive use. These rules will slow down the remediation process and lead to additional project delays and costs with no associated benefit. (26)

53. COMMENT: The proposed rules may slow the remediation process or even discourage entities from opting to remediate a property or brownfield due to these well-intended, but onerous requirements. The Department should provide flexibility in the application of these procedures. (1, 3, 19)

54. COMMENT: The ultimate goal of the Department's Site Remediation Program is to address the risks at sites where contamination from past industrial activities exist and return those sites to beneficial use. The proposed rules will not achieve this goal and, in fact, will have the potential to delay remediation activities and thus increase the risk of public exposure. (10)

55. COMMENT: The proposed notification rules will inevitably slow the remediation of contaminated sites in New Jersey. (2, 4, 7, 8, 10, 18, 22, 23, 26)

56. COMMENT: The proposed amendments will merely complicate the dialog which is needed among industry, local officials and local citizens. It will delay rather than promote the process of remediation, and will impose costly burdens upon industry, local officials and the Department, without a well-defined benefit. (22)

RESPONSE TO COMMENTS 52 to 56: The Department believes that the proposed rules will have positive impacts on site remediations in the State. The Department has long dealt with members of the public and local government representatives who express their concern about contaminated sites in their communities. These rules represent a significant step towards making information available to the public about the presence of contaminated sites and the actions that are being taken at those sites to mitigate risks to human health and the environment.

The Department realizes that public outreach can, in some instances, protract the remediation of a contaminated site. However, a person that is responsible for conducting the remediation is legally required to do so pursuant to the liability provisions of the Spill Act, so the option of whether or not to remediate a contaminated site is made obligatory by this act for persons and sites to which this statute applies. The Department disagrees that voluntary cleanups will be discouraged by the adoption of notice requirements. The Department continues to encourage voluntary cleanups. However, whether a property is remediated voluntarily or because of a statutory obligation, the remediation must be accomplished in accordance with all of the requirements of the Technical Rules. That said, volunteers may avail themselves of the option to propose alternative notification plans under N.J.A.C. 7:26E-1.4(n) just as a person who is legally liable to conduct the remediation.

In the Department's experience, early two-way communication with residents, business owners and local officials potentially affected by a remediation can be critical to a successful investigation and cleanup. This may be especially true when future uses include public recreation or housing. With an effective outreach strategy, the person responsible for conducting the remediation can anticipate the needs and concerns of the community and deal with them proactively; the remediation can be accomplished more quickly, thus providing a positive impact to the environment.

57. COMMENT: Public notice requirements should be limited to the posting of a sign, with no opportunity for other parties to request additional public outreach, for site remediation activities that have little impact on the surrounding neighborhood. More extensive public notice and

outreach procedures should be reserved for certain activities and the Department has failed to provide sufficient discretion as to which sites require the use of its limited resources for public outreach. The result will be fewer cases reviewed, longer delays in reviews conducted and ultimately fewer sites remediated. (13, 14, 19, 24)

RESPONSE: The Department anticipates that remediating parties will frequently choose to post a sign; however, some remediating parties may choose to send notification letters in order to convey specific information to owners and tenants near their sites. Based on site conditions, such as when contamination migrates off the site, more extensive public notice is required by these rules. The Department does not believe that the notification should be limited based on circumstances at the site because public concern may not be related to “risk” posed by the site. Whether the site poses risk to the neighboring community or not, the public has a right to information about contaminated sites in their communities and the remedial actions that are being taken to clean them up. The Department does not anticipate that the oversight of these notification requirements will significantly delay its reviews or result in fewer sites remediated.

The rules provide a one year “phase-in” period for sites currently undergoing remediation in order to afford the person responsible for conducting the remediation time to come into compliance with the new rules.

### **Impacts on Local Government Officials**

58. COMMENT: Local officials will not have the resources or expertise to respond to the large number of calls from concerned residents asking specific questions about sites and if they advise residents to call the Department for answers, the local official will be viewed as apathetic to constituency concerns . (4)

RESPONSE: The Department has launched an outreach program for municipal officials to inform them about these rule requirements and how best to manage the information that they will be receiving. Numerous municipal officials have continually expressed a need to be informed about site remediation projects in their communities. Although it is reasonable to expect that

local officials may receive some public inquires, the Department anticipates that the majority of inquires will be directed to the point of contact person listed on the public notice for the remediating party or to the Department.

### **Impacts on Economic Development**

59. COMMENT: Remediating contaminated properties and brownfields produces positive economic and environmental results by providing jobs for the construction companies and laborers who perform remediation work. However, the proposed regulations will create disincentives for promoting economic growth and investment in New Jersey. For example, the Department notified the public about pesticide contamination at a local middle school in Paramus and the response was negative media coverage; criticism from environmental groups; alarm and distrust from the public; and pending litigation. This response clearly foreshadows the reaction the regulated community will face when this rule is adopted. In spite of the Department's appropriate actions in that instance, the public's perception of the Department was one of distrust, and the belief that the Department did not care about the health and safety of their children. Making site remediation projects easier and more attractive is in everyone's interest. (3, 4)

60. COMMENT: The proposed rules create numerous disincentives toward remediation and will cause delays and increased costs in remediation projects. Incentives, not disincentives, continue to be the best tool the State can provide to encourage economic development and more cleanups. (2, 4, 7, 8, 10, 18, 22, 23, 26)

61. COMMENT: The "public notice" rule is unnecessary. Although these rules may be well intentioned, they will create more problems on the local level than they solve. By creating more rules and regulations for industry located in populated cities, the Department will be encouraging the continuing exodus of business to other states. (11, 22, 23)

RESPONSE to COMMENTS 59 through 61: The Legislature amended the Brownfield Act to include notification requirements, in part, to address concerns expressed by municipal officials and citizens about the lack of information concerning the remediation of contaminated sites in

their communities. The notification rules implement these legislative requirements. The Department does not believe that public knowledge about remedial activities will act as a disincentive for remediation and development in the State, nor does the Department view these requirements as a disincentive, because the cost to implement the proposed requirements is not great. The Department provided an extensive analysis of the economic impact of these rules in the Economic Impact Statement section of the rule proposal, including an evaluation of the possible costs associated with implementation of the proposed requirements.

### **Ancillary Costs of Notification**

62. COMMENT: Although the Department acknowledges the notification requirements will increase the costs of performing a remediation, the Department failed to recognize the potential costs associated with potential litigation from concerned citizens; public relations personnel; and potential fines of \$3,000 to \$8,000 per violation per day. The cost of complying with the onerous notification requirement could be put to better use in cleaning up the site. (4)

RESPONSE: In its economic impact analysis, the Department described the types of costs and estimated the range of costs that are likely to be associated with the increased notification requirements. Based on its experience implementing the notification requirements at publicly funded sites, the Department can better estimate cost associated with some of the notification requirements. In fact, the required signs have cost less than the Department's initial estimate of \$200. The Department has paid \$55 for one notification sign that meets the requirements of N.J.A.C. 7:26E-1.4 (h) and has paid as little as \$40 for signs when they were ordered several at a time.

In the vast majority of cases, the Department does not believe that it will be necessary for the person responsible for conducting the remediation to hire firms that specialize in public relations or communications, nor does the Department think that notification will likely result in litigation or fines for non-compliance. From what the Department has seen to date, it appears that the signs that have been posted at several publicly funded sites have generated very little public

interest. For these reasons the Department anticipates that the majority of remediation funds will be able to be spent on remediation.

The Department is unable to anticipate whether public notification will increase the quantity of litigation. However, the risk of litigation against a person responsible for conducting the remediation already exists, regardless of the public notification provisions in the Brownfields Act. This is because the Spill Act holds the person responsible for conducting the remediation strictly liable for conducting the remediation. To the extent that harm to others has resulted from discharges that trigger Spill Act liability, those parties already have the right to seek redress of those harms under the Spill Act and through common law causes of action.

The Department does not anticipate that it will be required to resort to assessing penalties for violations of these rules, as most of the violations are categorized as minor, and minor violations are afforded a grace period during which the person responsible for conducting the violation may correct the violation.

63. COMMENT: The proposed rules will be costly to implement, in that they require substantial investigation in order to identify the notice recipients. This will divert funds that could otherwise be dedicated to actual remediation of hazardous. (1)

RESPONSE: The Department disagrees that substantial investigation will be necessary to identify notice recipients. Municipalities can provide a list of property owners within 200 feet of a property for a nominal fee and other resources are available for use in obtaining the required information. For examples of those resources, see response to Comment 11. Also, the Department is amending the rules on adoption to allow the person responsible for conducting the remediation to notify tenants by mailing notices using the Certificate of Mailing option offered by the United States Postal Service, and to address these notices to "Current Occupant" or "Current Resident" as a way to ease the burden of notice mailing.

64. COMMENT: The commenter is concerned about added costs of compliance. Will the Department bill the person responsible for conducting a remediation if they field calls on a specific site? (4)

RESPONSE: In general, the Department does not bill remediating parties for the cost of answering telephone calls from the public. Under certain circumstances, such as, for example, after public meetings or other public outreach events, Department staff may be required to spend blocks of time fielding telephone calls concerning a particular site. In that case, the Department may charge for staff time spent responding to those calls on its bill for site oversight costs.

### **Impacts on Small Businesses**

65. COMMENT: The Department stated in its Regulatory Flexibility Analysis that it was in the public interest to place the same requirements on small businesses as big businesses. However, due to the limited resources of a small business, the financial impact is greater. The Department should provide resources to small business owners to answer questions resulting from the proposed requirements. The Department, perhaps in concert with Office of Economic Growth and Commerce should provide resources to help alleviate costs by providing answers to questions prior to small business owners reaching out to a lawyer or engineer. (1, 2, 4, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: In accordance with the New Jersey Regulatory Flexibility Act, the Department analyzed the impact of the proposed amendments to determine if these rules could be designed to minimize the burden on small businesses. As stated in the Regulatory Flexibility Analysis that is a part of the proposal, the Department explained that, “during this review the Department balanced the need to protect human health and the environment and determined that to reduce the requirements on small businesses would result in an unacceptable negative impact to human health and the environment. The Department believes that it is just as important to have public notification requirements for small businesses as it is for larger businesses. Many small businesses are located in and around residential and commercial communities throughout the State. Remedial actions associated with small businesses may be very visible; as such, these

activities often cause concern to people who live and work nearby. For this reason, the Department believes that it is important to have the same public notification requirements for small businesses as for any other party that is required to conduct remediation in New Jersey.” 39 N.J.R. 2695.

The Department’s Office of Community Relations within the Site Remediation Program is always available to respond to questions from the public, including small businesses, on all aspects of the Site Remediation Program, and will continue to be available to respond to questions about the notice requirements, as well. However, the best source of information about a particular site is the person responsible for conducting the remediation. It is for that reason that the Department included the requirement that all notices, whether by letter or sign, include a contact person to whom questions from the public can be directed. The Department anticipates that environmental consultants who are hired by remediating parties will generally be able to respond to inquiries from the public.

66. COMMENT: The steps necessary to complete the requirements of these rules are onerous to a property owner attempting to clean up and rehabilitate a site. Application of these new public notification rules to all contaminated sites within the State is not necessary. The new rules represent a significant additional burden to the business and development communities in New Jersey. (13, 14, 19, 24, 25)

RESPONSE: The Department acknowledges the potential for time delays and increased costs of a remediation project. The Department believes that public notification of ongoing remedial activities will ultimately allow remediation projects to move faster by facilitating discussions sooner rather than later. The Department does not view these requirements as onerous or burdensome because the cost to implement the proposed requirements is not great.

The statute and these implementing rules require that remediation of all sites on which a remedial investigation is initiated must include public notification. The only sites that are statutorily exempted from the notification requirements are homeowner underground storage tank cases and emergency response actions.

## **Ongoing Public Notification and Outreach Program**

67. COMMENT: Presumptive approval should be granted for sites with ongoing notification programs that meet certain requirements if timely Department review is not received. While the alternative notification plan is available, the proposal does not clearly state whether a responsible party will be able to deviate from the extremely prescriptive requirements set forth in the rule (including but not limited to scope, content and timing) and should be clarified. Flexibility should be granted to deviate from any provision as warranted by site-specific considerations and community needs, subject to the Department's approval. (2, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: The Department agrees that flexibility to deviate from the notification requirements is essential. The Department included N.J.A.C. 7:26E-1.4(n) to allow the person responsible for conducting the remediation to submit an alternative plan to the assigned case manager and Department's Office of Community Relations for the Department's prior approval. Although the Department will not allow presumptive approval, the Department will review all alternative plans and, if shown to meet the goal of the intended public participation notification requirements, the Department will approve the alternative plan. The Department recognizes this is a new process and will make every effort to review alternative plans in an expeditious manner.

If the person responsible for conducting the remediation develops and implements an alternative notification plan without the Department's prior approval it is possible that the alternative plan may not meet the intent of the notification requirements. In this circumstance, the Department would issue a notice of deficiency. However, since this is a minor violation, the person responsible for conducting the remediation would be afforded a grace period during which to correct the deficiency without penalty. If the person responsible for conducting the remediation fails to correct the violation, he/she may be penalized pursuant to the Oversight Rules, N.J.A.C. 7:26C.

68. COMMENT: Due to the backlog of cases, there could be significant delays in the Department's review and approval of alternate notification plans. The Department should add a

provision to N.J.A.C. 7:26E-1.4(n) to allow for presumptive approval of alternative notification plans at sites with ongoing notification/communication programs that meet certain specified requirements, if the Department's approval is not received within a specified time period. If an effective communication program is already in place at a site, and it is working for the local community, there is no need to confuse or alarm the public by instituting new notification mechanisms simply because the Department's review and approval is pending. (2, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: If the person responsible for conducting the remediation has already developed and implemented a communication plan that meets the goals of the notification requirements, the Department encourages submittal of that plan for approval pursuant to N.J.A.C. 7:26E-1.4(n). N.J.A.C. 7:26E-1.4(n) will not be modified on adoption to allow for presumptive approval of alternative plans because the Department believes that it is important to review and approve alternative plans to ensure that the alternative plan will provide sufficient information and will effectively reach those that have been identified by the Legislature to receive notification. The Department will make every effort to expeditiously approve alternative plans. If the Department determines that additional notification is needed, the Department has confidence that the public can be notified in a way that is not confusing or alarming.

69. COMMENT: Although communication and coordination is necessary and important when remediation work is to be performed off-site, there is no need for additional notification requirements for off-site contamination because a responsible party must obtain access agreements from affected parties to investigate or remediate off-site soil or ground water. Any additional notification requirements for contamination that has migrated off-site should be limited to soil contamination only. Additional notification requirements for groundwater contamination that has migrated off-site would be redundant with existing requirements to notify property owners and ground water users as part of the establishment of a Classification Exception Area (CEA). (N.J.A.C. 7:26E-8.3(b)5). Any notification requirements for ground water contamination that has migrated off-site should exclude up gradient property owners and tenants. (2, 7, 8, 10, 17, 18, 22, 23, 26)

70. COMMENT: The Department should exclude from the scope of this rule any site that has completed remediation and is currently in a monitoring-only phase. In the case of classification exception areas (CEAs), there are existing notification requirements. The Proposed Rule requires that the sign remain until such time as a no further action (NFA) letter is issued or that notification letters are sent every 2 years until an NFA letter is issued, when there is no activity or any issues at the site that are likely to be of public concern. It can take years after monitoring begins before the Department issues a NFA letter, if at all. The Department should reduce the notification requirements of sites engaged in long term monitoring or “natural attenuation.” (2, 7, 8, 10, 18, 22, 23, 26)

71. COMMENT: Many remedies involving natural remediation and use of engineering and institutional controls require no active remediation that would give rise to exposure to contaminants or any other impact to the public. These may include natural remediation of ground water pursuant to a classification exception area or capping of site contaminants beneath existing buildings, parking lots or concrete pavement. The Department is always responsible to review and ensure that these remedies are protective of public health and the environment. In many cases, these remediation techniques have no impact and give rise to no potential exposure to surrounding property owners and tenants. Where natural remediation and use of existing structures as engineering controls is approved, and contamination is not present beneath off-site businesses and residences, notification to off-site property owners and tenants should not be necessary. (25)

RESPONSE to COMMENTS 69 through 71: The Department understands that when contamination migrates off-site that the person responsible for conducting the remediation will need to contact other property owners in order to get access to conduct sampling that is required pursuant to the Technical Rules, N.J.A.C. 7:26E-4. However the notification requirements established at N.J.A.C. 7:36E-1.4 serve an entirely different purpose and are likely to be directed to different individuals than those that may be contacted for the purposes of site access.

While there are notification requirements associated with ground water classification exception areas (CEAs) at N.J.A.C. 7:26E-8.3(b)5, these notifications are conducted at a different time.

Remediating parties are required to conduct notification when the Department establishes a CEA, which is generally done once ground water contamination is fully delineated, at the end of the remediation investigation or during the remedial action phase. The notification required pursuant to N.J.A.C. 7:36E-1.4 must be conducted when the remedial investigation or a single phase remediation is initiated.

Notification associated with CEAs is only required to be sent to the owners of real property when the CEA is in a water use area. The purpose of this notification is to ensure that property owners are made aware that the ground water beneath their property is contaminated and that new wells should not be installed. Notification required pursuant to N.J.A.C. 7:26E-1.4 must be sent to all property owners and tenants within 200 feet of the site boundary and applies to all sites initiating a remedial investigation or single phase remediation in order to inform neighbors of remediation activities that will be taking place at the site.

For these reasons, the Department does not agree that there is redundancy in these two notification requirements. The Department firmly believes that the sharing of information with all property owners in close proximity to the site as early in the process as possible is paramount to effective communication and notification. If the timing of the CEA requirements to notify impacted property owners coincides with the timing to notify nearby property owners and occupants pursuant to the proposed requirements, these notification requirements can be consolidated upon approval by the Department.

The Department feels strongly that the need for communication with local residents and town officials does not cease once institutional/engineering controls are employed or the site moves from active remediation to long-term monitoring. Information about ongoing monitoring activities and institutional controls will help residents and local officials as they manage land use planning in their communities. If there is coincidental overlap with the notification requirements of other rule provisions, such as the biennial certification program, the remediating party could request that the Department approve a coordinated notification approach.

72. COMMENT: The provisions of N.J.A.C. 7:26E-1.4 are duplicative of the notification that is required for ground water classification exception areas and for vapor intrusion investigations. The existing notification provisions of the Technical Rules provide a prescribed process to notify the public and provide for responsible protectiveness and notification without imposing undue concern and distress upon the public at large due to incomplete data and ensuing premature conclusions. (17)

RESPONSE: The Technical Rules, N.J.A.C. 7:26E, require the person responsible for conducting the remediation to delineate and remediate off-site contamination but are silent regarding public notification. Notification of impacted and potentially impacted people is handled under Department policy. The proposed amendments will not change the Department's current practices regarding the reporting of indoor air and potable well sample results to potentially impacted parties. The Department will continue to report these data directly to the owners and tenants of the properties that are sampled during the course of a remediation. However, the Department considers communication of analytical results to be quite different from proactive, early notification to surrounding residents about remedial efforts at a contaminated site to be provided by the person responsible for conducting the remediation. Potable well and vapor intrusion sampling, if needed, are likely to occur after a remedial investigation has been initiated and the neighboring residents, ideally, would already be aware of the ongoing remediation activities. The Department does not expect these notifications to cause the public undue distress and concern.

### **Flexibility**

73. COMMENT: Although notification to affected property owners of the investigation and remediation of contaminated sites is necessary and appropriate, application of these new public notification rules to all contaminated sites within the State is not necessary. (25)

74. COMMENT: Under the current Site Remediation Program, responsible parties already provide communication measures tailored to meet the diverse nature of sites and communities within which they are located. Responsible parties in our State are committed to meaningful communication programs, and are already engaged in the process of notification. A "one size

fits all" approach will not work, and incentives not disincentives continue to be the best tool the State provides to encourage economic development and more cleanups. The Department should provide some guidance on effective communication programs, but the current proposal is not flexible enough to address the diverse nature of sites throughout the State. The rules should be revised to focus on principles and key elements to provide simple and meaningful information to all affected parties. (2, 4, 7, 8, 10, 18, 22, 23, 26)

75. COMMENT: The diverse nature of these sites warrants diverse and flexible responses when it comes to cleanup and notification options. Under this proposal, large industrial sites are treated the same as corner gas stations. Furthermore, the type of contamination, extent of contamination, and health effects of specific contaminants are not considered in the notification requirements. The rule is based on proximity to the site, not proximity to the contamination. This one-size-fits all approach toward notification is not workable in our diverse state. (4)

76. COMMENT: The severity of the contamination and the remediation required should be considered in the proposed notification requirements. The proposed requirements are certain to delay remediation. (21)

77. COMMENT: The proposed notification requirements are too prescriptive and do not allow enough flexibility for responsible parties to continue to remediate sites and effectively return them to beneficial use. This will be another factor in driving up the cost of remediation projects in New Jersey. The Department should revise the proposed regulations to provide flexibility for responsible parties to continue to comply with the intent of the most recent notification legislation (P.L. 2006 c.65) without being burdened by the detailed requirements outlined in the proposal. (10)

78. COMMENT: The notification and public outreach procedures should be a tiered notification system based on risk, rather than employing the one-size-fits-all approach as the proposed rule suggests. The contaminated properties with the highest risk to the public should require greater and more immediate notification and public outreach efforts. The public notification plan

approval process should be streamlined to ensure the actual cleanup of the contaminated property or brownfield is not delayed for unreasonable periods of time. (3)

RESPONSE to COMMENTS 73 to 78: In the amendments to the Brownfield Act, the Legislature specifically directed the Department to require any person who is responsible for conducting a remediation of a contaminated site to provide written notification to any local property owners and tenants who reside within 200 feet of the contaminated site. The Legislature did not direct that notification requirements be related to the level of risk presented by individual projects or type of contamination, but requires instead that “any person responsible for conducting a remediation of a contaminated site” must provide public notice. The only sites that were exempted from the notification requirements are homeowner underground storage tank cases and emergency response actions.

The Department acknowledges that flexibility will be important in implementing the proposed notification requirements. Pursuant to N.J.A.C. 7:26E-1.4(n), the person responsible for conducting the remediation may submit an alternative plan to the assigned case manager and Department's Office of Community Relations for the Department's prior approval. If the alternative plan meets the goals of these rule requirements, the Department will approve the plan and the person responsible for conducting the remediation may move forward with the alternative notification plan. The Department believes that the alternative plan provision will allow successful notification activities that are taking place to continue and to allow for flexible notification plans in the future.

79. COMMENT: The proposed rule is written too narrowly to address different community needs at different remediation sites across the State. In the interest of allowing responsible parties to respond to the local needs of New Jersey communities, the proposed rule should be revised to focus on the goals of effective public communications, not the specific details of content and implementation. (2, 7, 8, 10, 18, 22, 23, 26)

80. COMMENT: The proposed rules are overreaching, overly prescriptive and encumbering. They are constructed with such specificity they do not accommodate flexibility. The strict

construction of the rule does little more than accommodate enforcement action under the Grace Period Rule. At the same time, the very specificity which merely supports Grace Period Rule citations works in direct contradiction of the intent of the legislation to communicate meaningful information clearly and simply to the public. The Department should adopt a more sensible and flexible rule that will not impede remediation at regulated underground storage tank (UST) sites and certain unregulated UST sites, impose duplicate and redundant requirements on the owners and operators of regulated UST sites and expose the owners and operators of regulated UST sites to Grace Period violations of the UST Rule (N.J.A.C. 7:14B). It is unlikely this proposal will produce the desired benefit; rather it will require an inordinate resource demand in both the regulated community and the Department. (17)

RESPONSE to COMMENTS 79 and 80: These rules establish the minimum requirements that achieve the goals of the legislation and the Department believes these minimum requirements will be used at the vast majority of sites. It is anticipated that there will be some circumstances where notification and public outreach should be customized to meet site-specific needs. For this reason, N.J.A.C. 7:26E-1.4(n) allows the person responsible for conducting the remediation to submit alternative plans to the Department for review and approval.

Alternative plans may be warranted in some cases when, based on the needs of the community, remediating parties may need to go above and beyond these minimum requirements in order to facilitate a more comprehensive notification and outreach plan. The Department also recognizes that notification signs and letters may not be needed in certain circumstances, such as when the remediating party has already established a sophisticated community relations plan that satisfies the goals of the statute. N.J.A.C. 7:26E-1.4(n) allows the person responsible for conducting the remediation to submit the alternative plan to the Department for review and approval.

Notification can include information about the intended reuse of the property, describe remediation timeframes, and/or hours and types of site activities. For example, the generation of dust during site activities is a common public concern. If notification included language describing planned dust suppression methods, residents' concerns could be addressed before site work begins.

Note that the majority of the violations are classified as minor. As such, the person responsible for conducting the remediation will be afforded a grace period during which to come into compliance before a penalty will be assessed.

81. COMMENT: The Department should allow responsible parties to work closely and flexibly with municipalities to develop community specific public notification approaches as alternatives to postings, letter mailings, and fact sheets. The Department's current approach bypasses municipal governments and places all public notification requirements on the responsible party. The proposed rule may cause residents within a community to lose confidence that their municipal government is working with their best interests in mind. People often think of their local municipalities as a source through which information can be obtained, and an important forum through which their voice can be heard. (2, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: The notification rules do not prohibit a remediating party from working with local municipal official as part of their notification. In fact, the Department encourages remediating parties to work within existing local forums to communicate with the public. The statute specifically requires, however, that "any person who is responsible for conducting a remediation of a contaminated site shall be responsible for notifying the public of the remediation of the contaminated site pursuant to rules and regulations adopted by the Department . . . ." N.J.S.A. 58:10B-24.3a. This is why, as the commenter points out, the responsibility for complying with the notification requirements is placed on the person responsible for conducting the remediation, and not on the municipality, as the commenter suggests.

Both the statute and the Technical rules recognize the importance of keeping municipal officials apprised of the remediation. The statute directly addresses the need for municipalities to be notified. See N.J.S.A. 58:10B-24.1, which requires the person responsible for conducting a remediation to provide written notification to the clerk of the municipality wherein the site is located. The Department's rules at N.J.A.C. 7:26E-1.4(d) also require that the municipality be provided a copy of the remedial action workplan and any updates or status reports when requested by the municipality.

## **Municipal Notification**

82. COMMENT: Site remediation projects that will have no impact on surrounding properties should trigger notification to the municipal government only. More stringent notification requirements should be imposed for site remediation projects that will have an impact on surrounding properties. This would ensure that the public gets the information it needs without creating unwarranted alarm, potentially impacting property values, or slowing down remediations throughout the state. (4)

RESPONSE: Regardless of whether the contamination impacts the surrounding properties, the people who are adjacent to the site are the ones most likely to observe, be concerned with, and be potentially impacted by activities on a site. They will be the individuals most affected by increased truck and equipment traffic, noise and dust controls. Providing notification two weeks prior to field activities will allow the owners and occupants in close proximity to the site sufficient opportunity to voice their questions and concerns to the person responsible for conducting the remediation. This will allow the person responsible for conducting the remediation to adequately answer the community's questions and address the community concerns. By providing public notification prior to commencing field activities, the community will also have the facts, thereby avoiding speculation and undue concern that may arise when remediation work begins at a site.

Municipalities should routinely be notified of these projects both to allow for any concerns they may have and to encourage their assistance in responding to the public's needs. N.J.S.A. 58:10B-24.1 requires the person responsible for conducting a remediation to provide written notification to the clerk of the municipality wherein the site is located. The Department's rules at N.J.A.C. 7:26E-1.4(d) also require that the municipality be provided with a copy of the remedial action workplan and any updates or status reports when requested by the municipality.

## **Penalties/Enforcement**

83. COMMENT: There should be no penalties for the failure to comply with the proposed rules, unless and until the Department modifies the rules so that they are clear, reasonable and unambiguous. Because the notification requirements, particularly those related to sensitive populations and resources, are new and vastly different from any existing regulations, it will be difficult for the persons conducting the remediation and their consultants to comply with the rules as proposed. If the Department is going to require penalties, there should be, at a minimum, a one year period for the parties conducting the remediation and their environmental consultants to become accustomed to the rules before any enforcement action (including Notice of Deficiency) is initiated. (1)

RESPONSE: In the amendments to the Brownfield Act, the Legislature specifically directed the Department to adopt rules and regulations setting forth public notification requirements. To ensure compliance, the Brownfield Act provides specific penalty authority. Regarding the enforcement provisions of these rules, the Department has identified the majority of the violations as minor violations with a 30-day grace period. This will allow the person responsible for conducting the remediation to have the opportunity to comply with the notification requirements without penalty.

Because the Department believes public notification is an integral part of successful cleanups, it is important to have an enforcement program associated with Technical Rule requirements to ensure compliance with the specific requirements

The Department believes that the rule requirements are clear and reasonable. These responses to comments serve to provide further clarification and direction regarding compliance with these notification requirements. The Department does not believe that the requirements as proposed are complex or that they will be difficult to implement. The majority of the information needed for the sensitive population checklist is obtained during the preliminary assessment and the site investigation; thus, completing the one page checklist should not be overly burdensome.

84. COMMENT: The proposal includes numerous penalties for violations classified as minor and non-minor. The public notice requirements, from a penalty perspective, have been

disaggregated into numerous so called “minor” violations, each subject to a \$3,000 fine. It is the official public policy of New Jersey, as expressed in the State Plan and the Economic Growth Strategy, to clean up and reuse contaminated sites. These excessive penalties for trivial violations and failures that have no detrimental impact on environmental conditions may well serve to discourage private investment in neighborhoods with an urgent need for the clean up of contamination that will help to return these neighborhoods to a safe and healthy condition. (13, 14, 19, 24)

RESPONSE: The requirements listed in the violations table are broken down into discrete items to ensure that the person responsible for conducting the remediation complies with all portions of the notification rules and to allow the Department to focus on specific violations, as needed. During the allotted grace period, the person responsible for conducting the remediation can correct minor violations and come into compliance before the Department assesses a penalty. The Department does not believe that enforcement of these requirements will prevent private investors from redeveloping Brownfield sites in New Jersey.

85. COMMENT: The Department should assess penalties based upon business size as measured in employment and/or sales volume. (21)

RESPONSE: The Site Remediation Program's enforcement program is established by the Oversight Rules, N.J.A.C. 7:26C-10 and is based on potential impacts of the violation on human health and the environment and the ability of the program to implement its mission, rather than on a specific violator's ability to pay. The majority of penalties associated with noncompliance of the notification requirements are classified as minor and the person responsible for conducting the remediation at a site will have at least 30 days to achieve compliance, without being assessed a penalty. In addition, the Department is willing and able to settle with parties that receive penalties if the parties promptly come into compliance.

86. COMMENT: The Department should not impose penalties on responsible parties who have had long-standing communications plans in place at their sites while they await Department

review and approval of their alternative, site-specific, notification plans. (2, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: The Department will not penalize a remediating party if the alternative plan includes components that meet the intent of the statute. If compliance with the rule provision is delayed due to the Department's review, the Department will not assess penalties.

### **Exemptions**

87. COMMENT: The Department should exempt from the proposed requirements remedial alternatives that are being field-evaluated for feasibility as a pilot project. (2, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: In the amendments to the Brownfield Act, the Legislature did not provide an exemption for remedial alternatives that are being field-evaluated for feasibility as a pilot project from the notification requirements. The field activities associated with a pilot project for a remedial action would be essentially the same as for the implementation of the remedial action but on a smaller scale. Therefore, the public could become equally concerned by seeing personnel in protective clothing and the use of field instruments and heavy equipment during the conduct of a pilot project as during the conduct of the full remediation. Therefore, remedial action pilot projects should not be exempted from these notification requirements.

88. COMMENT: The rule requires that for sites where the remedial investigation or single phase remediation was initiated prior to the effective date, that party will have to comply within one year of the effective date of the rule adoption. Notification should not be required if the remediation is complete or nearly complete, and the contamination has been removed or contained because there is no public benefit in such cases. (4)

RESPONSE: The Department provided one year for implementation to allow remediating parties time to complete remedial activities that are nearly completed. The Department anticipates some remediations will receive a No Further Action letter within one year of the

effective date of these rules, and the notification requirements will not apply to those sites. The Department believes that a one year compliance deadline is appropriate.

89. COMMENT: Similar to the exceptions for heating oil underground storage tanks (USTs) for one-to-four family residential dwellings and emergency response actions, retail service stations should be exempt from the Proposed Rule. UST sites will result in significant additional work load for both the Department and responsible parties with minimal public benefit. Responsible parties at UST sites tend to have numerous projects with off-site contamination surrounded by dense development. In addition, there is also the opportunity for confusion and unwarranted fear caused by multiple notification letters being sent out by multiple property owners. This concern is particularly valid around retail gasoline station sites with multiple stations on cross streets at the same intersection. In these instances, the sources of contamination are unknown, commingled or involve multiple responsible parties. Providing notice to every property owner, whether or not there is an impact to that property owner, will simply create confusion. Retail service stations, similar to homeowner UST cases, may require a different approach from that applied to other types of remediation sites. (2, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: The Department agrees that many retail service station cases result in off-site contamination and also are often surrounded by dense development. This set of circumstances makes notification particularly important in order to allow the surrounding community to be kept apprised of remediation activities and these sites are not exempt from the Brownfield Act notification requirements. If the remediating party chooses to provide public notification using the notification letter option, rather than the sign option, it will have the opportunity to clearly explain to the public the activities that will be performed. The letter must include the name, address, block, lot, identification numbers, a statement that contamination has been identified and a brief description of the type of contamination, the affected environmental media, the actions being taken at the site and contact information. Providing the required information will enable the public and neighboring businesses including other gasoline stations to have the facts and, therefore, should reduce the opportunity for confusion and unwarranted fear.

If the contamination migrates from the site of the discharge, the person responsible for conducting the remediation will be required to prepare, distribute and publish a fact sheet. If contaminant plumes are migrating from several nearby service stations, the Department would encourage the coordination of public notification among the remediating parties so that the “larger picture” can be provided in a clear and simple way. Coordination of notification would qualify as an alternative plan that would require prior Department approval pursuant to N.J.A.C. 7:26E-1.4(n).

90. COMMENT: Currently, the underground storage tank (UST) program provides adequate notification and participation to owners and tenants within an area of concern. The Department sends owners and tenants copies of potable well and vapor testing results, and access agreements. The Department will direct the person responsible for conducting the remediation to conduct additional notifications if it deems that it is necessary. The Department also provides notification to municipalities for remedial action selection and the work plan and implementation phases of remediation.

Therefore, the public already has access to pertinent remediation information. All data and reports that are submitted to the Department are available through a public records search, and all contaminated sites are listed in the Known Contaminated Sites of New Jersey (KCS) report which is posted by the Department. (2, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: Although owners and tenants receive potable well and vapor testing results and therefore, will receive remediation information during discussions and/or correspondence for access, typically not all properties in the vicinity of the site need to be sampled. Therefore, adequate notice is not provided to all owners and tenants in the vicinity of the site. Also, if there were no potable wells impacts or vapor intrusion potential, no notice at all would have been provided.

While the Department agrees that access to lists of contaminated sites is available via the Known Contaminated Sites in New Jersey Report, available at <http://www.nj.gov/dep/srp/kcsnj/>, a goal of the Department has been to provide early, two-way communication about contaminated sites

to those who may not otherwise seek it out and be left disenfranchised from the remediation process. In 2005, after a series of round table meetings that included members of the environmental justice community, environmental and civic organizations, local officials and industry representatives, the Department's Public Participation Task Force concluded that early communication as described in the rule can be critical to a successful investigation and cleanup and this effort can save time and money while building critical community support. The Task Force Recommendation Report is available at <http://www.nj.gov/dep/srp/community/>. The public notification amendments to the Brownfield Act incorporate some of the conclusions reached by the Task Force. By requiring the person responsible for conducting the remediation to either post signs or send notification letters to local residents and officials, the Department ensures that those people potentially impacted by the remediation will know how to get more information.

91. COMMENT: The Department exempted the majority of the homeowner cases from the proposed rule requirement because “Remediation of the majority of homeowner cases is straightforward and these sites pose minimal risk to public health and the environment.” The Department should exempt all unregulated underground storage tank (UST) remediations because they are equally “straightforward.” Furthermore, many regulated UST remediation cases are also “straightforward.” The Department records indicate UST cases represent the second greatest category of cases handled by the Site Remediation Program, which is already overburdened. (17)

RESPONSE: The Department provided an exemption from these notification requirements for the person responsible for conducting the remediation who is remediating a discharge from an underground storage tank storing heating oil for on-site consumption in a one-to-four family residential dwelling. The reason given by the Department in the rule Summary is that home heating oil tank remediations are often completed in a single phase of limited duration and that it would be impractical to require the person responsible for conducting the remediation to comply with additional requirements in a case with a comparatively short turn around time period. In addition the Department noted in the Summary that amendments to the Brownfield Act

specifically exempt these types of remediations from these additional notification requirements. See N.J.S.A. 58:10B-24.1 and 2.

The Department agrees with the commenter that the remediation of some underground storage tanks can be straightforward. However, how quickly and easily a discharge can be remediated has more to do with the type of the contaminant, the duration of the discharge and site conditions such as soil type, geology and water use in the area of the site than with whether or not an underground storage tank is regulated by the Department pursuant to N.J.A.C. 7:14B.

While regulated underground storage tank cases do represent a large number of cases in the Site Remediation Program, the potential impacts on surrounding communities occur frequently and can be quite significant. For these reasons, the Department believes that it is important that communities that may be impacted by leaking underground storage tanks be notified of remedial activities.

92. COMMENT: The Department should clarify whether these regulations apply to voluntary remediation or to remediation required as a result of a spill or other accidental contamination, or both. Because of these new requirements, remediating parties will be less likely to conduct voluntary remediations in the future because of fear of penalty. (21)

RESPONSE: Pursuant to the underlying statutory provisions, compliance with the notification requirements is required for all sites with the exception of home heating oil tank remediations and emergency response actions. The provisions of the Technical Requirements for Site Remediation rules apply to all sites remediated, with or without the Department's oversight, including sites that are being remediated voluntarily. The Department does not anticipate that the rules will provide a significant disincentive to remediation, because they are not so burdensome and/or expensive that a remediating party would decline to voluntarily remediate a site based on the proposed public notice requirements.

93. COMMENT: The proposed regulations will pit residential neighbor against business enterprise and will provide a field day for lawyers - without benefit to the Department's intent. (21)

RESPONSE: The intent of the statute is to encourage dialogue between remediating parties and the public and the Department believes that these rules will foster that communication. The Department views the remediation of contamination in a positive light and believes that the public notification rules will be supported and welcomed by communities. In the past year the Department has been conducting notification at publicly funded sites in accordance with these rules and has not encountered the negative consequences anticipated by the commenter. In the Department's experience to date, neither the posting of signs nor the sending of notification letters has resulted in problems in local communities or resulted in litigation.

94. COMMENT: If the person conducting the remediation determines that contamination is entering or transitioning across his/her facility or site from an unidentified source, it should not trigger public notification requirements. In these cases, the person responsible for conducting the remediation should only be required to notify the Department and the local Health Department. The Department and the local Health Department should be responsible for all required public notifications where the responsible party has not yet been determined. (2, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: The Department does not require the owner or operator of real property to conduct remediation of contamination coming onto the site from another property owned or operated by another person, pursuant to the Brownfield Act, N.J.S.A. 58:10B-12g(5). As suggested by the commenters, the Technical Rules at N.J.A.C. 7:26E-1.4(c) require notification to the assigned case manager or the Department's hotline when contamination is identified that has migrated onto a site from an off-site source. The other notification requirements established by N.J.A.C. 7:26E-1.4 are not triggered by this circumstance.

### **Remediation Exempt From Public Notification**

95. COMMENT: The proposed rules exceed the intent of the statute and fail to recognize that certain entities require industry-specific treatment to avoid unnecessary adverse impacts to operations and customers. The proposed requirements and the lack of flexibility regarding application may impede, for example, a utility company's ability to safely and efficiently maintain the reliable distribution of service to its customers. It can also cause a conflict between the obligations imposed by the Department and the service obligations the utility company has to its customers pursuant to regulation by the Board of Public Utilities.

Utility equipment used in the distribution of electric service is often subject to unforeseeable failure or damage due to storms, motor vehicle accidents, third-party damages and other similar hazards, which may lead to a release of materials such as dielectric fluids. Upon receiving notification of such a release, the responsible party takes immediate action to clean-up the release at the site of the incident. These occurrences are of an emergent nature and therefore exempt from the broader notification requirements pursuant to N.J.A.C. 7:26E-1.4(b). In certain circumstances, however, the responsible party may restore service to its affected customer(s) pursuant to its service obligations, but then be required to conduct follow-up actions at the site related to the initial response action. These circumstances may include: investigation relating to a customer's property damage claim; replacement of utility equipment that was not readily available at the time of the initial response action, and facilitating a specially timed equipment outage and repair to allow for continued customer operations, especially for industrial and commercial customers for whom unplanned service outages can cause dangerous situations for workers and devastating economic losses. As discussed in the Rule Proposal Summary pursuant to subsection (e) on page 39 N.J.R. 2690 of the New Jersey Register, the Department would consider these follow-up actions to be subject to the broader notification requirements. As these follow-up actions are not required due to any additional release or threat to public health and welfare, the Department should exempt such actions from the proposed rules by expanding the definition of *emergency response action* to include any subsequent actions taken to address utility equipment releases resulting from incidents of an emergent nature. Otherwise, resources will be diverted from efforts to restore service and make permanent repairs to dealing with the burdensome administrative tasks associated with unwarranted notification. (10)

RESPONSE: The Department does not believe that there is a conflict between the notification rules at N.J.A.C. 7:26E-1.4 and the circumstances noted by the commenter. The Department included a cross reference at N.J.A.C. 7:26E-1.4(a) to the Discharge of Petroleum and Other Hazardous Substances rules at N.J.A.C. 7:1E-5.3 to clarify that the Department requires different notification of discharges that are of an emergent nature. The types of releases described by the commenter should be reported pursuant to N.J.A.C. 7:1E-5.3.

Only when remediation of the spill requires follow up activities that meet the definition of “remediation” pursuant to the Technical Requirements for Site Remediation, would the notification requirements of N.J.A.C. 7:26E-1.4 apply. None of the “follow-up actions” that the commenter mentions fall within the definition of “remediation.” Moreover, N.J.A.C. 7:26E-1.4(e) explicitly exempts emergency response actions from the majority of the notification requirements. Accordingly, there is no need to expand the definition of “emergency response action” as the commenter suggests.

96. COMMENT: Under current Department regulations regarding notification of releases, releases of dielectric fluids less than 25 gallons which are cleaned-up within 24 hours do not require notification to the Department Hotline. As such, the commenter seeks to clarify that this exemption is still valid and that under this scenario, the broader notification requirements do not apply and only the immediately impacted property owner need be notified of any actions taken to clean-up the release. Broader notification requirements in the context of a release such as this would cause an undue burden on the resources of the utility and would cause confusion and unnecessary concern to the public to whom no actual threat is posed. (10)

RESPONSE: The type of spills described by the commenter should be reported pursuant to N.J.A.C. 7:1E-5.3. The Department included a cross reference at N.J.A.C. 7:26E-1.4(a) to the Discharge of Petroleum and Other Hazardous Substances rules at N.J.A.C. 7:1E-5.3 to clarify that the Department requires different notification of discharges that are of an emergent nature. Thus, the commenter is correct that the exemption for releases of dielectric fluids less than 25 gallons which are cleaned-up within 24 hours is valid.

97. COMMENT: The Department should clarify who is responsible for notification when a site is owned by third-parties on which a utility company maintains distribution facilities. Specifically, a utility company may maintain facilities on a third-party owned property subject to evaluation and/or remediation under the Industrial Site Recovery Act (ISRA). Also, the company may be asked to perform work on facilities or install facilities on a known contaminated site. It is unclear from the proposed rules to what, if any, notification requirements, a utility would be subject to under these circumstances. As the utility is neither the property owner nor the responsible party, no notification requirements should be imposed on the utility in relation to facilities maintained and/or utility work done at these sites. Any such requirement would be redundant, as presumably the property-owner would have already complied with any necessary notification provisions and additional notification would likely lead to public confusion. (10)

RESPONSE: The proposed regulations would apply to the utility company if the utility company meets the definition of the person responsible for conducting the remediation and the activities conducted by the utility company meet the definition of “remediation” pursuant to the Technical Requirements for Site Remediation. Under the circumstance described, the ISRA subject party conducting the remediation would be responsible for complying with the new notification requirements.

98. COMMENT: Regional background levels of groundwater contamination above New Jersey Groundwater Quality Standards, or background levels of contaminants in industrial areas exceeding Department’s Soil Cleanup Criteria, or contaminated historic fill should be excluded from the notification requirements. A database of regional ground water, soils and historic fill background contamination information should be maintained by the Department and local Health Departments. (2, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: The Department does not have a database of regional background contamination for ground water or soil. The legal requirement to begin investigation of ground water quality is triggered by the discharge of hazardous substance at a site. If the person responsible for conducting the remediation identifies ground water contamination that is not attributable to a their site, they are required to notify the Department that contamination has migrated onto their

site pursuant to N.J.A.C. 7:26E-1.4(c). The remediating party would not be required to conduct public notification in that circumstance.

The person responsible for conducting the remediation is not required to remediate regional background soil contamination pursuant to N.J.A.C. 7:26E-3.10. Because the notification requirements of N.J.A.C. 7:26E-1.4 are initiated by the onset of the remedial investigation, and the presence of background contamination does not require a remedial investigation to be conducted, no notification would be required.

The Department has been developing maps indicating the locations of historic contaminated fill throughout the state that can be used by remediating parties to identify this material. Remedial investigation of historic contaminated fill is required pursuant to N.J.A.C. 7:26E-4.6 and thus would require public notification. However, due to the regional nature of historic contaminated fill remediating parties are not required to conduct additional notification when the contamination is identified “off-site” pursuant to N.J.A.C. 7:26E-1.4(m).

### **Local Government Officials**

99. COMMENT: Since public inquiries would be most efficiently addressed by local elected officials, the focus of the rule proposal should be to establish dialogue between local officials and the industry and business in their towns and cities. (11, 22, 23)

RESPONSE: The Department recognizes the critical role that local elected officials play in information dissemination and has included provisions in these rules to require the person responsible for conducting the remediation to provide the municipal clerk and designated local health official with a copy of the Sensitive Population and Resources Checklist and supporting documentation, as well as copies of all public notices with lists of recipients. The Department believes that this information will help encourage dialogue between local elected officials and the industry and business in their towns and cities.

100. COMMENT: The provision for additional public outreach based on a request from a municipal official will result in every mayor or other local official receiving a call from a concerned citizen regarding a contaminated site to request additional public outreach in an effort to ensure that some of the burden is taken off of the municipality; and some level of insurance is provided that there is shared liability if litigation ensues. (4)

RESPONSE: The Department is unable to respond to this commenter's claim about the burden on municipalities and litigation because the comment is unclear. The Department remains committed to working with municipal and elected officials to further the legislative notification mandates. These amendment to the Technical Rules reflect minimum requirements. N.J.A.C. 7:26E-1.4(j)1ii would allow a municipal official to request that the person responsible for conducting the remediation to go beyond the minimum notification requirements if the municipal official identifies a particular need in the community.

### **Alternative Notification Plan**

101. COMMENT: To eliminate a drawn out process of approval of an alternative notice plan, which will be time consuming and resource intensive for both the Department and person responsible for conducting the remediation, the Department should allow remediating parties to send notification letters by first class mail to the occupant at all addresses identified by a recognized private mailing service. The envelope should be clearly marked as first class mail and state that it contains official public notice of plans to clean up a nearby contaminated site. This should provide the most complete coverage possible and would eliminate the need to continuously update owner and tenant lists for subsequent mailings. (13, 14, 19, 24)

RESPONSE: The intent of the alternative plan provision in the proposed amendments is to allow for flexibility in cases where the person responsible for conducting the remediation has already established an effective method of communicating with the public, other than one expressed in the amendments. There also may be instances where the proposed requirements would not prove to be the most effective method of providing the community with information. The Department wanted to ensure that the remediating party had an avenue by which to request

approval for a plan that may be more appropriate for a particular remediation project. For instance, there could be circumstances where web-based information or a listserv would reach more of the community than the methods proposed. Limiting the alternative plan to individual notification letters by first class mail to the occupant at all addresses identified by a recognized private mailing service removes the flexibility that the Department sought to introduce by this provision.

### **Miscellaneous Topics**

102. COMMENT: Because the value of real property can be diminished based on its proximity to contaminated sites, even if there is no risk of impact from the contamination, public notice may impede the ability of a nearby property owner to sell the property at a fair market price. The nearby property owner should have recourse against the town, the remediating party, the county or the Department. The State should consider providing liability protection to responsible parties who are simply complying with the regulation, but get sued for diminution of adjacent property values. (4)

RESPONSE: Sites for which notification will be required are currently listed on the Department's Known Contaminated Sites in New Jersey Reports which is available to the public and to prospective purchasers. Existing real estate disclosure requirements already compel property sellers notify prospective purchasers of a wide variety of information including whether the property is adversely affected, or may be adversely affected, by an environmental hazard.

The amendments to the Brownfield Act and the notification rules establish a means to provide notification and do not address any liability associated with a discharge. Liability related to the discharge of hazardous substances is established by the Spill Compensation and Control Act. Damages associated with discharges of hazardous substances, including property diminution, are addressed by the Processing of Damage Claims Pursuant to the Spill Compensation and Control Act Rules, N.J.A.C. 7:1J.

103. COMMENT: When off site contamination is identified, instead of requiring the person responsible for conducting the remediation to provide a list of online resources for information about contaminants pursuant to N.J.A.C. 7:26E-1.4(k)5v(8), the Department should provide references to its own website or the local health official for this information. Referring the public to the United States Environmental Protection Agency and the Agency for Toxic Substances and Disease Registry can cause confusion without proper guidance due to the myriad of links to regulations and guidance that may not be relevant to the site. This is the kind of information that a well-designed communication program can provide to the public. (2, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: The Department does not currently maintain such information on its web site nor would it be likely that local Departments of Health would have this kind of information readily available. The purpose of this requirement is to provide access to information about contaminants that a recipient of a fact sheet may not otherwise know how to acquire. The person responsible for conducting the remediation can provide whatever additional guidance to the public that they think would be helpful to understanding this type of technical information.

104. COMMENT: Stakeholders to the remediation of any particular site must be local. These stakeholders must reside in the community, or be property owners where investigation or remediation issues must occur. Communication programs should be focused on property owners, government officials and other stakeholders that are actually impacted by the contamination or by the remediation response actions. State-wide organizations and non-community members are not stakeholders to a local remediation issue. (2, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: The Department agrees that the property owners and tenants in the local community have the greatest interest at stake in remediation activities in their neighborhoods. To that end, the rule requires the person responsible for conducting the remediation to provide notification letters and fact sheets to owners and tenants within 200 feet of the site boundary. Pursuant to N.J.A.C. 7:26E-1.4(o), the Department may determine that there is substantial public interest when it receives a petition containing the signatures of 25 or more people who live or work within 200 feet of the site, if contamination has not migrated off site; a petition containing

the signatures of 25 people that live or work within 200 feet of the extent of contamination, if contamination has migrated from the site boundary; or a written request by a municipal official, such as the Mayor or the chairperson of an environmental commission, or a designated local health official. Only these three types of petitions for enhanced public outreach will be entertained; accordingly, organizations or non-community members are not among the people or groups that may submit a petition.

105. COMMENT: The rule requires multiple submittals of information throughout the notification process in both hard copy and electronic format. In each case, these submittals must go to the case manager in the Department, the Office of Community Relations, the Municipal Clerk and the Health Official. Submittals required by the proposal include a general information notice describing the site, contamination and other pertinent factors, Sensitive Population and Resource Checklist, map showing the location of the site and sensitive populations, photograph of the notification sign, copy of the notification letter and any updates, fact sheet, copy of advertisement placed in newspaper, and any additional information required. Municipalities will be overwhelmed with documentation on each and every site. A municipality with tens or hundreds of sites will have to allocate resources to review, record and file this information. At a time when State funding for municipal services is scarce, the Department should not put in place a rule that will most likely require municipalities to spend more on the necessary resources to organize this material. (4)

RESPONSE: The Site Remediation Program held a series of stakeholder meetings in the Spring of 2005. At these meetings, municipal officials have repeatedly expressed a desire to be kept informed of remedial activities in their communities stating that their constituents often seek information from, and express concerns to them first. By providing the required information to the local government agency, municipal officials will be able to answer their constituents' questions and address their concerns more directly. In addition, the Department has been offering outreach and training to municipalities on the new rules and its resulting documentation.

106. COMMENT: Who has the legal responsibility to disclose the presence of contamination? Does any contractor and any property owner or anybody who has knowledge of a discharge of a

hazardous substance, have a legal responsibility to disclose it. To whom does this information need to be disclosed? (27)

RESPONSE: New N.J.A.C. 7:26E-1.4(a)1 clarifies who is required to disclose, or notify the Department of a discharge of hazardous substances and to whom the notification must be made. This rule requires any person responsible for a discharge to notify the Department immediately after a discharge commences in accordance with the Discharge of Petroleum and Other Hazardous Substances (DPHS) rules at N.J.A.C. 7:1E-5.3. The Spill Act requires a person responsible for a discharge to report a discharge immediately to the Department. See also the Spill Compensation and Control Act (the Spill Act), N.J.S.A. 58:10-23.11e.

A contractor who has been hired by a property owner or operator to conduct remediation activities is not responsible for notifying the Department. However, a contractor who is hired by the person responsible for conducting the remediation may contact the Department on behalf of the person responsible for conducting the remediation in order to comply with the notification requirements for that person.

A person who is not responsible under the Spill Act (such as a passerby) is not legally responsible for notifying the Department of a discharge. However, the Department strongly encourages anyone who becomes aware of a discharge to notify the assigned Department case manager or the Department's emergency hotline so that appropriate actions may be taken to ensure protection of human health and the environment.

107. COMMENT: Is there a requirement in the Technical Rules that all samples collected at a contaminated site be checked by the Department? (27)

RESPONSE: It is unclear what the commenter means by the statement "samples collected at a contaminated site [must] be checked by the Department." The Department reviews reports that are required by the Technical Rules including analytical data of environmental samples to ensure that remedial activities are conducted in compliance with environmental regulations and statutes. In most cases, the Department will conduct a quality assurance/quality control (QA/QC) review

of a representative portion of the analytical data to ensure that the samples were collected and handled properly and are analyzed in accordance with accepted laboratory protocols. All sample results of drinking water and indoor air receive a comprehensive QA/QC review.

108. COMMENT: Does the Department have the authority and does this rule mandate that fences be installed at all contaminated sites; and if so, would the Department mandate fencing on adoption? (27)

RESPONSE: The Department may require the installation of a fence at any contaminated site when it is necessary to ensure that access to the site is controlled. The installation of a fence is an engineering control which is addressed under the Technical Rules at N.J.A.C. 7:26E-8, Engineering and Institutional Controls.

109. COMMENT: When, during the course of a remediation, the Department becomes aware that people near the site could become exposed to contamination, what is the Department's obligation to notify the potentially affected people?

How does the Department handle notification in an immediate environmental concern situation? Does the Department tell people to do things like install treatment systems on their water, or avoid going onto certain properties? Does the Department warn prospective purchasers about the presence of contamination?

How does the Department handle notification in situations where there is the potential for vapor intrusion? How does the Department notify potentially affected schools districts, or residents? (27).

RESPONSE: The Department follows internal standard operating procedures in cases where contamination from a site could pose an immediate threat to human health. These are called immediate environment concern cases, which primarily involve the migration of contaminated ground water that can potentially impact either drinking water wells, or indoor air from the intrusion of vapors. When these conditions are identified, potentially impacted people are notified, either by Department personnel or by the person responsible for conducting the

remediation under the Department's oversight. The potentially impacted people are told of the potential risks and advised of any steps that should be taken to mitigate that risk. Additionally, either the Department or the person responsible for conducting the remediation may contact potentially impacted property owners concerning gaining access to the contaminated property for the purpose of sampling and evaluation.

The notification process is the same for potentially impacted drinking water, vapor intrusion or some other type of potential exposure. Notification is conducted in the same manner whether the potentially affected sites are schools, residences, commercial establishments or industrial facilities.

The notification of prospective purchasers regarding contamination at a site relates to real estate disclosure laws that are not under the authority of the Department. However, all of the Department's environmental reports and data are public information and are available under the Open Public Records Act (OPRA). The Department recommends that prospective purchasers conduct a due diligence search of information which would include a review of relevant Department files and data.

110. COMMENT: The Department states that compliance with the notification requirements will be required whether or not the remediation is being conducted with Department oversight. This conflicts with the Brownfield Act which provides that notification is to be provided by the person responsible for conducting the remediation which is defined as any person who executes an oversight document with the Department. This requirement must be removed from the proposed rules as it is clearly illegal. (1)

RESPONSE: The requirement to comply with the notification requirements, whether or not the remediation is being conducted with the Department's oversight, and whether or not it is being conducted voluntarily, is consistent with the general requirement that anyone remediating a contaminated site in New Jersey must comply with the Technical Rules, N.J.A.C. 7:26E.

The Department believes that it has reasonably interpreted the Brownfield Act notification requirements. Whether or not remediation is being conducted with Departmental oversight is irrelevant to the citizens in the vicinity of a contaminated site being remediated, and they will be unaware of that distinction. The purpose of these rules is to provide neighboring residents with information regardless of whether there is an oversight document.

111. COMMENT: The proposed rules require the notification of off-site discharges migrating onto a property from another property. This conflicts with the Brownfield Act, which provides that a person is not responsible to remediate a discharge migrating onto the property from an off-site source, N.J.S.A. 58:10B-12g(5). Therefore, this requirement must be deleted from the proposed rules. (1)

RESPONSE: The Department agrees that N.J.S.A. 58:10B-12g(5) provides that “remediation shall not be required of the owner or operator of real property for contamination coming onto the site from another property owned and operated by another person, unless the owner or operator is the person who is liable for cleanup and removal costs.” However, the rules are consistent with the Brownfield Act since they do not require remediation of a discharge that has migrated from other sites. The rules do not require remediation of contamination coming onto a site from another property; they simply require the person responsible for conducting the remediation to comply with the public notification and outreach requirements. N.J.A.C. 7:26E-1.4(c) provides only that the person responsible for conducting the remediation shall notify the Department if that person determines that contamination migrated onto their site from another site. Specifically, the person responsible for conducting the remediation shall notify his/her assigned case manager or if the case is not assigned to a case manager, the Department’s hotline at 1-877 WARNDEP or 1-877-927-6337.

112. COMMENT: The Department was required to develop rules within the framework of Brownfield Act, but these rules have gone beyond what was required in that law. By doing so, the Department has potentially created a regulatory hurdle that will unnecessarily alarm the public, incite litigation, and discourage more cleanups. The commenter urges the Department to

support changes to the law and subsequent changes to the proposed regulations that provide meaningful notification and continue to promote cleanups throughout our state. (4)

RESPONSE: On August 2, 2006, the Legislature amended the Brownfield Act by adding N.J.S.A. 58:10B-24.1 to -24.5. In these amendments, the Legislature authorized the Department to promulgate rules and regulations governing public notification of remediation of contaminated sites in N.J.S.A. 58:10B-24.3(b).

Prior to the enactment of this legislation, the Department had already formed a task force in order to discuss rules in consideration of stakeholder views. The Public Participation Task Force found that early communication with residents, business owners and local officials affected by remediation activities can be vital to a successful investigation and cleanup. With an effective outreach strategy, the parties responsible for the remediation can anticipate the needs and concerns of the community and address them proactively. Effective outreach creates a forum to share information and raise and address community concerns about the site early in the remediation process. The Department believes that these efforts will save time and money and build critical community support.

113. COMMENT: The scope of the proposed rules goes beyond the actions required to implement the legislative mandate and should be revised before adoption. The adoption of the rules should be stayed until the legislature has provided further guidance as it has indicated will be forthcoming. By way of example, the requirement to identify sensitive populations and resources is outside the scope of notice contemplated by the Statute as is any requirement that Environmental Justice neighborhood designations be included. The notice is sent to governmental agencies with trained staff with access to this type of information. The proposed notice content attempts to shift governmental function to the private sector. Public protection is a governmental function. To the extent that the legislature has determined that additional protection is needed in the context of site remediation, responsibility for those tasks that go beyond the specific criteria in the statute should be placed on the government. (9)

RESPONSE: The Department believes that it has the authority to require a survey of the area surrounding a contaminated site for sensitive populations and resources under the broad mandate of the Brownfield Act to protect public health and the environment. New N.J.A.C. 7:26E-1.4(f) sets forth the requirements for identifying sensitive populations and resources located within 200 feet of the site boundary, recording this information, and submitting this information to the Department, the local municipality, and the local health official. The Department anticipates that this information will be a valuable tool in helping the Department and local officials evaluate the real and perceived risks associated with the proximity of sensitive populations and resources to contamination at the site. Whether these risks are scientifically based or are perceived, they can pose an obstacle to site remediation. For example, administrators of grade schools, childcare facilities and parks are often faced with making decisions based on the community's perception of risk. Ensuring that sensitive populations and resources are identified and that the appropriate entities are notified can reduce the perception of risk. When administrators are informed, they are more able to provide information and address concerns of the people who use their facilities.

114. COMMENT: The proposed rules require that the person conducting the remediation to determine if an Environmental Justice Petition Neighborhood ("EJPN") has been designated in the same municipality as the property being remediated. The Brownfield Act does not require that an EJPN be identified, and therefore, this requirement is beyond the scope of the Act. In addition, compliance with this requirement will be difficult to achieve as the only place where EJPNS are identified are on the DEP website, which may or may not be up to date at the time of notification. This requirement is unconstitutionally vague and contravenes the Administrative Procedures Act, N.J.S.A. 52:14B-1, et seq. The Department does not provide notice when it elects to change its web site, therefore, this requirement must be removed from the proposed rules. (1)

RESPONSE: Although the Brownfield Act at N.J.S.A. 58:10B-24.3a and b directs the Department to adopt rules that set forth notice requirements, the Department recognizes that the Act does not explicitly mention the identification of "EJP neighborhoods." However, the Department has broad implementing authority under the Act to codify rules that are effective in implementing the Act. Accordingly, the Department does not believe that these rules are beyond

the scope of the Act or are unconstitutionally vague. The Department has found that concerns about whether residential and educational uses are proposed on a previously contaminated property are amplified in Environmental Justice communities because some of these communities may be dealing with disproportionate environmental impacts. Because of these concerns, the Department believes it is reasonable to require this information for sites located in these communities. In addition, the requirement to identify Environmental Justice neighborhoods is not vague because the rule only requires remediating parties to use the Department's website to identify Environmental Justice petition neighborhoods. The information regarding environmental justice neighborhoods required for the check list is available at <http://www.nj.gov/dep/ej/>. The Department welcomes input, particularly on the accuracy of the identification of EJP neighborhoods, and therefore encourages a person responsible for conducting the remediation to call the Department's Office of Community Relations if he/she believes that the information provided on the Department's website is not current.

115. COMMENT: The Department was charged with promulgating rules to implement the amendments to the Brownfield and Contaminated Site Remediation Act that require public participation in the site remediation process. However, the scope of the proposed rules goes far beyond the actions required to implement the legislative mandate and are arbitrary, capricious and unreasonable. The proposed rules are unclear in many ways and are open to interpretation, which could ultimately lead to unnecessary and unwarranted enforcement actions. The proposed rules do not differentiate between a remediation that poses a high level of risk to the community and a remediation that proposes little or no level of risk at all. Given the very large number of contaminated sites in New Jersey, the proposed rules will, if adopted, create a greater uncertainty to those receiving notice, and have the potential to create unnecessary panic and alarm for the public than to provide useful information. The Department must relate the notification requirements to the level of risk presented by individual projects. (1)

RESPONSE: The proposed regulations were formulated after the Department's Public Participation Task Force hosted a series of roundtable meetings that included members of the environmental justice community, environmental and civic organizations, health officers and local officials, and industry representatives and various associations. The purpose of the

roundtable meetings was to gather public input on improving public participation in the remediation of contaminated sites in New Jersey. The task force concluded that early, two-way communication with residents, business owners and local officials affected by remediation activities can be critical to a successful investigation and cleanup. This may be especially true when future uses of the property being remediated include public recreation or residential development. With an effective outreach strategy, the parties responsible for the remediation can anticipate the needs and concerns of the community and address them proactively. Effective outreach creates a forum to share information and raise and address community concerns about the site early in the remediation process. This effort can save time and money and build critical community support.

In its amendments to the Brownfield Act, the Legislature specifically directed the Department to require any person who is responsible for conducting a remediation of a contaminated site to provide written notification to any local property owners and tenants who reside within 200 feet of the contaminated site, N.J.S.A. 58:10B-24.3. Because the Legislature did not direct that notification requirements be related to the level of risk presented by individual projects, but instead that “any person responsible for conducting a remediation of a contaminated site” must provide public notice, the Department cannot contravene clear legislative intent by exempting certain projects from the public notice requirements.

116. COMMENT: The Brownfield Act requires notification “upon initiation of the remedial action.” The language is very specific with respect to point at which public notification is required. It is at the initiation of remedial action. While the amendments repeatedly use the word remediation, initiation of remediation is not the time the amendment dictates as the point to initiate public notification. According to the proposed rule, there must be public notification at the onset of remediation and the commenter believes there will not be sufficient information and documentation to release an educated analysis of the site to the public. Releases of any site remediation information at the initial stage of the process will not serve the best interest of the public and is inconsistent with the language in the Brownfield Act. (17)

RESPONSE: The language noted by the commenter is found at N.J.S.A. 58:10B-24.1, which mandates the timing of notification to the municipality. Under N.J.S.A. 58:10B-24.1, municipal notice only is required upon initiation of the remedial action phase of the remediation. This differs from the legislative direction at N.J.S.A. 58:10B-24.3, which governs public notice, and does not specify when notice is required. The Department believes that providing notification at the initiation of the remedial investigation makes sense. The Technical Rules define remedial investigation as “actions to investigate contamination and the problems presented by a discharge.” At the initiation of the remedial investigation, the person responsible for conducting the remediation will have sufficient information to inform the public about the type of contamination and the media affected at the site. It is at this point in the remediation that potential impacts may arise as community issues, which makes it an ideal time to establish a dialogue between the community and the remediating party.

117. COMMENT: The rule summary indicates that the sponsor of the amendments to the Brownfield Act, N.J.S.A. 58:10B-24.1-24.5 intends to propose further amendments to clarify the specific notification requirements upon which the proposed rule is based. The rule should not be adopted until those amendments are enacted. (2, 7, 8, 10, 18, 22, 23, 26)

RESPONSE: Although the Department understands that the sponsor of the Brownfield Act amendments regarding public notification may intend to propose further clarifications to the notification requirements, nevertheless, the statute is in place and it specifically directs the Department at N.J.S.A. 58:10B-24.3 to adopt rules and regulations setting forth the notice required under N.J.S.A. 58:10B-24.1 to -24.5. The Department has discussed the existing statutory requirements with the sponsor and believes that these rules meet the intent of the legislation. Further amendments to the Brownfield Act will simply clarify the language in these sections. The Department will amend these rules based on future statutory amendments, if required.

118. COMMENT: The Department’s rule proposal that was published in the New Jersey Register, included dozens of citations from the New Jersey Administrative Code (N.J.A.C.) as well as probably a score or more of other notes referring to New Jersey Administrative Statutes

Annotated (N.J.S.A.) and other State and Federal rules. None of these cited sections are published in the Register and the regulated parties either must have these items on hand or obtain them to properly understand the significance to the sentences or paragraphs in which they appear.

It is difficult to understand references to specific sections of the New Jersey regulations when those regulations are not readily available. Does the Department publish the Site Remediation Program regulations in a single publication and how might one obtain a copy of same? (21)

RESPONSE:

118. COMMENT: The Department's rule proposal that was published in the New Jersey Register, included dozens of citations from the New Jersey Administrative Code (N.J.A.C.) as well as probably a score or more of other notes referring to New Jersey Administrative Statutes Annotated (N.J.S.A.) and other State and Federal rules. None of these cited sections are published in the Register and the regulated parties either must have these items on hand or obtain them to properly understand the significance to the sentences or paragraphs in which they appear.

It is difficult to understand references to specific sections of the New Jersey regulations when those regulations are not readily available. Does the Department publish the Site Remediation Program regulations in a single publication and how might one obtain a copy of same? (21)

RESPONSE: The Department's rules are available from several sources. LexisNexis® is the publisher of the New Jersey Register (N.J.R.) and the New Jersey Administrative Code (N.J.A.C.). The New Jersey Register is the official journal of State agency rulemaking. Published twice a month, the Register contains the full text of rules that State agencies propose and adopt, as well as notices of public hearings, Gubernatorial Orders, and other notices. The New Jersey Administrative Code is a compilation of all of the rules of State agencies. To purchase a copy of the New Jersey Register or the New Jersey Administrative Code, contact LexisNexis® Customer Service at (800) 223-1940, or go to the LexisNexis® bookstore on the internet at [www.lexisnexis.com/bookstore](http://www.lexisnexis.com/bookstore). The New Jersey Register and the New Jersey Administrative Code are also accessible on-line at [www.lexisnexis.com/njoal](http://www.lexisnexis.com/njoal). In addition, both publications are available for review at individual public and university libraries throughout the State. Contact the library directly to determine if these publications are available. The Department provides a courtesy copy of most of its rules on its web site at

<http://www.state.nj.us/dep/rules> with SRP rules available at <http://www.nj.gov/dep/srp/regs/>. These rules can be read online or can be downloaded.

The codified New Jersey statutes are accessible on-line at [www.njleg.state.nj.us](http://www.njleg.state.nj.us) and the New Jersey Statutes Annotated (N.J.S.A.) is available for review at individual public and university libraries throughout the State. Federal statutes are set forth in the United States Code (U.S.C.), which is accessible on-line at [www.gpoaccess.gov/uscode/index.html](http://www.gpoaccess.gov/uscode/index.html). The Code of Federal Regulations (CFR) is accessible on-line at [www.gpoaccess.gov/cfr/index.html](http://www.gpoaccess.gov/cfr/index.html).

119. COMMENT: N.J.A.C. 7:26E-1.4(i) contains a provision allowing the option of notice of remediation to be sent to “[e]ach owner of all real property, as shown on the current municipal tax duplicate, and tenants of those properties, located within 200 feet of the site boundary.” The commenter does not object to notifying tenants concerning remedial activities occurring in proximity to their apartments. However, it should be emphasized that the obligation of notice belongs solely to the person performing the remediation, not on the landlord, manager, or other person involved in the apartment building or complex.

It should not be the owner or manager’s obligation to supply lists of tenants, to determine languages spoken by tenants, or to distribute or post any notices of the remediation within buildings. The legal obligation falls entirely on the person performing the remediation, not on landlords or managers of apartment dwellings. There are significant confidentiality and privacy issues that would prohibit apartment owners from disseminating this information. The commenter agrees with the Department’s statement in the summary section that if this form of notification is used for tenants that letters could be sent to current “resident” or “occupant” if names are not otherwise available. (5)

RESPONSE: The commenter’s interpretation of the Brownfield Act Amendments and the proposed rules is correct; the person who is responsible for conducting a remediation of a contaminated site is required to comply with these notification requirements. Therefore, except for cases where the landlord, owner or manager of an apartment building or complex is a

responsible party under N.J.S.A. 58:10B-24.4, the landlord, owner, or manager of an apartment building or complex would not have to provide notice.

### **The Role of the Department and the Public in Remedy Selection**

120. COMMENT: The public participation rules don't go far enough. The public should have the opportunity to help decide what remedial action should be taken at a contaminated site. The information provided by the public notification rules is informational only and will just tell the public what the remedial decision is, rather than giving them the opportunity to participate in the decision making process and help decide what is best for their community. (12)

121. COMMENT: People should have the opportunity to have their concerns about the remediation of contaminated sites in their neighborhoods heard by the Department and those comments should be made part of the public record. The public should be able to influence the how the remedial action is conducted.

Remediating parties should not be given the sole authority to select how remediations are implemented. The Legislature gave remediating parties that authority inappropriately. The Department should have more control over how contaminated sites are remediated. The Legislature should give the Department more authority to dictate how and to what level remediations are conducted. (27)

122. COMMENT: There needs to be meaningful public involvement in the selection of remedies and in the redevelopment of the State's Brownfields. In order to get better cleanups, better public participation and the kind of redevelopment that is really going to work for New Jersey, the Legislature needs to give the Department more authority to require permanent remedies. (20)

RESPONSE to COMMENTS 120 to 122: Historically, there has been debate about the proper level of the Department's and the public's involvement in the selection and approval of remedies, particularly when sites are slated for sensitive future uses such as residential or educational facilities. The Department agrees that the Department should have a greater role in

selecting remedies where there is greater probability for future exposure of the public to contamination. Over the last year, the Department has been working with Stakeholders and the Legislature to address these and other issues related to the Site Remediation Program. The Department believes that these rules go a long way to helping engender public participation concerning remediation of contaminated sites.

### **Summary of Agency-Initiated Changes:**

1. The Department is adding a requirement that the site identification number be printed on notification signs. Because there can be a number of known contaminated sites located along certain roads and highways within any given municipality, the site identification number will provide a unique identifier that will help the Department, municipal officials and the remediating parties to identify the site more quickly and therefore will be better able to answer inquiries from the public. The Department is adding a new N.J.A.C. 7:26E-1.4(h)4iii, to specify that the site identification number must be printed on the sign. This new subparagraph will specify that identification number be “Department's Preferred ID, as provided in the most recent edition of the “Department’s Known Contaminated Sites in New Jersey” report or the valid EPA site identification number. If neither number is available, the number provided by the Department's hotline may be substituted (1-877 WARNDEP or 1-877-927-6337).

The site ID number is readily available to the remediating party as the number is required to be provided in all submittals to the Department pursuant to the Technical Rules and is already required to be included on all notification letters. Under N.J.A.C. 7:26E-1.4(h)5, the person responsible for conducting the remediation must include the site ID when he/she submits documentation that a sign has been posted.

N.J.A.C. 7:26E-1.4(h)4iii, will be renumbered as N.J.A.C. 7:26E-1.4(h)4iv without change accordingly.

2. At N.J.A.C. 7:26E-1.11(b)3, the Department will change the reference from N.J.A.C. 7:26E-1.13(b) to its new Remediation Standards rules, N.J.A.C. 7:26D-2. On June 2, 2008, the Department deleted its ground water remediation standards from the Technical Requirements for

Site Remediation at N.J.A.C. 7:26E-1.13(b). These standards were recodified at N.J.A.C . 7:26D-2.

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

The Department has determined that these amendments do not require any specific action that is more stringent than any requirement of comparable Federal regulations. The implementing regulations for the Federal laws listed above provide specific requirements for public notice and outreach for the remediation of contaminated sites under the authority of the National Contingency Plan (NCP) regulations codified at 40 C.F.R. 300. The implementing regulations for CERCLA require the development of a Community Involvement Plan which forms the foundation for the Community Involvement Program. For CERCLA sites, the lead agency conducting the remediation is required prepare and implement community relations activities prior to commencing field work for the remedial investigation and include, at a

minimum, community interviews, public meetings and a local repository for information. The rules adopted herein are not more stringent than the Federal requirements and specifically state that they are not intended to satisfy the Federal requirements. Therefore, no Federal standards analysis is needed for these adopted amendments.

The Department has conducted an analysis of the new civil administrative penalty provisions in the adopted rules and has determined that they 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 adoption follows (additions indicated in boldface *\*thus\**; deletions indicated in brackets *\*[thus]\**):

## **SUBCHAPTER 1. GENERAL REQUIREMENTS**

### **7:26E-1.4 Notification and Public Outreach**

(a) - (e) (No change from proposal.)

(f) Except as provided in (e) above, the person responsible for conducting the remediation shall identify sensitive populations and resources located within 200 feet of the site boundary as follows:

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

3. Determine *\*[whether non-English speaking people inhabit any of the residences, attend any of the schools or child care centers, or use any of the parks, playgrounds, surface water or potable wells identified in (f)1 above,]\***\*if a language other than English is predominantly spoken by property owners and tenants in the area within 200 feet of the*

property boundary\* and record this information on the Sensitive Population and Resource Checklist pursuant to (f)1 above;

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

(g) Except as provided in (e) above, the person responsible for conducting the remediation shall provide public notice, either by posting a sign pursuant to (h) below or by sending periodic notification letters pursuant to (i) below, as follows:

1. All public notices, whether in the form of a sign or a notification letter, shall be in English. Additionally, where, pursuant to (f) above, the person responsible for conducting the remediation determines that \*[non-English speaking persons reside in or utilize]\*\* a language other than English is predominantly spoken by property owners and tenants in\* the area within 200 feet of the site boundary, notice shall also be provided in the non-English language; and

2. [With prior Departmental approval, t]The person responsible for conducting the remediation may, at any time, change the form of notification pursuant to this subsection from posting a sign pursuant to (h) below to sending periodic notification letters pursuant to (i) below, or from sending notification letters pursuant to (i) below to posting a sign pursuant to (h), below.

(h) If the person responsible for conducting the remediation chooses to provide public notice by posting a sign, the following shall apply:

1. - 3. (No change from proposal.)

4. The sign shall be at least two feet by three feet in size and shall include the following wording, printed in font that is of sufficient size to be readable from the street or sidewalk:

i. (No change from proposal.)

ii. “For Further Information Contact...,” followed by the telephone number for the person responsible for conducting the remediation and the telephone number for Department’s Office of Community Relations, which is posted on the Department’s website at [www.state.nj.us/dep](http://www.state.nj.us/dep); \*[and]\*

\*iii. The Department's Preferred ID, as provided in the most recent edition of the “Department’s Known Contaminated Sites in New Jersey” report or the valid EPA site identification number. If neither number is available, the number provided by the Department's hotline may be substituted (1-877 WARNDEP or 1-877-927-6337); and\*

\*[iii.]\* \*iv.\* (No change from proposal.)

5. - 6. (No change from proposal.)

(i) If the person responsible for conducting the remediation chooses to provide public notice by sending notification letters, the following shall apply:

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

3. The notices prepared pursuant to (i)1 and 2 above shall be sent to the following persons by certified mail \*or by using the certificate of mailing service\*:

i. - ii. (No change from proposal.)

4. The notice shall include the following site information:

i. – ii. (No change from proposal.)

iii. The Department's Preferred ID number as provided in the most recent edition of the “Department’s Known Contaminated Sites in New Jersey” report found at

<http://www.nj.gov/dep/srp/kcs-nj/>, or the valid EPA site identification number. If neither number is available, the number provided by the Department's hotline may be substituted (1-877 WARNDEP or 1-877-927-6337);

5. (No change from proposal.)

(j) If the person responsible for conducting the remediation proposes to bring contaminated material on to the site in an amount that is in excess of the amount that is needed to complete the remediation requirements or to construct the engineering controls approved by the Department in either a remedial action workplan pursuant to N.J.A.C. 7:26C-8 or a landfill closure plan pursuant to N.J.A.C. 7:26-2A.9, the person shall:

1. Send a notification letter to each of the following persons by certified mail \*or by using the certificate of mailing service\*:

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

2. (No change from proposal.)

(k) Except as provided in (e) above and (l) and (m) below, if contamination migrates off site in any environmental medium, the person responsible for conducting the remediation shall prepare, distribute and publish a fact sheet as follows:

1. The fact sheet shall be prepared and distributed:

i. Within two weeks after the \*[discovery]\* \*determination\* that contamination has migrated off site; or

2. (No change from proposal.)

3. The fact sheet and any updates shall be distributed by certified mail\*or by using the certificate of mailing service\*, to each owner of all real property, as shown on the current municipal tax duplicate, and the tenants of those properties, located within 200 feet of the site boundary;

4. The fact sheet and any updates shall be in English. Additionally, where, pursuant to (f) above, the person responsible for conducting the remediation determines that \*[non-English speaking persons reside in or utilize]\* \*a language other than English is predominantly spoken by property owners and tenants in\* the area within 200 feet of the site boundary, notice shall also be provided in the non-English language;

5. - 7. (No change from proposal.)

(l) If the contamination has only affected one adjoining property and the affected contaminated medium is limited to the soil, the person responsible for conducting the remediation shall notify only that adjoining property owner and tenant in writing via certified mail \*or by using the certificate of mailing service\*. The notice shall describe the nature and extent of the contamination.

(m) - (q) (No change from proposal.)

### **7:26E-1.11 Bias for Action**

(a) (No change from proposal.)

(b) If an immediate environmental concern (IEC) condition is identified at a site, the person responsible for conducting the remediation shall conduct the following interim response actions:

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

3. When potable water sources have been impacted by contamination at levels above the ground water remediation standards at \*[N.J.A.C. 7:26E-1.13(b)]\*\*N.J.A.C. 7:26D-2\*, treat the contaminated drinking water to a point at which the contaminant levels do not exceed the ground water remediation standards, or provide an alternative water supply.