DEPARTMENT OF ENVIRONMENTAL PROTECTION
SITE REMEDIATION PROGRAM
Administrative Requirements for the Remediation of Contaminated Sites
Readoption of Special Adopted Repeal and New Rules: N.J.A.C. 7:26B-1.5 and 4.1; 7:26C; and 7:26E-1.5, 1.7, 3.12 and 5.2

Readoption of Special Adopted New Rules: N.J.A.C. 7:14B-1.8; 7:26B-4.3 and 5.9; 7:26D-7.5; and 7:26E-1.9, 1.14 through 1.19 and 7.2

Readoption of Special Adopted Amendments: N.J.A.C. 7:1E-5.7 and 6.5; 7:1I-1.5, 2.6 and 3.3; 7:1J-1.4, 2.7 and 6.3; 7:7A-5.4 and 15.4; 7:8-5.4; 7:9C-1.1 and 1.6; 7:14A-3.1, 7.4, 7.5 and 9.10; 7:14B-1.6, 1.7, 2.4, 3.5, 3.6, 3.8, 4.2, 5.5, 5.6, 7.2, 7.4, 8.3, 8.4, 8.5, 8.7, 9 and 10.2; 7:22-3.4, 3.11, 3.17, 4.11 and 4.17; 7:26B-1.4, 1.6, 1.8 through 1.11, 3.3, 3.4, 4.2, 5.1, 5.3, 5.5, 6.1 through 6.5, 6.7, 8.1, 8.2, 8.3; 7:26D-1.1, 1.5, 7.1, 7.3, 7.4 and 7:26D Appendix 5; 7:26E-1.2, 1.3, 1.4, 1.6, 1.8, 1.11, 1.12, 2.1, 2.2, 3.1 through 3.5, 3.7, 3.9, 3.13, 4.1, 4.2, 4.4, 4.5, 4.6, 4.8, 5.1, 6, 7.1, 8 and 7:26E Appendix H; 7:38-1.4, 2.4, 6.6, 9.2 and 9.6; and 7:45-8.5

Readoption of Special Adopted Repeals: N.J.A.C. 7:1J-6.9; 7:26B-2.2, 2.3, 3.1 and 7:26B Appendix A; 7:26D Appendix 6; and 7:26E Appendices B and F

Adopted Amendments: N.J.A.C. 7:14B-8.3; 7:26B-3.3, and 4.3; 7:26C-2.3, 2.4, 4.2, 5.8, 5.10, 5.11, 6.2, 7.2, 7.3, 7.8, 7.9, 7.10, 9.5, 10.5, 11.2; 7:26D-7.4; and 7:26E-1.4, 3.1, 3.13, 4.6, 4.8, 5.2, 6.2, 6.3, 6.7, 7.2, 8.3, 8.4, 8.5, and 8.6,

Proposed: May 2, 2011 at 43 N.J.R. 1077(a)

Adopted: September 6, 2011 by Bob Martin, Commissioner, Department of Environmental Protection

Filed: September 8, 2011 as R. 2011 d. 251, **with a substantial change** not requiring additional public notice and opportunity for comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 13:1K-8; 58:10B-1 through 4, 8, 11, 12, 13, 17.1, 20, 26, 28, 29, 31; 58:10C-1 et seq.; and 58:10-23.11b, 11e2, 11f, 11g and 16

DEP Docket Number: 08-11-03

Effective Dates: September 8, 2011, Readoptions;
October 3, 2011, Amendments.

Expiration Dates: February 27, 2014, N.J.A.C. 7:1E;

July 20, 2017, N.J.A.C. 7:1I;

January 31, 2016, N.J.A.C. 7:1J;

September 4, 2015, N.J.A.C. 7:7A;

August 2, 2014, N.J.A.C. 7:8;

April 4, 2014, N.J.A.C. 7:9C;

December 2, 2015, N.J.A.C. 7:14A;

Pursuant to paragraph 6 of Executive Order No. 1 (2010), the expiration date of N.J.A.C. 7:14B is extended until the completion of the review of administrative regulations and rules by the Red Tape Review Group, and until such time as the chapter is readopted pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.;

June 6, 2013, N.J.A.C. 7:22;

August 23, 2016, N.J.A.C. 7:26B;

September 8, 2018, N.J.A.C. 7:26C;

June 2, 2015, N.J.A.C. 7:26D;

May 7, 2014, N.J.A.C. 7:26E;

November 2, 2013, N.J.A.C. 7:38;

June 1, 2016, N.J.A.C. 7:45.

The Department is readopting with amendments the specially adopted amendments, repeals, and new rules (the Interim Rules) that implement P.L. 2009, c. 60 (the Act). The Act includes the Site Remediation Reform Act (SRRA), N.J.S.A. 58:10C-1 et seq., and related amendments to the Industrial Site Recovery Act (ISRA), N.J.S.A. 13:1K-6 et seq., the Spill Compensation and Control Act (Spill Act), N.J.S.A. 58:23-11 et seq., the Underground Storage

of Hazardous Substances Act (UST Act), N.J.S.A. 58:10A-21 et seq., and the Brownfield and Contaminated Site Remediation Act (Brownfield Act), N.J.S.A. 58:10B-1 et seq.

The Department is implementing the requirements of SRRA, in three phases: (1) the special adoption of Interim Rules, including the replacement of the former Oversight of the Remediation of Contaminated Sites rules with the new Administrative Requirements for the Remediation of Contaminated Sites (ARRCS rules), N.J.A.C. 7:26C, and amending 14 other rules related to site remediation, all of which were effective on November 4, 2009 (see 41 N.J.R. 4467(a) (December 7, 2009)); (2) this readoption of the Interim Rules to continue the Interim Rules in effect while the Department continues to phase in the new site remediation paradigm; and (3) the proposal of major amendments, repeals and new rules (the Final Rules), through which the Department will fully implement the new site remediation paradigm (see 43 N.J.R. 1935(a) (August 15, 2011)).

The Interim Rules, which the Department is hereby readopting, include the ARRCS rules, at N.J.A.C. 7:26C and amendments to other rule chapters related to site remediation. Pursuant to SRRA at N.J.S.A. 58:10C-29, the Interim Rules became effective on November 4, 2009, upon acceptance for filing by the Office of Administrative Law (see N.J.S.A. 52:14B-4(c) as implemented by N.J.A.C. 1:30-6.4), for a period not to exceed 18 months, unless proposed and readopted in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B. The expiration date was extended by 180 days to October 31, 2011, pursuant to N.J.S.A. 52:14B-5.1c, as a result of the timely filing of the proposal to readopt the Interim Rules.

The proposal to readopt the Interim Rules with amendments was published in the New Jersey Register on May 2, 2011 at 43 N.J.R. 1077(a). No public hearing was held concerning the proposal. The comment period closed on July 1, 2011. The Department is readopting the

Interim Rules with a substantive change not requiring additional public notice and opportunity for comment.

This adoption document may be viewed on the Department's website at http://www.nj.gov/dep/rules.

Summary of Public Comments and Agency Responses

Michael G. McGuinness, Chief Executive Officer, New Jersey Chapter of National Association of Industrial and Office Properties (NAIOP), submitted written comments regarding the proposal. As will be discussed more fully in response to each comment, the Department has addressed many of the issues raised by the commenter in the proposal of the Final Rules noted above. The comments and the Department's responses follow:

UST Rules

1. COMMENT: The UST rules at N.J.A.C. 7:14B-7.4 generally describe requirements for a site investigation of an unknown contaminant source. These rules should be clarified to indicate that an UST facility owner and operator shall remediate any discharge during the additional site investigation only if the discharge originates from the UST facility.

RESPONSE: The Brownfield Act as amended at N.J.S.A. 58:10B-1.3a places the affirmative obligation to remediate discharges "on . . . the owner or operator of an UST . . . that has discharged a hazardous substance" (emphasis added). The Department agrees that the UST rules at N.J.A.C. 7:14B-7.4 require the owner or operator to remediate any discharge, and not just discharges from the owner's or operator's UST(s). However, reading N.J.A.C. 7:14B-7.4

together with N.J.A.C. 7:14B-8, which governs remediation, reveals that the owner or operator is only responsible pursuant to the UST rules for conducting remediation activities concerning discharges from the owner's or operator's tanks.

As part of the Final Rules proposal, the Department is proposing to amend N.J.A.C. 7:14B-7.4 to require that an unknown source investigation be conducted and the owner/operator submit an unknown source investigation report to the Department within 90 days of the event that triggered the unknown source investigation. The Department believes that simply demonstrating the current tank system alone is not leaking is not sufficient to address this issue; even if the existing tank system is tight, historical discharges from tanks that were subsequently replaced or from other sources such as compromised spill buckets and dispenser pans, may have occurred. Accordingly, soil and/or ground water samples are necessary to evaluate whether discharges have occurred at the facility.

If contamination from the UST systems is confirmed, the Final Rules would require the owner or operator to comply with N.J.A.C. 7:14B-7.3 (Confirmed discharges). If contamination is found that is not related to the UST system, but the owner or operator is any way responsible pursuant to the Spill Act for any hazardous substance that was discharged, then the owner or operator has the affirmative obligation to remediate the contamination pursuant to the Spill Act at N.J.S.A. 58:10-23.11g. If contamination is found for which the owner or operator is not responsible, then the owner or operator shall so document in the unknown source investigation report to be submitted to the Department within 90 days of the event that triggered the unknown source investigation.

2. COMMENT: N.J.A.C. 7:14B-8.3(a) and 8.3(e) require submittal of a remedial investigation report to the Department within a certain timeframe. This report should not be required to be submitted until submission of the response action outcome.

RESPONSE: N.J.A.C. 7:14B-8.3(a) requires that the owner or operator submit the remedial investigation report within 270 days after the date that the owner or operator confirmed the discharge, and N.J.A.C. 7:14B-8.3(e) requires the owner or operator submit the remedial investigation report within 90 days of the Department's approval of the remedial investigation workplan. However, since SRRA requires the Department to establish mandatory timeframes for various phases of the remediation, including the remedial investigation (N.J.S.A. 58:10B-28a(5)), the Department is proposing in the final rules to repeal the reporting requirements set forth at N.J.A.C. 7:14B-8.3(a) and (e), and to codify regulatory and mandatory timeframes for the completion of the remedial investigation and submittal of the remedial investigation report, and for the completion of the remedial action and issuing the response action outcome in the proposed Final Rules new N.J.A.C. 7:26E-4.10(b)2. However, the person responsible for conducting the remediation need not wait until the timeframe to submit the remedial investigation report has passed before submitting the response action outcome. Rather, the LSRP may issue and the person responsible for conducting the remediation may submit to the Department the response action outcome at any point in the remediation that the LSRP deems appropriate.

<u>ISRA Rules</u>

3. COMMENT: The ISRA rules at N.J.A.C. 7:26B-4.3(a)2vi require the owner or operator of the industrial establishment to submit any documents the Department requires for the remediation of the industrial establishment as part of the Remediation Certification. This should be clarified to limit the documents to those required pursuant to the Technical Requirements.

RESPONSE: The Industrial Site Remediation Act as amended by P.L. 2009, c. 60 requires the owner or operator of an industrial establishment who is submitting a remediation certification to the Department to include: ". . . (4) a certification that the owner or operator is subject to the provisions of [ISRA], including . . . the requirement to prepare and submit any document required by the department relevant to the remediation of the industrial establishment . . . ." N.J.S.A. 13:1K-9e. Consistent with this statutory provision, N.J.A.C. 7:26B-4.3(a)2vi does not require the submission of any documents as the commenter states, but rather requires the owner or operator to acknowledge in a remediation certification that the owner or operator is required to prepare and submit any document the Department requires for the remediation of the industrial establishment. Limiting this requirement as the commenter suggests would contravene N.J.S.A. 13:1K-9e.

4. COMMENT: The ISRA rules at N.J.A.C. 7:26B-5.1 phase out the ability to use the expedited review mechanism to comply with ISRA, which allowed an owner or operator of an industrial establishment that was previously remediated, and for which an NFA was issued, to close a transaction without further remediation where there has been no discharge since the date the NFA was issued. This is a valuable tool for efficiently closing transactions and should remain in effect.

RESPONSE: The expedited review option provides a mechanism for an owner/operator of an industrial establishment that was previously remediated to proceed with a planned closure or transfer of the industrial establishment without further remediation, if there were no new discharges or if a new discharge was remediated and approved by the Department. The existing rules limit this as a regulatory option to industrial establishments where the Department received the General Information Notice prior to November 4, 2009. This is because the expedited review option is predicated on Department oversight of a remediation, and therefore this option does not apply to cases where the owner or operator submits a General Information Notice on or after November 4, 2009.

For remediation initiated on or after November 4, 2009, owners and operators must hire a licensed site remediation professional and proceed without the involvement of the Department. In these situations, the licensed site remediation professional makes the determination that an industrial establishment that was previously remediated may proceed with a planned closure or transfer of the industrial establishment without further remediation, if there were no new discharges or if a new discharge was appropriately remediated, and immediately issue the response action outcome. There is no need for Department approval, because the licensed site remediation professional has the authority to approve a response action outcome as soon as the preliminary assessment is complete. Accordingly, this alternate compliance option is not necessary. Therefore, as a part of the Final Rule, the Department is proposing to delete this alternate compliance option in its entirety.

5. COMMENT: The ISRA rules at N.J.A.C. 7:26B-5.9(b)4 make the *de minimis* quantity exemption unavailable where the property is contaminated above any remediation standard. This new condition is not supported by the underlying ISRA statute, which contains very specific criteria to qualify for a *de minimis* quantity exemption. N.J.S.A. 58:10C-6b directed the Department to adopt rules to harmonize existing programs with the new requirements of the Site Remediation Response Act, not to make other changes in the regulations.

RESPONSE: This comment raises two issues: (i) whether the Industrial Site Recovery Act supports a condition of the *de minimis* quantity exemption that the industrial establishment not be contaminated; and (ii) whether the Site Remediation Reform Act authorized the Department to amend the *de minimis* quantity exemption in the ISRA Rules as part of any rules adopted pursuant to N.J.S.A. 58:10C-6.b.

The precursor to ISRA, the Environmental Cleanup and Responsibility Act ("ECRA"), first enacted in 1983, supports a condition of the *de minimis* quantity exemption that the industrial establishment not be contaminated. ECRA was in response to "discharges of toxic chemicals dating back to early industrialization [that] have left a legacy of contaminated industrial properties in this State." N.J.S.A. 13:1K-7. The Legislature sought to relieve the public or subsequent owners from bearing the burden of remediating these industrial sites, contaminated with hazardous substances and abandoned by private businesses that, deciding to cease their operations, just "walk away from the scene," Dixon Venture v. Dixon Crucible Company, 122 N.J. 228 (1991), or "dump and run," In Re Adoption of N.J.A.C. 7:26B, 128 N.J. 442, 461 (1992), thereafter leaving it to the taxpayers of New Jersey to fund the remediation of these abandoned properties.

Like its ECRA precursor, the primary purpose of ISRA is to affirmatively place the burden for remediating industrial establishments on the owners and operators of those establishments, thereby shielding taxpayers from footing the bill for remediating abandoned industrial sites. N.J.S.A. 13:1K-7. The Legislature established in ISRA the requirement for owners and operators of potentially contaminated industrial establishments to investigate, and if necessary remediate, contamination prior to selling or transferring the industrial establishment.

The ISRA rules at N.J.A.C. 7:26B-5.9(a) provide that the owner or operator of an industrial establishment to whom the Department grants a *de minimis* quantity exemption is exempt from the provisions of the ISRA rules (except for the requirement to submit a fee with the application for the exemption). N.J.A.C. 7:26B-5.9(b) lists the criteria that must be satisfied to qualify for this exemption, including the three criteria listed expressly in ISRA (N.J.S.A. 13:1K-9.6) and a fourth criterion implied in ISRA and codified at N.J.A.C. 7:26B-5.9(b), that "the industrial establishment is not contaminated above any standard set forth in the Remediation Standards, N.J.A.C. 7:26D." Contrary to the commenter's assertion, this rule is consistent with ISRA and the clear legislative intent to protect the public health and the environment, and to protect the public and subsequent owners from the cost of remediating abandoned industrial establishments. N.J.S.A. 13:1K-7.

The *de minimis* quantity exemption eliminates the obligation of the owner and operator to investigate a potentially contaminated industrial establishment to determine whether or not it is contaminated, thus requiring further remediation. The Legislature established the public policy in ISRA that if the owner or operator only used a *de minimis* quantity of hazardous substances, the owner or operator would not have to comply with ISRA in order to determine whether the industrial establishment is contaminated. If, however, the site is already known to be

contaminated, then the owner or operator must implement a remedial action in order to protect the public health and safety and the environment; this also eliminates the need to have the public or the subsequent owner pay for the remediation.

This is exactly the track of the regulatory *de minimis* exemption at N.J.A.C. 7:26B-5.9. As a result, the rule is not only consistent with ISRA, but also furthers the statute's legislative intent to ensure that the current generation of owners and operators address contamination at these sites so that burden does not fall on others who are less responsible for the contamination.

The provision of SRRA to which the commenter refers, N.J.S.A. 58:10C-6(b), is irrelevant to the issue of the Department's authority for readopting the Interim Rules because it contains the statutory authority for the Site Remediation Professional Licensing Board, and does not authorize the Department to undertake rulemaking.

The applicable provision of SRRA, N.J.S.A. 58:10C-29, is broadly worded to require the Department to adopt rules establishing a program that provides for the responsibilities of persons responsible for conducting the remediation and LSRPs in the remediation of contaminated sites. The phrase in this statutory provision, "The interim rules and regulations may include amendments to rules and regulations adopted pursuant to other laws, in order to make them consistent with [SRRA]," applied to the initial adoption of the interim rules as a limitation when the Department adopted the Interim Rules without public notice and comment. The Department's rulemaking here is not the initial adoption of the Interim Rules, but rather its readoption where the last sentence of N.J.S.A. 58:10C-29 is relevant: "The interim rules and regulations . . . may, thereafter, be amended, adopted or readopted by the department in accordance with the provisions of the 'Administrative Procedure Act.'" The Department has, in

compliance with the Administrative Procedure Act, proposed and determined to readopt the amendment to the *de minimis* quantity exemption as it appeared in the Interim Rules.

6. COMMENT: The ISRA rules at N.J.A.C. 7:26B-6.1(e) require the submittal of a remedial investigation report to the Department within 420 days after the ISRA initial notice. Submission of a remedial investigation report is not required under other programs prior to issuance of the response action outcome and therefore should not be required under ISRA.

RESPONSE: The Department acknowledges that the ISRA rules at N.J.A.C. 7:26B-6.1(e) require the submittal of a remedial investigation report to the Department within 420 days after the ISRA initial notice. However, in the Final Rules proposal, the Department is proposing to repeal and reserve ISRA Subchapter 6, Remediation Procedures, and to require in the ISRA rules at new N.J.A.C. 7:26B-3.3(a) that remediation is to be conducted in accordance with the procedures in the ARRCS rules (which themselves require that the technical aspects of remediation conform to the Technical Requirements), and to codify timeframes, including reporting timeframes, that will apply to all remediation, including remediation that is triggered by ISRA, in the ARRCS rules and Technical Requirements. In the Final Rules, the Department proposes to codify the mandatory timeframe for submitting the remedial investigation report at new N.J.A.C. 7:26C-3.3(a)5. That date is the date which is two years from the regulatory timeframe set forth in the Technical Requirements at N.J.A.C. 7:26E-4.10. The following table summarizes the proposed new dates by which the remedial investigation must be completed and the report submitted, which differ by the type of contaminated media, and the date on which the

contamination was discovered (this table was printed in the proposal for the Final Rules at 43 N.J.R. 1974).

Type of Contaminated Media	**Proposed New Rule Citation (N.J.A.C. 7:26E-)**	**Type of Site**	**Date on Which Requirement to Remediate Was Triggered**	**Regulatory Timeframe by Which Remedial Investigation Must be Completed**
n/a	4.10(a)	Any	Discharge discovered prior to May 7, 1999	May 7, 2014
Soil only	4.10(b)1i(1) and 4.10(b)2i(1)	ISRA and UST	Between May 7, 1999 and March 1, 2010	March 1, 2015
Soil and other contaminated media	4.10(b)1ii(1) and 4.10(b)2ii(1)	ISRA and UST	Between May 7, 1999 and March 1, 2010	March 1, 2017
Soil only	4.10(b)3i(1)	All other cases	Between May 7, 1999 and {effective date of the rule}	By {effective date of the rule plus three years}
Soil and other contaminated media	4.10(b)3ii(1)	All other cases	Between May 7, 1999 and {effective date of the rule}	By {effective date of the rule plus five years}
Soil only	4.10(b)1i(2) and 4.10(b)2i(2)	ISRA and UST	On or after March 2, 2010	Within three years after the earliest applicable requirement to submit a preliminary assessment and site investigation report (only site investigation report for UST cases)

Type of Contaminated Media	**Proposed New Rule Citation (N.J.A.C. 7:26E-)**	**Type of Site**	**Date on Which Requirement to Remediate Was Triggered**	**Regulatory Timeframe by Which Remedial Investigation Must be Completed**
Soil and other contaminated media	4.10(b)1ii(2) and 4.10(b)2ii(2)	ISRA and UST	On or after March 2, 2010	Within five years after the earliest applicable requirement to submit a preliminary assessment and site investigation report (only site investigation report for UST cases)
Soil only	4.10(b)3i(1)	All other cases	May 7, 1999 to the {effective date of the rule}	Within three years after the {effective date of the rule}
Soil and other contaminated media	4.10(b)3ii(1)	All other cases	May 7, 1999 to the {effective date of the rule}	Within five years after the {effective date of the rule}
Soil only	4.10(b)3i(2)	All other cases	On or after {effective date of the rule}	Within three years after the earliest applicable requirement to remediate
Soil and other contaminated media	4.10(b)3ii(2)	All other cases	On or after {effective date of the rule}	Within five years after the earliest applicable requirement to remediate

7. COMMENT: The ISRA rules at N.J.A.C. 7:26B-6.2(h) and 6.3 require the submittal of a soil, groundwater or surface water remedial action workplan to the Department within 420 days after the ISRA initial notice. Submission of a remedial action workplan is not required under other

programs prior to issuance of the response action outcome and therefore should not be required under the ISRA rules.

RESPONSE: The Department agrees that the ISRA rules are the only currently codified rules that set forth a timeframe for the submission of the remedial action workplan that is in advance of the submission of the response action outcome. As discussed in the response to comment 6 above, the Department is proposing to require in the ISRA rules at new N.J.A.C. 7:26B-3.3(a) that remediation is to be conducted in accordance with the procedures in the ARRCS rules (which themselves require that the technical aspects of remediation conform to the proposed new Technical Requirements), and to repeal and reserve ISRA Subchapter 6, Remediation Procedures. Also as part of the Final Rules proposal, the Department proposes to require submittal of a remedial action workplan prior to its implementation for all sites or areas of concern, not just those subject to ISRA (see proposed new N.J.A.C. 7:26E-5.6(a) in the Final Rules).

8. COMMENT: The definition of "response action outcome" in the ISRA rules, which cross references the definition in the ARRCS rules at N.J.A.C. 7:26C-1.3, should include an exception from the statement, "there are no contaminants present at the site," to exclude contaminants that have migrated to the site from an off-site source.

RESPONSE: There is no need to modify the definition of response action outcome. The Technical Requirements at N.J.A.C. 7:26E-3.7(g) allow the person responsible for conducting the remediation to make a claim that no further remediation is required because the source of the

remaining contamination either is at background levels, or is migrating in groundwater from off site. Additionally, the ARRCS rules already provide that a licensed site remediation professional may issue a response action outcome that is limited in scope, depending on site conditions and the nature and extent of the remediation conducted under the supervision of the licensed site remediation professional. N.J.A.C. 7:26C-6.2(b) requires the licensed site remediation professional to issue the response action outcome in accordance with N.J.A.C. 7:26C-6.2 and the Department's Guidance for the Issuance of Response Action Outcomes (see http://www.nj.gov/dep/srp/guidance/srra/rao_guidance.pdf), and N.J.A.C. 7:26C-6.5(a) specifies that the scope of the final remediation document is limited by the scope of the remediation addressed in that document.

Moreover, the Department's Guidance indicates that, whenever a known contaminated area of concern is not being addressed by the response action outcome that is being issued, the response action outcome must include a Notice of Known Onsite Contamination Source Not Yet Remediated (Notice). Examples of situations when this Notice would be appropriate include when the response action outcome does not address an area of concern that was newly discovered, is being addressed by a different responsible party or there exist other areas of concern at the site that require remediation. The purpose of the Notice is to memorialize in the response action outcome that there is an outstanding remediation obligation at the property, and that the discharge has been reported to the Department.

ARRCS Rules

9. COMMENT: The ARRCS rules at N.J.A.C. 7:26C-1.4(a)1 contain an inaccurate citation referencing the due diligence exemption. The correct citation is N.J.S.A. 58:10B-1.3(d)2.

RESPONSE: The currently codified rules at N.J.A.C. 7:26C-1.4(a)1 correctly cross reference N.J.S.A. 58:10B-1.3(d)2; therefore, no amendment is required. Please see the Notice of Administrative Corrections, 42 N.J.R. 778 (April 19, 2010).

10. COMMENT: The record retention requirements of N.J.A.C. 7:26C-2.5(a), (b) and (c), and of N.J.A.C. 7:26C-6.2(b)2ii are overbroad and burdensome. The person conducting remediation should not be obligated to submit contractual documents, draft documents, notes and other materials that are not necessary to communicate and document the remedial activities.

RESPONSE: Based upon this comment and its own review of this issue, the Department has determined that N.J.A.C. 7:26C-2.5 Record Retention is no longer appropriate. As a result, the Department is proposing, in the Final Rules to repeal N.J.A.C. 7:26C-2.5, which contains record retention provisions for a person responsible for conducting the remediation. SRRA at N.J.S.A. 58:10C-20 requires that records be maintained. However, this statutory provision applies to LSRPs and not to persons responsible for conducting the remediation. Since the ARRCS rules govern persons responsible for conducting the remediation only, it is not appropriate to include record retention requirements applicable to LSRPs in these rules under the new paradigm. During the transition period between when the Interim Rules were adopted on November 4, 2009 and the full implementation of the LSRP program, the provision was necessary to ensure that records were being maintained by persons remediating contaminated sites without a licensed site remediation professional. However, upon the effective date of the Final Rules, when all persons

will be required to remediate sites using a licensed site remediation professional, record retention will be the responsibility of the LSRP.

Additionally, in the Final Rules, the Department is proposing to amend N.J.A.C. 7:26C-6.2(b)2ii, which concerns what documents and data are to be submitted by the LSRP with the response action outcome, to specify that only one copy of the required information needs to be submitted, rather than three copies. The Department has also determined that it does not normally need to have a copy of contractual agreements between the LSRP and its client. However, the Department, on a case specific basis, may want to review and is therefore proposing new text by which it reserves its right to request copies of contractual documents.

However, the Department declines to further amend N.J.A.C. 7:26C-6.2(b)2ii as suggested by the commenter. SRRA at N.J.S.A. 58:10C-20 requires a licensed site remediation professional to "maintain and preserve all data, documents and information concerning remediation activities at each contaminated site the licensed site remediation professional has worked on, including but not limited to, technical records and contractual documents, raw sampling and monitoring data, whether or not the data and information, including technical records and contractual documents, were developed by the licensed site remediation professional or the licensee's divisions, employees, agents, accountants, contractors, or attorneys, that relate in any way to the contamination at the site." N.J.A.C. 7:26C-6.2(b)2ii implements that provision.

11. COMMENT: The requirement at N.J.A.C. 7:26C-3.2(b) to submit the remediation timeframe extension request form 30 days prior to a regulatory timeframe is excessively restrictive. The deadline for submitting the extension request should be reduced to one week.

RESPONSE: Requiring that the person responsible for conducting the remediation submit an extension request no later than 30 days prior to the end date of the regulatory timeframe ensures that the Department has enough time to evaluate the extension request. In most instances, the person responsible for conducting the remediation will know well before 30 days whether an extension will be needed, so the requirement to submit an extension request at least 30 days prior to the end date of the regulatory timeframe places no additional burden on the person responsible for conducting the remediation. The purpose of the regulatory timeframes is to provide milestones that will help keep the remediation on track and make it less likely that a mandatory timeframe will not be exceeded. When a mandatory timeframe is exceeded, SRRA requires the Department to assume direct oversight, and the person responsible for conducting the remediation is no longer free to conduct the remediation without first gaining the Department's approval.

12. COMMENT: The requirement at N.J.A.C. 7:26C-3.5(a) to submit the remediation timeframe extension request form 60 days prior to a mandatory timeframe is excessively restrictive. The deadline for submitting the extension request should be reduced to two weeks.

RESPONSE: The reasons discussed above in response to comment 11 concerning requiring the submittal of a request for an extension of remediation timeframe no later than 30 days prior to the end date of the regulatory timeframe also apply to the requirement that a request for an extension of a mandatory timeframe be submitted no later than 60 days prior to the end date of the mandatory remediation timeframe or the expedited site specific remediation timeframe. The Department must have enough time to review the extension request and make a determination as

to whether the request should be granted, and the person responsible for conducting the remediation must have enough time to determine how to best meet the timeframe if the request is denied. Whether an extension of a mandatory timeframe is granted is of critical importance because if the Department determines that the request should be denied, the remediation automatically falls under direct Department oversight if the mandatory timeframe is exceeded.

13. COMMENT: N.J.A.C. 7:26C-5.1(c)2 requires the person who is required to establish a remediation funding source to keep the funding source in place until the remedial action permit for an engineering control is obtained. As the remedial action permit requires a financial assurance for engineering controls, the person responsible for conducting remediation, where there is an engineering control, would be maintaining two funding sources for the engineering control simultaneously. The Department should release the remediation funding source prior to requiring a financial assurance to be posted.

RESPONSE: Since no rules are codified at N.J.A.C. 7:26C-5.1(c), the Department assumes that the commenter is referring to N.J.A.C. 7:26C-5.2(c), which requires the maintenance of the remediation funding source until: (1) either the Department or the LSRP issues an unrestricted use or limited restricted use final remediation document for the site; or (2) the person responsible for conducting the remediation obtains a remedial action permit for an engineering control and submits to the Department evidence of compliance with the requirement to establish financial assurance pursuant to N.J.A.C. 7:26C-7 prior to the termination of the existing remediation funding source.

The Department recognizes that there may be an overlap in funding source requirements. However, it is essential that there is no gap in funding for the remediation between the times that final remediation document is issued and the remedial action permit is in place.

The Department acknowledges the objection to the overlap between the remediation funding source requirements and the financial assurance requirements. Accordingly, in the Final Rules proposal, the Department is proposing to amend the ARRCS rules at N.J.A.C. 7:26C-5 to streamline the remediation funding source and financial assurance requirements in one subchapter. The Department is also proposing at new N.J.A.C. 7:26C-5.3(b) that once the person responsible for conducting the remediation is at the phase of the remediation where a remedial action permit is required, the amount of the remediation funding source may be reduced by an amount equal to the costs to operate, maintain and inspect the engineering controls, when a remedial action permit application, complete with evidence of financial assurance, is submitted to the Department. This is because the amount by which the financial assurance is reduced is required to be posted as a part of the remedial action permit application pursuant to N.J.A.C. 7:26C-5.2.

14. COMMENT: Instead of adopting N.J.A.C. 7:26C-5.2(h)1ii, the Department should revert to the provision in the former Oversight of the Remediation of Contaminated Sites rules (Oversight rules) that allowed the owner or operator of an industrial establishment to have 14 days following submission of the remediation certification to establish the remediation funding source.

RESPONSE: The Department acknowledges that the former Oversight Rules allowed 14 days after execution of the remediation agreement for the submittal of the remediation funding source. However, as a part of P.L. 2009, c. 60 , the Legislature amended the Brownfield Act at N.J.S.A. 58:10B-3b to provide that in the case of a remediation performed pursuant to ISRA, the remediation funding source is to be established no more than 14 days after the approval by the Department or the certification by the LSRP of a remedial action workplan, upon approval of a remediation agreement, or upon submission of a remediation certification (emphasis added). N.J.A.C. 7:26C-5.2(h)1 implements this provision in the Brownfield Act as amended.

15. COMMENT: The rules at N.J.A.C. 7:26C-5.8(a)3 and 4 should also reference the International Financial Reporting Standards as an acceptable criteria for self-guarantee.

RESPONSE: The Department agrees that N.J.A.C. 7:26C-5.8(a)3 and 4 should correctly cross-reference the most current of the industry-accepted financial reporting standards. Stakeholders have pointed out to the Department that the American Institute of Certified Public Accountants establishes auditing standards for non-publicly traded stock companies, while the Public Company Accounting Oversight Board establishes auditing standards for publicly traded stock companies. Accordingly, in the Final Rules proposal, the Department is proposing to delete the inappropriate cross reference to the American Institute for Certified Public Accountants guidelines from N.J.A.C. 7:26C-5.8(a)3, and to amend N.J.A.C 7:26C-5.8(a)4, concerning audited financial statements and N.J.A.C 7:26C-5.8(c), concerning statements of assets and liabilities of special purpose entities, to reflect the appropriate auditing and accounting standards.

The International Financial Reporting Standards have not yet been accepted by the United States as industry-accepted financial reporting standards. The Department is waiting until they are accepted in this country before amending its rules to so reflect.

16. COMMENT: The definition of remediation costs in N.J.A.C. 7:26C-1.3 is overbroad and should not include any costs not directly related to the remediation such as indirect capital costs, the cost of purchasing land, legal, or administrative and capital costs, given the fact that this term is used in the rules at N.J.A.C. 7:26C-5.10(a) only in connection with the amount of the remediation funding source and the cap on Department oversight fees. These costs are not considered remediation costs for purposes of brownfield reimbursement or Hazardous Discharge Site Remediation Fund funding and therefore should not be included in other contexts.

RESPONSE: The Department acknowledges that certain indirect costs are not considered remediation costs for purposes of brownfield reimbursement or Hazardous Site Remediation Fund funding. The monies in these funds are set aside to be used to reimburse parties who are not persons responsible for conducting the remediation for their cleanup costs.

However, the definition of remediation costs is necessarily broad to assure all costs to implement the remediation are captured in the cost estimate used as the basis for establishing a remediation funding source while the remediation is being conducted and for establishing financial assurance when a remedial action permit is required. If the person responsible for conducting remediation fails to complete the remediation, the Brownfield Act at N.J.S.A. 58:10B-3g allows the Department to undertake the remediation utilizing monies from the remediation funding source. The Legislature intended that the Department have an adequate

funding source when it determines to complete the remediation, including payment of indirect costs and costs including the purchase of land that may be necessary to implement an effective remedy (such as, for example, in the case of needing to locate a ground water recovery system at an off site location or if an impacted property owner requires cleanup to unrestricted standards).

Note that in the Final Rules proposal, the Department proposes to further amend the definition of remediation costs to include all costs associated with conducting the preliminary assessment, site investigation, remedial investigation, feasibility study when applicable, and remedial action, including costs incurred by a certified public accountant or an independent auditor. Additionally, certain legal costs may be considered remediation costs to the extent that they are directly supporting the remediation, but remediation costs shall not include those legal costs associated with recovery of costs expended on remediation, compelling a party to take part in the remediation, and defense against a Department enforcement action. Remediation costs also do not include interest on monies owed.

17. COMMENT: N.J.A.C. 7:26C-6.2(d) should provide that the LSRP may rely on a previously issued No Further Action letter.

RESPONSE: A blanket statement in the rules concerning reliance on a previously issued NFA may not be appropriate in all circumstances. Reliance on a previously issued NFA is an issue of professional judgment, including but not limited to consideration of when the NFA was issued, activities that may have transpired on the site since the NFA was issued, and case documentation. The Department is evaluating the need to further clarify this issue in the rules.

Should clarification on this issue be needed, the Department may propose a rule amendment sometime in the future.

18. COMMENT: N.J.A.C. 7:26C-6.2(f) should be modified to state that the licensed site remediation professional issuing a response action outcome shall certify that the contaminants "originating" at the site or area of concern meet all of the necessary criteria.

RESPONSE: There is no need to amend N.J.A.C. 7:26C-6.2(f) as suggested because, as discussed in response to comment 8 above, N.J.A.C. 7:26C-6.2 allows the licensed site remediation professional to limit the scope of the response action outcome as the LSRP determines is necessary. Accordingly, anything to which the licensed site remediation professional certifies may also be limited in scope, as necessary.

19. COMMENT: The bases for the Department to invalidate a response action outcome at N.J.A.C. 7:26C-6.4(a)4 and 6 are not supported by the Site Remediation Reform Act, which requires a determination that the remediation is not protective. N.J.A.C. 7:26C-6.4(a)4 should be modified to state, "Failure to materially comply with the conditions of the final remediation document." N.J.A.C. 7:26C-6.4(a)6, regarding the remediation not being performed in accordance with all applicable statutes, guidance and rules, should be deleted.

RESPONSE: The Department declines the suggestion to add "materially" to N.J.A.C. 7:26C-6.4(a)4 or to rephrase this provision as suggested. The commenter correctly points out that SRRA at N.J.S.A. 58:10C-22 requires the Department to invalidate a response action outcome if the Department determines, among other things, that the remedial action is not protective of

public health, safety or the environment. SRRA does not limit the Department's ability to invalidate a response action outcome where the response action outcome is not "materially" protective. Moreover, where a person is not complying with the conditions of a final remediation document, such as in the case of the requirement to maintain an engineering control such as a cap or a ground water pump and treat system, that failure could render the remedial action not protective. In those instances, the Department must be able to invalidate the response action outcome and thereafter require that the person responsible for conducting the remediation conduct additional remediation to make the remedy protective of public health, safety or the environment.

In the Final Rules proposal, the Department is proposing to replace the lead-in to N.J.A.C. 7:26C-6.4(a) so that the rule will affirmatively provide that a remedial action is not protective of the public health, safety and the environment when any of the listed events occurs. The Department is also proposing to repeal N.J.A.C. 7:26C-6.4(a)6. In its place, the Department is proposing new N.J.A.C. 7:26C-6.4(a)6 through 11, which set forth additional circumstances pursuant to which a remedial action can be considered not protective of the public health, safety and the environment.

20. COMMENT: The basis for the Department to invalidate a Response Action Outcome for failure to implement a presumptive remedy, codified at N.J.A.C. 7:26C-6.4(b)2, should be modified to specify "unless the remedy is as protective as the presumptive remedy," consistent with N.J.S.A. 58:10C-22.

RESPONSE: The Brownfield Act at N.J.S.A. 58:10B-12g(1) as amended provides that the Department shall require the use of a presumptive remedy or an alternative remedy where new construction is proposed for residential purposes, for use as a child care center, or as a public, private or charter school, or any other use that involves use by a sensitive population.

N.J.S.A. 58:10B-12g(10) requires the Department to establish presumptive remedies, based on a variety of site and future use factors. That provision goes on to allow the person responsible for conducting the remediation to suggest an alternative presumptive remedy in those instances where the person responsible for conducting the remediation demonstrates to the Department that the presumptive remedy is impractical to implement due to conditions at the site, or where an alternative remedy would be equally protective over time as a presumptive remedy.

SRRA at N.J.S.A. 58:10C-22 requires the Department to invalidate a response action outcome if the Department determines that the remedial action is not protective of public health, safety, or the environment or if a presumptive remedy was not implemented as required pursuant to N.J.S.A. 58:10B-12.

The Department agrees that it may not invalidate a response action outcome that is the result of an alternative remedy, where the implementation of that remedy is protective of public health, safety or the environment. Accordingly, the Technical Requirements at N.J.A.C. 7:26E-5.1(i)2i and ii currently provide that either a presumptive remedy or an alternative remedy may be used. Furthermore, the mechanism for the person responsible for conducting the remediation to request Department approval for the use of an alternative remedy is codified at N.J.A.C. 7:26E-5.1(k). It is at this stage that the determination is made as to whether the alternative remedy is equally as protective as the presumptive remedy.

The suggested amendment for N.J.A.C. 7:26C-6.4(b)2 is inappropriate because this provision does not concern how to obtain approval of an alternative remedy. Rather, it sets forth how the Department may have recourse if implementation of either the presumptive remedy or the alternative remedy fails. The Department will not approve an alternative remedy unless the remedy would be equally protective as the presumptive remedy. However, if the person responsible for conducting the remediation fails to implement any remedy, whether it is the presumptive remedy or an alternative remedy that has been approved as equally protective, the Department must be able to have recourse to invalidate the response action outcome.

22. COMMENT: N.J.A.C. 7:26C-7.7 should include a provision that allows homeowners and condominium associations to satisfy the financial assurance requirements by providing their annual budget, consistent with the Remedial Action Permit for Soil and Groundwater Guidance documents.

RESPONSE: The Department agrees with the commenter and is proposing to amend the financial assurance requirements for condominium associations in the Final Rules. In that proposal, the Department proposes that financial assurance requirements be codified in the ARRCS rules at Subchapter 5. At new N.J.A.C. 7:26C-5.3(e), the Department is proposing to allow the person responsible for conducting the remediation pursuant to a remedial action permit who is a residential condominium association to meet the financial assurance amount requirements by submitting an annual budget approved by the governing body of the residential condominium association that reflects an amount dedicated to the operation, maintenance and inspection of engineering controls which is equal to the annual estimated amount required.

22. COMMENT: N.J.A.C. 7:26C-7.7 should be revised to indicate that the amount of the financial assurance should be limited to the cost to operate, maintain and inspect the engineering control over the following 12 month period.

RESPONSE: SRRA, at N.J.S.A. 58:10C-19c, provides that the financial assurance the Department may require will guarantee that "funding is available to operate, maintain, and inspect the engineering controls . . . for the period that such controls are required." Accordingly, the only situation in which a 12-month period suggested by the commenter would be appropriate would be if the engineering controls were only required for that period. In all other circumstances, the financial assurance must cover all of the costs for the entire period that such controls are required, not just one 12-month period. However, N.J.A.C. 7:26C-7.7(a)2i provides that financial assurance be maintained according to the most recent estimate of the life of the permit. Accordingly, where the most recent estimate reveals that financial assurance may be decreased, the person responsible for conducting the remediation is permitted to do so. Conversely, where the most recent estimate reveals that financial assurance must be increased, the person responsible for conducting the remediation is necessarily required to do so.

23. COMMENT: At N.J.A.C. 7:26C-7.7, the Department should create an exception for the posting of financial assurance in circumstances where the engineering control is only required for historic fill material.

RESPONSE: SRRA at N.J.S.A. 58:10C-19 allows the Department to require that a person issued a permit for the operation, maintenance and inspection of an engineering control maintain financial assurance. Upon a determination by the Department that large quantities of historic fill material exist on that parcel of land, the Brownfield Act at N.J.S.A. 58:10B-12h.(1) allows for the rebuttable presumption that the remedial action for such areas will be the use of engineering or institutional controls. In almost every situation, the remedy chosen for the remediation of historic fill involves an engineering control such as a cap. Because an engineering control is part of the remedy, the Department must be assured that sufficient funding is available to ensure that the engineering control is maintained, and therefore will continue to require financial assurance for a remedy of historic fill that includes an engineering control. However, in the Final RuleS proposal, the Department has proposed amendments to no longer require the posting of financial assurance for a ground water classification exception area (CEA) because a CEA is solely an institutional control, and does not involve an engineering control.

24. COMMENT: At N.J.A.C. 7:26C-7.7(b)2, the exemption afforded to innocent purchasers who acquired the property before May 7, 2009 should be modified to provide financial relief for innocent purchasers who acquired the property after that date by limiting the required financial assurance to an amount equal to the cost to operate maintain and inspect the engineering control over the following 12 month period.

RESPONSE: SRRA at N.J.S.A. 58:10C-19c(2) lists those entities who are not required to establish or maintain a funding source for the operation, maintenance, and inspection of the engineering controls installed as a part of a remedial action of a contaminated site. SRRA

specifically exempts " . . . a person who is not otherwise liable for cleanup and removal costs pursuant to N.J.S.A. 58:10-23.11 et seq. who purchases [sic] contaminated property before the date of enactment . . ." of SRRA. SRRA was enacted on May 7, 2009. N.J.A.C. 7:26C-7.7(b)2 implements N.J.S.A. 58:10C-19c(2) by affording the exemption only to innocent purchasers who acquired contaminated property before May 7, 2009. Accordingly, SRRA does not support the commenter's suggestion.

25. COMMENT: N.J.A.C. 7:26C-7.8(b) should be revised to allow the request to the Department for a rescission of permittee status to be submitted any time prior to the sale or transfer of a business or other business events listed in the rule.

RESPONSE: N.J.A.C. 7:26C-7.8(b) specifically requires that the request to the Department for a rescission of permittee status be submitted at least 60 calendar days prior to the sale or transfer of the property, transfer of the operation of the property, or termination of a lease. The Department has determined that it needs 60 days within which to process the request, including rescinding the permittee status of one person, and transferring that status to another person. Additionally, 60 days provides adequate time within which the prospective permittee may come into compliance with the financial assurance requirements of N.J.A.C. 7:26C-7.8, if applicable, because without compliance, the transaction may not proceed.

26. COMMENT: The title of the document that appears at N.J.A.C. 7:26C Appendix A should be changed to "Certification of Non-Liability," since certain parties making the submission are not developers.

RESPONSE: The certification at Appendix A provides the means by which a person may certify, pursuant to the Brownfield Act at N.J.S.A. 58:10B-2.1b, that the person is exempt from paying the Department's indirect program costs as part of his or her oversight costs because that person has a defense to liability for remediating a site pursuant to the Spill Act at N.J.S.A. 58:10-23.11g.d or because the person responsible for conducting the remediation is cleaning up and removing hazardous substances at his or her primary residence.

The Department agrees with the commenter that the current title of the document at Appendix A is too limiting. However, the Department does not agree that the title should be changed to "Certification of Non-Liability," as only a court can determine the liability of a party. On adoption, the Department is modifying the title of Appendix A to "Indirect Cost Exemption Certification," in order to more accurately reflect the document's purpose.

Technical Requirements for Site Remediation

27. COMMENT: N.J.A.C. 7:26E-6.2(b) should be deleted. Department pre-approval should not be required for routine soil remedial actions. This provision is not consistent with the intent of the Site Remediation Reform Act to expedite cleanups by eliminating Department pre-approval.

RESPONSE: N.J.A.C. 7:26E-6.2(b) conforms with ISRA at N.J.S.A. 13:1K-9h, which allows the owner or operator of an industrial establishment to implement a soil remedial action without prior Department approval of the remedial action workplan if the remedial action can be completed within 5 years from the commencement of the implementation of the remedial action

and the remedial action meets the established minimum residential or nonresidential use remediation standards adopted by the Department.

Additionally, this specific requirement applies only to sites that are subject to N.J.A.C. 7:26C-2.3, that is, sites for which remediation was initiated prior to November 7, 2009 and therefore are being remediated based upon Department approvals. However, with the full implementation of the licensed site remediation professional program in May 2012, the Department recognizes that this subsection will be in conflict with the intent of the licensed site remediation professional program, which is centered on the concept of remediation proceeding without Department approval. Accordingly, the Department has proposed to delete this subsection in the Final Rules proposal.

28. COMMENT: At N.J.A.C. 7:26E-6.6, it is unclear what types of cleanups require remedial action progress reports. This should be clarified.

REPSONSE: N.J.A.C. 7:26E-6.6(a) states that the person responsible for conducting the remediation who does not have a remedial action permit shall submit remedial action progress reports to the Department pursuant to this section and according to the remedial action schedule pursuant to N.J.A.C. 7:26E-6.5. N.J.A.C. 7:26E-6.5(a) states that the person responsible for conducting the remediation shall prepare a schedule of the remedial action pursuant to this section if the remedial action requires more than three months to complete.

Accordingly, such remedial action progress reports are required for any remedial action that requires more than three months to complete. However, the frequency of progress report submissions is at the discretion of the person responsible for conducting the remediation.

However, with the full implementation of the licensed site remediation professional program in May 2012 and the proposed establishment of regulatory timeframes for remedial action, the Department recognizes that the benefit of remedial action progress reports is minimal. Accordingly, the Department is proposing to delete this section in the Final Rules proposal.

Federal Standards Analysis

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

Discharge of Petroleum and Other Hazardous Substances (DPOHS) Rules, N.J.A.C. 7:1E

N.J.A.C. 7:1E is not promulgated under the authority of or in order to implement, comply with or participate in any program established under Federal law, or under a State statute that incorporates or refers to Federal law, Federal standards or Federal requirements. However, there are Federal standards or requirements to which a meaningful comparison can be made, and the Department has performed this comparison for rules in N.J.A.C. 7:1E being readopted.

The effect of the DPOHS rules that cross-reference the ARRCS rules is that the remediation of a discharge will have to be conducted according to the ARRCS rules, including the use of a licensed site remediation professional as applicable. To the extent that the Federal regulations do not require the use of a licensed site remediation professional, the addition of the

requirement to comply with the ARRCS rules may be perceived as making the DPOHS rules more stringent than their Federal analogues.

The Department is unable at this time to determine whether the requirement that remediation be conducted using the services of a licensed site remediation professional will increase or decrease the cost of the remediation. Although the Interim Rules have been in effect since November 4, 2009, the Department has not collected enough meaningful data to determine the costs versus the benefits of the new remediation paradigm. The remediation of a discharge under the rules in place prior to the Interim Rules could be performed without the aid of a professional who is trained in site remediation. The Department has no data on whether fees to be charged by a licensed site remediation professional will be higher or lower than the fees currently charged by existing site remediation professionals. However, as discussed in the Economic Impact statement in the proposal, the underlying purpose of SRRA is to help streamline the remediation process and the Department anticipates that added efficiencies may offset any costs that may result from the requirement to use a licensed site remediation professional.

Processing of Damage Claims Pursuant to the Sanitary Landfill Facility Closure and Contingency Fund Act Rules, N.J.A.C. 7:1I

N.J.A.C. 7:1I is not promulgated under the authority of, or in order to implement, comply with or participate in any program established under Federal law or under a State statute that incorporates or refers to Federal law, standards or requirements. Accordingly, no further analysis is required.

Processing of Damage Claims Pursuant to the Spill Compensation and Control Act Rules, N.J.A.C. 7:1J

N.J.A.C. 7:1J is not promulgated under the authority of, or in order to implement, comply with or participate in any program established under Federal law or under a State statute that incorporates or refers to Federal law, standards or requirements. Accordingly, no further analysis is required.

Freshwater Wetlands Protection Act (FWPA) Rules, N.J.A.C. 7:7A

A comparison of the adopted amendments with the Federal regulations is appropriate in the case of the FWPA rules, because the Department is obligated under Federal law to ensure that its FWPA rules are at least as stringent as the regulations implementing the Federal 404 wetlands permitting program. As discussed above in connection with the DPOHS rules, to the extent that the Federal regulations do not require the use of a licensed site remediation professional, the addition of the requirement to comply with the ARRCS rules may be perceived as making the FWPA rules more stringent than their Federal analogues. However, as discussed above, the Department is unable at this time to determine whether the requirement that remediation be conducted using the services of a licensed site remediation professional will increase or decrease the cost of the remediation because there is not yet enough meaningful information available regarding the cost of using a licensed site remediation professional.

Stormwater Management Rules, N.J.A.C. 7:8

There are no current, analogous Federal requirements for stormwater management planning; however, there are several Federal programs concerning stormwater runoff and nonpoint source pollution control. The Federal Clean Water Act (33 U.S.C. §§1251 et seq.) requires permits under Section 402 of that Act for certain stormwater discharges. The Department's requirements to obtain such permits are set forth in the NJPDES rules, N.J.A.C. 7:14A, rather than in the Stormwater Management rules. Section 319 of the Clean Water Act authorizes a Federal grant-in-aid program to encourage states to control nonpoint sources. The Department developed a management program for nonpoint source control under which the Department issues grants to local, regional, State, and interstate agencies as well as to nonprofit organizations to, for example, develop or monitor best management practices to control stormwater. Under Section 6217(g) of the Coastal Zone Management Act Reauthorization and Amendments of 1990 (CZARA), P.L. 101-508, the U.S. Environmental Protection Agency (EPA) has published "Guidance Specifying Management Measures For Sources of Nonpoint Pollution In Coastal Waters" (CZARA 6217(g) Guidance). States may opt to participate or not participate in the overall coastal zone management program, with no penalty for non-participation other than the loss of Federal grants for this program. No mandatory Federal standards or requirements for nonpoint sources pollution control are imposed. The CZARA 6217(g) Guidance includes management measures for stormwater runoff and nonpoint source pollution control from land development as well as many other source types. The Department has developed a coastal zone management program, including a component addressing coastal

nonpoint pollution control. The Stormwater Management rules at N.J.A.C. 7:8 are one means by which the Department implements its nonpoint pollution control program.

The Department has determined that the rules being readopted that prohibit recharge of stormwater that is inconsistent with an approved remedial action workplan or landfill closure plan (as opposed to only plans approved by the Department) do not contain any standards or requirements that exceed the standards or requirements imposed by Federal law. Rather, these amendments take into account that, with the adoption of the ARRCS rules, there will be plans that are approved by both the Department and by licensed site remediation professionals, thus making the two sets of rules consistent with each other. Accordingly, Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. (P.L. 1995, c. 65) do not require any further analysis.

Ground Water Quality Standards (GWQS), N.J.A.C. 7:9C

The GWQS provide the basis for protection of ground water quality in New Jersey by establishing constituent standards for ground water pollutants. These constituent standards are applicable to the development of effluent limitations and discharge requirements pursuant to the NJPDES rules, N.J.A.C. 7:14A; to the development of minimum ground water remediation standards pursuant to the Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1 et seq.; and to other requirements and regulatory actions applicable to discharges that cause or may cause pollutants to enter the ground waters of the State. The authority for setting these standards comes solely from New Jersey law and has no Federal counterpart. The GWQS are not promulgated under the authority of, or in order to implement, comply with, or participate in any program established under Federal law or under a State statute that incorporates or refers to

Federal law, Federal standards or Federal requirements. The GWQS do not contain any standards or requirements that exceed those required by Federal law. The GWQS provides the associated ground water standards that are relevant to the New Jersey Underground Injection Control program, RCRA D, and RCRA C ground water monitoring programs at 40 CFR 144 through 146, 258 and 264. These Federal programs are implemented through the NJPDES program.

New Jersey Pollutant Discharge Elimination System (NJPDES) Rules, N.J.A.C. 7:14A

The NJPDES rules are developed partly under the National Pollutant Discharge Elimination System as authorized by the Federal Clean Water Act (including surface water and sludge management programs), under the underground injection control (UIC) program as authorized under the Federal Safe Drinking Water Act, and under ground water monitoring and corrective action portions of the municipal solid waste landfill and hazardous waste programs as authorized under the Resource Conservation and Recovery Act (RCRA).

The authority for regulating the types of discharges to ground water covered by Subchapter 7 comes primarily from State statutes including N.J.S.A. 58:10A-1 et seq., and has no Federal counterpart (except in regard to injection wells as discussed below). N.J.A.C. 7:14A-7 is not promulgated under the authority of, or in order to implement, comply with, or participate in any program established under Federal law or under a State statute that incorporates or refers to Federal law, Federal standards or Federal requirements (except as discussed below).

Some of the units regulated under N.J.A.C. 7:14A-7 are injection wells that are also regulated under N.J.A.C. 7:14A-8. An underground injection control (UIC) permit issued in accordance with N.J.A.C. 7:14A-8 is a discharge to ground water (DGW) permit that is also

subject to certain provisions of N.J.A.C. 7:14A-7. In addition, injection wells are regulated under USEPA rules for the Federal Underground Injection Control Program created pursuant to Part C of the Federal Safe Drinking Water Act (SDWA) (42 U.S.C. §§300(f) et seq.). These USEPA rules are found mainly at 40 CFR Parts 144 through 148. To the extent that some N.J.A.C. 7:14A-7 provisions regulate injection wells, N.J.A.C. 7:14A-7 might be considered one of the means by which the Department participates in the UIC program established under Federal law. However, all NJPDES rule provisions that impose standards or requirements specific to injection wells are found in N.J.A.C. 7:14A-8 rather than in N.J.A.C. 7:14A-7. To the extent that some N.J.A.C. 7:14A-7 provisions affect injection wells, those provisions implement Federal UIC mandates; they do not exceed them.

Underground Storage Tank (UST) Rules, N.J.A.C. 7:14B

Although there is a Federal Underground Storage Tank program pursuant to 42 U.S.C. §§ 6991 et seq., which regulates the operation, closure and upgrade of regulated underground storage tanks, there are no provisions in the Federal statute or regulations requiring a certification program for contractors performing services on underground storage tanks. The Federal rules at 40 CFR 280.20(e) encourage states to certify individuals to perform services on regulated underground storage tank systems.

N.J.A.C. 7:14B-1.7 contains certification statements to be signed by tank owners and consultants upon submission of documents to the Department. There is no Federal counterpart to this requirement. However, requiring certification does not increase any costs associated with the operation of an UST.

N.J.A.C. 7:14B-1.8, which requires an owner or operator of an underground storage tank to conduct all site investigation and tank closure activities required in the UST rules in accordance with the ARRCS rules at N.J.A.C. 7:26C-2.4, including using the services of a licensed site remediation professional, has no Federal counterpart. Accordingly, as discussed above in connection with the amendments to the DPOHS rules, to the extent that the Federal regulations do not require the use of a licensed site remediation professional, the addition of the requirement to comply with the ARRCS rules may be perceived as making the UST rules more stringent than their Federal counterpart. However, as discussed above, the Department is unable at this time to determine whether the requirement that remediation be conducted using the services of a licensed site remediation professional will increase or decrease the cost of the remediation because no meaningful information is yet available regarding the cost of using a licensed site remediation professional.

Financial Assistance Programs for Environmental Infrastructure Facilities (FAPEIF) Rules, N.J.A.C. 7:22

The FAPEIF rules being readopted do not exceed the standards imposed by Federal law. The Federal government provides monies to the State in the form of capitalization grants under the Environmental Infrastructure Financing Program, which is administered pursuant to the rules contained within N.J.A.C. 7:22. Federal regulations have been adopted at 40 CFR Part 35, Subpart K, which establish requirements applicable to States for the implementation and management of State Revolving Funds (SRF). The regulations define eligible activities of the SRF and the types of projects that the SRF can finance, establish requirements that apply to

recipients of SRF assistance, specify capitalization grant agreement requirements, environmental review requirements and financial requirements (including cash draw procedures, annual reports, audits and others). Extensive policy documents have also been issued by the US Environmental Protection Agency with respect to the SRF program including the "Initial Guidance for State Revolving Funds (January 1988)," which better defines the applicability of the project-level requirements, and elaborates on other Federal laws that impact the SRF program. Other requirements applicable to SRF recipients are also included as conditions to the award of the Federal capitalization grant agreements. N.J.A.C. 7:22 is designed to achieve conformance with these Federal requirements and to protect the use of public funds to ensure the self-perpetuating nature of the SRF. The Department is readopting updates to those portions of the FAPEIF rules concerning disclosure of whether a site is being remediated to cross reference the Administrative Requirements for the Remediation of Contaminated Sites rules. The requirement that disclosure be made, however, is not changing.

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

The ISRA rules do not contain any standards or requirements that exceed those imposed by Federal law. ISRA was not enacted under the authority of, or in order to implement, comply with, or participate in, a program established under Federal law. Moreover, the ISRA rules do not incorporate Federal law, standards or requirements.

ISRA does, however, contain several references to remediation programs established by Federal law. These references grant equivalent status to those remediations performed under Federal law for the purpose of determining an owner or operator's compliance requirements

pursuant to ISRA. The references to Federal law in these rules are not the type of references that require further analysis pursuant to Executive Order No. 27 (1994) or N.J.S.A. 52:14B-1 et seq., because they are incidental to the administration of the ISRA program. In fact, the inclusion of equivalent Federal approvals in these rules promotes the policy objectives outlined in Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. Therefore, the Department has determined that the readoption of the prior adopted amendments to the ISRA rules do not contain any standards or requirements that exceed those imposed by Federal law, and no further analysis under Executive Order No. 27 (1994) or N.J.S.A. 52:14B-1 et seq. is required.

Administrative Requirements for the Remediation of Contaminated Sites (ARRCS) Rules, N.J.A.C. 7:26C

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

law, and no further analysis under Executive Order No. 27 (1994) or N.J.S.A. 52:14B-1 et seq. is required.

Remediation Standards, N.J.A.C. 7:26D

The Remediation Standards, N.J.A.C. 7:26D, are adopted under the authority of the Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1 et seq., the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11a et seq., and the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. Each of these State statutes refers to or incorporates Federal law, Federal standards or Federal requirements. Thus, in accordance with N.J.S.A. 52:14B-22 through 24 and Executive Order No. 27 (1994), the Department compared the requirements of the Remediation Standards being readopted 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., the Resource Conservation and Recovery Act (RCRA) of 1980; 42 U.S.C. §§6901 and 6991 et seq., and the Federal Safe Drinking Water regulations 40 U.S.C. §§141, 142 and 143.

The Department has determined that the rules being readopted do not contain any standards or requirements that exceed those imposed by Federal law, and no further analysis under Executive Order No. 27 (1994) or N.J.S.A. 52:14B-1 et seq. is required.

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

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

The Department has determined that, with the exception of the provisions that are described in the following paragraphs, the amendments to the Technical Requirements being readopted do not require any specific action that is more stringent than any requirement of comparable Federal rules. The implementing regulations for the Federal laws listed above provide only generic procedural requirements on how to investigate and remediate contaminated sites. For example, the National Contingency Plan (NCP), 40 CFR 300, the implementing regulations for CERCLA, provides possible options for conducting the remedial investigation, but the NCP does not detail the minimum steps that must be taken before an area of concern can be considered to have been adequately evaluated.

The Department is readopting several amendments to the Technical Requirements that differentiate requirements for a site that is being remediated with a licensed site remediation professional from sites that are being remediated without a licensed site remediation professional, and to establish regulatory timeframes for the completion and submission of the receptor evaluation, and the submission of a preliminary assessment/site investigation report. As discussed in the Federal Standards Analysis for the ARRCS rules above, the Department has determined that the rules that establish the LSRP program do not contain any standards or requirements that exceed those imposed by Federal law, and no further analysis under Executive Order No. 27 (1994) or N.J.S.A. 52:14B-1 et seq. is required. However, the establishment of regulatory timeframes for the completion of certain remediation work is more stringent than equivalent Federal programs. Like the Federal remediation programs, the Department allowed the remediation of contaminated sites to be conducted on site specific schedules. The Department has found that this practice has allowed cleanups to be dragged out unnecessarily and has prolonged the remediation process. As described in the section concerning the DPOHS rules above, the Department is unable at this time to determine whether the requirement that remediation be conducted using the services of a licensed site remediation professional will increase or decrease the cost of the remediation because no meaningful information is available yet regarding the cost of using a licensed site remediation professional. However, the Department believes that there will be an overall cost savings associated with the timeframes. When contamination is allowed to persist in the environment, it is more likely to migrate to ground water, surface water and to soil off the property being remediated, which often adds to the overall cost of remediation. If the remediation of contaminated sites is completed in a

timelier manner, such sites can be put to better use and often may generate more taxes for local and state government.

The Department is readopting with amendment the requirements for the person responsible for conducting remediation to submit information on reporting forms or submit technical reports with cover forms that will be provided by the Department. Because there are no equivalent requirements for the Federal remediation programs, this is considered a more stringent requirement. The Department has developed these forms as a part of the licensed site remediation professional program and will allow the Department to more quickly and efficiently enter information about the person that is conducting remediation, and technical and administrative information about contaminated sites into its databases. The use of forms will help ensure that technical reports are delivered to the proper section within the Site Remediation Program so that they can be reviewed as effectively as possible. Again, as described above, the Department is unable at this time to determine whether the requirement that remediation be conducted using the services of a licensed site remediation professional will increase or decrease the cost of the remediation because no meaningful information is available yet regarding the cost of using a licensed site remediation professional.

The Department is working toward the submission of the majority of site remediation related information electronically so that the Site Remediation Program can be run as efficiently as possible and so that that same information can be easily shared with the public, Federal and local governments and any other interested person.

Highlands Water Protection and Planning Act Rules, N.J.A.C. 7:38

The Highlands Act and Planning Act (Highlands Act) delineates a contiguous area in the northwest portion of the State of New Jersey as the "Highlands Region" based on common physical and geographic features. It further divides the Region into two parts: the preservation area and the planning area. The Highlands Act mandates that the Department's rules provide enhanced environmental standards for development in the preservation area to protect its important water, ecological and cultural resources. By inference, the planning area is deemed to have fewer critical resources and may be more suitable for development.

The enhanced standards in the preservation area apply to all aspects of potential development. They include strict limitations on obtaining new sources of potable water and constructing new wastewater facilities, and preclude development in areas containing statutorily-identified, environmentally sensitive features. Further, the Highlands Act rules require a comprehensive analysis of the environmental impact of all project components.

A comprehensive regional approach to regulation is not common in Federal environmental regulation. The Federal Environmental Protection Agency (EPA) establishes one set of standards nationwide and then requires individual states to establish their own, comparable standards. States often retain the ability to devise more stringent or regional standards if appropriate. There is no requirement to apply all Federal standards to a single site in a comprehensive manner. That is, certain aspects of a proposed development may comply with a standard and be approved while other aspects may not comply and may be denied. There are no comprehensive Federal standards that apply specifically to the Highlands Region like the State rules being readopted herein. Therefore, there is no basis for comparison between these rules in

their entirety and any one specific Federal regulation. While some of the individual standards comprising a Highlands preservation area approval do have comparable Federal regulations, the Department has determined that the Highlands Act Rules being readopted with amendments do not amend any provision that has a comparable Federal Regulation. No further analysis under Executive Order No. 27 (1994) or N.J.S.A. 52:14B-1 et seq. is required.

Rules for the Review Zone of the Delaware and Raritan Canal State Park, N.J.A.C. 7:45

There are no current, analogous Federal requirements for the regulation of a State Park as a recreation area, source of potable water and as an historic district; however, the Federal Clean Water Act does concern stormwater runoff and nonpoint source pollution control. The Federal Clean Water Act, 33 U.S.C. §§1251 et seq., requires permits under Section 402 of that Act (33 U.S.C. §1342) for certain stormwater discharges. The Department's requirements to obtain such permits are set forth in the NJPDES rules, N.J.A.C. 7:14A, rather than in Rules for the Review Zone of the Delaware and Raritan Canal State Park. Accordingly, the within rules do not conflict with, and are not more stringent than, the Federal Clean Water Act. Therefore, Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. (P.L. 1995, c. 65) do not require any further analysis.

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

CHAPTER 26C

ADMINISTRATIVE REQUIREMENTS FOR THE

REMEDIATION OF CONTAMINATED SITES

APPENDIX A

[DEVELOPER CERTIFICATION] ***INDIRECT COST EXEMPTION**

CERTIFICATION*

(No change to text of Appendix A.)

Based on consultation with staff, I hereby certify that the above statements, including the Federal Standards Analysis addressing the requirements of Executive Order No. 27 (1994), permit the public to understand accurately and plainly the purposes and expected consequences of this readoption with amendments. I hereby authorize this readoption with amendments.

Date: _____

_____
Bob Martin, Commissioner
Department of Environmental Protection