NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE AUGUST 6, 2018 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

ENVIRONMENTAL PROTECTION

SITE REMEDIATION AND WASTE MANAGEMENT

Discharges of Petroleum and Other Hazardous Substances

Heating Oil Tank System Remediation Rules

Administrative Requirements for the Remediation of Contaminated Sites

Technical Requirements for Site Remediation

Adopted Amendments: N.J.A.C. 7:1E-5.7; 7:14A-1.2, 7.5, 8.4, and 8.5; 7:14B-1.6, 5.5, 7.2, 9.5, 12.1, 16.2, 16.3, 16.4, and 16.11; 7:26B-3.4 and 5.9; 7:26C-1.3, 1.4, 1.5, 1.7, 2.3, 3.2, 3.3, 3.4, 3.5, 4.2, 4.3, 4.4, 4.6, 4.7, 5.2, 5.4, 5.8, 5.11, 6.2, 7.2, 7.3, 7.5, 7.6, 7.7, 7.11, 7.12, 7.13, 9.1, 9.5, 9.9, 11.2, 11.3, 11.4, 12.1, 12.2, 12.3, 14.2, and 14.4, and 7:26C Appendices B and D; and 7:26E-1.3, 1.6, 1.7, 1.8, 1.11, 1.14, 1.16, 2.1, 4.1, 4.10, 5.1, 5.2, 5.3, 5.5, 5.6, and 5.8; and 7:26E Appendix A

Adopted Repeals and New Rules: N.J.A.C. 7:26C-9.10 and 12.4

Adopted New Rules: N.J.A.C. 7:26C-9.12; and 7:26F

Adopted Repeals: N.J.A.C. 7:26C-6.3 and 13

Proposed: July 17, 2017, at 49 N.J.R. 2055(a).

Adopted: June 8, 2018, by Catherine R. McCabe, Commissioner, Department of Environmental Protection.

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Filed: June 26, 2018, as R.2018 d.142, **with non-substantial changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3), **and with the proposed amendments to N.J.A.C. 7:26C-6.4 and 7.8 not adopted**.

Authority: N.J.S.A. 13:1D-9, 58:10-23.11 et seq., 58:10A-1 et seq., 58:10A-21 et seq., 58:10A-37.1 et seq., 58:10B-1 et seq., and 58:10C-1 et seq.

DEP Docket Number: 10-17-06.

Effective Date: August 6, 2018.

Expiration Dates: January 27, 2021, N.J.A.C. 7:1E;

November 2, 2022, N.J.A.C. 7:14A;

April 18, 2010, N.J.A.C. 7:14B, pursuant to Executive Order No. 1 (2010), the chapter expiration date is extended from April 18, 2010, until the completion of the review of administrative regulations and rules by the Red Tape Review Group, and until such time as the extended regulation or rule is readopted pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

July 22, 2023, N.J.A.C. 7:26B;

July 11, 2025, N.J.A.C. 7:26C;

May 7, 2019, N.J.A.C. 7:26E; and

August 6, 2025, N.J.A.C. 7:26F.

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The Department of Environmental Protection (Department) is adopting amendments, new rules, and repeals in its rules governing site remediation. The Department is adopting a new chapter, N.J.A.C. 7:26F, Heating Oil Tank System Remediation Rules, to address the closure of heating oil tank systems, and remediation of discharges from those systems. For purposes of this new chapter, the term "heating oil tank systems" means residential above ground or underground heating oil tank systems, and small, non-residential above ground or underground heating oil tank systems. The new chapter is prescriptive, but includes a certain amount of flexibility by providing a process by which the tank owner may vary from certain technical requirements and deal with residual soil contamination. With the adoption of the new chapter, the Department is deleting the requirements for remediating discharges from heating oil tank systems from other rules governing site remediation.

The Department is also adopting amendments to N.J.A.C. 7:1E, Discharges of Petroleum and Other Hazardous Substances (DPHS) rules; N.J.A.C. 7:14A, New Jersey Pollutant Discharge Elimination System (NJPDES) rules; N.J.A.C. 7:14B, Underground Storage Tanks (UST) rules; N.J.A.C. 7:26B, Industrial Site Recovery Act (ISRA) Rules; N.J.A.C. 7:26C, Administrative Requirements for the Remediation of Contaminated Sites (ARRCS); and N.J.A.C. 7:26E, Technical Requirements for Site Remediation (Technical Requirements). The amendments streamline those rules, clarify provisions that make it difficult to implement the rules, and simplify the implementation of the licensed site remediation professional (LSRP) program.

Proposed Amendments Not Being Adopted

The Department is not adopting proposed amendments to N.J.A.C. 7:26C-6.4 in ARRCS related to correction, rescission, withdrawal, and invalidation of a final remediation document. As summarized below, the Department received a number of comments, which highlighted that further input from stakeholders is needed to ensure that any changes to these provisions achieve the desired environmental protection, without unduly burdening the regulated community.

The Department proposed to amend N.J.A.C. 7:26C-6.4 to add flexibility to the rules concerning when a response action outcome must be withdrawn or invalidated, and a no further action letter rescinded because the remedy is no longer protective of public health and safety and of the environment. Under certain circumstances, such as when the Department amends a remediation standard to make it more stringent by an order of magnitude or more, there is a presumption that a prior remediation is no longer protective of the environment. The proposed amendments were in response to requests by the regulated community that, rather than a blanket determination that all previously completed remedies are not protective, there be a procedure by which the person responsible for conducting the remediation may first evaluate the ongoing protectiveness of the selected remedy before the remedy is considered no longer protective; the remedy may continue to be protective, depending on site-specific conditions.

Commenters opposing the proposed amendments indicated that the proposed amendments were overly restrictive and contrary to the intent of the Legislature, and that they created a process that was violative of due process, including prescriptive, unnecessary, and unrealistic timeframes. Commenters were generally concerned that the proposed amendments improperly shifted authority to invalidate response action outcomes from the Department to LSRPs, and that withdrawal of a response action outcome would be compelled, even when a remedial action that was the subject of the response action outcome remained protective. By mandating withdrawal of a response action outcome, the proposed amendments improperly presumed that new circumstances or new conditions could not be considered as new areas of concern, contrary to past Department approach. Based on the comments received, the Department has determined not to adopt the proposed amendments to N.J.A.C. 7:26C-6.4.

This rule adoption can also be viewed or downloaded from the Department's website at http://www.nj.gov/dep/rules.

Summary of Hearing Officer's Recommendation and Agency's Response

The Department held a public hearing on August 31, 2017, at the Department's Public Hearing Room, 401 East State Street, Trenton, New Jersey. Two people provided oral comments. David E. Haymes, Executive Assistant to the Assistant Commissioner of the Site

Remediation and Waste Management Program served as hearing officer. After reviewing the comments received during the public comment period, the hearing officer has recommended that the rulemaking be adopted with the changes as described below in the Summary of Public Comments and Agency Responses and the Summary of Agency-Initiated Changes. The Department accepts the hearing officer's recommendations.

The 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: Docket No. 10-17-06

401 East State Street, 7th Floor

Mail Code 401-04L

PO Box 402

Trenton, New Jersey 08625-0402

Summary of Public Comments and Agency Responses:

The following people submitted written comments and/or gave oral testimony on the proposal:

1. Mark Annis, ANCO Environmental Services, Inc.
2. Vini Bandeira, Precision Testing Labs

3. Eric Baumgarten, TRC Solutions

4. Angela Bavosa

5. Sara Bluhm, New Jersey Business and Industry Association

6. Eric DeGesero, Fuel Merchants Association of New Jersey

7. John Donohue, Fuel Merchants Association of New Jersey

8. Michael A. Egenton, New Jersey Chamber of Commerce

9. Bryan Fallucca, Phoenix Consulting, LLC

10. Thomas Francis, Cardinal Environmental Consulting, LLC

11. Elizabeth George-Cheniara, Esq., on behalf of the New Jersey Builders Association

12. Dennis Hart, Chemistry Council of New Jersey and the Site Remediation Industry Network

13. John M. Marion, CALMAR Associates, LLC

14. Michael G. McGuinness, NAIOP NJ, the Commercial Real Estate Development Association

15. John J. Oberer, Licensed Site Remediation Professionals Association

16. Devang Patel, Envocare

17. Anthony Russo, Commerce and Industry Association of New Jersey

18. Ryan K. Seibert, CALMAR Associates, LLC

19. Bruce S. Shapiro, New Jersey Association of Realtors

20. John H. Weitz, Jr.

21. Glenn Wisniewski, Marksmen Enterprises, LLC

A summary of the timely submitted comments and the Department's responses follows. The number(s) in parentheses after each comment identify the commenter(s) listed above.

Rulemaking Procedure

1. COMMENT: Contrary to other rulemakings that adhered to the agency's guidelines for seeking public input, the Department did not, in this instance, utilize a fully represented stakeholders' process. Further, contrary to the statement in the notice of proposal Summary at 49 N.J.R. 2055(a), and multiple statements made by the Department ensuring that stakeholder input is obtained before rules are proposed, relevant stakeholders, including entities focused upon corporate members of the regulated community, were not involved in any of the reported discussions with the rule development team. In favor of a more robust stakeholder process, the Department should withdraw the proposed amendments to ARRCS regarding the definition of "person" at N.J.A.C. 7:26C-1.3, the certification language at N.J.A.C. 7:26C-1.5(c), and N.J.A.C. 7:26C-6.4(b) and (c). Further, the Department should not move forward with amending the Technical Requirements at N.J.A.C. 7:26E-5.2(b) and (c) with respect to the use of alternative fill. (5 and 11)

2. COMMENT: This rulemaking fails to comply with the requirements and the spirit of the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and Governor Chris Christie's Executive Order Number 2 because of, among other reasons, the lack of public

involvement and transparency associated with this rulemaking. The openness and transparency of this process is questioned. (5, 12, and 17)

3. COMMENT: This rulemaking contains many miscellaneous, unrelated, and potentially significant provisions that were not previously vetted in any way with the regulated community. A public comment proposal of over 300 pages that contains such varied provisions, and no, or minimal, compliance with the procedural protections regarding each change, does not provide meaningful notice to the regulated community of what new regulations and obligations the Department is seeking to impose. (5, 12, and 17)

4. COMMENT: Though meetings were held with stakeholders in the past, there were no more recent opportunities given to stakeholders to share and address concerns and topics in a public forum with the Department's rule development team. As a result, the Department could not give serious consideration to stakeholder feedback as it was drafting these amendments. (8)

RESPONSE TO COMMENTS 1, 2, 3, AND 4: Regulated community involvement and transparency are integral components of the Department's rule and policy development. On January 20, 2010, Governor Christie issued Executive Order No. 2, which describes common sense principles for the promulgation of rules. Executive Order No. 2 requires State agencies to "[e]ngage in the 'advance notice of rules' by soliciting the advice and views of knowledgeable persons from outside of New Jersey State government, including the private sector and

academia, in advance of any rulemaking to provide valuable insights on the proposed rules, and to prevent unworkable, overly-proscriptive or ill-advised rules from being adopted."

Consistent with the direction of Executive Order No. 2, the Department engaged in a stakeholder process, meeting with representatives of affected interests to seek their experiences and perspectives. The Department assembled a rule development team that included stakeholders from the Fuel Merchants Association, New Jersey Association of Realtors, the insurance industry, the New Jersey Department of Community Affairs, and several environmental consulting firms that employ certified subsurface evaluators and LSRPs. Additional meetings occurred throughout the development of the proposed rulemaking, in which the Department disseminated information and solicited feedback from the regulated community. Using information gained during this stakeholder process, the Department proposed rules satisfying its statutory mandate to protect the public health and safety and the environment.

The Department afforded sufficient notice and opportunity to provide comments and discuss the rulemaking, consistent with the requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. The Department initially provided a 60-day public comment period on the rulemaking. However, in response to requests for extensions, the Department extended that public comment period for an additional 14 days. As with any rulemaking, and as contemplated by the Administrative Procedure Act, the Department has reviewed, considered, summarized, and is responding in this notice of adoption to all formally submitted comments

received during the entirety of the public comment period. As such, the Department proposed and is adopting these rules in accordance with the public notice and comment procedural requirements in the Administrative Procedure Act.

For a discussion of the adopted amendment to ARRCS, N.J.A.C. 7:26C, regarding the definition of "person" at N.J.A.C. 7:26C-1.3, certification language at N.J.A.C. 7:26C-1.5(c), and amendments to the Technical Requirements at N.J.A.C. 7:26E-5.2(b) and (c) with respect to the use of alternative fill, see the responses to comments 151 through 159, 170 through 173, and 254 through 256 below, respectively.

General Concerns

5. COMMENT: This rulemaking is a major piece of regulation that will have profound impact on the contaminated site remediation process in New Jersey. Proposed amendments to ARRCS and the Technical Requirements, and the new Heating Oil Tank System Remediation Rules will complicate procedures and processes without providing increased protection of human health and the environment. (15)

RESPONSE: Since the most recent amendments to the chapters governing site remediation were adopted in May 2012, stakeholders and other interested parties have requested additional amendments to help streamline remediation. These requested amendments are part of this rulemaking. Additionally, the Department is correcting errors and closing loopholes that it has identified in the course of administering the existing rules.

Consolidating the rules concerning heating oil tank system remediation in one chapter simplifies procedures and processes because these rules will be easy to find and understand, and will provide environmental professionals with a valuable resource with which they can more quickly and consistently remediate discharges from heating oil tank systems. The longer such contamination persists in the environment, the more likely it will spread to ground water, surface water, and soil. The more quickly and correctly contamination is remediated, the fewer the instances of prolonged human and ecological exposure to the contamination, thereby resulting in fewer negative consequences to New Jersey residents and workers and to the State's natural resources.

The amendments to the other rules concerning site remediation make the rules easier to understand and implement, encouraging the continuous remediation of a site and emphasizing the importance of timely remediation. These amendments also streamline and simplify the implementation of the LSRP program and provide additional clarity. To the extent the rules provide deadlines for completing remediation, they reduce the amount of time that contamination remains in the environment. As stated above, the sooner the contamination is remediated, the better for New Jersey's residents and natural resources.

Economic Impact Statement

6. COMMENT: The Department's economic analysis is grossly flawed. The fees charged by a subsurface evaluator firm may be less than those charged by an LSRP firm. The amount

charged for a heating oil tank system closure is not the domain of the Department (unless subject to a Hazardous Discharge Site Remediation Fund grant or loan), but rather is subject to market forces beyond the control of the State of New Jersey and subject to the principle of interstate commerce as many LSRPs, subsurface evaluators, property owners, and insurance carriers are located out-of-State. By restricting the free trade of acknowledged equal final remediation documents, the Department is inappropriately restricting interstate commerce, and subjecting the State of New Jersey to potential litigation. (15)

RESPONSE: The Economic Impact statement for the Heating Oil Tank System Remediation Rules, N.J.A.C. 7:26F, fully complies with the requirements of the Administrative Procedure Act at N.J.S.A. 52:14B-4(a)(2) and the Office of Administrative Law's Rules for Agency Rulemaking at N.J.A.C. 1:30-5.1(c)3. It describes the expected range of costs and other economic impacts that the Department anticipates for this portion of the rulemaking. The Department is required to provide "adequate notice" of its "views regarding the rules' expected economic impacts" to enable interested parties "opportunity to submit comments on the issue." It is not required to quantify these costs with particularity where the actual costs may vary significantly on a case-by-case basis. *In re Adoption of N.J.A.C. 5:96 and 5:97*, 416 *N.J. Super*. 462, 473-74 (App. Div. 2010); see also *In re Protest of Coastal Permit Program Rules,* 354 *N.J. Super*. 293, 365 (App. Div. 2002) (holding that the Department's socio-economic impact statement is sufficient when it "set[s] forth the impact that [the Department] 'anticipate[s]' or expect[s] from the proposed regulations").

As discussed below in the Response to Comment 21, the Legislature provided at N.J.S.A. 58:10C-15.b that discharges from heating oil tank systems may be remediated by either a certified subsurface evaluator or an LSRP. The Department is not preventing LSRPs from remediating discharges from heating oil tank systems. Rather, in order to prevent confusion regarding the quality or validity of the final remediation document in the remediation of a discharge associated with a heating oil tank system, the rules provide that all such remediations will have the same Department-issued heating oil tank no further action letter.

N.J.A.C. 7:26F, Heating Oil Tank System Remediation Rules

General Comments

General Support of Rules

7. COMMENT: There is support for the new Heating Oil Tank System Remediation Rules, N.J.A.C. 7:26F, most importantly the *de minimis* provision, since the rules are long overdue. (6 and 7)

8. COMMENT: The Heating Oil Tank System Remediation Rules will assist property owners in remediating any discharges from their heating oil tanks, while at the same time reducing the amount of time and money it takes for remediation. The proposed rule changes will help expedite real estate transactions where there are heating oil tanks, as well as reduce costs associated with these transactions at the time of sale. By giving homeowners greater flexibility in addressing issues associated with their heating oil tanks, the Department is recognizing and

taking action to assist these property owners, especially in cases when there is a real estate transaction contingent upon work being done to a heating oil tank. (19)

RESPONSE TO COMMENTS 7 AND 8: The Department acknowledges the commenters' support for the adopted rules.

9. COMMENT: The multiple references to definitions from other regulations is cumbersome and increases the potential for confusion. The definitions for 20 of the 38 defined terms are found in other chapters. Having to look at other rules for definitions makes this a more complex review for homeowners. Wherever possible, the definitions pertinent to N.J.A.C. 7:26F should be in N.J.A.C. 7:26F. To the extent practicable, this chapter is intended to be easily understood by the regulated community and the chapter should endeavor to be very much a 'standalone' document. This provides the regulated community a clear path for compliance with the rule and minimizes any confusion with respect to the remedial investigation and the remedial actions required by rule. (3, 5, 6, 7, 8, 12, 15, and 17)

RESPONSE: The adopted definitions and citations refer to other chapters, such as ARRCS, in order that when the definitions and citations are amended, they remain consistent throughout the site remediation-related rules. However, specific to N.J.A.C. 7:26F, the Department will include all definitions in the courtesy copy of the rules that will be posted to the Department's website at www.nj.gov/dep/rules.

10. COMMENT: There should be a single definition of "heating oil tank system," rather than definitions of both "heating oil tank system" and "small, non-residential, above ground heating oil tank system." Further, the definitions should include the term "nominal" with regard to tank size, so there is no confusion that the rules apply to single or combined tank storage of 2,000 gallons. A 2,000-gallon tank should not be excluded because the piping may contain a small quantity of heating oil.

The single definition should read: "heating oil tank system means a residential above ground heating oil tank system, an unregulated heating oil tank, or a non-residential above ground heating oil tank system that is any one or a combination of tanks, including appurtenant pipes, lines, fixtures, and other related equipment, with a nominal capacity of 2,000 gallons or less, used to store heating oil for on-site consumption in a non-residential building, the volume of which, including the volume of the appurtenant pipes, lines, fixtures, and other related equipment, is less than 10 percent below the ground." (6 and 7)

RESPONSE: The Heating Oil Tank Remediation Rules, N.J.A.C. 7:26F, regulate three types of tank systems: residential above ground heating oil tank systems; small, non-residential above ground heating oil systems; and unregulated heating oil tank systems. Each of these terms is defined at adopted N.J.A.C. 7:26F-1.5, Definitions. Collectively, they are referred to as heating oil tank systems, as stated in the adopted definition of "heating oil tank system." Therefore, each definition is necessary.

In order to address possible confusion regarding the capacity of the "small, non-residential above ground heating oil tank system," the Department is modifying the definition at N.J.A.C. 7:26F-1.5 on adoption to clarify that the 2,000-gallon volume limit applies only to the tanks.

11. COMMENT: The Department should rename the term "unregulated heating oil tank system" as "unregulated underground heating oil tank system." (18)

RESPONSE: An unregulated heating oil tank system is not limited to a tank system that is 10 percent or more below ground. It includes any above ground tanks and appurtenant pipes, lines, fixtures, and related equipment, used to contain heating oil for on-site consumption in a residential building. Accordingly, the definition includes some above ground tank systems. Changing the term to refer only to underground heating oil tank systems would be incorrect.

12. COMMENT: The definition of "residual contamination" at N.J.A.C. 7:26F-1.5, Definitions, should be adopted across the suite of site remediation rules. The definition in N.J.A.C. 7:26F is clear and easily understood. (6 and 7)

RESPONSE: The Department acknowledges the commenters' support for the adopted definition. On adoption, the Department is adding the definition of "residual contamination" to both ARRCS and the Technical Requirements.

13. COMMENT: The definition of "residual contamination" at N.J.A.C. 7:26F-1.5, Definitions, should be revised to include a statement that, in high biased soil samples, extractable petroleum hydrocarbons concentrations may not exceed the residual product/free product limit of 8,000 milligrams extractable petroleum hydrocarbons/kilogram, and 2-methylnaphthalene concentrations may not exceed applicable impact to ground water exposure pathway screening levels. (18)

RESPONSE: Residual contamination is defined at N.J.A.C. 7:26F-1.5, Definitions, as contamination remaining in soil at a site, after implementation of a remedial action, at a concentration that exceeds the applicable soil remediation standard in N.J.A.C. 7:26F or the Remediation Standards, N.J.A.C. 7:26D. Exceedances of the impact to ground water soil remediation standard for 2-methylnaphthalene are included in this definition. The 8,000 milligrams extractable petroleum hydrocarbons/kilogram concentration refers to residual product. Residual contamination is not the same as residual product, which is defined in the Technical Requirements at N.J.A.C. 7:26E-1.8, Definitions. As such, the Department is not changing the definition on adoption.

14. COMMENT: The Department should clarify what is meant by "owner" in N.J.A.C. 7:26F. The rules are written in terms of the owner's responsibilities; however, the rules refer to an owner as the owner of the property, and also the owner of the heating oil tank system. In contrast, the Spill Compensation and Control Act (Spill Act), N.J.S.A. 58:10-23.11a et seq., refers

to "responsible party," which is well understood. "Owner," as used in the proposed new rules, is not as clear. Is the owner necessarily the responsible party? (16)

RESPONSE: The term "owner" in N.J.A.C. 7:26F means a person who owns a heating oil tank system or, in the absence of any such person, a person who has a legal or equitable title to real property at which a heating oil tank system is located. Throughout N.J.A.C. 7:26F, the Department was very specific in its use of the term "owner," when referring to the person who is responsible for the heating oil tank system. The term "property owner," although not defined in the new rules, refers to the person who has legal or equitable title to the real property at which the heating oil tank system is located. In most cases, this person will be the owner, although that is not necessarily the case. Whether the owner is a "responsible party" under the Spill Act is not relevant to the owner's responsibilities under new N.J.A.C. 7:26F.

General Requirements

15. COMMENT: The new chapter may have a significant impact on the many heating oil tank system remediation cases that are open, stalled, or dormant. The Department should work to minimize the impact of the new rules by implementing several policies. For example, continuing education training programs that individuals must attend in order to be certified to perform services on unregulated underground storage tank systems in accordance with N.J.A.C 7:14B-16, Certification of individuals and business firms for unregulated underground storage tank systems, should immediately include instruction on the new chapter. The Department

policy should also be clear for existing cases that initiated remediation in accordance with the Technical Requirements at N.J.A.C. 7:26E and Department guidance prior to adoption of the new rules; the open cases should be allowed to proceed either under the prior rules (under which the remediation began) or under the new rules, so the impact of the new rules on the tank owner is minimal and the transition seamless. It is also urged that the Department policy for variances from this chapter be structured for the long-term, as an estimated 850 open cases are reported to be currently in the system. (6 and 7)

RESPONSE: The Department certifies individuals and business firms to perform services on unregulated heating oil tank systems, as set forth in the Underground Storage Tank rules at N.J.A.C. 7:14B-16, Certification of individuals and business firms for unregulated underground storage tank systems. Among the requirements for an individual to be certified is mandatory continuing education, at N.J.A.C. 7:14B-16.7, Continuing education requirements. In order that Department-certified individuals are familiar with the new requirements, the Department will begin training on the new Heating Oil Tank System Remediation Rules, N.J.A.C. 7:26F, once the rules are operative.

With regard to remediation cases involving discharges from heating oil tank systems that are in progress at the time this chapter becomes operative, a case may proceed under either the new rules at N.J.A.C. 7:26F, or under the existing rules. Remediation that commences on or after the operative date of the new chapter must proceed under N.J.A.C. 7:26F.

The Department does not understand what is meant by "… the Department policy for variances from this chapter [should] be structured for the long-term, as an estimated 850 open cases are reported to be currently in the system" and, therefore, cannot respond to this comment.

16. COMMENT: The notice of proposal Summary, at 49 N.J.R. 2056, states that the new chapter will not apply if the heating oil tank system is located on a property to which the ISRA Rules apply. Although such facilities may have heating oil tank systems on the property, remediation of discharges from those systems must be addressed through ARRCS and the Technical Requirements, with oversight of an LSRP, who will issue an entire site response action outcome. The Department will not issue a heating oil tank system no further action letter for the heating oil tank system remediation.

Is it the Department's intent not to issue a no further action letter for remediation of a heating oil tank system at any site that may be subject to the ISRA Rules in the future? If the owner of a non-residential site elects to close an unregulated heating oil tank system or requires remediation of a release from such a system, and ISRA has not yet been triggered, who determines whether the site is subject to ISRA, such that new N.J.A.C. 7:26F does not apply? (6 and 7)

RESPONSE: If a remediation is required due to an event that triggers the ISRA Rules, N.J.A.C. 7:26B, such as the transfer of ownership of a subject business, then the closure of a heating oil

tank system or the remediation of a discharge from such a system must be completed pursuant to ARRCS, N.J.A.C. 7:26C, and the Technical Requirements, N.J.A.C. 7:26E, as stated in the Heating Oil Tank System Remediation Rules at N.J.A.C. 7:26F-1.2(d)3. It is the responsibility of the owner and operator to determine whether an event has occurred to require remediation under the ISRA Rules.

If there has been no event that triggers remediation under the ISRA Rules, then closure of a heating oil tank system or remediation of a discharge from such a system is conducted under the new rules at N.J.A.C. 7:26F. If there are other contaminated areas of concern at the site, then a remediation of a discharge from a heating oil tank system may be conducted as part of the larger remediation, as provided at N.J.A.C. 7:26F-1.2(d).

17. COMMENT: Will selected ion monitoring analysis be required for ground water samples being analyzed as part of a remediation conducted pursuant to N.J.A.C. 7:26F? (20)

RESPONSE: The Technical Requirements at N.J.A.C. 7:26E-2.1(a)4 require the use of analytical methods that have analytical sensitivity sufficient to accurately measure concentrations to meet the data quality objectives detailed in a site-specific quality assurance project plan. Certain analytical methods may require the use of selected ion monitoring to achieve data quality objectives. Although the new Heating Oil Tank System Remediation Rules at N.J.A.C. 7:26F do not contain the term “selected ion monitoring,” the rules specify at N.J.A.C. 7:26F-2.2, Sample analysis, that the owner must have all soil and water samples collected and analyzed in

accordance with the requirements in the Technical Requirements at N.J.A.C. 7:26E-2, Quality assurance for sampling and laboratory analysis. Therefore, selected ion monitoring may apply to the analysis of samples collected as part of a remediation conducted pursuant to N.J.A.C. 7:26F.

18. COMMENT: Soil delineation is expensive (thousands of dollars per day). This is nearly as much as the cost of remediating the contamination, but soil delineation does not achieve any cleanup of the contamination. Soil delineation should not be required. (20)

RESPONSE: As stated in the notice of proposal Summary at 49 N.J.R. 2059, soil contamination is the most frequent type of contamination associated with a discharge from a heating oil tank system. If a discharge is discovered, an owner is required to determine whether there is soil contamination associated with the discharge. The extent of the contamination can be determined only by delineation. Therefore, the Department cannot do away with the delineation requirement. However, the rules do provide an option that allows delineation to occur at the same time as remediation, which in some cases may be more efficient. Under N.J.A.C. 7:26F-3.4, Initiating soil remediation with delineation during excavation, an owner may excavate contaminated soil while delineating the extent of the contamination. As stated in the notice of proposal Summary at 49 N.J.R. 2059, under this option the contaminated soil can be removed, the residual soil sampled and, if necessary based on sample results, additional contaminated remediated soil can be removed, all while the equipment used to remove the

heating oil tank still remains on the site. The alternative is to delineate the horizontal and vertical extent of contaminated soil prior to implementing a remedial action (N.J.A.C. 7:26F-3.5, Initiating soil remediation with delineation) which, as the commenter suggests, separates the delineation from the actual cleanup of contamination.

19. COMMENT: The proposed new heating oil tank system remediation rules may encourage owners to decommission tanks, rather than remove them from the ground. Future tank corrosion can create a future discharge of oil where it does not yet exist. (20)

RESPONSE: Under both the prior rules and the adopted new rules, an owner is responsible for remediating a discharge from a heating oil tank system. Therefore, new N.J.A.C. 7:26F should not affect an owner's decision whether to close a heating oil tank system.

Whether a non-leaking unregulated heating oil tank system (a heating oil tank system that is 10 percent or more below ground, as defined at N.J.A.C. 7:26F-1.5, Definitions) may be decommissioned in place, rather than be removed, is not up to the Department, but is governed by local government ordinance. The Department does not regulate a heating oil tank system, unless it causes a discharge that must be remediated. Decommissioning a non-leaking underground storage tank involves removing heating oil and sludge from the tank; therefore, future corrosion of the tank should not result in a discharge. If the unregulated heating oil tank system is leaking, then decommissioning must include remediation of the discharge. If an

unregulated heating oil tank system is abandoned and not properly decommissioned, such that it causes a discharge, the owner is responsible for remediation.

20. COMMENT: Insurers are concerned that a significant number of homeowner tanks are being removed, but no calls are being made to the insurance carrier regarding possible coverage. What the tank owners are finding is that coverage would have been provided, but they were either not aware or advised by a contractor not to call the insurance carrier. Insurance adjusters would like language or information on the Department web page about possible insurance coverage in the event that a removed tank had a discharge, or a discharge was found from a tank.

The other concern is that the trigger for insurance coverage is often the impact to ground water. In the case of ground water, tentatively identified compounds are an issue because in some cases they are what triggers coverage due to the ground water impact. The proposal to not require analysis for tentatively identified compounds is of concern to homeowners who would now lose coverage. There is a ground water quality criterion of "none noticeable." The problem is that the current guidance can be subjective relative to visual or olfactory observation. The Department should provide clear guidance on exactly what constitutes an impact to ground water based on visual or olfactory observation. (9)

RESPONSE: Whether an owner contacts an insurance company, and what action the insurance company takes in response to notice of a discharge from a heating oil tank system is beyond the

scope of this rulemaking. However, as a courtesy, the Department will add to its heating oil tank system website and the letters sent by the Department's Bureau of Case Assignment and Initial Notice, a recommendation that the owner contact his or her insurance company.

For a discussion of analysis and evaluation of tentatively identified compounds in ground water samples, see the Response to Comments 113 through 119.

21. COMMENT: The tasks associated with a ground water remedial investigation, remedial action, receptor evaluation, and immediate environmental concern remediation should be the responsibility of an LSRP only. Heating oil tank system cases should be transferred to an LSRP from the assigned subsurface evaluator.

N.J.A.C. 7:26F should be revised so that the complex tasks associated with a ground water remedial investigation and remedial action, receptor evaluation, ecological evaluation, and immediate environmental concern investigation should also be the responsibility of an LSRP, and all heating oil tank system cases at these stages should be transferred from the assigned subsurface evaluator to an LSRP. (15)

RESPONSE: Prior to its repeal in this rulemaking, ARRCS, at N.J.A.C. 7:26C-13, Remediation of unregulated heating oil tank systems, allowed a discharge from a heating oil tank system to be remediated under the oversight of either an LSRP or a certified subsurface evaluator. This is the same as in the adopted rules. Under the repealed rules, the homeowner obtained a final remediation document at the end of remediation, which was either a no further action letter

issued by the Department (if a certified subsurface evaluator supervised the remediation), or a response action outcome from an LSRP (if an LSRP supervised the remediation). As discussed in the notice of proposal Summary at 49 N.J.R. 2062, the two documents mean the same thing: the discharge from a heating oil tank system has been remediated appropriately. The Brownfield and Contaminated Site Remediation Act (Brownfield Act), N.J.S.A. 58:10B-1 et seq., allows the Department to issue no further action letters for heating oil tank systems; accordingly, under the adopted rules, the Department will issue a heating oil tank system no further action letter, whether an LSRP or a certified subsurface evaluator conducted the remediation. See N.J.S.A. 58:10B-13.1. The Department's issuance of the ultimate document does not affect the professional judgment that is required in order to complete the remediation.

Although the adopted Heating Oil Tank System Remediation Rules are more prescriptive than the existing rules, they continue to allow an LSRP to exercise his or her independent judgment on the remediation of heating oil tank systems. An environmental professional may vary from some technical requirements of the Heating Oil Tank System Remediation Rules in accordance with new N.J.A.C. 7:26F-1.10, Variance from the requirements of this chapter. Unlike remediation of discharges unrelated to discharges from heating oil tank systems, however, which only an LSRP may oversee, a subsurface evaluator may oversee the remediation of a discharge from a heating oil tank system and may exercise his or her judgment

regarding variances. See the notice of proposal Summary at 49 N.J.R. 2061, for a further discussion of variances.

With regard to remediation of discharges that directly impact sensitive receptors, and whether they should be remediated only by LSRPs, the Legislature made no distinction between discharges from heating oil tank systems that directly impact sensitive receptors and those that do not. As discussed in the Response to Comment 6, the Site Remediation Reform Act (SRRA) at N.J.S.A. 58:10C-15.b provides that any discharge from a heating oil tank system may be remediated by either a certified subsurface evaluator or an LSRP. The Department will continue to closely monitor such remediations; the Department assigns a case manager to every case involving a discharge from a heating oil tank that directly impacts a sensitive receptor, whether the remediation is overseen by an LSRP or a subsurface evaluator.

22. COMMENT: N.J.A.C. 7:26F-1.2(a) states, “An owner shall comply with this chapter to remediate a discharge of heating oil from a heating oil tank system. For the purposes of this chapter, when the fill hose is connected to the heating oil tank system, any discharge from the fill hose is considered a discharge from the heating oil tank system.” A discharge from the tank piping when the fill hose is attached should also be considered a discharge from the heating oil tank system. (6 and 7)

23. COMMENT: Proposed N.J.A.C. 7:26F-1.2(a) states that “when the fill hose is connected to the heating oil tank system, any discharge from the fill hose is considered a discharge from

the heating oil tank system." This should be revised to state, "any release that occurs during the tank filling process, is considered a discharge from the heating oil tank system." (13)

RESPONSE TO COMMENTS 22 AND 23: The purpose of N.J.A.C. 7:26F-2.1(a) is to clarify that when the fill hose is connected to the heating oil tank system, any discharge from the fill hose is considered a discharge from the heating oil tank system. By definition, the tank piping is always part of the heating oil tank system; therefore, there is no need to state that a discharge from the piping is a discharge from the heating oil tank system.

24. COMMENT: Proposed N.J.A.C. 7:26F-1.2(b) allows the owner to remediate the discharge under the oversight of local authorities, if these authorities do not refer oversight of the remediation to the Department. Based on this statement, the person responsible for the discharge does not have to meet the requirements of N.J.A.C. 7:26F. The term "local authorities" is not definitively defined. The exemption to remediate in accordance with this subchapter implies, but does not warrant, that local authorities will have the professional and technical knowledge in this field, to provide the necessary guidance pertaining to the remedial activities required and ensure impacted soils are remediated to applicable standards. (13 and 18)

25. COMMENT: At N.J.A.C. 7:26F-1.2(b), the 100-gallon exemption is contrary to the Spill Act, as there is no provision for a *de minimis* quantity discharge of any hazardous material. A discharge of 100 gallons of home heating oil would certainly result in an exceedance of the

Department's remediation standards and/or extractable petroleum hydrocarbons screening level. The term "local authorities" is not defined in the proposed rule and will lead to confusion regarding who may act in the Department's stead; if a local authority rules that the remediation is complete, there is no provision for the case to be closed out or a no further action letter to be provided in accordance with the proposed rule or the Department's existing regulations. This will further confuse the homeowner and real estate community, and more importantly, is not protective of human health and the environment. The exemption should be deleted in its entirety. (15)

26. COMMENT: N.J.A.C. 7:26F-1.2(b)2 states, "Remediate the discharge in accordance with this chapter, if local authorities refer the oversight of the remediation to the Department."

The rule should be modified to allow the tank owner to elect to remediate in accordance with this chapter, such that a no further action letter can be issued. It is further recommended that the citation read, "Remediate the discharge in accordance with this chapter, if local authorities refer the oversight of the remediation to the Department or if the tank owner seeks a letter of no further action be issued by the Department."

In many cases the owner has need of a no further action letter or seeks a no further action letter issued for the remediation of a spill or similar small release to document the remediation as complete. (6 and 7)

RESPONSE TO COMMENTS 24, 25, AND 26: The purpose of N.J.A.C. 7:26F-1.2(b) is to allow a local government to oversee the remediation of a surface discharge from a heating oil tank

system of less than 100 gallons that does not reach the waters of the State. Typically, these discharges are remediated by excavation and proper disposal of the impacted soil. The Department believes that such discharges do not require Departmental oversight. Such remediations are simple, do not require a sophisticated level of professional and technical knowledge, and are protective of public health and safety and of the environment. The rule is consistent with the Spill Act's requirements, in that notice must still be provided to the Department's Hotline, and the remediation must be in accordance with the new chapter. The only differences are who may oversee the remediation, and whether the Department will issue a heating oil tank system no further action letter at the conclusion of the remediation.

The Department is not defining "local authorities," in order to allow each municipality or county to determine who will oversee the remediation of these small discharges of heating oil. One municipality or county may assign this responsibility to the health department, another may assign it to the public works department. Defining the term would limit municipalities and counties within the State in determining how best to handle such small discharges.

The Department will refer a remediation to the local authorities based on the information provided to the Department Hotline. Once the Department refers the remediation to the local authorities, the Department considers the matter closed, unless the local authority refers the remediation back to the Department. The Department is modifying N.J.A.C. 7:26F-1.2(b) on adoption to state that if an owner wants the Department to issue a heating oil tank no

further action letter, the owner must either request that the local authority refer oversight of the remediation to the Department, or contact the Department to request such oversight.

27. COMMENT: According to the notice of proposal Summary, the Heating Oil Tank System Remediation Rules, N.J.A.C. 7:26F, are intended to make remediation requirements clearer for parties remediating heating oil tank systems. N.J.A.C. 7:26F-1.2(c) gives the Department the opportunity to demand additional remediation beyond that which may be required. This provision does not make the rules clearer, and the Department should remove it from the rules. (15)

RESPONSE: The provisions of the chapter are prescriptive and, as written, will apply to most circumstances; however, the rules cannot anticipate every eventuality. N.J.A.C. 7:26F-1.2(c) provides flexibility in order to protect the public health and safety and the environment.

28. COMMENT: Proposed N.J.A.C. 7:26F-1.2(d) does not allow an LSRP to apply his or her professional judgment to submit a key document as provided by SRRA, N.J.S.A. 58:10C-1 et seq., and as stated in the existing regulations. Rather, LSRPs are required to adhere to the proposed prescriptive regulations. The Department acknowledges in the notice of proposal Summary at 49 N.J.R. 2062 that:

> Some heating oil tank system owners or purchasers of real property might believe that a no further action letter from the Department is preferable to a response

> action outcome; others may believe that the LSRP's response action outcome is preferable. *In fact, the two documents mean the same thing: the discharge from a heating oil tank system has been remediated appropriately.* [emphasis added]

Since the two final remediation documents are equivalent by law (see SRRA at N.J.S.A. 58:10C-2 and the Brownfield Act at 58:10C-13.2), there is no legal requirement specifying which format is used. Therefore, if the person responsible for conducting the remediation, that is, the heating oil tank system owner or purchaser of real property, desires to utilize an LSRP and receive the immediate relief of a response action outcome without waiting for the Department's review and approval, there should not be a prohibition as established by the proposed rule.

Furthermore, the proposed Heating Oil Tanks System Remediation Rules, N.J.A.C. 7:26F, when compared to the construct of ARRCS, N.J.A.C. 7:26C, and the Technical Requirements, N.J.A.C. 7:26E, are overly prescriptive and do not allow for the use of professional judgment by an LSRP, who, by virtue of his or her education, professional experience, and robust examination process, is capable of rendering his or her professional opinion. Surely, the most capable professionals in the State, who have been deemed experts in their field (via the legislative intent), should be capable of developing their own professional judgment without prescriptive Department oversight. This was, as many will recall, the original model for the Clean Up Star pilot program, wherein the greatest number of simple, soil only, cases could be administered with minimal oversight, allowing Department staff to focus on the more complex cases where potential complete exposure pathways threaten human health and the

environment. The Heating Oil Tanks System Remediation Rules should continue to follow paradigm.

N.J.A.C. 7:26F-1.2(d) should be modified to specifically exempt an LSRP from the requirements of N.J.A.C. 7:26F and allow the remediation of a heating oil tank system to proceed consistent with the Technical Requirements. (15)

RESPONSE: As noted in the notice of proposal Summary at 49 N.J.R. 2056, the Heating Oil Tank System Remediation Rules are purposely prescriptive. As part of the rulemaking process, the Department assembled a rule development team that included stakeholders from the Fuel Merchants Association, the New Jersey Association of Realtors, the insurance industry, the New Jersey Department of Community Affairs, and several environmental consulting firms that employ certified subsurface evaluators and LSRPs. The Department considered the views of the development team members in preparing the proposed rules. The Department believes, and the stakeholders concurred, that if all the requirements for remediation of discharges from heating oil tank systems are set forth with specificity in the Department's rules, tank owners can be more confident in the necessity of the tasks that environmental professionals implement to remediate such discharges.

The Department disagrees with the statement that the prescriptive nature of the Heating Oil Tank System Remediation Rules does not allow an LSRP to exercise his or her professional judgment during the remediation of a discharge from a heating oil tank system. The Heating Oil Tank System Remediation Rules at N.J.A.C. 7:26F-1.10, Variance from the

requirements of this chapter, allow for variances from the requirements of the Heating Oil Tank System Remediation Rules. This provision of the rules allows an LSRP to exercise his or her professional judgment in remediating discharges from heating oil tank systems. Additionally, the Department is modifying the rules upon adoption to add new N.J.A.C. 7:26F-1.11, Use of Department technical guidance documents. The new section requires an owner conducting the remediation pursuant to N.J.A.C. 7:26F to apply any available and appropriate technical guidance concerning site remediation as issued by the Department, or provide a written rationale and justification for any deviation from guidance. As a result, the Department is recodifying proposed N.J.A.C. 7:26F-1.11, Selection of environmental professionals, as N.J.A.C. 7:26F-1.12. See the Response to Comment 95 for additional discussion of this issue.

The adopted rules specify the type of final remediation document that applies to the remediation of discharges from heating oil tank systems. As noted in the notice of proposal Summary at 49 N.J.R. 2056, the final document indicating that the remediation is complete is the Department-issued heating oil tank system no further action letter. However, the Department recognizes there are situations where it makes sense for an LSRP to issue a response action outcome when remediating a discharge from a heating oil tank system. The Heating Oil Tank System Remediation Rules address these situations at N.J.A.C. 7:26F-1.2(d)2 (sites where all areas of concern, including a heating oil tank system, are being remediated) and 3 (sites that are being remediated pursuant to the ISRA Rules, N.J.A.C. 7:26B).

The difference in the time it takes the Department to issue a heating oil tank system no further action letter, as compared to an LSRP issuing a response action outcome, is not significant. The Department generally issues a heating oil tank system no further action letter approximately two weeks after it receives the completed paperwork. The Department can expedite the issuance of a heating oil tank system no further action letter under time-critical situations.

29. COMMENT: New N.J.A.C. 7:26F-1.2(d)3 states that if heating oil is discharged from a heating oil tank system that is located on a site with other contaminated areas of concern, then the owner may remediate the discharge from the heating oil tank system "pursuant to (d)2 above when the owner is remediating the site pursuant to the Industrial Site Recovery Act Rules, N.J.A.C. 7:26B." N.J.A.C. 7:26F-1.2(d)2 should be changed to clarify that it applies only when remediation of a heating oil tank at an industrial site is being conducted as part of an ISRA activity. Remediation of a heating oil tank system at an industrial facility can be conducted under N.J.A.C. 7:26F, provided the remediation is not triggered by an ISRA event. N.J.A.C. 7:26F-1.2(d)3 should be modified as follows: "When the owner is remediating the site pursuant to the Industrial Site Recovery Act Rules, N.J.A.C. 7:26B; remediation of a heating oil tank system shall be pursuant to (d)2 above." If, at a later date, the site becomes subject to the ISRA Rules, the LSRP retained can evaluate the completeness of the remediation in the context of the ISRA Rules requirements. (6 and 7)

NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE AUGUST 6, 2018 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

RESPONSE: N.J.A.C. 7:26F-1.2(d)3 states that when the owner is remediating the site pursuant to the ISRA Rules, N.J.A.C. 7:26B, the remediation of a discharge from a heating oil tank system shall be pursuant to N.J.A.C. 7:26F-1.2(d)2. Therefore, if the site is being remediated pursuant to ISRA, then the site is subject to ARRCS and the Technical Requirements, rather than the new rules at N.J.A.C. 7:26F. However, N.J.A.C. 7:26F-1.2(d)2 does not apply only to a site subject to the ISRA Rules. If a discharge from a heating oil tank is located on a site at which there are other contaminated areas of concern, but the ISRA Rules do not apply, then the owner may proceed under either new N.J.A.C. 7:26F, or both ARRCS and the Technical Requirements. Only if the ISRA Rules apply, is the owner required to remediate the discharge from a heating oil tank system in accordance with ARRCS and the Technical Requirements. The Department is not modifying N.J.A.C. 7:26F-1.2(d) on adoption.

30. COMMENT: N.J.A.C. 7:26F-1.6(a) directs that, upon discovery of a discharge, the owner shall immediately notify the Department by calling the Department Hotline at 1-877-WARNDEP (1-877-927-6337). This is an unrealistic requirement for a homeowner. The Department should provide a homeowner exception. (15)

RESPONSE: The immediate notification to the Department's Hotline upon the discovery of a discharge is a statutory requirement of the Spill Act at N.J.S.A. 58:10-23.11e.

31. COMMENT: N.J.A.C. 7:26F-1.6(b) states, "When remediating a discharge from a heating oil tank system in accordance with this chapter, the owner shall comply with the notification requirements of the Administrative Requirements for the Remediation of Contaminated Sites at N.J.A.C. 7:26C-1.7(j)." This requirement should be modified to read, "When remediating a discharge ... the owner shall comply with the notification requirements ... at N.J.A.C. 7:26C-1.7(b) and (c)." N.J.A.C. 7:26F-1.6(a) requires the owner to notify the Department, so there is redundancy in the reference to N.J.A.C. 7:26C-1.7(j), which references N.J.A.C. 7:26C-1.7(a), which requires notifying the Department. N.J.A.C. 7:26C-1.7(j) also references N.J.A.C. 7:26C-1.7(d); as discussed in greater detail at Comment 190, N.J.A.C. 7:26C-1.7(d) should not be applicable to heating oil tanks systems. (6 and 7)

RESPONSE: Because discharges from some heating oil tank systems can be remediated pursuant to ARRCS, it is necessary to include reference to N.J.A.C. 7:26C-1.7(a) at N.J.A.C. 7:26C-1.7(j). However, while compliance with N.J.A.C. 7:26C-1.7(d) is in the existing rule, the filing of a Discharge Notification Form pursuant to N.J.A.C. 7:26C-1.7(d) is not an existing requirement for the remediation of heating oil tank systems. Accordingly, the Department is modifying N.J.A.C. 7:26C-1.7(j) on adoption to require only a heating oil tank system remediation conducted pursuant to N.J.A.C. 7:26F to follow the notification requirements of N.J.A.C. 7:26C-1.7(a) through (c).

32. COMMENT: N.J.A.C. 7:26F-1.6(b) should also state, "The person responsible for the remediation shall immediately notify the Department: if a discharge not already known is identified, it is determined an immediate environmental concern condition exists or it is determined contamination has migrated onto the site." In this way, all of the notification requirements incorporated by reference are simply included in the rule. (6 and 7)

33. COMMENT: The responsibility to report a discharge to the Department's Hotline, N.J.A.C. 7:26F-1.6, Notification requirements, should be expanded to include any person, including, but not limited to, the owner who knows or should reasonably know of a discharge. The inclusion of the phrase "any person, including but not limited to," would ensure that environmental professionals, county health officials, and/or first responders have the legal right to notify the Department of a discharge. (13 and 18)

RESPONSE TO COMMENTS 32 AND 33: The Spill Act at N.J.S.A. 58:10-23.11e requires any person subject to liability for a discharge to notify the Department. Although the statute specifies who must notify the Department, it does not preclude others (such as first responders or county health officials) from notifying the Department.

34. COMMENT: N.J.A.C. 7:26F-1.7(c) and (d) address obtaining access to off-site properties by going through the courts. These provisions are unrealistic for private homeowners. It is unreasonable for a homeowner to have to retain legal counsel to obtain access to an off-site property. This could present a financial burden on the homeowners. The Department should

modify this requirement to allow for Department involvement or cross-reference ARRCS at N.J.A.C. 7:26C-8, Site Access. (15)

RESPONSE: The Brownfield Act at N.J.S.A. 58:10B-16 sets forth with specificity the procedures that the owner, as defined in N.J.A.C. 7:26F, is required to follow when requesting off-site access. Whether the owner chooses to hire an attorney is entirely up to the owner. The Department is not involved in the process of obtaining off-site access. There is no need to cross-reference N.J.A.C. 7:26C-8, Site Access, as N.J.A.C. 7:26F-1.7, Site access requirements, includes all of the relevant requirements.

35. COMMENT: The requirement at N.J.A.C. 7:26F-2.1(a)2 to hire an environmental professional within 48 hours to remediate a discharge from a heating oil tank system is insufficient time for the owner. The owner always has the right to hire whomever he or she chooses, and should be encouraged to select the best contractor/environmental professional. For example, multiple bids/proposals are required by municipal contract regulation and corporate policies. Homeowners could be subjected to predatory sales tactics by unscrupulous contractors. This requirement should be modified to read 45 days consistent with SRRA, N.J.S.A. 58:10C-1 et seq., ARRCS, N.J.A.C. 7:26C, and the Regulations of the New Jersey Site Remediation Professional Licensing Board, N.J.A.C. 7:26I. (15 and 16)

36. COMMENT: The requirement at N.J.A.C. 7:26F-2.1(a)2 to hire an environmental professional within 48-hours is unrealistic. Requiring the tank owner to remove the tank

contents and arrange for temporary storage on site as needed, within 48 hours of the discovery of a discharge, makes sense. However, most tank owners are totally unfamiliar with heating oil tank projects, remediation, and services. Retention of a closure contractor and an environmental professional should not be rushed decisions. They should be diligently considered. Research of qualified firms and the solicitation and evaluation of several competitive proposals should take more than 48 hours.

Further, in the case of an unregulated heating oil tank system, beyond the removal of the product in the tank, little can be done to initiate closure within the 48-hour timeframe specified. Construction permits are needed, and they can take up to 21 days to process, and contractors are required to notify the underground utility mark-out services prior to commencement of excavation and allow for the identification of underground utilities on sites. (6 and 7)

37. COMMENT: N.J.A.C. 7:26F-2.1(a)2 states that within 48 hours after the discovery of the discharge, the owner shall hire a certified closure contractor and environmental professional, and initiate closure of the unregulated heating oil tank system. This timeframe is unrealistic. The requirement to hire a contractor and environmental professional within 48 hours is far too restrictive. There is a very high percentage of owners who have never been involved with environmental matters and, thus, would not have sufficient time to find and vet potential firms and receive and evaluate competing proposals. For owners without sufficient funds, the 48-hour timeframe would also put them in the questionable legal position of retaining a firm

knowing that payment is not possible. The owner should hire an environmental professional in accordance with N.J.A.C. 7:26C-2.3(a). (12)

38. COMMENT: Proposed N.J.A.C. 7:26F-2.1(a)2i requires that an environmental professional (defined as a "certified subsurface evaluator or a licensed site remediation professional") be hired within 48 hours after discovery of a discharge. The proposed timeline places an onerous and unnecessary burden on the responsible party, particularly when the tank would likely be discharging for some time. The timeframe is also impractical to obtain proposals from potential professionals; to review retention and contract documents. Additionally, 48 hours to "initiate closure of the unregulated heating oil tank system" is an unrealistic deadline to schedule the professional to perform the removal work at the site. (11 and 15)

39. COMMENT: The Department is requiring a homeowner during a non-emergency response event or the lack of an identified immediate environmental concern to obtain an environmental professional within 48 hours of discovery of a discharge, pursuant to N.J.A.C. 7:26F-2.1(a)2i(3). The vast majority of discharges from residential sites are identified during the underground storage tank removal and are not emergency response events, nor do they meet the definition of an immediate environmental concern as defined by the Department. Forty-eight hours is insufficient time for the consumer to adequately review the available firms in New Jersey and make a proper selection, particularly since N.J.A.C. 7:14B-12.1(d) and (e) will be

amended in relation to penalty points for certified individuals and firms with electronic postings of said penalty points for the regulated community to review.

Therefore, a more appropriate timeframe for a non-emergency response or immediate environmental concern should be 30 calendar days from the discovery of the discharge when such reported discharge does not meet the definition of an emergency response event or immediate environmental concern as defined by the Department. (21)

RESPONSE TO COMMENTS 35 THROUGH 39: The 48-hour timeframe in N.J.A.C. 7:26F-2.1(a)2 is a reasonable amount of time for a homeowner or person responsible for conducting the remediation to hire a closure contractor, subsurface evaluator, or LSRP. The Department provides a list of certified firms and individuals on its website at https://www13.state.nj.us/DataMiner. In the majority of heating oil tank system cases, the discharge is discovered at the time the heating oil tank system is being removed. It is more cost-effective to immediately continue the remediation, rather than backfill the excavation and return at a later date.

As one commenter states, it is likely that the discharge has been on-going for an extended period of time. The Department believes, therefore, that it is imperative to commence remediation activities as quickly as possible to mitigate the threat to the public health and safety and the environment. However, the Department recognizes that there are situations where the discharge may be discovered on a weekend, making it difficult to hire an environmental professional within the prescribed 48 hours. The Department is modifying

N.J.A.C. 7:26F-2.1(a)2 on adoption to allow the owner "two business days" to hire an environmental professional.

40. COMMENT: The Department should modify N.J.A.C. 7:26F-2.1(a)2ii to include other certifications that apply for removal of above ground heating oil tanks. The rule should state, "For a residential above ground heating oil tank system or a small non-residential above ground heating oil system: (1) Hire an environmental professional to remediate the discharge pursuant to this chapter; and (2) Initiate removal of the residential above ground heating oil tank system or the small non-residential above ground heating oil system by retaining the services of a contractor who holds a valid New Jersey Home Improvement Contractor Certification or a Heating, Ventilating, Air Conditioning and Refrigeration License or a contractor certified in closure in accordance with N.J.A.C. 7:14B-13 or 16."

Pursuant to the Board of Examiners of Heating, Ventilating, Air Conditioning and Refrigeration Contractors, a licensed New Jersey Heating, Ventilating, Air Conditioning and Refrigeration contractor can perform services on a heating oil above ground storage tank without also needing a Home Improvement Contractor Registration, since performance of these services is within the scope of practice of a licensed Heating, Ventilating, Air Conditioning and Refrigeration contractor. (6 and 7)

RESPONSE: As adopted, N.J.A.C. 7:26F-2.1(a)2ii provides that within two business days after the discovery of the discharge, for a residential above ground heating oil tank system or a small

non-residential above ground heating oil system the owner shall: (1) hire an environmental professional to remediate the discharge pursuant to this chapter; and (2) initiate removal of the residential above ground heating oil tank system or the small non-residential above ground heating oil system. An environmental professional is required only if there has been a discharge that must be remediated. Individuals in a number of professions are qualified to initiate removal of a residential above ground heating oil tank system or a small non-residential above ground heating oil system. The Department will not modify the rule to specify the various categories of professionals, including licensed New Jersey Heating, Ventilating, Air Conditioning and Refrigeration contractors, that can perform this service.

41. COMMENT: At N.J.A.C. 7:26F-2.1(a)2i(1), change the phrase "hire a certified closure contractor, unless the unregulated heating oil tank system is located on a farm" to "hire a certified closure contractor." Are not farmers required to implement remedial activities in accordance with the regulations? (13)

RESPONSE: In most cases, only certified closure contractors may perform closure on an underground storage tank or an unregulated heating oil tank; however, the Spill Act at N.J.S.A. 58:10A-24.1b provides an exception for closure of underground storage tanks and unregulated heating oil tanks located on a farm. If there has been a discharge from a heating oil tank system located at a farm, then the discharge must be remediated pursuant to N.J.A.C. 7:26F, which includes the services of an environmental professional.

42. COMMENT: At N.J.A.C. 7:26F-2.1(a), the term "initiate closure" is not defined and, thus, subject to a broad range of interpretation. This term should be further defined to provide both owners and environmental professionals clarity as to what this entails. Likewise, the term "hire" is vague and not defined. This should be clarified. (5, 6, 7, 12, and 17)

RESPONSE: The Department is using the common meaning of the word "initiate," which means to cause an action to begin. In N.J.A.C. 7:26F, "closure" has the meaning as defined in the UST rules at N.J.A.C. 7:14B-1.6, Definitions. The Department uses the common meaning of "hire," which means to employ for wages.

Free Product Remediation

43. COMMENT: The timeframes set forth in N.J.A.C. 7:26F-3.2, Free product remediation, for identifying and remediating free product are not reasonable for some homeowners. Some insurance companies consider free product removal part of the remediation. As such, insurance companies require homeowners to pay deductibles and/or their allocation, which can be substantial. Therefore, this leaves a burden on the homeowner to pay for this work to be completed. Although financial assurance options are available as set forth in N.J.A.C. 7:26F-9.2, Application for financial assistance, funding may not be available for several years following submittal of an application to request funding. This would exceed the timeframes set forth in N.J.A.C. 7:26F-3.2, Free product remediation. Additionally, the one-year timeframe for

remediation of free product could be exceeded due to commingled light non-aqueous phase liquid plumes, beneath structures, etc. The Department should include provisions to allow for an extension due to lack of funding or complex cases. (15)

RESPONSE: In order to protect public health and safety and the environment from the consequences of a discharge of heating oil, an owner must mitigate the ongoing source of dissolved phase and vapor phase contamination as quickly as possible, thereby protecting potential receptors, such as drinking water and indoor air. Such protections would be eroded if the rules provided for remediation of free product only if and when it is financially convenient for the owner. It is the Department's experience that in most circumstances, free product can be remediated within the one-year timeframe. The Department can exercise its enforcement discretion if the owner will not meet the one-year timeframe due to a delay in obtaining State funding, provided that the owner filed a technically and administratively complete application for funding in a timely manner pursuant to N.J.A.C. 7:26F-9, Petroleum underground storage tank remediation, upgrade, and closure fund.

44. COMMENT: The requirement at N.J.A.C. 7:26F-3.2, Free product remediation, to remove free product coming from a heating oil tank system and excavate all free product saturated soil is unrealistic. All soil may not be accessible and other remediation technologies (other than removal) exist. The Department should require removal of all free product that is technically practicable and initiate the remediation of free product saturated soil within 60 days. (15)

RESPONSE: The Department is modifying N.J.A.C. 7:26F-3.2(a)2 on adoption to clarify that the owner shall, within 60 days after identifying the presence of free product, treat or remove the free product to the extent practicable, or contain the free product when treatment or removal is not practicable. This represents the first remedial step prior to the collection of soil samples in the remediation of a discharge from a heating oil tank system, and is consistent with the Technical Requirements at N.J.A.C. 7:26E-5.1(e). The Department is also modifying N.J.A.C. 7:26F-3.7(b)1i and ii upon adoption to state that if the owner does not remove all of the free product, then the owner is required to have an engineering control in place and obtain a deed notice and soil remedial action permit pursuant to N.J.A.C. 7:26F-3.7(b)1. Because of the potential for the remaining free product to impact ground water, the Department is adding new N.J.A.C. 7:26F-3.7(b)2iii upon adoption, to require that all free product must be remediated in order to implement a remedial action pursuant to N.J.A.C. 7:26F-3.7(b)2. Likewise, the owner cannot choose to implement a remedial action pursuant to N.J.A.C. 7:26F-3.7(b)3, which allows a small quantity of contaminated soil to remain on the property. In addition, containment of free product that is in contact with ground water requires a classification exception area and an application for a ground water remedial action permit that includes a technical impracticability determination, consistent with Department guidance.

45. COMMENT: In less sorptive soils (sands and gravels with low percentages of silt and/or clay), it is possible for investigative and/or post-remedial soil samples to test analytically

compliant (passing extractable petroleum hydrocarbons and contingent base neutrals) but exhibit evidence of residual oil (greasy appearance and sometimes oil saturation) and free-phase oil. While the Department requires corrective action for soils exhibiting evidence of residual oil/free product, the regulatory requirements should indicate same regardless of analytical compliance. Also, since the evidence is often based on visual observation, which can be subjective, the Department should reference basic field tests (for example, oil staining on paper, oily residue on sample gloves, liberation of oil via the soil/water agitation test). (9)

RESPONSE: The adopted rules do not preclude the owner from implementing the methods identified by the commenter to establish the presence of free product saturated soils. Adding references to specific tests would limit the options available to the environmental professional. If there is visual or olfactory indication of soil contamination, but analytical results do not indicate an exceedance of any soil remediation standard, then additional soil remediation would not be required. However, if the contaminated soils are in direct contact with ground water and product is detected on the water table, then the soils would need to be remediated to mitigate this potential source of ground water contamination.

46. COMMENT: N.J.A.C. 7:26F-3.2(a)1 and 2 are not consistent with the Department's Light Non-aqueous Phase Liquid (LNAPL) Initial Recovery and Interim Remedial Measures Technical Guidance. That guidance requires product recovery (interim remedial measure) to be initiated within 60 days, not completed. N.J.A.C. 7:26F-3.2(b)4, which requires that the remediation of

free product be completed within one year of its discovery, is also inconsistent with the Department's Light Non-aqueous Phase Liquid (LNAPL) Initial Recovery and Interim Remedial Measures Technical Guidance, which requires an interim remedial measure to be initiated and product to be delineated. The Department should reconcile the discrepancy between the timeframes in N.J.A.C. 7:26F-3.2, Free product remediation, and the Department's Light Non-aqueous Phase Liquid (LNAPL) Initial Recovery and Interim Remedial Measures Technical Guidance. (3)

RESPONSE: The timeframes for remediation of free product are set forth in the Technical Requirements at N.J.A.C. 7:26E-1.10, Control of ongoing sources and implementation of interim remedial measures, not the Light Non-aqueous Phase Liquid (LNAPL) Initial Recovery and Interim Remedial Measures Technical Guidance. The Department proposed N.J.A.C. 7:26F to address the remediation of discharges from heating oil tank systems. These remediations typically begin with the removal of the heating oil tank system and the excavation of free product saturated soils. Because discharges from heating oil tank systems involve smaller volumes of free product, these excavations are normally completed within the 60-day timeframe and the remediation of the free product is usually completed within one year.

47. COMMENT: N.J.A.C. 7:26F-3.2, Free product remediation, should be codified as N.J.A.C. 7:26F-3.5, with subsequent sections recodified. Organized this way, N.J.A.C. 26F would be in the same order as the typical investigation of a discharge from a heating oil tank system:

identification and removal of obviously impacted soils adjacent to the tank, followed by soil sample collection and initial determination of depth to ground water, and then a ground water investigation. If free product is identified, then an investigation may follow to identify the presence of any additional source material. In the initial phase of remediation, accessible free product saturated soil is removed as, if it remains in the excavated area, it is unlikely the soil analysis will support remediation being complete. Accordingly, soil remediation is continued where practicable. This applies even when free product is evidenced though it is being observed collecting on ground water in the excavation or leaching from the excavation sidewall.

It is usually when free product is identified in the subsequent ground water investigation that the need to investigate and/or remove source material, including free product saturated soil, is determined. (6 and 7)

48. COMMENT: N.J.A.C. 7:26F-3.2(b) should be relocated to N.J.A.C. 7:26F-4.2(b)3, with the proposed new (b)3 and those subsequent paragraphs recodified accordingly. (6 and 7)

RESPONSE TO COMMENTS 47 AND 48: The purpose of N.J.A.C. 7:26F-3.2, Free product remediation, is to have the responsible party remove as much free product as is technically practicable, and then stabilize the site if further remediation is delayed for any reason. The first step is to remove obviously impacted soils, such as those impacted with free product. Thus, the Department included these requirements in N.J.A.C. 7:26F-3.2(a) and (b). The Department structured the rule to place in a single section all of the requirements related to remediation of free product; the purpose of such consolidation is to make the requirements related to a single

subject easier to find within the chapter. To reorganize the rule chapter as the commenters suggest would fragment the provisions related to remediation of free product, which would be contrary to the Department's purpose in consolidating the rules related to remediation of discharges from heating oil tank systems.

49. COMMENT: N.J.A.C. 7:26F-3.2(b)3 states that free product must be remediated until either there is no observable sheen, or there is only a discontinuous sheen, which is an observable amount of heating oil on the surface of the water in any well or excavation, that is: broken or intermittent and does not cover the majority of the water surface; and less than 0.25 mm thick as measured using an interface probe. The proposed change is supported, and should be incorporated into the Technical Requirements, N.J.A.C. 7:26E, for all petroleum products. (5, 12, and 17)

RESPONSE: The Department acknowledges the commenters' support for the adopted rules. However, the Department is not amending the Technical Requirements to include this provision. The Department's technical guidance for remediation of free product is consistent with the adopted rule; therefore, amendment of the Technical Requirements is not necessary. The Department is modifying N.J.A.C. 7:26F-3.2(b)3 on adoption to describe how to determine whether a sheen is discontinuous, which is also discussed in existing guidance. Because the new Heating Oil Tank System Remediation Rules are intended to be prescriptive, and in order to make it clear to an owner what is required in a remediation, the Department is including in the

rules some information that is otherwise contained in guidance for purposes of other types of remediation.

50. COMMENT: In N.J.A.C. 7:26F-3.2(b)3ii, it may not be possible to measure light non-aqueous phase liquid at a thickness of 0.25 mm or less using an interface probe. Interface probe manufacturers typically advertise accuracy as good as 1.0 mm. The Department should remove this statement or modify it to read 1.0 mm. (15)

RESPONSE: Based on the comment, the Department reevaluated the information available regarding the accuracy of interface probes, and determined that interface probe manufacturers typically advertise accuracy to be 1.0 mm. Because readily available interface probes may not be accurate to the degree necessary to meet the proposed requirement, the Department is not adopting the 0.25 mm measurement reference at N.J.A.C. 7:26F-3.2(b)3ii.

Ground Water Remediation

51. COMMENT: N.J.A.C. 7:26F-4.2(a) should be modified to require a ground water investigation when the results of a soil sample collected within two feet of bedrock or ground water indicate the presence of a heating oil-related contaminant above the site-specific impact to ground water soil remediation standard by either soil water partitioning or the Synthetic Precipitation Leachate Procedure. (6 and 7)

52. COMMENT: N.J.A.C. 7:26F-4.2(a)2 should be changed to state that the presence of a heating oil-related contaminant be determined by either soil water partitioning or the Synthetic Precipitation Leachate Procedure for that contaminant, not both. (18)

53. COMMENT: Proposed N.J.A.C. 7:26F-4.2(a)2 contains ground water investigation requirements that are beyond what is required outside of the heating oil tank system program and, thus, would be a problem when soil sampling "indicates the presence of a heating oil-related contamination above the site-specific impact to ground water soil remediation standard determined by both soil water partitioning and Synthetic Precipitation Leachate Procedure." The Department on several prior occasions indicated that exceedance of an impact to ground water screening level/standard is not a trigger to conduct a ground water investigation. The Department should provide technical justification for the proposed expansion. (5 and 11)

54. COMMENT: N.J.A.C. 7:26F-4.2(a)2 should refer to applicable ground water technical guidance. (15)

RESPONSE TO COMMENTS 51, 52, 53, AND 54: In response to comments, and to ensure that the requirements for ground water investigation in N.J.A.C. 7:26F are equivalent to those in the Technical Requirements, the Department is not adopting proposed N.J.A.C. 7:26F-4.2(a)2 and 3, which identified when a ground water investigation is required. The Department is adding new N.J.A.C. 7:26F-4.2(a)2 to cross-reference the circumstances that trigger a ground water investigation, which are set forth elsewhere in the chapter at N.J.A.C. 7:26F-3.4(a)2i(4) and (a)3iv and 3.5(a)5.

55. COMMENT: The sampling locations presented in N.J.A.C. 7:26F-4.2(b)1ii and iii should be relocated to N.J.A.C. 7:26F-4.3, since they address post-remediation ground water sampling. (18)

RESPONSE: N.J.A.C. 7:26F-4.2(b)1ii and iii describe where to locate ground water sampling points as part of a ground water investigation, not post-remediation ground water sampling. N.J.A.C. 7:26F-4.3, Ground water remedial action requirements, governs remediation of ground water contamination, rather than investigation of whether such contamination exists. The sampling locations related to investigation properly remain in N.J.A.C. 7:26F-4.2, Ground water investigation requirements.

56. COMMENT: At N.J.A.C. 7:26F-4.2(b)1ii, sampling locations for ground water should occur at what is expected to be a high bias location. If ground water has already been delineated, with the extent to impacts previously determined, then ground water sampling should occur within the area of the formerly remediated impacted soils. (13)

RESPONSE: N.J.A.C. 7:26F-4.2(b)1ii applies to the initial investigation of ground water. Therefore, ground water contamination has not yet been delineated when the owner applies this part of the rule. The Department is requiring that the initial ground water sample be collected from a location outside of the excavation because of the possibility that the ground

water sample within the excavation could be impacted by rain water, which could bias analytical results low due to dilution.

57. COMMENT: N.J.A.C. 7:26F-4.2(b)2i(1) states that monitoring wells should be constructed with five feet of well screen above the water table and 10 feet of well screen below the water table. The Department should remove this statement from the rule. Well construction should be designed to best address an LNAPL (No. 2 heating oil) and account for the site-specific conditions observed in the field. (13)

RESPONSE: In drafting N.J.A.C. 7:26F-4.2(b)2i(1), the Department chose requirements that are specifically suited to address LNAPL, as all heating oils regulated by this rule are LNAPLs. The rules do allow for variances for site-specific conditions. Specifically, N.J.A.C. 7:26F-1.10, Variance from the requirements of this chapter, allows an owner to vary from many of the requirements. The Department is modifying N.J.A.C. 7:26F-4.2(b)2i(1) on adoption to clarify that construction of monitoring wells must meet the requirements of N.J.A.C. 7:9D, Well Construction and Maintenance; Sealing of Abandoned Wells.

58. COMMENT: At N.J.A.C. 7:26F-4.2(b)3, the Department proposes that the volume of water within the backfill (if proposed N.J.A.C. 7:26F-3.3(f) was not followed) must be included when determining the volume of water to be purged prior to sampling. This requirement could result in thousands of gallons being purged. For example, a modest excavation of 20 feet by 20

feet extending 10 feet into the saturated zone backfilled with a permeable stone (25 percent porosity) would have a pore volume of 1,000 cubic feet or approximately 7,500 gallons and, thus, three pore volumes would be 22,500 gallons. This scenario may not be uncommon, and would be an excessive requirement and would serve no additional protectiveness of the environment and public health. The Department should remove the phrase "the excavation was not backfilled pursuant to N.J.A.C. 7:26F-3.3(f) prior to (the effective date of this chapter), then include the volume of water that fills the excavation when determining the volume of water to be purged prior to sampling." This language provides consistency with the Department's Field Sampling Procedures Manual for ground water samples. (5, 12, and 17)

RESPONSE: If a ground water monitoring well is installed in excavations, not backfilled pursuant to N.J.A.C. 7:26F-3.3(f)2, then the water volume of the entire excavation needs to be calculated and removed while purging the well prior to sampling. As the commenters note, the purged volume of water may be thousands of gallons. However, if backfilling an excavation with soil is not conducted pursuant to N.J.A.C. 7:26F-3.3(f), then clean rain water can accumulate in the former excavation. This accumulated water, when sampled, will result in an inaccurate determination of ground water quality because it is not a true representation of the ground water conditions outside of the excavation. Therefore, the Department is not modifying the rule on adoption. The Department recognizes that there may be situations in which it is not necessary to purge this volume of ground water (such as when a ground water sample is collected soon after the excavation is backfilled, and there is no rain event). In such a situation,

the owner could consider submitting a variance under N.J.A.C. 7:26F-1.10, Variance from the requirements of this chapter, and purge a different volume of ground water, provided the owner meets the conditions of N.J.A.C. 7:26F-1.10.

59. COMMENT: At N.J.A.C. 7:26F-4.2(b)4, and also in the soil remediation requirements at N.J.A.C. 7:26F-3.3(c)2, the Department should use language consistent with N.J.A.C. 7:26F-2.2(a)3. Replace the word "substances" with "parameter." (15)

RESPONSE: For consistency with N.J.A.C. 7:26F-2.2(a)3, the Department is modifying N.J.A.C. 7:26F-4.2(b)4 and 3.3(c)2 on adoption to replace “substances” with “applicable parameters.”

60. COMMENT: N.J.A.C. 7:26F-4.3, Ground water remedial action requirements, does not specify actions necessary to obtain ground water compliance per analytical results following remedial activities (single round compliance verses two confirmatory rounds). Likewise, it does not specify the timeframe required between sampling events. (13)

61. COMMENT: No specifications are outlined in N.J.A.C. 7:26F-4.3, Ground water remedial action requirements, to evaluate post remediation ground water data to determine compliance with applicable remediation standards (that is, single round compliance verses two confirmatory rounds). (18)

RESPONSE TO COMMENTS 60 AND 61: The Department is modifying the ground water remedial action requirements at N.J.A.C. 7:26F-4.3(a)2 on adoption to state that an owner must

remediate ground water until two confirmation samples, collected 90 days apart, indicate that concentrations are at or below the applicable remediation standard. This timeframe will account for seasonal variability in the ground water table, and ensure that all product has been remediated, and that no sources of dissolved phase contamination remain.

62. COMMENT: At N.J.A.C. 7:26F-4.2(c) and 4.3, when the initial ground water investigation indicates that the ground water exceeds the applicable remediation standard, an LSRP should be hired to ensure the remediation of the ground water is conducted in accordance with the Technical Requirements, N.J.A.C. 7:26E, and applicable Department guidance. A subsurface evaluator is not sufficiently trained (or certified by the examination process) to administer or apply the Department's regulations and guidance and protect human health and the environment. (15)

RESPONSE: SRRA at N.J.S.A. 58:10C-15.b allows both LSRPs and subsurface evaluators to perform remediations of discharges from heating oil tank systems. Therefore, it is not statutorily appropriate, nor is it necessary to limit the oversight of ground water remediation to LSRPs. The Heating Oil Tank System Remediation Rules, N.J.A.C. 7:26F, contain prescriptive requirements concerning the investigation of ground water (N.J.A.C. 7:26F-4.2), receptor evaluation (N.J.A.C. 7:26F-6 as referenced at N.J.A.C. 7:26F-4.2(c)), and ground water remedial action (N.J.A.C. 7:26F-4.3). A certified subsurface evaluator should be able to follow these prescriptive requirements.

63. COMMENT: The workplan requirements in N.J.A.C. 7:26F-4.3, Ground water remedial action requirements, do not include a description of the treatment system or locations of sampling ports. The Department should include a treatment system schematic with locations of sampling ports. (15)

RESPONSE: The engineering requirements of ground water remedial actions are site-specific; therefore, a treatment schematic with locations of sampling ports would not be useful in the rules. The environmental professional should design the ground water remediation system based on the site-specific requirements.

Receptor Evaluation

64. COMMENT: Regarding N.J.A.C. 7:26F-6, Receptor Evaluation, receptor evaluations require professional judgment, and should be performed by an LSRP in accordance with the Technical Requirements, N.J.A.C. 7:26E, and applicable Department guidance. A subsurface evaluator is not sufficiently trained (or certified by the examination process) to administer or apply the Department's regulations and guidance and protect human health and the environment. (15)

RESPONSE: SRRA at N.J.S.A. 58:10C-15.b allows both LSRPs and subsurface evaluators to perform remediations of discharges from heating oil tank systems. Therefore, it is not statutorily appropriate, nor is it necessary to limit evaluation of receptors to LSRPs. As noted in

Response to Comment 62, the Heating Oil Tank System Remediation rules contain prescriptive requirements concerning receptor evaluation at N.J.A.C. 7:26F-6. A certified subsurface evaluator should be able to follow these prescriptive requirements.

65. COMMENT: N.J.A.C. 7:26F-6.2(a)1 states, "within 14 days after identifying ground water contamination exceeding the applicable standard, determine if any potable wells or irrigation wells used for portable purposes exist within 100 feet of the known extent of the ground water contamination by: ..." Fourteen days is too short of a timeframe to conduct a door-to-door survey to identify any well used for potable purposes. The Technical Requirements at N.J.A.C. 7:26E-1.14, Receptor evaluation – ground water, provide 90 days to conduct a door-to-door survey, which is more realistic. The proposed door-to-door survey requirement in N.J.A.C. 7:26F-6.2(a)1 should be consistent with the requirements at N.J.A.C. 7:26E-1.14. (3, 5, 12, and 17)

RESPONSE: Unlike the Technical Requirements, which require a door-to-door survey within as much as a 500-foot radius, the Heating Oil Tank Remediation Rules require a door-to-door survey within only a 100-foot radius. Therefore, the shorter timeframe at N.J.A.C. 7:26F-6.2(a)1 is reasonable. The owner should be able to identify any potable wells or irrigation wells used for potable purposes within that radius within 14 days.

66. COMMENT: The Technical Requirements at N.J.A.C. 7:26E-1.14, Receptor evaluation – ground water, require that potable wells located within 500 feet sidegradient and downgradient, and 250 feet upgradient from the known contaminated area be sampled. For heating oil tank system cases, N.J.A.C. 7:26F-6.2(a)1 requires the owner to determine if any potable wells or irrigation wells used for potable purposes exist within 100 feet of the known extent of the ground water contamination. The Department should clarify its rationale for the difference between the 250-feet or 500-feet distance. (16)

RESPONSE: The Department developed the potable well receptor evaluation requirements in the Technical Requirements, N.J.A.C. 7:26E, to address all types of contaminated sites. The Heating Oil Tank System Remediation Rules, N.J.A.C. 7:26F, were developed to specifically address discharges of heating oil. Typically, the extent of impact to ground water from discharges from heating oil tank systems is limited. Therefore, the Department reduced the initial receptor evaluation requirement in N.J.A.C. 7:26F to 100 feet of the known extent of the ground water contamination.

67. COMMENT: At N.J.A.C. 7:26F-6.2(a)2ii, the Department should specify the analysis required and reference the Department's Field Sampling Procedures Manual as part of this citation. (6 and 7)

RESPONSE: N.J.A.C. 7:26F-6.2(a)2ii requires well samples to be analyzed pursuant to the Technical Requirements at N.J.A.C. 7:26E-2.1(a)9, which lists the analytical methods required

for the analysis of potable water samples. The Department is modifying N.J.A.C. 7:26F-6.2(a)2ii on adoption to refer to N.J.A.C. 7:26F-2 Table 2.1, which lists the chemicals that must be analyzed. N.J.A.C. 7:26F-6.2(a)2ii identifies sample analytes and analytical methods, and not sample collection techniques. The Department's Field Sampling Procedures Manual contains sampling methods, and is not relevant to the analytical methods; therefore, a reference to the manual would not be appropriate at N.J.A.C. 7:26F-6.2(a)2ii.

68. COMMENT: In N.J.A.C. 7:26F-6.2(a)2iv(1), the Department should include the requirement to contact the Department Hotline, consistent with ARRCS at N.J.A.C. 7:26C-1.7(b). The Department should also explain what it means to "conduct all actions required by the Technical Requirements for Site Remediation at N.J.A.C. 7:26E-1.11." The Department should also add the phrase "including the requirement to provide temporary potable water." (6 and 7)

RESPONSE: N.J.A.C. 7:26F-6.2(a)2iv(1) requires an owner who identifies a contaminant in excess of any Class II-A Ground Water Quality Standard to conduct all actions required by the Technical Requirements for Site Remediation at N.J.A.C. 7:26E-1.11, Immediate environmental concern requirements. N.J.A.C. 7:26E-1.11 describes in detail all actions needed to address immediate environmental concern conditions. There is no need to refer to N.J.A.C. 7:26C-1.7(b) because if an owner must comply with N.J.A.C. 7:26E-1.11, then the owner must contact the Department Hotline, which is required under N.J.A.C. 7:26E-1.11(a)1.

N.J.A.C. 7:26E-1.11(a)2iii requires that, within five days of identifying a direct contact immediate environmental concern, the person responsible for conducting the remediation must implement an interim response action. As explained in the Department's Immediate Environmental Concern Technical Guidance, in the case of a potable water immediate environmental concern, an interim response action includes providing potable water.

69. COMMENT: The proposed vapor intrusion requirement at N.J.A.C. 7:26F-6.3(a) should be consistent with the requirements at N.J.A.C. 7:26E-1.15, Receptor evaluation – vapor intrusion. This provides the regulatory community consistent timeframes and provides a benefit to the owners and environmental professionals. (5, 12, and 17)

RESPONSE: The Department developed the vapor intrusion receptor evaluation requirements in the Technical Requirements, N.J.A.C. 7:26E-1.15, Receptor evaluation – vapor intrusion, to address all types of contaminated sites. Conversely, the Heating Oil Tank System Remediation Rules, N.J.A.C. 7:26F, were developed to specifically address discharges of heating oil. Because heating oil typically is not a significant source of vapor intrusion impacts, the vapor intrusion receptor evaluation requirements in N.J.A.C. 7:26F-6.3, Receptor evaluation – vapor intrusion, allow an owner to attempt to remediate discharges prior to evaluating the vapor intrusion pathway. With this approach, the owner may be able to complete the remediation without having to conduct a vapor intrusion receptor evaluation, thus, saving the owner time and money.

70. COMMENT: The Department should include at N.J.A.C. 7:26F-6.3(a)4, the analysis required, and reference the Department's Field Sampling Procedures Manual. (6 and 7)

RESPONSE: The vapor intrusion receptor requirements at N.J.A.C. 7:26F-6.3(a)4 require air samples to be analyzed pursuant to the Technical Requirements at N.J.A.C. 7:26E-2.1(a)7. N.J.A.C. 7:26E-2.1(a)7 lists the analytical methods required for the analysis of air samples using canister-based collection techniques. N.J.A.C. 7:26F-6.3(a)4 should also include the chemicals that are part of the analysis of the air sample. On adoption, the Department is modifying N.J.A.C. 7:26F-6.3(a)4 to refer to N.J.A.C. 7:26E-2.1(c)3, which identifies the chemicals that must be analyzed. As stated in the Response to Comment 69, the Department's Field Sampling Procedures Manual contains sampling methods, and is not relevant to the sample analytes and analytical methods at N.J.A.C. 7:26F-6.3(a)4; therefore, a reference to the manual would not be appropriate.

71. COMMENT: The Department should specify the reporting requirement per ARRCS at N.J.A.C. 7:26C-1.7(b), in N.J.A.C. 7:26F-6.3(d). (6 and 7)

RESPONSE: The vapor intrusion receptor evaluation requirements at N.J.A.C. 7:26F-6.3(d) direct the owner to comply with the vapor intrusion receptor evaluation requirements in the Technical Requirements at N.J.A.C. 7:26E-1.15(e) and (f). N.J.A.C. 7:26E-1.15(f) requires notice to the Department of an immediate environmental concern and notice to the Department

Hotline (which is required by N.J.A.C. 7:26E-1.11, Immediate environmental concern requirements, referred to in N.J.A.C. 7:26E-1.15(f)). Therefore, there is no need to add a reference to N.J.A.C. 7:26C-1.7(b), which also requires notification to the Department Hotline of contamination from a discharge, or an immediate environmental concern.

72. COMMENT: N.J.A.C. 7:26F-6.4(b)3 provides, "If an environmentally sensitive natural resource is present and any contaminant concentration is present at the site that exceeds any ecological screening criterion or any aquatic surface water quality standard, then a licensed site remediation professional is required to prepare an ecological risk assessment pursuant to the Technical Requirements for Site Remediation at N.J.A.C. 7:26E-4.8(c)2, for the environmental professional to submit to the Department with the remedial action report." Why does the LSRP need to prepare the ecological risk assessment? The Department should clarify why an ecological risk assessment must be prepared by an LSRP. (3)

RESPONSE: N.J.A.C. 7:26F-6, Receptor Evaluation, describes the conditions that trigger the performance of an ecological risk assessment. Due to the prescriptive nature of N.J.A.C. 7:26F, a certified subsurface evaluator can evaluate site conditions in order to determine if an ecological risk assessment is required. However, the typical certified subsurface evaluator does not have the expertise to conduct an ecological risk assessment due to the highly technical nature of such assessments. The Department requires an LSRP to conduct an ecological risk assessment because an LSRP should have the necessary expertise.

73. COMMENT: The Department should change N.J.A.C. 7:26F-6.4(a) to state, "An ecological receptor evaluation is required at any heating oil tanks system site that is not a one to four family residential site when: ..." (6 and 7)

RESPONSE: The ecological receptor evaluation requirements at N.J.A.C. 7:26F-6.4(b) reference the ecological receptor requirements of the Technical Requirements at N.J.A.C. 7:26E-1.16(d), which provide an exception from performing an ecological receptor evaluation where the remediation is an underground storage tank storing heating oil for on-site consumption in a one-to-four family residential building. Because of the reference, the exception does not need to be repeated.

Soil Remediation

74. COMMENT: At N.J.A.C. 7:26F-3.3(a), the term "heating oil tank" should be changed to "heating oil tank system," consistent with the use of the term throughout the chapter. (6 and 7)

RESPONSE: The Department is modifying the rule on adoption to use the correct term, "heating oil tank system."

75. COMMENT: The Department should modify N.J.A.C. 7:26F-3.3(f)1 to also include licensed quarry/mine material as fill material. (13 and 18)

RESPONSE: Provided that licensed quarry/mine material meets the requirements for fill material at N.J.A.C. 7:26F-3.3(f)1, it may be used as fill material. Material that does not meet the requirements of N.J.A.C. 7:26F-3.3(f)1, whether from a licensed quarry/mine or elsewhere, cannot be used as fill material. A specific reference at N.J.A.C. 7:26F-3.3(f)1 to licensed quarry/mine material is not necessary. For a further discussion of licensed quarry/mine material, see the Response to Comments 124, 125, and 126, below.

76. COMMENT: N.J.A.C. 7:26F-3.3(f)1i provides that an owner may backfill an excavation using fill material that is not contaminated above any remediation standard, pursuant to N.J.A.C. 7:26D, Remediation Standards. It is not clear how to demonstrate this (for example, number of samples to be collected and analysis that is required to be performed). The Department should include reference to its Fill Material Guidance for SRP Sites. (15)

RESPONSE: The Department's Fill Material Guidance for SRP Sites provides technical guidance for demonstrating that fill material is not contaminated above the Remediation Standards, N.J.A.C. 7:26D. The Department is modifying N.J.A.C. 7:26F-3.3(f)1i on adoption to refer to the technical guidance.

77. COMMENT: The Department should state the requirement at N.J.A.C. 7:26F-3.3(f)1iii in a more practical manner. The rules require an owner, when backfilling an excavation, to use fill material that is of equal or lesser permeability than the soil that was removed. Excavations

should be filled responsibly, fill should be compacted, and contractors should not create "dry wells" that collect water and can contribute to basement water intrusion. However, it is not common practice to measure permeability of existing soils or backfill, nor is it common practice to engineer the compaction requirement to achieve a less permeable condition.

The Department should change the language to read, "When backfilling the excavation, the owner shall: select and place fill material to minimize the transmission and collection of rainfall and runoff and the backfill shall provide support equal to that of the soil removed for the structures in proximity to the excavation." (6 and 7)

RESPONSE: The purpose of N.J.A.C. 7:26F-3.3(f)1iii is not to require the measurement of the permeability of the backfill material, but to ensure that the excavation is filled with material similar to what was removed. The suggested language would allow a broad interpretation of how to backfill an excavation. An owner may vary from this requirement, in accordance with N.J.A.C. 7:26F-1.10, Variance from the requirements of this chapter. The rule does not address whether the backfill material provides the proper support for structures in proximity to the excavation, which is an engineering issue, not a remediation issue.

78. COMMENT: N.J.A.C. 7:26F-3.3(f)1iii states that when backfilling an excavation, the owner shall use backfill "of equal or lesser permeability than the soil removed." Permeable backfill material such as 3/4 inch stone is often used when excavations extend into ground water and in situations where it is not safe to compact soils (stone does not require

compaction). Stone is almost always provided by quarries and, thus, is a virgin product free of contaminants. Also, stone is ideal when excavation does not completely remove all impacted soil because, unlike stone, fine grained backfill tends to adsorb residual oil impacts, reducing the effectiveness of treatment technologies. The permeability of stone is also beneficial if in-situ chemical or biological injections will be performed or if ground water pump and haul/treat will be utilized because permeable backfill allows better water and air exchanges, thus, enhancing natural remediation of any residual impacts. Often it is not known if residual soil and/or ground water impacts remain at the time of backfilling, so stone is often the default choice of backfill. In addition, in cases where impacted clay or silt is excavated, it is difficult to find local, reasonably priced, certified clean silt or clay. Using clay/silt backfill, which tends to be blocky or chunky, within ground water, around utilities or hard to reach areas, is problematic. This requirement of "of equal or lesser permeability" is counterproductive and overreaching. The clean fill requirements in the Technical Requirements, N.J.A.C. 7:26E, and the Department's Fill Material Guidance for SRP Sites technical guidance document should apply to the Heating Oil Tank System Remediation Rules, N.J.A.C. 7:26F. (5, 12, and 17)

RESPONSE: As provided in N.J.A.C. 7:26F-1.10, Variance from the requirements of this chapter, if the owner determines that the use of backfill of greater permeability than the soil removed is acceptable, then that alternative backfill may be used. The Department does not discourage backfilling with stone, if such will be beneficial to the remediation (in situ remediations or ground water pump and treat systems). However, such backfilling must not result in an

accumulation of water within the area being remediated. The reason for this is that when backfilling an excavation with soil that is less permeable than the surrounding soil, clean rain water can accumulate in the former excavation. This accumulated water, when sampled, will result in an inaccurate determination of ground water quality because it is not a true representation of the ground water conditions outside of the excavation.

79. COMMENT: N.J.A.C. 7:26F-3.3(f)2 states, "If an excavation extends into the saturated zone, compact the backfilled soil in one-foot intervals." This statement should be stricken from the rule. Engineering constraints may dictate backfill procedures. For example, in certain applications where compaction techniques could cause structural damage to an on-site building. This statement is also general and does not specify any compaction testing percentages. (13)

80. COMMENT: N.J.A.C. 7:26F-3.3(f)2 should not specify a dimension for thickness of intervals for compaction. The Department should change the rule language to read, "compact the backfill in lifts as needed to achieve appropriate compaction." (15)

RESPONSE TO COMMENTS 79 AND 80: As stated in the notice of proposal Summary at 49 N.J.R. 2055, the Department assembled a team of stakeholders to assist in developing the Heating Oil Tank System Remediation Rules. The development team determined that for the purposes of compacting soil for soil porosity, compaction in one-foot lifts was appropriate. Pursuant to N.J.A.C. 7:26F-1.10, Variance from the requirements of this chapter, the owner may vary from

the requirement in N.J.A.C. 7:26F-3.3(f)2 regarding the compaction method to be used. If the owner determines that an alternative compaction method is applicable, then that alternative method may be used. The owner shall note its use, provide the variance information required by N.J.A.C. 7:26F-1.10, and note any other changes in the report the owner submits to the Department. The rule does not address compaction testing percentage, which is an engineering issue concerned with structural stability. N.J.A.C. 7:26F is concerned with reducing pore space, not with structural stability.

81. COMMENT: N.J.A.C. 7:26F-3.3(f)2 states, "if an excavation extends into the saturated zone, compact the backfilled soil in one-foot intervals." The Department should not be mandating the compaction of backfill, as that decision should be left for the environmental professionals in charge of the project. (5, 12, and 17)

RESPONSE: When an excavation extends to the saturated zone, a monitoring well is required pursuant to N.J.A.C. 7:26F-3.4(a)2i(4) and (a)3iv and 3.5(a)5. If the excavation backfill material is not compacted in one-foot lifts, water can accumulate in the former excavation. This accumulated water, when sampled, will result in an inaccurate determination of ground water quality because it is not a true representation of the ground water conditions outside of the excavation. If a ground water monitoring well is installed in excavations not backfilled pursuant to N.J.A.C. 7:26F-3.3(f)2, then, pursuant to N.J.A.C. 7:26F-4.2(b)3, the water volume of the

entire excavation needs to be calculated and removed while purging the well prior to sampling. Therefore, the Department is adopting N.J.A.C. 7:26F-3.3(f)2 as proposed.

82. COMMENT: The Department should clarify N.J.A.C. 7:26F-3.3(g) to detail under what circumstances an owner is required to obtain a permit from the Department prior to implementing any soil remedial action where dewatering is proposed. For example, N.J.A.C. 7:9D-1.3, Applicability, states that excavations and certain activities that do not endanger or threaten subsurface or percolating waters are not governed by the requirements and standards for the permitting, construction, and decommissioning of wells. (13 and 18)

RESPONSE: The Department is modifying N.J.A.C. 7:26F-3.3(g) on adoption to identify when an on-scene coordinator authorization permit is required and when a discharge to ground water permit is required pursuant to the NJPDES rules, N.J.A.C. 7:14A.

83. COMMENT: N.J.A.C. 7:26F-3.4, Initiating soil remediation with delineation during excavation, should state that that samples should be biased to locations of elevated field screening readings and/or visual staining. (18)

RESPONSE: As stated in the notice of proposal Summary at 49 N.J.R. 2059, unless the owner intends to leave contamination behind in accordance with the residual contamination provisions of the new rules, the owner must excavate contaminated soil until the remaining soil is at or below the Department standards for unrestricted use. Once the excavation is complete,

there should be no locations to bias sampling. No modification to N.J.A.C. 7:26F-3.4, Initiating soil remediation with delineation during excavation, is necessary.

84. COMMENT: N.J.A.C. 7:26F-3.4(a) states, "An owner electing to initiate soil remediation by excavating contaminated soil while delineating the extent of soil contamination shall: 1. Unless the owner leaves residual contamination pursuant to N.J.A.C. 7:26F-3.7, Residual contamination, excavate contaminated soil until contamination is no longer detectable by methods including, but not limited to, field instrumentation, sight, or smell; ..." However, at N.J.A.C. 7:26F-3.3(a), the owner is required to remediate soil until soil sampling indicates that the property meets the requirements for unrestricted use at N.J.A.C. 7:26F-3.6, Unrestricted use soil remedial action, or the residual contamination requirements at N.J.A.C. 7:26F-3.7. N.J.A.C. 7:26F-3.4, Initiating soil remediation with delineation during excavation, by directing the environmental professional overseeing the remediation to continue soil removal until sight and smell yield no discernible evidence of heating oil impacting the soil, appears to require the owner to remediate beyond the extent both intended and required by the Department.

Regardless of the method the owner elects to conduct the remediation, the endpoint is that set forth at N.J.A.C. 7:26F-3.6(a); the property meeting the soil remediation requirements. The endpoint is not a subjective determination based on sight and smell. Requiring excavation to continue until discernable evidence, as described, is eliminated, burdens the owner with bearing the costs of removing soil unnecessarily. The language at N.J.A.C. 7:26F-3.4(a)1 should

be changed to state, “Unless the owner leaves residual contamination pursuant to N.J.A.C. 7:26F-3.7, excavate contaminated soil until field screening methods, including field instrumentation, sight and smell, indicate the results of the confirmatory soil sample analysis will achieve compliance with the remediation standards established at N.J.A.C. 7:26F-3.6.” This change would mirror the requirement at N.J.A.C. 7:26F-3.4(a)4. (5, 6, 7, 12, and 17)

85. COMMENT: It is possible for soil to be visibly stained, contain odors, etc., but not contain contaminants at concentrations exceeding applicable standards and/or screening levels. The Department should change N.J.A.C. 7:26F-3.4(a)1 to read, "including, but not limited to, field instrumentation, sight, smell and/or laboratory analysis." (15)

RESPONSE TO COMMENTS 84 AND 85: The owner has the option of remediating soil pursuant to either N.J.A.C. 7:26F-3.4, Initiating soil remediation with delineation during excavation, or N.J.A.C. 7:26F-3.5, Initiating soil remediation with delineation. N.J.A.C. 7:26F-3.4 allows an owner to perform a remedial action starting with excavation, by delineating contamination while excavating soil. (See the notice of proposal Summary at 49 N.J.R. 2059.) In contrast, N.J.A.C. 7:26F-3.5 requires delineation of soil contamination prior to implementing a remedial action. (See the notice of proposal Summary at 49 N.J.R. 2060.) Under either option, the soil must be remediated to meet the requirements for unrestricted use in accordance with N.J.A.C. 7:26F-3.6, Unrestricted use soil remedial action.

As stated in the notice of proposal Summary at 49 N.J.R. 2059, the first option allows an owner to remove soil while the equipment used to remove the heating oil tank remains on the

site, which could be more cost efficient in some situations. Unlike the second option, however, the extent of the soil contamination has not yet been delineated when the excavation takes place. Therefore, in most cases, the soil has not been subject to laboratory sampling to determine at what location the soil is no longer contaminated (or meets the remediation standard). Accordingly, N.J.A.C. 7:26F-3.4(a) requires soil to be removed until contamination is no longer detectable by the sampling methods available in the field, which include field instruments, sight, and smell. While these are useful methods of detection, they are not conclusive; the soil remediation is not complete until the soil samples are evaluated to determine whether they meet the requirements for unrestricted use, as N.J.A.C. 7:26F-3.4(a)5 requires.

86. COMMENT: N.J.A.C. 7:26F-3.4(a)2i(4) and (a)3iv should be changed to state, "If contamination, in excess of the remediation standards, extends to within two feet of bedrock or if ground water is encountered in the excavation, then collect a ground water sample pursuant to N.J.A.C. 7:26F-4.2 ..." (6 and 7)

87. COMMENT: N.J.A.C. 7:26F-3.4(a)2i(4) and (a)3iv state, "If contamination extends to bedrock or if ground water is encountered in the excavation, then collect a ground water sample…" This language does not take into consideration high water table. The Department should change the language to read, "If contamination extends to or within two feet of bedrock or ground water, then collect a ground water sample ..." (15)

RESPONSE TO COMMENTS 86 AND 87: The Department is modifying N.J.A.C. 7:26F-3.4(a)2i(4) and (a)3iv on adoption to state that a ground water sample is required if the excavation extends to within two feet of either bedrock or ground water, as noted in the Department's Ground Water Technical Guidance: Site Investigation, Remedial Investigation, Remedial Action Performance Monitoring.

88. COMMENT: At N.J.A.C. 7:26F-3.4(a)2ii, perimeter soil samples should also be collected for laboratory analysis from areas where contaminated soils are excavated due to a discharge from unregulated heating oil tank system piping. The Department should add language requiring collection of perimeter soil samples in accordance with the frequencies specified in applicable guidance. (15)

RESPONSE: The lateral extent of a discharge from piping is normally limited in scope due to the small diameter of the source. The collection of perimeter soil samples is, therefore, unnecessary if the discharge is from the piping.

89. COMMENT: N.J.A.C. 7:26F-3.4(a)3 uses the term "small, non-residential above ground heating oil tank system." The word "small" should be deleted. (6 and 7)

RESPONSE: The Department includes the word "small" as part of the definition to distinguish these types of heating oil tank tanks from the larger above ground heating oil tank systems that are subject to ARRCS and the Technical Requirements. The Department included 2,000 gallons

as the upper limit for a small non-residential above ground heating oil system to be consistent with the statutory definition of an unregulated heating oil tank in the Underground Storage of Hazardous Substances Act at N.J.S.A. 58:10A-22.

90. COMMENT: It is believed that the reference to paragraph (a)7 in N.J.A.C. 7:26F-3.4(a)6ii(4) is meant to be paragrah (a)6, and the Department should make this correction to the rule. (6, 7, and 18)

RESPONSE: The erroneous reference in N.J.A.C. 7:26F-3.4(a)6ii(4) to "(a)7" appears in the courtesy copy of the notice of proposal, available on the Department's website. The official version of the notice of proposal, 49 N.J.R. 2055(a), does not contain the error, but instead requires the owner to "repeat the activities set forth in this paragraph," which is N.J.A.C. 7:26F-3.4(a)6.

91. COMMENT: N.J.A.C. 7:26F-3.5(a)1 states, "install a minimum of four soil borings, no more than 10 feet from where the discharge was discovered, in four equal directions (for example, north, south, east, and west)." This requirement is far too prescriptive. The Department should allow the environmental professional to use professional judgment as each unique situation warrants. (5, 12, and 17)

RESPONSE: As noted in the notice of proposal Summary at 49 N.J.R. 2056, the Heating Oil Tank System Remediation Rules are purposely prescriptive. The Department believes, and the

stakeholders who participated on the rule development team concurred, that if all of the requirements for remediation of discharges from heating oil tank systems are set forth with specificity in the Department's rules, owners can be more confident in the necessity of the tasks that environmental professionals implement to remediate such discharges.

N.J.A.C. 7:26F-1.10, Variance from the requirements of this chapter, allows for variances from the requirements of the Heating Oil Tank System Remediation Rules. Accordingly, an environmental professional may exercise his or her professional judgment in remediating discharges from heating oil tank systems to meet the needs of any unique situations that may arise.

92. COMMENT: Both N.J.A.C. 7:26F-3.5(a)3 and 4 direct that delineation be continued until no further contamination is observed. The rule should require that delineation be continued only until the field screening indicates the results of the soil sample analysis will demonstrate compliance with the criteria at N.J.A.C. 7:26F-3.6, Unrestricted use soil remedial action. (6 and 7)

RESPONSE: The Department is modifying N.J.A.C. 7:26F-3.5(a)3 on adoption to state that delineation need only continue until field screening indicates no further contamination or until bedrock is encountered. The adopted rule is consistent with N.J.A.C. 7:26F-3.5(a)4.

93. COMMENT: N.J.A.C. 7:26F-3.5(a)5 should be changed to state, "If ground water or bedrock are encountered before delineation is complete, or contamination, in excess of the remediation standards, extends to within two feet of bedrock or ground water; collect a ground water sample pursuant to N.J.A.C. 7:26F-4.2." (6 and 7)

RESPONSE: The Department is modifying N.J.A.C. 7:26F-3.5(a)5 on adoption. Under the adopted rule, a ground water sample is required if the contamination, as defined pursuant to N.J.A.C. 7:26F-1.5, Definitions, extends to "within two feet of either" bedrock or ground water. The purpose of N.J.A.C. 7:26F-3.5(a)5 is to determine whether a ground water sample is required, not to determine whether soil delineation is complete; therefore, the Department is not adding the condition that the soil contamination be in excess of the remediation standard.

94. COMMENT: Where the originally contaminated area exceeds two feet in depth, N.J.A.C. 7:26F-3.5(c)2 requires an owner to collect two additional soil samples per 300 square feet, or fraction thereof, of the originally delineated area for each additional two feet of depth. As most discharges begin near the invert of an underground storage tank and can extend far vertically, this requirement seems misguided or geared more for surface discharges. The rule should require that, where the originally contaminated area exceeds two feet in thickness, the owner must collect additional soil samples for each additional two feet of thickness. (5, 12, and 17)

RESPONSE: The delineated area referred to in N.J.A.C. 7:26F-3.5(c)2 can begin at the tank invert for an underground storage tank, or at the ground surface for an above ground storage tank, and continue to an unspecified depth. This issue was discussed among the rule development team during the rulemaking process, and it was determined that based on the typical treatment area, two samples per 300 square feet of area per two feet of depth is the appropriate number of samples needed to ensure the remedial action is complete. This is reflected in the proposed rule, and the Department is not modifying it on adoption.

95. COMMENT: The Department should modify N.J.A.C. 7:26F-3.6(a), (b), and (c) to include the provision that the analytical data for all the samples can be evaluated in accordance with the Department's Technical Guidance for the Attainment of Remediation Standards and Site-Specific Criteria. (6 and 7)

RESPONSE: The technical guidance documents established by the Department pursuant to SRRA can be applied to the Heating Oil Tank System Remediation Rules, N.J.A.C. 7:26F. The Department is modifying the rules on adoption to add new N.J.A.C. 7:26F-1.11, Use of Department technical guidance documents. The new section requires an owner conducting remediation pursuant to N.J.A.C. 7:26F to apply any available and appropriate technical guidance concerning site remediation as issued by the Department, or provide a written rationale and justification for any deviation from guidance. As a result, the Department is recodifying, without change on adoption, proposed N.J.A.C. 7:26F-1.11, Selection of

environmental professionals, as N.J.A.C. 7:26F-1.12. With the addition of new N.J.A.C. 7:26F-1.11, Use of Department technical guidance documents, a specific reference in N.J.A.C. 7:26F-3.6, Unrestricted use soil remedial action, to specific technical guidance is not needed.

96. COMMENT: N.J.A.C. 7:26F-3.6(a)2 does not consider that the toxicity data may change and necessitate a change to N.J.A.C. 7:26F, separate from the Remediation Standards, N.J.A.C. 7:26D, and guidance currently used by the Department. This will eventually lead to conflict between Department rules - unless the chapters are revised concurrently - leading to separate standards for homeowners and other responsible parties. The Department should delete N.J.A.C. 7:26F-3.6(a)2 and replace it with the phrase, "The following conditions are met: Soil sample results are below the minimum applicable Soil Remediation Standards at N.J.A.C. 7:26D-4 and Appendix 1 and/or soil screening level guidance." (15)

RESPONSE: In adopting the Heating Oil Tank System Remediation Rules, the Department's goal is to codify as many of the relevant requirements in one chapter as possible, in order to make the chapter easier for owners and environmental professionals to use. The Department determined that including the relevant soil remediation standard in the chapter, rather than simply including a reference to the Remediation Standards, N.J.A.C. 7:26D, would better achieve this goal. The Department recognizes that it must amend N.J.A.C. 7:26F-3.6, Unrestricted use soil remedial action, if it amends the soil remediation standard for

unrestricted use in the Remediation Standards, in order to prevent a conflict between the chapters.

97. COMMENT: At N.J.A.C. 7:26F-3.6(a)2, the impact to ground water pathway evaluation using the synthetic precipitation leachate procedure extraction should be consistent with current Department guidance, that is, the collection of at least three samples for synthetic precipitation leachate procedure extraction and analysis. The reliance on a single synthetic precipitation leachate procedure sample is insufficient because of the variability in soil conditions and at least three samples should be required to protect homeowners. The Department should delete this provision. (15)

RESPONSE: N.J.A.C. 7:26F-3.6(a)2 does not specify the number of samples that must be collected for synthetic precipitation leachate procedure analysis. The number of soil samples that must be collected is described in Sample analysis, N.J.A.C. 7:26F-2.2 Table 2-1, which states for heating oil No. 2, “Analyze 25 percent of samples that contain extractable petroleum hydrocarbons greater than 1,000 mg/kg for naphthalene and 2-methylnaphthalene.” For a typical heating oil tank system, no more than eight soil samples are collected for extractable petroleum hydrocarbons analysis. As such, no more than two samples would typically be collected and analyzed for naphthalene and 2-methylnaphthalene.

This is consistent with the Department’s current applicable guidance document, Development of Site-Specific Impact to Ground Water Soil Remediation Standards Using the

Synthetic Precipitation Leaching Procedure (Version 3.0 - November 2013), which contains an exception for small fuel oil cases, such that one or two soil samples may be used for the synthetic precipitation leachate procedure analysis. Because the typical area of impacted soil is small, the Department considers analysis of one or two samples to be representative of soil conditions.

98. COMMENT: Since proposed N.J.A.C. 7:26E-1.16(d) exempts one-to-four family residences from having to perform an ecological investigation, N.J.A.C. 7:26F-3.6(a)2ii and (b)2ii and 3.6(c) should be modified to expressly include the exemption. (6 and 7)

RESPONSE: N.J.A.C 7:26F-3.6(a)2ii and (b)2ii state that there must not be any impacts to ecological receptors as determined by N.J.A.C. 7:26F-6.4, Receptor evaluation – ecological. N.J.A.C. 7:26F-6.4(b) states that "the owner shall conduct an ecological receptor evaluation, except as provided in the Technical Requirements at N.J.A.C. 7:26E-1.16(d) …" Adopted N.J.AC. 7:26E-1.16(d) exempts the person responsible for conducting the remediation of an underground storage tank storing heating oil for on-site consumption in a one-to-four family residential building from performing an ecological receptor evaluation. Additional references to the exemption in N.J.A.C. 7:26F-3.6(a)2ii and (b)2ii are not needed. However, the Department is modifying N.J.A.C. 7:26F-6.4 on adoption by relocating the reference to N.J.A.C. 7:26E-1.16(d) from N.J.A.C. 7:26F-6.4(b) to subsection (a), so that the rule clearly states this exception at the beginning of the rule section.

At N.J.A.C. 7:26F-3.6(c), the Department inadvertently omitted the requirement that there be no impact to any ecological receptor, as determined by N.J.A.C. 7:26F-6.4, Receptor evaluation – ecological, for kerosene. The Department is modifying N.J.A.C. 7:26F-3.6(c) on adoption to add this requirement, making the ecological investigation exemption for kerosene consistent with the exemption for No. 2 heating oil (at N.J.A.C. 7:26F-3.6(a)2ii) and No. 4 and No. 6 heating oil (at N.J.A.C. 7:26F-3.6(b)2ii).

99. COMMENT: At N.J.A.C. 7:26F-3.7, Residual contamination, the use of institutional and/or engineering controls, as a remedial strategy to address “residual contamination” in soils, must consider extractable petroleum hydrocarbons residual product/free product limits and the impact to ground water exposure pathway screening level to prevent future ground water contamination. (18)

RESPONSE: The owner must consider extractable petroleum hydrocarbons residual product/free product limits and the impact to ground water exposure pathway screening levels when determining whether an institutional control and engineering control are needed. Pursuant to N.J.A.C. 7:26F-3.2, Free product remediation, free product is required to be removed or treated, or contained if removal or treatment is not practicable. Pursuant to N.J.A.C. 7:26F-3.6, Unrestricted use soil remedial action, the owner is required to evaluate the applicable site-specific impact to ground water remediation standard pursuant to N.J.A.C. 7:26D.

100. COMMENT: N.J.A.C. 7:26F-3.7(a)1 should expressly state that it does not apply to a one-to-four family residential building. (6 and 7)

RESPONSE: N.J.A.C. 7:26F-3.7(a)1 references N.J.A.C. 7:26F-6.4, Receptor evaluation – ecological, regarding the performance of ecological receptor evaluations. Adopted N.J.A.C. 7:26F-6.4(a) references N.J.A.C. 7:26E-1.16(d), which provides for the exception for the performance of an ecological receptor evaluation where the remediation is an underground storage tank storing heating oil for on-site consumption in a one-to-four family residential building. In the notice of proposal, this reference was in N.J.A.C. 7:26F-6.4(b), but the Department is relocating it upon adoption to subsection (a) for greater clarity, as discussed in the Response to Comment 98. It is not necessary to repeat the exception in N.J.A.C. 7:26F-3.7(a)1.

101. COMMENT: N.J.A.C. 7:26F-3.7(a)2i provides three alternative ground water scenarios under which an owner may implement a soil remedial action pursuant to (b), which allows residual contamination to remain. There should be an “or” between the first two alternatives. (3)

RESPONSE: N.J.A.C. 7:26F-3.7(a)2 provides three alternatives. The Department has included “or” between the second and third alternatives in the list, which is grammatically sufficient and correct under the Office of Administrative Law’s Standard of Clarity.

102. COMMENT: N.J.A.C. 7:26F-3.7(a)2 provides three alternative ground water scenarios under which an owner may implement a soil remedial action pursuant to (b), which allows residual contamination to remain. The second alternative scenario is that the owner conducted a "ground water remedial investigation" that did not identify any ground water contamination above the applicable ground water remediation standards. The rule should refer to a "ground water investigation" or a "site investigation," rather than a "ground water remedial investigation." (15)

RESPONSE: The Department is modifying N.J.A.C. 7:26F-3.7(a)2ii on adoption to remove the word "remedial," making the rule consistent with the rest of the chapter, which uses the term "ground water investigation."

103. COMMENT: N.J.A.C. 7:26F-3.7(b)1iii references N.J.A.C. 7:26C-7, Deed Notices, Ground Water Classification Exceptions Areas, And Remedial Action Permits, for obtaining a soil remediation permit, but it does not clearly state that all the provisions under N.J.A.C. 7:26C-7 must be followed (that is, permit modifications, transfers, etc.). How does the Department plan on implementing measures to address when a permittee sells the property, does not transfer the permit, and cannot be located? This seems to be more likely under a residential scenario versus a commercial or industrial property owner. N.J.A.C. 7:26F-3.7(b)1iii should be revised to reflect that all provisions of N.J.A.C. 7:26C-7 must be followed. Additionally, the Department

should provide guidance for homeowners with respect to long-term monitoring and maintenance, and reporting when properties are transferred. (15)

RESPONSE: N.J.A.C. 7:26F-3.7(b)1iii requires an owner to obtain a soil remedial action permit pursuant to N.J.A.C. 7:26C-7, Deed Notices, Ground Water Classification Exceptions Areas, And Remedial Action Permits. An owner cannot obtain a soil remedial action permit unless all requirements of N.J.A.C. 7:26C-7 are met; therefore, the suggested modification is not necessary.

The Department provides guidance and helpful hints on remedial action permits, including monitoring, maintenance, and reporting under such permits, on its website at www.nj.gov/dep/srp.

104. COMMENT: The Department should make it clear in N.J.A.C. 7:26F-3.7(b)2iv(2) that the heating oil tank system deed notice exempts the property owner from the requirement of obtaining and maintaining a remedial action permit. (6 and 7)

RESPONSE: As stated in the notice of proposal Summary at 49 N.J.R. 2061, an owner who chooses a heating oil tank system deed notice does not have to obtain a remedial action permit, pay related Department fees, or submit biennial certifications. Adopted N.J.A.C. 7:26F-3.7(b)2iv(2) explains what an owner is required to do in order to implement a soil remedial action that allows residual contamination to remain on site. Modifying the rule on adoption to identify what is not required is unnecessary.

105. COMMENT: These rules, and in particular, the small quantity exception at N.J.A.C. 7:26F-3.7(b)3, are long overdue and are generally supported. Under the existing rules, a small amount of contamination that might migrate under a home can require the home to be supported while an excavation is conducted underneath the structure, causing great disruption and distress to the homeowner, as well as a huge financial expenditure, which may exceed the value of the property, to remediate a trace amount of contamination which is not causing a concern. (6 and 7)

RESPONSE: The Department acknowledges the commenters' support for the adopted rules.

106. COMMENT: N.J.A.C. 7:26F-3.7(b)3, which allows leaving 15 cubic yards of contaminated soil in place, should not be adopted. It is often less expensive to initially excavate a small quantity of contaminated soil than it is to delineate and then have to remobilize to excavate the contaminated soil. The proposed rule will not save money to the consumer. To collect soil samples and delineate will require the use of a direct push technique and more analysis, which is equal to disposal costs. After performing the analysis, further dig-out may be required, adding potentially unnecessary expense to the consumer. (1)

107. COMMENT: The 15-cubic-yard rule for discharges of heating oil from residential tanks at N.J.A.C. 7:26F-3.7(b)3 costs homeowners undue additional expense, which will hold up home sales. This should be reconsidered. About 90 percent of the time, the remediation project is at

least 20 tons, so the homeowner has to pay for delineation and remediation. The owner has to delineate to determine if there is enough contaminated soil to meet the new rule, which at an average cost of $1,800 per day, plus samples, totals $3,000 to $4,000. This is not in the best interest of the New Jersey taxpayer. Interested parties with the most investment in the process have the most to lose, that being money. The cost for delineation outweighs the minuscule possibility that less than 15 cubic yards of contamination is present. This new rule simply makes no sense. (4)

RESPONSE TO COMMENTS 106 AND 107: The 15-cubic-yard exception is an alternative to removal only if the criteria in N.J.A.C. 7:26F-3.7(b)3 are met, including the requirement that the contamination is located beneath a residential building. In such cases, it may be worth the cost of delineation to potentially avoid the cost of removal of contaminated soil from under the structure. In all cases, the decision of which remediation option to pursue is up to the owner, who may choose this option if he or she believes it to be in his or best interest.

108. COMMENT: At N.J.A.C. 7:26F-3.7(b)3, the Department has determined that a small quantity exception is a practical and protective alternative for owners dealing with small quantities (less than 15 cubic yards) of residual contamination. However, if a building does not have a concrete slab or basement floor, an exposure pathway to contamination remains. (18)

RESPONSE: The small quantity exception at N.J.A.C. 7:26F-3.7(b)3 allows an owner to leave residual contamination in place under circumstances in which the small amount of remaining

contamination is effectively capped. As stated in the notice of proposal Summary at 49 N.J.R. 2060, the small quantity exception is appropriate because the exposure pathway is effectively cut off; the building slab or basement floor acts as a protective cap. In the scenario the commenter presents, in which the building does not have a slab or basement floor, the exposure pathway is not cut off; therefore, allowing residual contamination to remain would not be appropriate and the Department would not issue a heating oil tank system no further action letter in such a situation.

109. COMMENT: Are there exceptions to the 15 cubic yard small quantity exception at N.J.A.C. 7:26F-3.7(b)3 for cases exhibiting: (1) impact to ground water; (2) impact to other receptors, for example, vapor intrusion, surface water, potable wells, and utility conduits; and (3) extractable petroleum hydrocarbons) concentrations at or above product saturation levels? (20)

RESPONSE: Pursuant to N.J.A.C. 7:26F-3.7(a), the small quantity exception at N.J.A.C. 7:26F-3.7(b)3 is available to an owner only when there are no impacts to: (1) ecological receptors; and (2) ground water. Additionally, pursuant to N.J.A.C. 7:26F-3.7(b)3, the option is only available when: (a) the discharge has not migrated off-site; (b) excavation or treatment of contaminated soil is impeded or is otherwise impracticable; (c) impacts to receptors are mitigated; (d) the ground water is not contaminated above applicable standards; and (e) the residual contamination does not and will not pose a threat to the public health and safety and the

environment. Lastly, pursuant to N.J.A.C. 7:26F-3.2, Free product remediation, the owner must either treat or contain all the free product that is present.

110. COMMENT: Regarding the heating oil tank system deed notice, N.J.A.C. 7:26F-3.7(b)2, and the small quantity exception option at N.J.A.C. 7:26F-3.7(b)3, safe excavation techniques in close proximity to a dwelling (such as the Occupational Safety and Health Administration standard of a 1-to-1 slope) will result in additional contamination remaining outside the foundation if structural support is omitted from the remedial approach. For example, a 12-foot long excavation along a house foundation that is 12 feet deep with contamination starting at six feet deep with an approximate 1-to-1 slope will result in approximately eight cubic yards of additional contamination outside the "cap," which could potentially be affected by precipitation and foundation drainage over time. This lack of structural support will also contradict N.J.A.C. 7:26F-3.7(b)3i, which states, “All soil contamination not located under a residential building is remediated pursuant to N.J.A.C. 7:26F-3.6.”

The Department is correct in its Economic Impact regarding the potential economic impact to property value, lack of potential future property insurance availability, potential for future resale of the impacted property, and possibly, lack of mortgage availability. Only time will tell if this proposed regulation will provide a negative or positive impact on the real estate market, mortgage market and insurance market. (21)

RESPONSE: There are engineering methods for shoring excavations that would allow all contamination next to the structure to be removed without supporting the entire structure, as would be required for removing contamination from underneath the structure. Therefore, contamination outside the perimeter of the structure need not remain.

111. COMMENT: Proposed N.J.A.C. 7:26F-3.7(b)3 requires an owner to implement a soil remedial action, without remedial action permit or deed notice being required, where less than 15 cubic yards of residual contamination would be left under a residential building. While this is a positive change, the Department should clarify how it determined a threshold of 15 cubic yards, which seems to be an arbitrary number and interferes with allowing an LSRP to apply his or her professional judgment. (5 and 11)

RESPONSE: As stated in the notice of proposal Summary at 49 N.J.R. 2061, the Department based the threshold of 15 cubic yards upon a review of residential heating oil tank system remediations in northern New Jersey. There, the average distance between residential buildings is generally smaller than in other areas of the State. Based on the locations of the heating oil tank systems on the properties, approximately half of the contaminated soil could be removed, while the other half (on average, approximately 15 cubic yards) was located under the residence.

As noted in the notice of proposal Summary at 49 N.J.R. 2056, the Heating Oil Tank System Remediation Rules are purposely prescriptive. The Department believes, and the

stakeholders who participated in the development of the rules concur, that if all the requirements for remediation of discharges from heating oil tank systems are set forth with specificity in the Department's rules, tank owners can be more confident in the necessity of the tasks that environmental professionals implement to remediate such discharges.

112. COMMENT: The Department should modify N.J.A.C. 7:26F Appendix A, Model Deed Notice Paragraph 9(i) to clarify that the deed notice is not intended to impede the ability of the owner to transfer title to the property. (6 and 7)

RESPONSE: The purpose of a deed notice is to inform the public that contamination above the unrestricted use soil standards remains on the property after a remedial action. It is the property owner's choice whether to implement a remedial action that requires a deed notice pursuant to N.J.A.C. 7:26F Appendix A. The Department's intent is not to impede the transferability of the property. The presence of a deed notice may have an impact on the property owner's ability to transfer title to the affected property, notwithstanding the presence or absence of the suggested language in the notice. Therefore, the suggested language is not needed.

<u>Sample Analysis</u>

113. COMMENT: At N.J.A.C. 7:26F-2.1, General remediation requirements, the elimination of tentatively identified compound analytic requirements for ground water sampling is of concern.

There will be potential health risks where impacted ground water could lead to a vapor intrusion situation or in potable well use areas. Heating oil is a mix of many different compounds and sometimes surprisingly unexpected compounds are over detectable levels via tentatively identified compound analysis. Tentatively identified compound analysis is often an invaluable approach to alerting occupants of a dwelling. Public interest is best preserved by keeping the 500 parts per billion benchmark in place. (1)

114. COMMENT: Leaving tentatively identified compounds in place in ground water undoubtedly presents human health risks, even though health studies have not been conducted on these compounds, as tentatively identified compounds are often degradation products of known carcinogens. (20)

115. COMMENT: Proposed N.J.A.C. 7:26F-2.2, Sample analysis, is a positive requirement where sampling would not be required for tentatively identified compounds. It is appreciated that the Department recognizes that tentatively identified compounds are of low risk to public health and safety and that requiring remediation would increase costs and time for remediation for marginal benefits. (5 and 11)

116. COMMENT: If the Department has determined that sampling for tentatively identified compounds is not required for No. 2 heating oil releases within a residential setting, then it may be concluded that these compounds are not a risk to human health and the environment. This is difficult to quantify, since limited health based information is published/available for many of the individual tentatively identified compounds. Also, based on their general molecular size,

structure, and weight their degradation within the environment can be slow, thereby adversely affecting water quality over a long period of time. This lengthy period of time becomes apparent, by their detection in ground water after all individual constituents of concern are no longer present, or have degraded into one of these daughter products.

If the Department is not requiring sampling for tentatively identified compounds for releases of No. 2 heating oil, the existing requirements to sample for tentatively identified compounds during volatile organic compounds and base neutral analyses for diesel fuel applications should also be amended. These fuels are comprised of the exact same constituents and, therefore, should be addressed similarly. Diesel releases also generally (not always) occur at commercial facilities and not in residential settings. Based on this, the sampling requirements for diesel and No. 2 heating oil should be the same. (13)

117. COMMENT: Proposed N.J.A.C. 7:26F-2.2, Sample analysis, departs from the existing Technical Requirements, which require the identification of tentatively identified compounds in ground water contaminated with No. 2 fuel oil. However, the existing requirement to evaluate tentatively identified compounds in water samples analyzed for volatile organic compounds and semi-volatile organic compounds will remain for discharges of diesel fuel.

The Department has stated that “based on the Department’s experience in overseeing the remediation of tens of thousands of heating oil tank systems, most of the compounds on the list of tentatively identified compounds that are associated with No. 2 fuel oil discharges are of low risk to public health and safety and the environment, and they readily degrade. The

Department has determined that requiring the remediation of all tentatively identified compounds has resulted in the expenditure of unnecessary time and money, with only minor benefits to human health and the environment."

Diesel and No. 2 fuel oil are identical, except that red dye is added to No. 2 fuel oil to distinguish it from diesel. If the Department has determined that negating the requirement to sample for tentatively identified compounds in ground water relating to a No. 2 fuel oil discharge poses a low risk to public health and the environment, then, by default, the requirement to sample for tentatively identified compounds in ground water related to a diesel discharge should be amended. (18)

118. COMMENT: Tentatively identified compounds identified above standards do drive a ground water cleanup on both commercial and residential sites and have done so for many years. However, tentatively identified compounds identified above standards also determine a third-party impact for residential sites and require the homeowner insurance carrier to provide a full or partial fiduciary obligation for cleanup efforts depending upon policy exclusions in place. Removing the requirement to sample for tentatively identified compounds for fuel oil will further shift the overall cleanup burden onto the homeowner and ultimately, the State through the Petroleum Underground Storage Tank Remediation, Upgrade, and Closure Fund (currently underfunded).

Additionally, tentatively identified compounds are addressed in the Department's ground water quality criteria at N.J.A.C. 7:9C-1.7(c)6. This section states, "For a synthetic

organic chemical not listed in Appendix Table 1, the applicable interim generic criterion in Appendix Table 2 shall apply until an interim specific criterion is developed or a specific criterion is promulgated in accordance with this subsection." Appendix Table 2 gives limits for each compound and the totals based on whether the synthetic organic chemicals are defined as carcinogens or non-carcinogens. The synthetic organic chemical compounds defined as carcinogens have a low limit of five microgram/liter for each compound lacking specific or interim specific criteria and 25 microgram/liter total. Benzene, a targeted compound, is classified as a "known" human carcinogen (Category A) under the USEPA Risk Assessment Guidelines of 1986. Many of the tentatively identified compounds identified in ground water samples from No. 2 fuel oil discharges are benzene-containing compounds. Since the Department believes that tentatively identified compounds resulting from No. 2 fuel oil are of low risk to human health and the environment, has the Department researched these benzene type compounds and determined that they are not carcinogens? Also, the new regulation includes not only No. 2 fuel oil but also No. 4, No. 6, and kerosene for heating purposes as well. However, the Department only states that tentatively identified compounds associated with No. 2 fuel oil discharges are of low risk to public health and the environment. Has the Department addressed these other fuels and determined that tentatively identified compounds from these fuels are also a low risk?

Finally, the Department states in its notice of proposal Summary that diesel fuel and Number 2 fuel oil are identical except for the dye placed in Number 2 fuel oil. It is unfair to the

portion of the regulated community who own commercial properties with diesel fuel tanks to continue to require tentatively identified compound analysis. Therefore, the Department should consider either removing tentatively identified compound sampling requirements from both Number 2 fuel oil and diesel fuel, continue tentatively identified compound requirements for both products, or remove any unknown compounds or compounds not potentially identified in the product from the overall tentatively identified compound ground water quality standard of 500 parts per billion. (21)

119. COMMENT: The driver for most dissolved ground water impacts resulting from a No. 2 fuel oil release are total synthetic organic chemicals. By removing tentatively identified compounds there will be a substantial decrease in the number of ground water impacted sites as the cumulative comparison has been removed. Additionally, ground water impacts will now be a subjective analysis by the investigator versus objective analysis. The Department should delete the phrase "(except that analyses of fuel oil No. 2 shall not include a library search of the highest Tentatively Identified Compounds)" from the Heating Oil Tank System Remediation Rules at N.J.A.C. 7:26F-2.2 Table 2-1 at Footnotes 2 and 5. (15)

RESPONSE TO COMMENTS 113 THROUGH 119: After reviewing the comments, as well as Comments 248 and 249 concerning the Technical Requirements at N.J.A.C. 7:26E-2.1 Table 2-1, the Department has determined that ground water samples associated with discharges of No. 2 heating oil should continue to be analyzed for tentatively identified compounds. The Department is not adopting the proposed deletion of tentatively identified compound analysis

for ground water associated with discharges of No. 2 heating oil in the Technical Requirements at N.J.A.C. 7:26E-2.1 Table 2-1. For consistency, the Department is modifying the Heating Oil Tank System Remediation Rules at N.J.A.C. 7:26F-2.2 Table 2-1 on adoption to add the requirement to analyze ground water samples associated with a discharge of No. 2 heating oil for tentatively identified compounds.

120. COMMENT: N.J.A.C. 7:26F-2.2, Sample analysis, states at paragraph (a)1 that the owner shall have all soil and water samples collected and analyzed by a certified laboratory. It is assumed that it is not the Department's intent to have certified laboratories collecting the soil sample. Typically, the collection of the soil samples is the purview of the environmental professional retained to conduct the remediation at the site. Rather than state that the owner must have the samples collected and analyzed, generally, the rule should require the owner to have the samples collected in accordance with the Department's Field Sampling Procedures Manual, and then analyzed. (6 and 7)

RESPONSE: The Department is modifying N.J.A.C. 7:26F-2.2, Sample analysis, on adoption to reorganize the requirements for sampling and analysis. The adopted rule requires that samples be collected in accordance with the requirements for Quality Assurance for Sampling and Laboratory Analysis in the Technical Requirements, and that samples be analyzed by a certified laboratory.

121. COMMENT: In Table 2-1 at N.J.A.C. 7:26F-2.2, Sample analysis, Footnotes 4 and 5 contain the phrase, "… but excluding phenol and substituted phenols." This is too vague. Different labs provide different lists of compounds when asked not to include phenols and substituted phenols, or they rely on the environmental professional to provide the list of compounds. Additionally, this wording implies that only the base extraction should be completed, as phenols and substituted phenols are part of the acid extraction. The Department should provide reference to specific compounds that should be excluded and identify if it is the Department's intent to include only base extraction. (15)

RESPONSE: Footnotes 4 and 5 in Table 2-1 at N.J.A.C. 7:26F-2.2, Sample analysis, refer to the U.S. Environmental Protection Agency's (USEPA) Target Compound List of semi-volatile compounds. The specific phenols and substituted phenols identified in this list are those compounds to which the footnotes refer. If other phenolic compounds are included, the owner or environmental professional should determine why they are listed and whether they should remain due to site-specific concerns.

It should also be noted that, with the exception of USEPA Method 625, the routinely used extraction methods no longer separate fractions into base/neutrals and acids and subsequently analyze them separately. "Base/neutrals and acids" (collectively) are extracted as semi-volatile compounds and are analyzed in one fraction in one chromatographic run.

122. COMMENT: Table 2-1 at N.J.A.C. 7:26F-2.2, Sample analysis, requires analysis of 25 percent of samples that contain extractable petroleum hydrocarbons greater than 1,000 milligrams/kilogram for naphthalene and 2-methylnaphthalene. If an engineering control or remediation is required for extractable petroleum hydrocarbons that is above 5,100 milligrams/kilogram, what value is there to analyzing contingency samples on samples that have an extractable petroleum hydrocarbons concentration above 5,100 milligrams/kilogram? The value in analyzing samples that have extractable petroleum hydrocarbons concentrations greater than 1,000 milligrams/kilogram and 5,100 milligrams/kilogram is delineation. N.J.A.C. 7:26F-2.2 Table 2-1 should be modified to require analysis of 25 percent of samples that contain extractable petroleum hydrocarbons greater than or equal to 1,000 mg/kg, and less than or equal to 5,100 mg/kg. (15)

RESPONSE: Naphthalene and 2-methylnaphthalene are known components of No. 2 fuel oil. Footnote 7 in Table 2-1 at N.J.A.C. 7:26F-2.2, Sample analysis, requires that naphthalene and 2-methylnaphthalene analyses be performed on samples with the greatest extractable petroleum hydrocarbons concentrations. These analyses are biased to the worst-case extractable petroleum hydrocarbons concentration because it is assumed that these samples will also represent the worst-case concentrations for these two contaminants.

The naphthalene analysis is to determine whether there is a direct contact issue via inhalation, and the 2-methylnaphthalene analysis is to determine whether there is an impact to ground water issue. The 5,100 milligrams per kilogram extractable petroleum hydrocarbon soil

remediation standard is based on direct contact via ingestion. Different remedial actions may be required for naphthalene and 2-methylnaphthalene compared to extractable petroleum hydrocarbons, and, therefore, the contingency analyses are required to be performed on the samples with the greatest extractable petroleum hydrocarbon contamination.

If the owner of the heating oil tank system elects to comply with N.J.A.C. 7:26F-3.4, Initiating soil remediation with delineation during excavation, delineating the extent of soil contamination while excavating contaminated soil, sampling and analysis can be conducted after the soil has been excavated. In this case, depending on the level of extractable petroleum hydrocarbons in the soil, sampling and analysis of naphthalene and 2-methylnaphthalene may not be required.

Post-Compliance Activities

Site Restoration and Remedial Action Report

123. COMMENT: N.J.A.C. 7:26F-7.2(a)9 identifies what documentation of the clean fill material used in the excavation must be prepared. The proposed clean fill material requirement should be consistent with the Technical Requirements at N.J.A.C. 7:26E-5.7, Remedial action report requirements. (5, 12, and 17)

RESPONSE: The Technical Requirements do not include specific reporting requirements for clean fill. Instead, detailed clean fill documentation is addressed in the Department's Fill Material Guidance for SRP Sites technical guidance. Because the Heating Oil Tank System

Remediation Rules are purposely prescriptive, N.J.A.C. 7:26F does contain clean fill reporting requirements. The Department is adding N.J.A.C. 7:26F-7.2(a)9vi upon adoption to require that the environmental professional include a statement in the remedial action report that the clean fill is of equal or lesser permeability than the soil removed from the heating oil tank system excavation. This statement is needed, so the Department can better interpret ground water data for samples collected from a backfilled excavation.

124. COMMENT: N.J.A.C. 7:26F-7.2(a)9 requires documentation of the clean fill material used in the excavation, including copies of sample results. If the fill material is from a certified quarry, there may be no sample results. The circumstances under which it is acceptable to omit sampling results for fill material should be identified. (3)

125. COMMENT: The requirement at N.J.A.C. 7:26F-7.2(a)9 to submit copies of clean fill material sampling results should be modified to account for the use of certified licensed quarry material/mine material. Whenever licensed quarry/mine material, certified as such by the quarry/mine operator, is delivered to a property undergoing remediation, the owner should be able to rely on the certification for the purpose of issuing a final remediation document without sampling the delivered licensed quarry/mine material. In addition, the Department should add to N.J.A.C. 7:26F, the definition of “Licensed Quarry/Mine Material” from the Department’s technical guidance document, Fill Material Guidance for SRP Sites. (13 and 18)

126. COMMENT: The reference to clean fill only at N.J.A.C. 7:26F-7.2(a)9 will preclude use of licensed quarry material for site restoration. The Department should allow documentation of clean fill or licensed quarry material used in the remediation as outlined in the Department's technical guidance document, Fill Material Guidance for SRP Sites. (15)

RESPONSE TO COMMENTS 124, 125, AND 126: The Department is modifying N.J.A.C. 7:26F-7.2(a) on adoption to identify what information is required to be included in the remedial action report when licensed quarry/mine material is used as fill material in heating oil tank system remediations. This information is necessary to document and ensure that the fill material meets the definition of "licensed quarry/mine material," which the Department is also adding to N.J.A.C. 7:26F-1.5, Definitions, on adoption. Both the list of information at N.J.A.C. 7:26F-7.2(a)10 and the definition of "licensed quarry/mine material" are used in the Department's technical guidance document, Fill Material Guidance for SRP Sites.

127. COMMENT: N.J.A.C. 7:26F-7.2(a)11i, ii, and iii do not require sample names, qualifiers, or reporting limits to be listed on data tables. The Department should include these in the required data tables. (15)

RESPONSE: The Department agrees that sample names, qualifiers, and reporting limits should be included in the data tables provided pursuant to recodified N.J.A.C. 7:26F-7.2(a)12i, ii, and iii, and is modifying the rule on adoption to require the information.

128. COMMENT: At N.J.A.C. 7:26F-7.2(a)11iv, vapor intrusion analytical results are required in tabular form for each building with an incomplete vapor intrusion pathway. Tabulated analytical results for both incomplete and complete pathways should be required. (3)

RESPONSE: Data reporting requirements for complete vapor intrusion pathway scenarios are addressed at N.J.A.C. 7:26F-6.3(d), which references the requirements of the Technical Requirements at N.J.A.C. 7:26E-1.15(e) and (f).

Certifications

129. COMMENT: N.J.A.C. 7:26F-1.9(d) states, "Prior to the implementation of the remedial action, my environmental professional informed me that residual contamination would remain in certain areas of my property." It is not reasonable to include in the statement that the property owner was informed that residual contamination would remain prior to implementation of the remedy. There are instances when impacts cannot be fully evaluated until excavation activities have commenced; therefore, the environmental professional may not be able to provide this information to the property owner prior to remediation as it may be unknown at the time. This would also be the case if delineation is occurring during excavation as described in N.J.A.C. 7:26F-3.4, Initiating soil remediation with delineation during excavation. The language should be changed to require the information be provided "prior to or during" the implementation of the remedial action, rather than just "prior to." (15)

RESPONSE: The Department is modifying the certification at N.J.A.C. 7:26F-1.9(d) on adoption to state that the information was provided "prior to or during" the implementation of the remedial action, in order to address those situations where it is determined after a remedial action has commenced that not all soil contamination can or will be remediated to the applicable remediation standards.

Heating Oil Tank System No Further Action Letter

130. COMMENT: N.J.A.C. 7:26F-7.3(a)2 requires an Unregulated Heating Oil Tank System Remediation Form for each environmental professional conducting a portion or phase of remediation, but in many cases the underground storage tanks or above ground storage tanks will have been removed many years ago and the company that removed the tank may no longer exist. Further, if the individual who removed the tank is no longer licensed, there will be no leverage for the tank owner to obtain signatures. The Department should carry this requirement to the subsurface evaluator licensing rules (subsurface evaluator must provide completed form upon termination of retainage) and provide a process for work that was done by firms and individuals that are no longer licensed or no longer exist. (3)

RESPONSE: The Department evaluates, on a case-specific basis, situations where the firm or individual that performed the remediation is no longer licensed or no longer exists. Depending on the circumstances, the owner could submit a variance pursuant to N.J.A.C. 7:26F-1.10,

Variance from the requirements of this chapter. Amending the subsurface evaluator licensing rules is beyond the scope of this rulemaking.

131. COMMENT: N.J.A.C. 7:26F-7.3(d) requires that the owner request the Department to correct incorrect administrative site information by submitting a completed questionnaire and paying a fee. There should be a similar requirement for the environmental professional who discovers incorrect administrative site information. (3)

RESPONSE: The Heating Oil Tank System Remediation Rules, N.J.A.C. 7:26F, place obligations on the owner, as defined at N.J.A.C. 7:26F-1.5, Definitions, not on the environmental professional. Therefore, the Department is not adding this requirement.

Amendments To Correct or Streamline Provisions of Other Rules

N.J.A.C. 7:1E, Discharges of Petroleum and Other Hazardous Substances Rules

132. COMMENT: The proposed amendments at N.J.A.C. 7:1E-5.7(a)2i would allow for remediating a discharge in accordance with either the facility's approved Discharge Cleanup and Removal plan, or ARRCS and the Technical Requirements. The amendments are supported, as they would enable more expedient cleanups for smaller spills. (5, 8, 11, 12, and 17)

RESPONSE: The Department acknowledges the commenters' support for the adopted rules.

133. COMMENT: N.J.A.C. 7:1E-5.7(a)2i restores the option of responding to a discharge pursuant to either the facility's Discharge Cleanup and Removal plan or ARRCS and the Technical Requirements. The Department should clarify how discharges cleaned up in accordance to Discharge Cleanup and Removal plans will be appropriately identified in the New Jersey Environmental Management System and the Department's DataMiner database, so that cases managed this way are not erroneously flagged for compliance and enforcement actions. The Department should identify these cases as "Referred – [insert Department Bureau]," similar to how incidents referred to the Site Remediation and Waste Management Program are categorized. (5, 8, 12, and 17)

RESPONSE: The person reporting the discharge to the Department Hotline should specify whether the discharge will be remediated in accordance with the Discharge Cleanup and Removal plan or ARRCS and the Technical Requirements. If the person responsible for conducting the remediation chooses to remediate pursuant to the Discharge Cleanup and Removal plan, but subsequently receives a letter from the Site Remediation and Waste Management Program, the person responsible for conducting the remediation should contact the Bureau of Case Assignment and Initial Notice in the Site Remediation and Waste Management Program and request that the case be correctly assigned to the Department's Compliance and Enforcement Program.

134. COMMENT: The Department, at N.J.A.C. 7:1E-5.7(c), proposes to restore the option of responding to a discharge according to the Discharge Cleanup and Removal plan. The Department should clarify that if a discharge is addressed under the cleanup plan, a response action outcome or no further action letter is not required. (15)

RESPONSE: Provided that the discharge is properly addressed through the facility's Discharge Cleanup and Removal plan, then a final remediation document issued pursuant to ARRCS is not required.

N.J.A.C. 7:14A, New Jersey Pollutant Discharge Elimination System

135. COMMENT: N.J.A.C. 7:14A-7.5(d)1 states that a discharge to ground water permit is required when the discharge is likely to exceed the Ground Water Quality Standards, N.J.A.C. 7:9C. In many cases there will be a temporary exceedance. The text of the rule should be changed to specify "permanent" or "long term." (15)

RESPONSE: The phrase "except as provided in (e) below" at N.J.A.C. 7:14A-7.5(d) indicates that N.J.A.C. 7:14A-7.5(d) does not apply to discharges to ground water that are part of a site remediation (that is, discharges to ground water subject to 7:14A-7.5(b)). N.J.A.C. 7:14A-7.5(d) applies to discharges permitted by the Department's Division of Water Quality.

136. COMMENT: The proposed change at N.J.A.C. 7:14A-7.5(e) is concerning, primarily due to its rigidity in language, "the Department shall invalidate its approval of a discharge to ground

water proposal if ..." It is commonly known that the injection of remediation agents into the ground water may result in temporary exceedances of the Ground Water Quality Standards (for example, naturally occurring metals, by-products of reagents, trace contaminants from the manufacturing processes for the reagents, desorption of contaminants from the solid matrix, etc.). These temporal exceedances are generally short-lived, but are a reality of completing in-situ remediation projects that must be acknowledged and accepted for Discharge to Ground Water approvals. The required ground water monitoring plans, existing classification exception areas, and/or a new classification exception area for the injection program should serve as the desired protection the Department is trying to achieve. The Department should consider changing "shall" to "may," and "invalidate" to "re-evaluate." (3)

RESPONSE: The Department has historically acknowledged the reality of temporary exceedances of ground water quality criteria for individual constituents and "localized effects of a permitted discharge." The Department evaluates compliance based on the entire text of the Ground Water Quality Standards rules, not just on exceedances of numeric criteria. Pursuant to the Ground Water Quality Standards at N.J.A.C. 7:9C-1.6(c), a localized effect from a discharge under an NJPDES permit is considered a classification exception area that is not subject to the requirements in ARRCS at N.J.A.C. 7:26C-7, Deed notices, ground water classification exceptions areas and remedial action permits.

The discharge to ground water proposal submitted pursuant to N.J.A.C. 7:26E-5.6, Permit identification and requirements for discharge to ground water proposals, should

document which negative impacts to ground water quality are expected or possible due to the discharge. The proposal should include a permit-related classification exception area and appropriate monitoring to address potential risks and expected impacts.

In October 2017, the Department published the In Situ Remediation: Design Considerations and Performance Monitoring Technical Guidance Document, which discusses (in section 7) how a permit-related classification exception area can be established through the permit-by-rule process when a discharge is approved.

The Department is modifying N.J.A.C. 7:14A-7.5(e) on adoption to state that an NJPDES permit will be invalidated only when the approved discharge does not comply with the provisions of the Ground Water Quality Standards, N.J.A.C. 7:9C, or the Surface Water Quality Standards, N.J.A.C. 7:9B. For consistency, the Department is making a similar modification on adoption at N.J.A.C. 7:14A-8.4(f), pertaining to a NJPDES-permitted discharge using a Class V well. The Department is also modifying N.J.A.C. 7:14A-8.4(f) on adoption to expressly include the Department's authority to take enforcement action in the event of a violation, as is stated in N.J.A.C. 7:14A-8.4(c).

137. COMMENT: The proposed change at N.J.A.C. 7:14A-7.5(f)2 is concerning due to the lack of clarity with definitions and references. The Department should define the phrases "negative impacts" and "not anticipated." The subsurface environment is complex and the protective measures required in the discharge to ground water permit process (monitoring plan,

classification exception area) should serve as a means to be protective of human health and the environment. (3)

RESPONSE: The Department interprets the phrases “negative impacts” and “not anticipated” based on the general definitions of the words. Examples of impacts caused by discharges may include violations of ground water quality criteria when such an impact was not expected or where a criterion violation persisted for significantly longer than expected; influences on the vapor intrusion pathway that caused indoor air screening levels to be exceeded within a nearby building apparently due to that influence; displacement or mobilization of product which was detected in a nearby storm sewer; and injected fluids that migrated to the surface and caused erosion problems and safety risks.

A negative impact was anticipated if a discharge to ground water proposal included a proposed permit-related classification exception area for a constituent in the discharge, for example, sodium, and monitoring confirmed that the discharge did in fact cause an exceedance of the sodium criterion. If a classification exception area was not proposed by the person responsible for the discharge, or required by the Department, the same data would show a negative impact was not anticipated.

If a negative impact is expected, the proposal should include the means of addressing or mitigating the impact. If a negative impact is not anticipated, this new provision clarifies that such impacts must be immediately addressed by the person responsible for the discharge. In some situations that will mean notifying the Department as indicated in the reporting

requirements section of the discharge authorization letter and possibly modifying the discharge to ground water proposal by submitting a permit-related classification exception area proposal. In other cases, the permittee may also need to do notifications and remediation required by the rules listed in this new provision (for example, an updated receptor evaluation). Such remediation may need to be done before or after complying with the NJPDES reporting requirements explained in the discharge authorization letter.

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

138. COMMENT: The proposed amendment to the release response plan provisions at N.J.A.C. 7:14B-5.5(a)3 refers to an individual certified pursuant to N.J.A.C. 7:14B-16, Certification of individuals and business firms for unregulated underground storage tank systems. This reference should be deleted, as services provided by individuals certified pursuant to this subchapter are limited to unregulated heating oil tank systems. (6 and 7)

RESPONSE: The Department published an adoption of interceding amendments to N.J.A.C. 7:14B on January 16, 2018 (see 50 N.J.R. 409(a)), which included amendments to the release response plan requirements at N.J.A.C. 7:14B-5.5. Those amendments deleted the reference to N.J.A.C. 7:14B-16, Certification of individuals and business firms for unregulated underground storage tank systems. Accordingly, individuals certified pursuant to N.J.A.C. 7:14B-16 are authorized to perform services on unregulated heating oil tank systems.

139. COMMENT: Proposed N.J.A.C. 7:14B-7.2(b) requires that the person responsible for conducting the remediation notify the Department Hotline even when a discharge is not confirmed. This conflicts with the proposed amendment to N.J.A.C. 7:26C-1.7(d)2, where notification is required only if there is a confirmed discharge. The notice of proposal Summary at 49 N.J.R. 2067 states, "The Department is only concerned with confirmed discharges, not suspected discharges." The Department should proceed with the proposed amendment to N.J.A.C. 7:26C-1.7(d)2, but delete the proposed amendment to N.J.A.C. 7:14B-7.2(b). (5, 6, 7, 11, 12, and 17)

140. COMMENT: Regarding N.J.A.C. 7:14B-7.2(b), if inconclusive results are provided after completion of operations defined in N.J.A.C. 7:14B-7.1(a), and the conditions are called into the Department, a case/spill number is assigned. The proposed text provides for actions if the discharge is identified, however is less forthcoming if the discharge is disproved. Because the reporting of suspected spill conditions would be cause for a case/spill number, in either case a final report and associated response action outcome would be required to close the case/spill number. The Department should provide improved text and provide clear narrative references to the next steps for closure (N.J.A.C. 7:14B-9.5(c)). (15)

RESPONSE TO COMMENTS 139 AND 140: The notification requirements at N.J.A.C. 7:26C-1.7(d)2 apply to all cases; whereas, the notification requirement at N.J.A.C. 7:14B-7.2(b) applies specifically to a suspected release from an underground storage tank regulated pursuant to the UST rules, N.J.A.C. 7:14B. If the suspected release cannot be confirmed or disproved, the site

investigation that is required must be properly conducted pursuant to the Technical Requirements.

N.J.A.C. 7:14B-7.1, Suspected releases, specifies that the underground storage tank owner or operator must complete a suspected release investigation within seven days if any of the criteria at N.J.A.C. 7:14B-7.1(a)1 through 7 are met. If the underground storage tank owner or operator identifies, for example, mathematical errors in conducting inventory control that disproves the suspected release, no additional work needs to be conducted and no report is made to the Department's Hotline. However, if the owner or operator cannot confirm or disprove a suspected release, N.J.A.C. 7:14B-7.2(b) requires the underground storage tank owner or operator to call the Department's Hotline to report that a site investigation pursuant to the Technical Requirements for the Remediation of Contaminated has been triggered. This report to the Department's Hotline establishes the date that the underground storage tank owner or operator shall comply with N.J.A.C. 7:26C-2.2, Criteria for determining when a person is required to remediate a site, including retaining an LSRP within 45 days, submitting the Site Investigation report within one year, and, as applicable, issuing a response action outcome to close out the incident report if no discharge(s) were identified.

Based on the suggestion from the commenters and for consistency, the Department is adding new N.J.A.C. 7:14B-7.2(c) and (d) on adoption. This language is the same as in existing N.J.A.C. 7:14B-9.5(c) and (d). These requirements provide clear narrative for the next steps, whether it is determined that a discharge did or did not occur. Whenever a site investigation is

required, including when a discharge has not been identified, the final resolution of the event that triggered that site investigation requirement is through the issuance of a response action outcome.

141. COMMENT: Proposed N.J.A.C. 7:14B-9.5(c) requires the submission of a response action outcome even in the context of a tank investigation that reveals no discharge/no remediation requirement. This new administrative process would add unnecessary cost and, therefore, it should be made an option rather than a requirement. Nevertheless, having a response action outcome may, in certain instances, be a benefit for lenders and in assuring buyers that remediation has been completed. (5 and 11)

142. COMMENT: N.J.A.C. 7:14B-9.5(c) allows the owner or operator to submit a response action outcome pursuant to ARRCS, N.J.A.C. 7:26C, if the site investigation report is submitted and the owner or operator concludes that no further remediation is required. The proposed change is supported. (5, 12, and 17)

RESPONSE TO COMMENTS 141 AND 142: The Department acknowledges the commenters' support for the adopted rule. Even if no discharges are found during tank closure it is important to document via the LSRP's issuance of a response action outcome that no discharges occurred from that underground storage tank system. The issuance of a response action outcome following underground storage tank closure represents that the underground storage tank has been properly closed, such that the owner and operator are released at that

time from the requirement to maintain financial responsibility (see N.J.A.C. 7:14B-15.3, Incorporation of the Code of Federal Regulations by reference, and 40 CFR 280.113).

The Department is modifying N.J.A.C. 7:14B-9.5(c) on adoption to state that if the owner or operator concludes in the site investigation report that no further remediation is required, then the LSRP shall issue a response action outcome to the owner or operator. The proposed rule stated that the owner or operator shall issue the response action outcome; however, only an LSRP can issue a response action outcome.

143. COMMENT: N.J.A.C. 7:14B-12.1(d) provides for the assignment of penalty points to any certified individual or business firm that fails to properly perform underground tank services pursuant to the Heating Oil Tank System Remediation Rules. The penalty point system proposed at N.J.A.C. 7:14B-12.1(d) is arbitrary and capricious, subjective in nature, cumbersome to administer, and fails to clearly establish how the Department would impose these penalties or initiate revocation of certification. The penalty point system also burdens Department staff with substantiation and documentation of noncompliance, issuance of letters, and posting to a "scoreboard." Some of the listed violations in N.J.A.C. 7:14B-12.1(d) also appear to be duplicative violations for the same conduct. (5, 6, 7, 11, 12, 15, and 17)

144. COMMENT: Instead of assigning penalty points under new N.J.A.C. 7:14B-12.1(d), the Department should bring enforcement actions against certified individuals and firms who fail to comply with the regulations and who repeatedly provide inferior service to the regulated

community. The Department should vigorously enforce existing N.J.A.C. 7:14B-12.1(c), 16.10, and 16.11, which provide the Department enforcement authority against any certified individual or firm for failure to comply with the Heating Oil Tank System Remediation Rules, N.J.A.C. 7:26F, or for the failure of the individual or firm to meet the standards established for business practices. In addition, the existing regulations already establish the mechanism to revoke certification or deny certification renewal. (5, 6, 7, 11, 12, and 17)

145. COMMENT: At N.J.A.C. 7:14B-12.1(d), does the Department's notification to the certified individual or business firm and posting of the information to the Department's heating oil tank systems website happen simultaneously? The Department should clarify the timing of its notification to the certified individual or business firm, versus the Department's posting of information to its heating oil tank system website. (3)

146. COMMENT: N.J.A.C. 7:14B-12.1, Penalties, establishes a paradigm where Department reviewers and case managers can impose penalties upon the environmental professional and publicly disclose those penalties, yet the rule does not provide a mechanism for the environmental professional to review, dispute, or appeal the penalty or seek retraction of the publication of a penalty found to be improperly awarded. Environmental professionals should also have the opportunity to correct deficiencies before the Department issues points and notices, since inaccurate notices posted to the Department's website could be damaging to an environmental professional's reputation, even if the penalty points are retracted or corrected

by the Department following further investigation. The proposed changes at N.J.A.C. 7:14B-12.1(d), (e), and Table 12-1 should not be adopted. (3, 5, 6, 7, 11, 12, and 17)

147. COMMENT: The penalty point process proposed at N.J.A.C. 7:14B-12.1(d) should identify that the offenses listed apply only to subsurface evaluators. (15)

148. COMMENT: The penalty point system in N.J.A.C. 7:14B-2.1(d) should be revised to include "unscrupulous activities" – that is, high pressure sales tactics. (15)

149. COMMENT: Table 12-1 at N.J.A.C. 7:14B-12.1, Penalties, provides that failure to evaluate potable wells pursuant to N.J.A.C. 7:26F-6.2, Receptor evaluation – ground water, is a major deficiency. If an environmental professional is unable to gain access to a property to sample off-site potable water wells, the environmental professional should not receive penalty points if his or her report documents unsuccessful attempts to obtain access to the property. (15)

RESPONSE TO COMMENTS 143 THROUGH 149: In response to comments, the Department is not adopting N.J.A.C. 7:14B-12.1(d) and (e), or the companion amendment at N.J.A.C. 7:14B-12.1(c). In the absence of N.J.A.C. 7:14B-12.1(d), “notwithstanding (d) below” at N.J.A.C. 7:14B-12.1(c) is not needed. Although the Department is not adopting the proposed subsections, the Department still has the authority to deny, suspend, revoke, or refuse to renew the certification of a subsurface evaluator pursuant to N.J.A.C. 7:14B-13.10, Denial, suspension, revocation, and refusal to renew a certification. In addition, the Department has the ability to refer an LSRP to the Site Remediation Professional Licensing Board for violations of SRRA, N.J.S.A. 58:10C-16.

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

150. COMMENT: Proposed N.J.A.C. 7:26B-3.4(a)1 provides that the owner or operator shall establish and maintain a remediation funding source in accordance with N.J.A.C. 7:26C-5 within 14 days after the Department receives a remedial action workplan certified by an LSRP for the industrial establishment. The revised timeframe is too short. The Department should retain the existing 30-day timeframe. (15)

RESPONSE: As stated in the notice of proposal Summary at 49 N.J.R. 2065, the Brownfield Act at N.J.S.A. 58:10B-3.b requires establishment of a remediation funding source no more than 14 days after the approval by the Department or the certification by the LSRP of a remedial action workplan. The adopted rule is consistent with the statute.

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

151. COMMENT: Proposed N.J.A.C. 7:26C-1.3 amends the definition of "person" to also include, for the purpose of enforcement, a responsible corporate official, which includes a managing member of a limited liability company or general partner of a partnership. The proposed changes are improper, poor public policy, and contrary to established law. This change should not be adopted. (5, 6, 7, 8, 11, 12, and 17)

152. COMMENT: The proposed amendment to the definition of "person" in N.J.A.C. 7:26C-1.3 is clearly not authorized by the enabling legislation. For example, "person" is defined under the Spill Act, N.J.S.A. 58:10-23.11b, as public or private corporations, companies, associations,

societies, firms, partnerships, joint stock companies, individuals, the United States, the State of New Jersey, and any of its political subdivisions or agents. The definitions of "person" in other related environmental statutes are substantively identical and do not include language that includes corporate officials or shareholders. These other statutory definitions recognize the long-standing distinction between a human being acting in his or her personal capacity as contrasted with acting as a representative of a corporate entity. Clearly, had the Legislature intended to ignore that distinction, the Legislature could have selected language such as that proposed by the Department. The Legislature did not do so. The proposed change should not be adopted. (5, 8, 11, 12, and 17)

153. COMMENT: Existing New Jersey environmental statutes do not provide a basis for the Department to change the definition of "person" as proposed. The Spill Act defines "person" to mean "public or private corporations, companies, associations, societies, firms, partnerships, joint stock companies, individuals, the United States, the State of New Jersey and any of its political subdivisions or agents." N.J.S.A. 58:10-23.11b. It further provides that a right of contribution for cleanup costs exists against "persons in any way responsible for a discharged hazardous substance." N.J.S.A. 58:10-23.11f.a(2)(a). Nothing in the statute or any other applicable authority provides that a corporate officer, managing member of a limited liability company, or general partner of a partnership, is responsible for the liabilities of that corporation, limited liability company or partnership, respectively, under the Spill Act due solely to their status as a corporate officer, director, manager, member, or partner of an entity. (14)

154. COMMENT: The limits on liability for human beings when acting in an official capacity as a corporate official or a shareholder of a corporate entity or as a government official or officer of a public entity are well established. As a general matter, the rule of law that has evolved in New Jersey is that the corporate form as a wholly distinct and separate entity will be upheld. As such, a primary reason for incorporation is the insulation of shareholders from the liabilities of the corporate enterprise.

The proposed amendment to the definition of "person" in N.J.A.C. 7:26C-1.3 is inconsistent with these well-established protections. It would create liability for shareholders and corporate officials in all situations, whereas under well-established law, liability must be established on a case-by-case basis under specific and limited scenarios when piercing the corporate veil is justified. In removing the well-established concept of a corporate veil, the Department is acting without legislative authority and is usurping the role of the Legislature to modify centuries of established law. Clearly, the New Jersey Legislature has not sought fit to provide broad authority for the Department to pierce the corporate veil for all responsible corporate officials.

Further, the protections shielding corporate officials and shareholders can be removed if (and only if) the established exceptions are proven. For example, corporate officials can be held responsible under the tort participation theory if (and only if) proofs are established that the corporate officer had sufficient direct involvement in the commission of the tort. Liability can attach even if the officer's acts were performed for the corporation's benefit and the

officer did not personally benefit. However, the tort participation theory has specific parameters that are ignored by the proposed amendment. As such, the proposed amendment improperly seeks to circumvent established law. The Department has not identified its authority for so doing, or established the rationale for treating corporate officers and shareholders as if they were direct owners.

Finally, as a matter of public policy, the proposal to completely vitiate the protections afforded human beings acting as corporate officers directly contradicts the fundamental and sound purposes for which those protections were established, namely, to ensure that individuals would be shielded from liability so that corporate entities could function as independent entities and to foster investment under the corporate form. The existence of a corporate entity as distinct from the individuals who effectuate that entity's actions is both intentional and a fundamental component of our system of laws. The proposed rule would ignore that intentional and fundamental distinction and should not be adopted. (5, 8, 11, 12, and 17)

155. COMMENT: The proposed amendment to the definition of "person" at N.J.A.C. 7:26C-1.3, which provides a blanket rule making officers of corporations and managers of limited liability companies liable for the acts of those entities, is contrary to existing statutes that created and govern corporations and limited liability companies. Existing laws and the public policy of the State of New Jersey treat corporations (and limited liability companies) as distinct from their constituent shareholders or members. For example, N.J.S.A. 42:2C-30a states that

"[t]he debts, obligations, or other liabilities of a limited liability company, whether arising in contract, tort, or otherwise: (1) are solely the debts, obligations, or other liabilities of the company; and (2) do not become the debts, obligations, or other liabilities of a member or manager solely by reason of the member acting as a member or manager acting as a manager." Thus, naming any manager, officer, director, shareholder, or partner as a respondent on an order or a defendant in a legal proceeding for the liabilities of a corporation, company, or limited liability company, solely due to the individual's title, would violate New Jersey statutes and public policy limiting the liability of corporate officers, directors and shareholders, limited liability company managers and members, and limited partners of partnerships. Such a change would be an expansion of the existing law regarding liability of such individuals. There is no authority for the Department to adopt such a rule in violation of existing New Jersey laws and decisions regarding creation and governance of corporations and limited liability companies. (14)

156. COMMENT: The Department proposes to amend the definition of "person" at N.J.A.C. 7:26C-1.3 to include "responsible corporate officer." This greatly expands the definition of "person." Furthermore, the use of terms like "responsible corporate official" is general and vague. The Department should delete the proposed amendment. (15)

157. COMMENT: The proposed amendment to the definition of "person" at N.J.A.C. 7:26C-1.3 is vague in identifying who would be a "responsible corporate official." For example, the rule appears to suggest that all managing members would be considered responsible when

acting for a limited liability company or limited liability corporation. However, managing members and corporate officials are not uniformly vested with authority to act autonomously. Rather, more typically, managing members and corporate officials derive their authority from various corporate formation and governance documents. For example, it is common for the authority of a corporate official, as well as that of a managing member of a limited liability company or a limited liability corporation, to be proscribed so as to require approval for certain actions, including the expenditure of funds beyond a specific limit. The proposed rule suggests that corporate officials have authority to be responsible for all actions of the corporate entity relating to compliance with environmental laws or that a single official should have such authority. That is not accurate. The authority vested in corporate officers differs from official to official and from entity to entity. In that context, the term "responsible" is vague and without sufficient specificity to allow the regulated community to comprehend its meaning. Therefore, the proposed amendment should not be adopted. (5, 8, 11, 12, and 17)

158. COMMENT: The proposed amendment to the definition of "person" is vague, ambiguous, arbitrary, and capricious, because it uses incorrect terminology and is internally inconsistent. The term "responsible corporate official" is undefined and vague. For example, is it intended to mean those with environmental, health and safety responsibility, check signing authority, anyone on the board of directors, any shareholder of a closely held corporation, someone with a title of vice president or higher, etc.? In addition, limited liability companies and partnerships are not corporations, and, therefore, the term "responsible corporate official,

which includes a managing member of a limited liability company or a general partner of a partnership" is internally inconsistent, because members of limited liability companies and general partners of partnerships are not corporate officials. (14)

159. COMMENT: It is extremely concerning that the change in the definition of "person" at N.J.A.C. 7:26C-1.3 may allow the Department or other entities to pursue an enforcement action against an individual member or partner who has clear intentions of operating in a manner that is protective of human health, safety, and the environment. Those members and/or partners that are acting in good faith to correct a violation and/or prevent a future violation should not be held personally liable as this would defeat the purpose of establishing a limited liability company or partnership.

It is also concerning that the Department may stretch this definition (now or in the future) to include those limited liability companies or partnerships providing environmental services in the regulatory world (for example, LSRPs) where professional judgment is utilized to make remedial decisions. The Department should further clarify the intended potential consequences referred to in the definition, and explain how such consequences pertain to individuals and/or affect the protections afforded through the establishment of limited liability companies or partnerships. (10)

RESPONSE TO COMMENTS 151 THROUGH 159: The Department is not changing existing law with its adopted amendment to the definition of "person." The amendment codifies in the rules, a liability concept that is expressly provided in the Water Pollution Control Act, in a

manner consistent with the legislative intent and expansive liability provisions of the Spill Act, and using a legal standard applied in administrative decisions and State and Federal cases for decades. The Legislature has determined that there is "a need for a systematic and consistent approach to the detoxification" of contaminated sites in New Jersey. N.J.S.A. 58:10-23.20. This approach is set forth in three main statutes: 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 Spill Act, N.J.S.A. 58:10-23.11 et seq. The purpose of the amendment to the definition of "person" in N.J.A.C. 7:26C-1.3 is to further the "systematic and consistent" approach that the Legislature sought using a consistent definition of the "persons" who are required to comply with rules concerning the remediation of a discharge, and to give notice to the regulated community by using a definition that more clearly sets out when an individual may be subject to enforcement.

ARRCS is promulgated under multiple statutes, notably including the Water Pollution Control Act and the Spill Act (as well as the Industrial Site Recovery Act, the Brownfield Act, the Underground Storage of Hazardous Substances Act, and SRRA). Under the Water Pollution Control Act, "person" includes "any responsible corporate official for the purpose of enforcement action." N.J.S.A. 58:10A-3. Under the Spill Act, "person" includes individuals, and "person responsible for conducting the remediation" includes all persons "in any way responsible for a hazardous substance." N.J.S.A. 58:10-23.11b. Definitions in the Industrial Site Recovery Act, SRRA, and the Brownfield Act are similar. Consistent with the Water Pollution Control Act and the Legislature's direction that the Spill Act is to be "liberally construed to

effect its purposes" of protecting "the general health, safety, and welfare of the people of this State," the Department has long interpreted the term person "in any way responsible for a hazardous substance" to include those corporate officers who were directly responsible for creating a violation or who, by reason of their position in the business entity, had the authority and control either to have prevented the violation from occurring or to have corrected the violation after it occurred.

Amending ARRCS to explicitly include "responsible corporate official" in the definition of "person," therefore, gives notice to individuals in business entities of the situations in which the Department will hold them liable under its existing authority in the Water Pollution Control Act, the Spill Act, and related statutes. It also makes the definition of "person" in ARRCS consistent with the definition in the Water Pollution Control Act rules and the Solid Waste rules, both of which include "corporate officials." Additionally, the Underground Storage Tank rules include a definition of "responsible corporate official." See N.J.A.C. 7:14-8.2; 7:14B-1.6; and 7:26B-1.4. Based on the clear statutory authority in the Water Pollution Control Act and the Spill Act, the amendment to the definition of "person" in ARRCS is not ultra vires.

Moreover, the Department's inclusion of responsible corporate officers in the definition of person is not contrary to established corporate liability doctrine because New Jersey and Federal law have long recognized that the protections afforded by the corporate form are not absolute. In fact, New Jersey courts have held that "the Legislature intended that the privilege of incorporation should not ... become a device for avoiding statutory responsibility." *State,*

Dep't of Envtl. Prot. v. Ventron Corp., 94 *N.J*. 473, 502 (1983). And under the New Jersey Business Corporation Act, the protections accorded are made subject to "the over-riding interests of this State and third parties." N.J.S.A. 14A:1-1(3)(b). As is made clear throughout New Jersey's environmental statutes, the "over-riding interests of the State" include protection of the environment and the public health, safety, and welfare of residents of the State. See, for example, N.J.S.A. 13:1E-6, 13:1E-2, 58:10-23.11a, and 58:10A-2.

The principle of responsible corporate officer liability for violations of public health and welfare statutes is distinct from, and unrelated to, the corporate law doctrine of veil piercing. Veil piercing allows the imposition of liability on individual officers and shareholders of a corporation (as well as related corporate entities) when the corporate form has been intentionally misused to commit a violation. Imposition of liability in these cases depends on showing both that the corporation is a "mere instrumentality" or "conduit" of its owner and that the corporate form has been used to "defeat the ends of justice, ... to perpetrate fraud, to accomplish a crime, or otherwise to evade the law." *Ventron*, 94 *N.J*. at 500-501. In addition to reaching shareholders and parent companies, as well as corporate officers, veil piercing is applicable in contract and tort cases, as well as enforcement actions by the State. As demonstrated by *Ventron*, veil piercing is based on existing common law and continues to be available to the State in appropriate cases. The tort participation theory is another unrelated principle of individual liability that is legally distinct from responsible corporate officer liability.

The Department does not rely on either of these separate legal theories as the basis for this rule amendment.

Responsible corporate officer liability, by contrast, does not require the Department to prove either tortious conduct or any abuse of the corporate form for criminal or fraudulent purposes. In the context of public health and welfare statutes specifically, Federal and state courts have held for decades that corporate officers may be found individually liable if their actions directly caused a statutory violation, or if they had authority to prevent such a violation, or to correct one after it occurred, but failed to act – in other words, where they are "responsible" for the violation. This "responsible corporate officer" doctrine evolved as a common-law theory of liability and has been widely adopted, including in New Jersey's environmental rules, administrative decisions, and State case law. Specifically, in *State, Department of Environmental Protection v. Standard Tank Cleaning Corp.*, 284 *N.J. Super*. 381 (App. Div. 1995), the Appellate Division held that the responsible corporate officer doctrine would impose individual liability on a corporate official who "had actual responsibility for the condition resulting in the violation or was in a position to prevent the violation but failed to do so." Multiple unpublished decisions of the Appellate Division, as well as decisions by the Commissioner and administrative law judges, have applied this standard to find corporate officials liable under the Water Pollution Control Act and the Solid Waste Management Act. These decisions not only demonstrate the established legal basis for the Department's amendment of the definition of person, they also demonstrate that the imposition of individual

liability under these circumstances is not contrary to New Jersey corporate law. This amendment aligns ARRCS with an array of other Department rules pertaining to flood hazard areas, freshwater wetlands, solid waste management, and water pollution control that also codify common law responsible corporate official liability.

The Department's intent in proposing the amendment was to make it clear, consistent with New Jersey case law, that corporate officials, members of limited liability companies, and general partners who, by reason of their position in the business entity, have the actual authority and control to have prevented or corrected a specific violation, but fail to do so, are subject to enforcement. Whether a particular corporate official is a "responsible corporate official" with respect to a particular violation is a fact-specific determination, and the Department will continue to bear the burden of demonstrating in an enforcement action that an individually named corporate official should be considered a "responsible corporate official" under the facts of that case.

The Department's intent in stating in the proposed rule that a responsible corporate official "includes a managing member of a limited liability company or a general partner of a partnership" was to make clear that the term includes responsible individuals in all business entities, not just corporations, not to imply that all individuals holding the named positions would automatically be liable, or to imply that only responsible individuals in the listed entities could be responsible corporate officials. Depending on his or her actual responsibility and control, a president, vice-president, or chief compliance officer of a corporation, a managing

member of a limited liability company, or a general partner of a limited liability partnership may be a responsible corporate official. Although limited liability companies and general partnerships are not "incorporated" under State law, they are recognized as corporate entities with a legal existence separate and apart from their members and partners. Courts in New Jersey and elsewhere have not distinguished between corporate forms when applying responsible corporate officer liability and this rule does not make a distinction either. To do so would elevate form over substance without reason. The legal standard described in *Standard Tank* is the guiding principle, not the label that attaches to the corporate entity.

The amended definition of "person" does not affect the liability of LSRPs and other environmental professionals acting in that capacity because it does not affect the underlying structure of ARRCS, which imposes liability primarily on persons responsible for conducting the remediation. Pursuant to N.J.A.C. 7:26C-2.2, Criteria for determining when a person is required to remediate a site, this broadly includes dischargers, owners, and operators of contaminated sites, and other persons responsible for a hazardous substance. An LSRP, subsurface evaluator, or other professional retained by the person responsible for conducting the remediation is generally only liable to the Department for violations of ARRCS in the rare instances where the regulatory provision imposes requirements directly on the LSRP (for example, an LSRP may be subject to enforcement for violating N.J.A.C. 7:26C-6.2, Response action outcomes) or where the individual or firm is itself a person responsible for conducting the remediation under N.J.A.C. 7:26C-2.2, Criteria for determining when a person is required to remediate a site. The

amendment to the definition of person, therefore, does not affect the liability of LSRPs and other environmental professionals acting in that capacity. It should be noted, however, that an LSRP is obligated to comply with ARRCS pursuant to N.J.A.C. 7:26I-6.3(a)5, and the Technical Requirements, pursuant to N.J.A.C. 7:26I-6.3(a)4. The Site Remediation Professional Licensing Board, not the Department, enforces N.J.A.C. 7:26I.

160. COMMENT: Some definitions in ARRCS (for example, building, cleanup and removal costs, etc.) direct the reader to other regulations/documents; definitions should be copied and provided so the reader does not have to search for them. Consider providing all definitions within ARRCS so the reader does not have to consult multiple documents simultaneously. (3)
RESPONSE: See the Response to Comment 9 above regarding references to definitions in other chapters.

161. COMMENT: What is the source of the definition of “historically applied pesticides” at N.J.A.C. 7:26C-1.3, Definitions? Within the definition, the statement "has been found to have long-lived residues and lasting health and environmental impacts" is ambiguous and occasionally contested. The Department should remove this statement. (15)
RESPONSE: The source of the definition is the Department’s Historically Applied Pesticide Site Technical Guidance, available at www.nj.gov/dep/srp/guidance. An important characteristic of historically applied pesticides is that they persist in the environment. For example, lead and

arsenic are elements that do not break down and, therefore, will persist in the environment indefinitely. Further, DDT and its metabolites (DDE and DDD) and aldrin and its metabolite dieldrin, while persistent in the environment, will eventually break down after a number of years. Another important characteristic is the ability of a pesticide to become bound to soil. Soil samples collected from areas where pesticides have historically been applied routinely contain concentrations of pesticides in exceedance of soil remediation standards. The adopted definition is appropriate, based on these characteristics.

162. COMMENT: The definition of "remediation costs" includes Department fees and oversight costs. Fees can be calculated, but how can responsible parties or their LSRPs account for oversight costs? Will the Department provide an estimate? Provide guidance or clarify how Department oversight costs are to be accounted for. (3 and 15)

RESPONSE: The definition's inclusion of Department fees and oversight costs in remediation costs is consistent with the remediation funding source requirements found in ARRCS at N.J.A.C. 7:26C-5.3, Determination of remediation funding source and financial assurance amount. Specifically, N.J.A.C. 7:26C-5.3 states that the remediation funding sources should be established and maintained in an amount that is equal to or greater than the cost of the remediation, and shall include Department fees and oversight costs.

For a site that has a remediation funding source and a requirement to pay oversight costs, the Department requires one year's worth of oversight costs to be accounted for in the

total amount of remediation funding source that is being established/maintained. This should be documented in the initial remediation cost review and updated annually.

To estimate the oversight costs, an LSRP can reference past oversight invoices and/or rely on his or her experience and professional judgment. For a site that has not previously been subject to oversight costs, such that prior invoices are not available, the person responsible for conducting the remediation may rely on the LSRP's professional judgment, or contact the Department.

163. COMMENT: At N.J.A.C. 7:26C-1.3, Definitions, the Department proposes to amend the definition of "statutory permittee" to include "tenants" of the property, where responsibilities to comply with N.J.A.C. 7:26C-7, Deed notices, ground water classification exceptions areas, and remedial action permits, regarding permit transfers and deed notices would occur when an institutional or engineering control has been placed, not when the permit has been issued. Adding "tenant" to the definition of statutory permittee is not appropriate, as a tenant that is not a person responsible for conducting the remediation is not required to be a co-permittee or establish financial assurance or develop remedial action. Remove the word "tenant" from this definition. (5, 11, and 15)

RESPONSE: The inclusion of the term "tenant" is not new; the term is in the existing definition of statutory permittee at N.J.A.C. 7:26C-1.3. A tenant is appropriately a statutory permittee

because a tenant's presence on the property may affect the protectiveness of a remedy that includes an institutional or engineering control.

General Information - Applicability and Exemptions

164. COMMENT: The proposed amendment to N.J.A.C. 7:26C-1.4, Applicability and exemptions, adds the holder of a security interest in an underground storage tank or heating oil tank system to the list of persons who may be responsible for the discharge of hazardous substances. Clarify how all appropriate inquiries and lender liability protections address this situation. The amendment should not be adopted. (15)

RESPONSE: N.J.A.C. 7:26C-1.4, Applicability and exemptions, lists the persons who are required to comply with ARRCS; it does not define who is a person responsible for a discharge of a hazardous substance under the Spill Act. Prior to the adopted amendments, N.J.A.C. 7:26C-1.4(a)4iii and iv specified that holders of a security interest in a site who actively participated in the management of the site or negligently caused a new discharge are considered persons responsible for a hazardous substance and required to comply with ARRCS. The adopted amendments explicitly include holders of a security interest in an underground storage tank or heating oil tank system. A person may hold a security interest in an underground storage tank system or heating oil tank system without holding a security interest in the site as a whole, and the holder of such a security interest is similarly liable with respect to discharges from the tank system. As stated in the adopted amendment at N.J.A.C. 7:26C-1.4(a)4iii, the holder of a

security interest in an underground storage tank or heating oil tank system is required to comply with ARRCS only if the holder actively participated in the management of the tank system prior to foreclosure or negligently caused a new discharge after foreclosure. This is consistent with the limitation on liability for holders of a security interest provided by the Spill Act, N.J.S.A. 58:10-23.11g6. The limitation on liability for persons who conducted all appropriate inquiries prior to purchase is not relevant to these provisions because, pursuant to N.J.S.A. 58:10-23.11g8, the holders of a security interest are not required to conduct an environmental investigation.

165. COMMENT: The Department proposes to amend N.J.A.C. 7:26C-1.4(c)2i(2) and (3) to require a person remediating a landfill to comply with ARRCS if the site does not have a final remediation document or solid waste approval from the Department, but has already been developed with a building. However, if the building has been erected, it is too late. This should be dealt with through the building code, not ARRCS. (15)

RESPONSE: The Department has observed that buildings have been constructed on landfills without the Department's having ensured the protection of people occupying those buildings. In order to ensure the protection of the public health and safety and the environment, and to close this administrative loophole, the Department is adopting the amendments to N.J.A.C. 7:26C-1.4(c)2i to require persons remediating landfills to comply with ARRCS, even if the building is already constructed. The fact that there are existing buildings on a landfill site does

not make it "too late" for a person conducting remediation to comply with ARRCS since many, if not most, sites in the State where discharges that are remediated have existing buildings.

166. COMMENT: The Department has confirmed that a discharge of mineral oil is a petroleum discharge exempt from LSRP retention and document submittal requirements. To be consistent with Department regulations and guidance, which define mineral oil as a petroleum product, the Department should identify mineral oil as an example of a petroleum surface spill, rather than a separate type of spill. (5, 12, and 17)

RESPONSE: The Department is modifying N.J.A.C. 7:26C-1.4(d)1 upon adoption to identify a petroleum spill as including a spill of mineral oil. As the commenters state, the Department considers mineral oil a petroleum product.

167. COMMENT: Regarding N.J.A.C. 7:26C-1.4(d), mineral oil, a petroleum product, is widely used as transformer fluid. Existing regulations provide that, for certain discharges of transformer fluid from a transformer that does not contain polychlorinated biphenyls in concentrations of 50 parts per million or greater, no notification to the Department Hotline is required. Existing (and proposed) regulations exempt a discharge of 100 gallons or less of mineral oil that does not reach the waters of the State and is remediated within 90 days from LSRP retention and document submittal requirements. It is requested that the Department confirm that a discharge of less than 100 gallons of non-polychlorinated biphenyls mineral oil

from a transformer is exempt from LSRP retention and document submittal requirements, assuming it has not reached the waters of the State, is remediated within 90 days, and appropriate records are maintained. (5, 12, and 17)

RESPONSE: The Spill Act at N.J.S.A. 58:10-21.11e requires that the person responsible for conducting the remediation notify the Department of all discharges, including discharges from a transformer of any volume of mineral oil containing any concentration of polychlorinated biphenyls. N.J.A.C. 7:26C-1.4(d)1 sets forth when the person responsible for conducting the remediation of a discharge of mineral oil from a transformer is exempt from the requirements of N.J.A.C. 7:26C-2.3, Requirements for the person responsible for conducting the remediation. To clarify when this exemption applies, the Department is modifying N.J.A.C. 7:26C-1.4(d)1 on adoption to state that the mineral oil discharged from the transformer must contain less than 50 parts per million polychlorinated biphenyls and be remediated in accordance with the Technical Requirements, N.J.A.C. 7:26E, within 90 days after the discharge.

168. COMMENT: The proposed exemption in N.J.A.C. 7:26C-1.4(d)1 for discharges of less than 100 gallons of mineral oil from a transformer is inappropriate and represents a significant potential health risk to the residents of the State. Mineral oil transformers may contain polychlorinated biphenyls less than 50 milligrams/kilogram (40 CFR Part 761.30(a)(iii)(B) and 761.3) and a discharge of 100 gallons of mineral oil containing just under 50 milligrams/kilogram of polychlorinated biphenyls would result in a discharge of 35.5 lbs. of

polychlorinated biphenyls (a hazardous material) to the environment. This is in excess of the Remediation Standards, N.J.A.C. 7:26D, the USEPA Toxic Substances Control Act Bulk Remediation Waste threshold (40 CFR Part 761.62), and the one-pound USEPA Comprehensive Environmental Response, Compensation, and Liability Act Reportable Quantity (40 CFR Part 171.8). The Department should not adopt the proposed exemption. (15)

RESPONSE: N.J.A.C. 7:26C-1.4(d) exempts the person responsible for conducting the remediation from hiring an LSRP and submitting documents to the Department; remediation of the discharge must still be conducted in accordance with the Technical Requirements, N.J.A.C. 7:26E, including demonstration of compliance with remediation standards and proper disposal of contaminated soils. Moreover, the exemption applies only if the requirements of N.J.A.C. 7:26C-1.4(d) are met, including: (1) the date of the discharge is known; (2) the volume of the discharge is known and must be less than 100 gallons; (3) the discharge does not reach the waters of the State of New Jersey; and (4) the contamination is remediated within 90 days after the occurrence of the discharge. Provided the conditions of the adopted rule are met, the rule exempting the discharge from hiring an LSRP and submitting documents to the Department should not present a health risk to residents of the State.

169. COMMENT: N.J.A.C. 7:26C-1.4(d)1i provides an exemption from LSRP retention and document submittal requirements for a petroleum surface spill or a surface spill of mineral oil from a transformer, of less than 100 gallons, that does not reach the waters of the State of New

Jersey, provided that any contamination is remediated within 90 days after the occurrence of the spill. The Department should clarify that "remediated within 90 days" means initiating the remedial process, which includes responding to a known or suspected discharge and any applicable interim measures. (5, 12, and 17)

RESPONSE: N.J.A.C. 7:26C-1.4(d)1i requires that any qualifying discharge of petroleum be fully remediated within 90 days after the occurrence of the spill. Not only must remediation be initiated, but also all required remedial actions must be completed within 90 days of the occurrence of the spill.

170. COMMENT: Proposed N.J.A.C. 7:26C-1.5(c) further compounds the problems associated with changing the definition of "person" by requiring the individual signing a certification to certify not only that he or she has authority to bind the company, but also that "I have the authority to prevent a violation of the Site Remediation Reform Act, N.J.S.A. 58:10C, or of the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C, as well as to correct any such violation should one occur." The import of that language is to impose personal liability for violations of SRRA on the person signing the certification as a corporate officer. That requirement is unwise and will have disastrous consequences.

First, the effect of the amendment will be to cause remediation throughout the State to stall, not because corporations and limited liability companies that own or acquire property do

not want to remediate those properties, but because no corporate officer will be willing to assume personal liability for the cleanup by signing such a certification.

Second, the proposed amendment will stifle economic growth in New Jersey. Many development projects in New Jersey, and virtually all redevelopment projects, involve some amount of environmental remediation. Developers take on a substantial amount of risk in undertaking a project, knowing that estimated remediation costs could be far exceeded, resulting in reduced profits or even losses. If the Department's regulations require a corporate officer to assume personal liability for remediating these redevelopment projects, developers will seek projects in other states that will not go after them personally if the project fails due to unforeseen environmental costs. (14)

171. COMMENT: The proposed certification requirement at N.J.A.C. 7:26C-1.5(c) is ultra vires, vague, and improperly voids the existing protections for human beings acting in their capacity as officials, officers, or shareholders of corporate entities. The proposed language will substantially limit the submission of mandated documents, is contrary to sound public policy, and should not be adopted.

Overall, the proposed language improperly seeks to impose personal liability on a human being who is acting, not in his or her personal capacity, but in his or her capacity as a corporate official or shareholder. As noted in the notice of proposal Summary at 49 N.J.R. 2067, the revised certification language is tied to the proposed amended definition of “person” to include, for the purposes of enforcement, a responsible corporate official, which includes a

managing member of a limited liability company. The effort to impose personal liability for all certification signatories acting in their individual capacity is improper.

The proposed additional certification language is not specific to the information that is being submitted with that certification. Rather, the language seeks to impose upon the certification signatory personal responsibility for any violation of SRRA or ARRCS, even if such violation is not specifically associated with the information contained in the document with which the certification is submitted. Therefore, the proposed language seeks to mandate that the signatory have authority regarding other submissions, including those not yet created. Further, the proposed new certification language is not limited to the site for which the submission associated with the certification is being made. The certification, as written, would arguably apply to any violation of SRRA or ARRCS anywhere.

The proposed language also assumes that all violations can be prevented. That assumption is absurd. Despite the most reasonable and practical efforts, it is entirely conceivable that some violations will still occur. The language is not limited to a requirement that the efforts to prevent violations be subject to being reasonable, practical, and within the signatory's power. The required language would require that each signatory commit, under penalty of perjury, to a statement that is reasonable to believe is not accurate. In that sense, the proposed language is insisting that the signatory commit perjury. The proposed language is also internally contradictory in that the signatory would be obligated, not only to prevent

violations of SRRA or ARRCS, but also to correct violations that occur. The language, therefore, assumes that signatories will fail to prevent violations.

In addition, the proposed language assumes that all violations can be corrected by the person responsible for conducting the remediation for which the certification is being made. Clearly, there are some violations that are beyond the ability of some of the persons responsible for conducting the remediation to correct, such as those entities without sufficient financial resources to take all required actions. Hence, the assumption that all violations can be corrected is simply false and mandating that the signatory execute such a certification under penalty of perjury without any limitations is absurdly onerous.

In addition to the foregoing improprieties of the proposed new language, the language presumes that signatories acting in their official capacity would uniformly have the authority and power to take all actions required to: (a) prevent all violations of SRRA or ARRCS; and (b) take all actions to correct any violation of SRRA or ARRCS, regardless of the cost or complexity of such actions. That presumption is patently false. Even assuming that the signatory believed that sufficient funds would always be available, many, if not most, signatories do not have unlimited authority to act. For example, an official acting on behalf of a municipal entity most commonly does not have the authority to commit that municipality to act without the approval of the governing body and limited by the approved budget. The same limitations are common for many, if not most, corporate entities.

Given the foregoing, it is highly likely that potential certification signatories will simply refuse to execute certifications that include the proposed language. Yet the regulations require that submissions be accompanied by the certifications. Therefore, it is highly likely that submissions, including mandated submissions, will not be able to be submitted, which in turn will delay or forestall remediation.

Further, contrary to the statement in the notice of proposal Summary at 49 N.J.R. 2055, and multiple statements made by the Department about ensuring that stakeholder input is obtained before rules are proposed, relevant stakeholders, including entities focused upon corporate members of the regulated community, were not involved in any of the reported discussions with the rule development team. Accordingly, the Department should either withdraw this portion of the proposed rule entirely or withdraw this portion of the proposal in favor of a robust stakeholder process. (5, 8, 11, 12, and 17)

172. COMMENT: Proposed N.J.A.C. 7:26C-1.5(c) changes existing language of the certification that the person responsible for conducting the remediation must include in submission to the Department. The proposed language in the certification, “I have the authority to prevent a violation of the Site Remediation Reform Act, N.J.S.A. 58:10C, or the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C, as well as to correct any such violation should one occur;” improperly seeks to impose personal liability on the individual who is acting, not in his or her personal capacity, but in his or her capacity as a corporate official or shareholder. (6 and 7)

173. COMMENT: The rulemaking requires certification that "I have the authority to prevent a violation." This makes an extreme and unrealistic assumption that all violations are preventable. Given the broad and vague nature of this statement, it is likely that parties will refuse to sign, and submittals will not be able to be made. The proposed amendment should be deleted. (15)

RESPONSE TO COMMENTS 170, 171, 172, AND 173: In response to comments, the Department is modifying N.J.A.C. 7:26C-1.5(c) on adoption to delete the proposed certification that the individual signing the certification has authority to prevent a violation of ARRCS and SRRA, and to correct a violation should one occur. Adopted N.J.A.C. 7:26C-1.5(b), which identifies who may sign a certification, ensures that only an individual with appropriate authority with respect to the remediation (or someone who has been expressly delegated authority by such a person) may sign the certification, making the certification language at proposed N.J.A.C. 7:26C-1.5(c) unnecessary. Deleting this proposed certification does not affect the Department's authority to take enforcement action against a responsible corporate official in his or her individual capacity, which (as discussed in the Response to Comments 151 through 159) is based on the statutory authority in the Spill Act, Brownfields Act, SRRA, and Water Pollution Control Act, the definition of "person" set forth in N.J.A.C. 7:26C-1.3, and the case law interpreting individual liability for environmental violations.

For response to more general concerns raised in Comments 170, 171, 172, and 173, see the Response to Comments 1 through 4 regarding the stakeholder process, and the Response to Comments 151 through 159 regarding the liability of responsible corporate officials.

174. COMMENT: The Department should clarify the basis for the proposed amendment to require the “existing statutory permittee” to pay for the remedial action permit transfer fee, as provided at N.J.A.C. 7:26C-7.11(a). (5 and 11)

RESPONSE: The existing statutory permittee is the entity that has the incentive to terminate its status as a statutory permittee and transfer the permit to the subsequent statutory permittee. As such, the adopted rule places the responsibility of paying the permit transfer fee with the entity that has the most incentive to complete the permit transfer. This requirement does not prevent private parties from entering into an agreement between themselves establishing that an entity other than the statutory permittee will pay the permit transfer fee. However, the parties to the agreement cannot agree to shift liability for a civil administrative penalty or other enforcement action in the event that the Department does not receive the required remedial action permit transfer fee.

General Information - Notice Requirements

175. COMMENT: Proposed N.J.A.C. 7:26C-1.7(b)3 requires notice to the Department if a reported discharge, which is determined to be migrating off-site, will be required to be reported separately, in accordance with N.J.A.C. 7:26C-1.7(b)3. The definition of "site" in

ARRCS and the Technical Requirements includes the property/area of concern and the extent of the contaminated plume(s). Delete the proposed addition to the rule. (15)

RESPONSE: Adopted N.J.A.C. 7:26C-1.7(b)3 requires notice to the Department when a discharge that was previously reported as being from on-site is subsequently determined to have originated off-site and then migrated onto the site. The purpose of this requirement is for the person responsible for conducting the remediation to inform the Department that the discharge should not be attributed to the person responsible for conducting the remediation, but instead should be attributed to the off-site location where the discharge occurred. The Department released an updated version of the Administrative Guidance for Addressing Unknown Off-Site Sources of Contamination in January 2016, outlining how to make such a report.

176. COMMENT: N.J.A.C. 7:26C-1.7(c) indicates that it is not necessary to notify the Department Hotline if the only discharge that has occurred at the site is historic fill. The Department should clarify whether historic fill is considered a discharge and, if so, whether additional actions are required based on the definition of a discharge. (3)

RESPONSE: The placement of historic fill is a discharge and, as such, ARRCS at N.J.A.C. 7:26C-2.2(a) requires that it be remediated, but that does not mean that the fill material must be removed or treated. Once the Department determines that a property contains a large quantity of historic fill, there is a rebuttable presumption that the fill material does not need to

be removed or treated in order to comply with applicable health risk or environmental standards. However, institutional or engineering controls may be required, to allow for continued use of the property. See the Brownfield Act at N.J.S.A. 58:10B-12h(1).

177. COMMENT: Proposed N.J.A.C. 7:26C-1.7(c), which states that a person responsible for conducting the remediation is not required to notify the Department if the only discharge is historic fill, is supported. (5, 11, 12, and 17)

178. COMMENT: The proposed change in the discharge notification requirements for regulated tank sites at N.J.A.C. 7:26C-1.7(d)2 is supported. (5, 6, 7, and 11)

RESPONSE TO COMMENTS 177 AND 178: The Department acknowledges the commenters' support for the adopted rules.

179. COMMENT: At N.J.A.C. 7:26C-1.7(f), the replacement of the term "LSRP of record" with "LSRP hired to perform remediation pursuant to N.J.A.C. 7:26C-2.3(a)1" further obfuscates a difficult issue. The term "LSRP of record," while not used in SRRA, has become common language and should be defined. The Department should delete the proposed replacement language and define "LSRP of record" in N.J.A.C. 7:26C-1.3, Definitions, as "the Licensed Site Remediation Professional who has been hired to perform remediation pursuant to N.J.A.C. 7:26C-2.3(a)1." The Department should make the same modification at N.J.A.C. 7:26C-6.2(a). (15)

RESPONSE: The Department proposed to amend the rule to remove “of record” as a description of LSRP in the notification requirements of N.J.A.C. 7:26C-1.7(f) and 6.2(a) specifically because the term “LSRP of record” is undefined. The adopted language more clearly identifies the LSRP whose contact information should be given. Replacing the undefined term “LSRP of record” with the language equivalent to the definition the commenter suggests, makes it unnecessary for the Department to add a definition. To the extent that entities within the regulated community have found it helpful to use the term “LSRP of record,” they may continue to do so; however, the term is no longer in the Department’s rules.

180. COMMENT: The requirement at N.J.A.C. 7:26C-1.7(g) to provide proof to the Department within 14 days of notification to the public may not be sufficient time, as it can take weeks to receive proof of publication. The Department should revise the language to read, "within 14 days of receipt of proof of publication or other form of verification of providing such to the public." (15)

RESPONSE: To emphasize the importance of conducting public notification and outreach before remedial activities begin, the Department proposed to amend N.J.A.C. 7:26C-1.7(g) to require the person responsible for conducting the remediation to provide the Department with proof of public notice and outreach within 14 days after providing such notice to the public. As in the existing rule, the proposed amended rule requires the proof to be provided along with a form available on the Department’s website. The Department agrees that proof of publication may

be difficult to provide within 14 days. Therefore, the Department is modifying N.J.A.C. 7:26C-1.7(g) on adoption to state that if the proof of publication has not been received, then a copy of the advertisement that has been submitted to the newspaper, along with the name of the newspaper and date the advertisement is to be published, can be provided instead. Once proof of publication is received, the remediating party must forward documentation to the Department in the next remedial phase report verifying that the advertisement was published.

181. COMMENT: N.J.A.C. 7:26C-1.7(h)2 amends the timing of the specified notification requirements from remedial action to remedial investigation phase. There is concern regarding this change because there is not always a clear distinction between the start and finish of site investigation and remedial investigation activities. Public notification in the beginning of the remedial investigation, when the extent of the remediation is not defined on the site, will result in undue concern and confusion leading the public to the wrong conclusion that the site is not protective of the environment and public health. Further, if the contamination has not been fully delineated and there are off-site impacts, then that could also affect the notice. It is recommended that the proposed change at N.J.A.C. 7:26C-1.7(h)2 not be adopted. (5, 11, 12, and 17)

RESPONSE: The Department strongly believes that requiring public notification at the start of the remedial investigation addresses the very concerns raised by the commenters. Specifically, by notifying the public prior to delineation, the public will be educated much sooner in the

process as to what remedial activities are and will be occurring at a site. Without such notification, the public may be concerned about and unaware of the nature and purpose of the activities involved in a remedial investigation. Additionally, there may often be overlap among various phases of remediation. For example, the person responsible for conducting the remediation may opt to remove all visually contaminated soils while delineating contaminated soil. Public concerns regarding the soil removal may be alleviated if the public is informed prior to this soil removal occurring.

182. COMMENT: Pursuant to N.J.A.C. 7:26C-1.7(h)2i, public notification is now supposed to be made prior to the remedial investigation phase instead of the remedial action phase. However, this section of the rule still reads, "The notification shall summarize site conditions and describe the activities that are to take place to remediate the site …" If the site is in the remedial investigation phase as opposed to the remedial action phase, information regarding what will be done to remediate the site might be limited. How much information is required regarding remediation activities? Is it sufficient to just include activities that are planned for the remedial investigation phase of work? The requirement should be changed to state, "The notification shall summarize site conditions and describe the activities that are to take place to investigate (if in remedial investigation phase) or remediate (if in remedial action phase) the site …" (15)

RESPONSE: The notification is intended to cover all phases of remediation commencing with the remedial investigation. At a minimum, the notification shall comply with N.J.A.C. 7:26C-1.7(h)2 by summarizing site conditions and describing, to the extent known, the activities that are to take place to remediate the site. If the notification is done by letter, pursuant to N.J.A.C. 7:26C-1.7(h)2i, written updates of the progress of the remediation are to be sent every two years until remediation is completed and a final remediation document is filed with the Department. As the remediation moves forward and more becomes known about the activities that will take place during the later phases of the remediation, subsequent notifications can provide additional information. Because the definition of "'remediation' or 'remediate'" includes all remedial phases including the remedial investigation and remedial action, adding the suggested language would be superfluous.

183. COMMENT: N.J.A.C. 7:26C-1.7(j) states, "The person responsible for conducting the remediation of any heating oil tank system in accordance with N.J.A.C. 7:26F, except as provided in N.J.A.C. 7:26C-1.4(c)4 above, or the person responsible for conducting an emergency response action, shall comply only with the notification requirements of (a) through (d) above." N.J.A.C. 7:26C-1.7(d) requires that written notice of a confirmed discharge on the Department's form be submitted within 14 days. This rule is intended to apply to regulated tank systems where the Federal rule requires notice of discharge be made to the implementing agency. While this may be in the existing rule, filing of this notice is not the current practice for

releases from heating oil tank systems, nor should it be. The person responsible for conducting the remediation of any heating oil tank system in accordance with N.J.A.C. 7:26F should only have to comply with the notification requirements of N.J.A.C. 7:26C-1.7(a) through (c). (6 and 7)

RESPONSE: N.J.A.C. 7:26C-1.7(d) requires the submittal of a Confirmed Discharge Notification to the Department within 14 calendar days after a discharge of a hazardous substance or the discovery of a discharge of a hazardous substance pursuant to N.J.A.C. 7:1E-5.7, Discharge response, of the rules governing discharges of petroleum and other hazardous substances (N.J.A.C. 7:26C-1.7(d)1) or after the owner or operator of a regulated underground storage tank determines that there has been a discharge from the regulated underground storage tank (N.J.A.C. 7:26C-1.7(d)2). As defined at N.J.A.C. 7:14B-1.6, Definitions, regulated underground storage tanks do not include heating oil tank systems; therefore, N.J.A.C. 7:26C-1.7(d)2 is not relevant to heating oil tank systems. Accordingly, the Department is modifying N.J.A.C. 7:26C-1.7(j) on adoption to require that a heating oil tank system remediation conducted pursuant to new N.J.A.C. 7:26F follow only the notification requirements of N.J.A.C. 7:26C-1.7(a), (b), and (c).

184. COMMENT: At N.J.A.C. 7:26C-1.7(j), there is an exemption from certain requirements for persons responsible for the remediation of a discharge from a heating oil tank system because the Department assumes that the discharge will be localized. Can this assumption also be

made for cases subject to ARRCS and the Technical Requirements, as sometimes the discharge is an isolated, small spill (for example, 150 gallons on a surface)? (16)

RESPONSE: ARRCS at N.J.A.C. 7:26C-1.4(d)1 already includes an overarching exemption for petroleum surface spills of less than 100 gallons that do not reach the waters of the State and are remediated within 90 days of the discharge. Such discharges are exempt from the requirement at N.J.A.C. 7:26C-2.3, Requirements for the person responsible for conducting the remediation, to use the services of an LSRP or to submit documents to the Department. This would include the notification requirements at N.J.A.C. 7:26C-1.7, Notification and public outreach.

General Information - Notice Requirements - Alternative Fill

185. COMMENT: N.J.A.C. 7:26C-1.7(k) requires prior written permission from the Department for bringing alternative fill in excess of the amount needed to complete the remediation, as per N.J.A.C. 7:26E-5.2, Specific remedial action requirements. However, the Department has recently stated that it will not approve a proposal to use alternative fill to raise grade above the Federal Emergency Management Agency flood hazard level. Instead of banning the use of alternative fill to raise grade above the flood line, the Department should consider evaluating the use of alternative fill at these sites on a case-by-case basis. (15)

RESPONSE: The Department has not stated that it will not approve a proposal to use alternative fill to raise grade above the Federal Emergency Management Agency flood level.

Rather, pursuant to N.J.A.C. 7:26E-5.2, Specific remedial action requirements, the person responsible for conducting the remediation must request prior written approval from the Department in such a situation. As is presently done, the Department will conduct a site-specific evaluation of the proposed use of alternative fill in excess of the volume required to restore the pre-remediation topography and elevation of the receiving area of concern. For most situations, the Department is not opposed to the placement of alternative fill up to the 100-year storm elevation (established by the Federal Emergency Management Agency). Proposed placement above that level is subject to greater scrutiny by the Department to determine its need from a remediation perspective. In large part, this scrutiny will be in the Department's evaluation of the justification provided for the proposed placement.

186. COMMENT: Recodified N.J.A.C. 7:26C-1.7(k)2 requires that when the person responsible for conducting the remediation proposes to bring to the site alternative fill that does not meet the requirements of the Technical Requirements at N.J.A.C. 7:26E-5.2(b), the person must also include the volume of alternative fill being brought to the site in the notice being sent to people in the vicinity of the site and to the local and county officials. Can a timeline be established for Department approval of alternative fill? Waiting indefinitely for Department approval would result in delays for site redevelopment projects. There should be a maximum of a two-week turnaround on Department approval to limit delays to redevelopment work. (15)

RESPONSE: Because projects vary in complexity and an initial review may reveal that the person responsible for conducting the remediation needs to provide additional information, the Department cannot establish a fixed time for the necessary site-specific evaluation. In addition, the Department cannot predict or control the number of evaluations it may need to do at any given time. The Department will prioritize its evaluation efforts to ensure that completion of remediation projects is not delayed. However, the Department's primary concern is to ensure that it can conduct the evaluations appropriately in order to adequately protect the public health and safety and the environment.

187. COMMENT: The proposed amendment at N.J.A.C. 7:26C-2.3(c)1 requires that a new LSRP must be hired within 48 hours after the dismissal, resignation, or incapacity of that licensed site remediation professional where there is an immediate environmental concern, or within 45 days where there is not an immediate environmental concern. Forty-eight hours is not sufficient time for retention (particularly if the situation arises on a weekend) given the process needed to find and hire a suitable LSRP, and the practical realities involved with the retention process. (5, 11, and 15)

RESPONSE: An immediate environmental concern arises when a discharge has already impacted a receptor, such as a potable well. In such cases, it is incumbent upon the Department and the person responsible for conducting the remediation to ensure that the investigation and any remedial measures being implemented continue unabated. However, the Department

acknowledges that if an LSRP is dismissed, resigns, or is incapacitated on a weekend, it could be difficult to retain a new LSRP within 48 hours. Therefore, the Department is modifying N.J.A.C. 7:26C-2.3(c)1 on adoption to allow the person responsible for conducting the remediation two business days to retain a new LSRP.

188. COMMENT: At N.J.A.C. 7:26C-2.3(c) and (d), the term "incapacity" is too vague. The term "incapacity" should be defined and should include inability to make decisions, inability to comply with timeframes, and inability to rely on other LSRPs. (15)

RESPONSE: The Department intends the term to mean physical or mental inability to perform the responsibilities and duties of an LSRP, which would include the inability to make decisions. This interpretation is consistent with standard dictionary definitions; therefore, the Department does not see a need to define the term. The suggested language, “inability to comply with timeframes” and “inability to rely on other LSRPs” (unless based on a physical or mental inability to perform duties in general), are beyond the standard definition of “incapacity,” although they may result from an incapacity. If a person responsible for a remediation determines that the retained LSRP is unable to comply with timeframes, or is unable to rely on other LSRPs as may be required, the person may wish to consider retaining a new LSRP, even in the absence of incapacity.

189. COMMENT: N.J.A.C. 7:26C-2.3(a)2 directs the person responsible for conducting the remediation to notify the Department on a form. This service is now electronic, so the Department should revise the rule accordingly. (15)

RESPONSE: Although the retention information is submitted electronically, the Department still considers this to be submission via a "form." Therefore, there is no need to amend the rule.

Timeframes

190. COMMENT: N.J.A.C. 7:26C-3.3(a) states that "the person responsible for conducting the remediation who is remediating any discharge that was identified or should have been identified (for example, through a preliminary assessment or site investigation) prior to May 7, 1999, shall complete the remedial investigation of the entire site and submit the remedial investigation report by the following applicable date ..." The Department should clarify the statement, "should have been identified … prior to May 7, 1999 …" As an example, an owner removes an underground storage tank prior to the September 3, 1986, underground storage tank registration deadline and reports no discharge. Then, during a property transaction in 2017, a buyer conducts due diligence and discovers soil contamination in the former underground storage tank area. Is the seller responsible in that the seller "should have identified the contamination" prior to May 7, 1999, and, therefore, is not compliant with the statutory timeframe? Is the site automatically subject to direct oversight? (5, 12, and 17)

RESPONSE: As stated in guidance posted on the Department's Site Remediation Program website in 2013 (see www.nj.gov/dep/srp/timeframe/), a "discharge that should have been identified" is a discharge or contaminated area of concern at a site at which the contamination should have been identified due to an obligation to complete a preliminary assessment and/or site investigation on or before May 7, 1999, pursuant to the ISRA Rules (N.J.A.C. 7:26B), the Underground Storage of Hazardous Substances Rules (N.J.A.C. 7:14B), an Administrative or Court Order, Remediation Agreement, or a Spill Act Directive. As such, in the example given, if there was no discharge reported and there was no obligation to have conducted a preliminary assessment or site investigation pursuant to the applicable rules, an Administrative or Court Order, a Remediation Agreement, or a Spill Act Directive, any discharge observed today relating to the former underground storage tanks would not be subject to the statutory timeframe to complete the remedial investigation of the contaminated site, and the site would not be subject to direct oversight on that basis.

191. COMMENT: N.J.A.C. 7:26C-3.5(d) states that the Department may grant an extension of a mandatory remediation timeframe in writing when needed because of a delay in obtaining access to property, site-specific circumstances, such as ongoing litigation or insufficient monetary resources, or other circumstances such as fire or flood.

The Department should add a fourth criterion for when an extension is needed: site complexity. In many instances, the timeframes imposed by the Department are unrealistic and

unattainable. This one-size-fits-all approach does not reflect the variable complexity of remediation cases; it is beyond dispute that there is a great disparity in size, nature, and complexity of contaminated sites in New Jersey. Also, being placed in direct oversight does not serve to further the Department's goal of expediting the effective remediation of contaminated sites. The Department should also confirm that a site that obtains an approval from the Department for an extension to a mandatory timeframe, is not in direct oversight at that point in time. (3, 5, 11, 12, and 17)

RESPONSE: Pursuant to N.J.A.C. 7:26C-3.5(d), the Department may grant an extension to the person responsible for conducting the remediation for "… other circumstances beyond the control of the person responsible for conducting the remediation … or other site-specific circumstances that may warrant an extension, as the Department may determine." The person responsible for conducting the remediation may request an extension to the mandatory remediation timeframe based on site complexity as "other site-specific circumstances …" In addition, extensions to regulatory timeframes based on site complexity are addressed in the Technical Requirements at N.J.A.C. 7:26E-4.10(b).

192. COMMENT: Being placed in direct oversight does not serve to further the Department's goal of expediting the effective remediation of contaminated sites. The Department should also confirm that a site that obtains an approval from the Department for an extension to a mandatory timeframe, is not in direct oversight at that point in time. (5, 11, 12, and 17)

RESPONSE: If the Department provides written approval of an extension to a mandatory or expedited site-specific timeframe pursuant to N.J.A.C. 7:26C-3.5(d), the person responsible for conducting remediation does not trigger the direct oversight requirements at N.J.A.C. 7:26C-14.2, Compulsory direct oversight, unless the extended mandatory or expedited site-specific remediation timeframe has passed.

Remedial Action Permits

193. COMMENT: Proposed N.J.A.C. 7:26C-7.5(e) creates a new process requiring the termination of an existing remedial action permit and the issuance of a new remedial action permit for each site created by the subdivision upon which an engineering or institutional control exists. This is an unnecessary process, since the site could involve the same owner. The proposed approach is also inconsistent with other Department programs for administrative changes, where a permit modification process should suffice. The Department should clarify the basis for the amendments concerning payments for the remedial action permit application fees as proposed at N.J.A.C. 7:26C-7.5(e). (5 and 11)

RESPONSE: Remedial action permits are established for tax blocks and lots that comprise the site that is the source of ground water contamination that is being actively or passively remediated or where the remediation of soil contamination does not meet the unrestricted use standard. When a tax block and lot that is the subject of a remedial action permit is subdivided, the permit no longer accurately reflects the location for which the permit was obtained

because that tax block and lot no longer exists. As such, a new permit is required; the existing permit cannot be modified, but must be terminated. Both the permit termination and the new permit application are subject to applicable fees because these fees relate to the Department's processing of the termination or application. Ownership of the property has no bearing on the requirements to terminate the existing deed notice and remedial action permit, file a new deed notice, and obtain a new remedial action permit due to the subdivision of a tax lot subject to a remedial action permit.

The Department is modifying N.J.A.C. 7:26C-7.5(e) upon adoption to correctly refer to the applicable fee as a remedial action permit termination fee, and to make it clear that the permit for the original block and lot is terminated, and new permits are obtained for each new lot (created by the subdivision) on which there is an engineering or institutional control.

194. COMMENT: N.J.A.C. 7:26C-7.6(c) states that the Department will automatically issue remedial action permits to persons responsible for conducting the remediation who do not submit applications in accordance with the promulgated timeframes. The Department should clarify how it will determine and identify who is the person responsible for conducting the remediation for the purpose of issuing remedial action permits. Is the permittee the owner of the property where the institutional and engineering control is located, the property tenant, or the discharger of the spill? (5, 8, 12, 15, and 17)

RESPONSE: Each person that meets the criteria in N.J.A.C. 7:26C-1.4(a) and (b) is a person responsible for conducting the remediation, and, thus, a permittee. The Department will also include on the remedial action permit it issues each "statutory permittee" as defined in N.J.A.C. 7:26C-1.3, Definitions.

195. COMMENT: The Department should clarify how it will require financial assurance from the person responsible for conducting the remediation when it automatically issues a remedial action permit or modified remedial action permit pursuant to N.J.A.C. 7:26C-7.6(c) and (d), as this is part of the remedial action permit application process. (5, 8, 12, 15, and 17)

196. COMMENT: Pursuant to N.J.A.C. 7:26C-7.6(c), the Department shall issue a remedial action permit if the person responsible for conducting the remediation does not timely apply for a remedial action permit pursuant to this section. This provision does not address posting of financial assurance and requirements for remedial action permit compliance. This provision should be amended. The Department may issue an order to the responsible party to undertake this activity and follow proper procedures in ARRCS. (15)

RESPONSE TO COMMENTS 195 AND 196: As a condition of the remedial action permit, the Department could require the permittees to submit, within a specific timeframe, an estimate, certified by an LSRP, of the costs to ensure the protectiveness of all engineering controls. The persons to whom the remedial action permit is issued will be required to comply with its terms;

compliance with a remedial action permit that the Department issues unilaterally is no different than compliance with any other remedial action permit.

197. COMMENT: The Department should clarify how it will address remedial action permit conditions that are not able to be satisfied (for example, a person responsible for conducting the remediation who did not realize he or she needed a remedial action permit, which includes monitoring requirements for ground water wells that may no longer exist). (5, 8, 12, and 17)

RESPONSE: Permittees are required to comply with the conditions of a remedial action permit issued unilaterally by the Department, just as they are with the conditions of any other remedial action permit. In the example given, for a case that had been closed with a no further action letter and a classification exception area, SRRA established that the property owner is required to apply for a remedial action permit. Once the permit is issued, the permittee is responsible for satisfying all requirements established in it, including conducting any ground water monitoring required to ensure that the remedy remains protective. Consequently, the permittee may need to install monitoring wells or use temporary well points to evaluate ground water conditions. Similarly, for remedial action permits required prior to an LSRP issuing a response action outcome, the LSRP should be aware that a remedial action permit and ground water monitoring are required. The Department expects that the LSRP would inform the person responsible for conducting the remediation of the need to obtain the remedial action

permit and that monitoring of ground water will be a requirement of the remedial action permit.

198. COMMENT: N.J.A.C. 7:26C-7.6(c) and (d) state that the Department will automatically issue remedial action permits and modifications to persons responsible for conducting the remediation who do not timely apply for a remedial action permit or remedial action permit modification. The Department should clarify the term "not timely." (5, 8, 12, 15, and 17)

RESPONSE: The proposed rule provided that the Department would issue a remedial action permit if the person responsible for conducting the remediation did not apply on or before the expiration of the timeframe provided in the rule. For clarity, the Department is modifying N.J.A.C. 7:26C-7.6(c) on adoption to remove "timely apply," and to specify that the Department will issue a remedial action permit or modified remedial action permit when the person responsible for conducting the remediation does not "submit an application" within the timeframes specified at either N.J.A.C. 7:26C-7.6, Remedial action permit application schedule, or N.J.A.C. 7:26C-7.12, Modification of specific requirements in a remedial action permit, as applicable.

199. COMMENT: What role does the LSRP and professional judgment play in the process under N.J.A.C. 7:26C-7.6(c) through (e), which provide for the Department's issuance of a new or modified remedial action permit? Is the person responsible for conducting the remediation

given an opportunity to address Department concerns before the Department action is taken? The Department should clarify the circumstances under which it will issue or modify a remedial action permit and the role of an LSRP in the process (either the current LSRP or the LSRP that approved the original permit). Under what circumstances (other than the biennial certification process) does the Department review the status/protectiveness of a remedial action? (3)

RESPONSE: The Department will issue a remedial action permit or modified permit when the person responsible for conducting the remediation has failed to apply for one pursuant to N.J.A.C. 7:26C-7.6, Remedial action permit application schedule, or N.J.A.C. 7:26C-7.12, Modification of specific requirements in a remedial action permit. The Department anticipates that this will only occur in situations when the person responsible for conducting the remediation has not retained an LSRP. If the person responsible for conducting the remediation retains an LSRP, then the Department anticipates that the person responsible for conducting the remediation will submit a permit application based on the LSRP's professional judgment. As set forth at N.J.A.C. 7:26C-7.6(a), the person responsible for conducting the remediation who was issued a final remediation document by the Department prior to May 7, 2012, was required to apply for a remedial action permit by May 7, 2014. Therefore, that person has already had more than four years to apply for a remedial action permit and has failed to do so.

200. COMMENT: N.J.A.C. 7:26C-7.6(e) requires that the permittee pay the applicable remedial action permit fee pursuant to N.J.A.C. 7:26C-4.6, Payment of remedial action permit fees, within 30 days after the Department issues a remedial action permit or modification. The Department should clarify how the permittee will remit payment (that is, complete/submit a form or pay an invoice issued by the Department). (5, 8, 12, and 17)

RESPONSE: The Department will bill the permittee the permit application fee, appropriate annual remedial action permit fees, and a remedial action protectiveness certification fee. The permittee will then remit payment to the Department of the Treasury in response to the invoice.

201. COMMENT: The Department should revise proposed N.J.A.C. 7:26C-7.8(d)2, which states that the permittee will "take all necessary action" to ensure the protectiveness of a remedial action before the due date of the next biennial certification. Timing could be an issue if a deficiency is discovered a short time before the biennial certification is due, especially if extensive corrective actions are needed. The Department should revise the timing for requirement to "take all necessary action" or identify extenuating circumstances that may qualify for a different implementation schedule. (3)

RESPONSE: As stated in the notice of proposal Summary at 49 N.J.R. 2069, the Department proposed amending N.J.A.C. 7:26C-7.8(d)2 to clarify that, if a permittee cannot certify to the Department that a deed notice or declaration of environmental restrictions, including all

engineering controls, is being properly maintained and that the soil remedial action continues to be protective of the public health and safety and the environment, then a permittee must take all necessary actions to safeguard that the remedial action is protective of public health and safety and the environment before the due date of the next required biennial certification. In reviewing this comment, the Department identified a potential issue with the use of the word "next." In situations where a biennial protectiveness certification is being prepared and the LSRP determines that the remedy is no longer protective, a person could interpret "next" to mean either the biennial protectiveness certification currently being prepared, or the one due subsequent to the one being prepared. In addition, the Department did not propose to amend the similar language at N.J.A.C. 7:26C-7.9, Specific conditions applicable to ground water remedial action permits, which would have created a discrepancy between these two portions of the rule. For these reasons, the Department has determined not to adopt the proposed amendments to N.J.A.C. 7:26C-7.8(d)2.

202. COMMENT: N.J.A.C. 7:26C-7.2(d) requires that the person responsible for conducting the remediation and the statutory permittee perform certain actions within 30 days after municipal subdivision approval of a property. The permittee may not be the current property owner and may not be involved in the decision to develop or subdivide the property. The Department should revise the timing requirement in N.J.A.C. 7:26C-7.2(d) to within 30 days of becoming aware of municipal approval of the subdivision of the site. (3)

RESPONSE: Permittees and statutory permittees have an obligation to maintain engineering or institutional controls and each permittee and statutory permittee must be aware of proposed changes that affect the engineering or institutional controls. Adopted N.J.A.C. 7:26C-7.13(c) requires a permittee and statutory permittee to terminate an existing remediation permit, and apply to the Department to obtain a new remediation permit within 30 days after municipal subdivision approval of the site. If there is a deed notice on the original parcel, adopted N.J.A.C. 7:26C-7.2(d) requires the person responsible for the remediation and the statutory permittee to, within 30 days after municipal subdivision approval, terminate existing deed notices, and file new deed notices for each subdivided parcel. Modifying the rule to require the deed notices to be terminated and replaced within 30 days after the person responsible learns of the subdivision approval could have the effect of extending the time period under which the subdivided parcels do not have recorded deed notices.

The Department recognizes that some permittees and statutory permittees may not become aware of the municipal subdivision at the same time. The Department is, therefore, modifying N.J.A.C. 7:26C-7.2(d) on adoption to state that either the person responsible for conducting the remediation or the statutory permittee (the definition of which includes the property owner) shall conduct the necessary actions in N.J.A.C. 7:26C-7.2(d)1 through 3.

Deed Notices and Classification Exception Areas

203. COMMENT: N.J.A.C. 7:26C-7.2(c) requires a person responsible for conducting the remediation who is not the property owner of the contaminated site to provide the property owner's written agreement to record the deed notice or provide notice in lieu of a deed notice. This is an overly burdensome, redundant, and costly requirement that does not appear to have a regulatory justification. A property owner is required to sign the deed notice before it can be recorded, and the owner's consent to the deed notice is documented by such signature; requiring preparing and execution of a separate written agreement demonstrating the owner's consent adds time and cost to an already burdensome process, not just on the part of the person responsible for conducting the remediation, but for the property owner as well. How a person responsible for conducting the remediation chooses to address this issue with a property owner should not be mandated by the Department, and the signature of the owner on the deed notice should be sufficient. The proposed change at N.J.A.C. 7:26C-7.2(c) should not be adopted. (5, 8, 12, and 17)

RESPONSE: When remediation is conducted on property not owned by the person responsible for conducting remediation, communication with the property owner will be required to obtain access to conduct remediation. While negotiating access, the person responsible for conducting remediation and the LSRP should also be communicating conceptual remedies to the property owner. When a potential remedy is a limited restricted or restricted use remedial action, the person responsible for conducting remediation must obtain the property owner's consent before proceeding with the remedy. Requiring the person responsible for conducting

the remediation to obtain the property owner's written consent ensures that the property owner understands the nature of the remediation, and the potential restrictions to which the property will be subject when the remediation is concluded.

204. COMMENT: There are concerns with N.J.A.C. 7:26C-7.2(c), which requires that the Department review and potentially comment on the written agreement stating that the property owner consents to record a deed notice on the property, which is a negotiated contract. In addition, such documents should not be available to the public via an Open Public Records Act request. The proposed changes should not be adopted. (5, 8, 12, and 17)

RESPONSE: The Department has no interest in receiving or reviewing a copy of the agreement between the remediating party and the property owner. Written concurrence can be in the form of a letter indicating the property will not be remediated to the unrestricted use standard and will be subject to an institutional control and engineering control (added as appropriate) with a signature block noting the acceptance of the limited restricted or restricted use remedial action by the property owner.

205. COMMENT: Proposed amended N.J.A.C. 7:26C-7.2(c)2, which allows notice in lieu of a deed notice, should not be adopted. The intent of the notice in lieu of a deed notice is to inform and advise the existing and subsequent landowners of the environmental conditions that exist on the property. The additional requirements to provide the property owner's

written agreement for a municipality in the form of a formal resolution, for a county in the form of formal resolution, and for a State or Federal government agency in the form of a signed written agreement by the head of the agency, for a notice in lieu of a deed notice is burdensome, onerous, and unnecessarily costly.

The additional requirements will cause additional delays (it could take months to receive a formal resolution from a municipal and/or county body) in the remedial action process, leading to potential missed regulatory and/or mandatory timeframes and ultimately may not result in approval by the regulatory agency. As a hypothetical situation, a person responsible for conducting the remediation conducts an in-situ remediation that takes several years and there are residual impacts beneath the intersection of a Federal highway and county road, and the decision is made to leave impacts in place under an institutional control. After pursuing the Federal and county governments for multiple years with no good faith approval, the person responsible for conducting the remediation must now re-start the remediation to remediate the impacts. This scenario would result in additional unnecessary costs and delays, and would likely result in the person responsible for conducting the remediation being non-compliant for timeframes and, thus, subject to direct oversight, fines, and other penalties. The proposed change should not be adopted, or the Department should provide a person responsible for conducting the remediation with a certain amount of time to dispute the proposed institutional control with a technical justification. (5, 8, 12, and 17)

206. COMMENT: N.J.A.C. 7:26C-7.2(c)2 requires a government-owner of property to indicate agreement to a deed notice by various formal actions. For a municipality or county, the written agreement is in the form of a formal resolution; and for a State or Federal governmental agency, the head of the agency or its designee must sign the written agreement. These government organizations can take a long time to provide the required acceptance and may impact timeframes. While waiting for approval, timeframes should be suspended. (15)

RESPONSE TO COMMENTS 205 and 206: It is essential for a person responsible for conducting the remediation who is not the owner of the contaminated site to obtain the agreement of the property owner if remediation of the site to an unrestricted use standard will not be achieved. The Department recognizes that obtaining a formal resolution from a governmental entity approving the implementation of institutional or engineering controls may require a presentation and vote at a town council meeting or a presentation at a Federal or State agency.

When remediation is conducted on property owned by a governmental entity, the person responsible for conducting the remediation will need to communicate with the governmental entity in order to obtain access to conduct remediation. While negotiating access, and even after access is obtained, the person responsible for conducting remediation and the LSRP should also be discussing the proposed remedial strategy with the property owner – in this case, the governmental entity. When a potential remedy is a limited restricted or restricted use remedial action, the person responsible for conducting remediation must obtain the governmental entity's consent before proceeding with the remedy.

Automatically suspending the remediation timeframes until the governmental entity acts does not further the Department's goal of protecting public health and safety and the environment. The timeframes are designed to ensure that the remediation proceeds appropriately. However, pursuant to N.J.A.C. 7:26E-5.8, Remedial action regulatory timeframes, the person responsible for conducting the remediation has the option to apply for a regulatory timeframe extension. Provided the person responsible for conducting the remediation meets the requirements at N.J.A.C. 7:26C-3.2, Regulatory timeframes, a regulatory timeframe extension up to the mandatory remediation timeframe shall be deemed to be approved by the Department. Pursuant to N.J.A.C. 7:26C-3.5, Extension of a mandatory or an expedited site specific remediation timeframe, the person responsible for conducting the remediation also has the option to apply for a mandatory time frame extension. For a mandatory timeframe extension, the Department would consider delays in obtaining a formal resolution, a valid reason for an extension, provided the extension request was timely filed, the resolution request allowed a reasonable time for the governmental entity to pass a resolution, and there has been ongoing follow-up to obtain the resolution.

207. COMMENT: The proposed amendment to N.J.A.C. 7:26C-7.2(c)i requires municipal consent in the form of a formal resolution prior to placing a deed notice on municipal property. Certain governmental agencies operate large facilities with multiple remediation projects underway upon land owned by various municipalities, but which are effectively owned and

operated by the governmental agencies under long-term leases. The requirement to obtain municipal approval is an undue burden that will delay remediation and result in unnecessary cost to taxpayers and toll payers. The Department should exempt governmental agencies with long-term leases from the requirement. (3)

RESPONSE: When a person responsible for conducting remediation proposes to remediate a contaminated site that the person does not own, to a standard other than the unrestricted use standard, it is irrelevant whether the property is owned by an individual or is occupied by a governmental entity under a long-term lease. Access is required from the property owner to conduct any remediation and communication will be necessary to gain approval to remediate to any standard other than an unrestricted use standard. Therefore, the Department does not believe there is a difference in obtaining a formal resolution for properties under a long-term lease versus properties not leased. Under the circumstances where governmental agencies are operating under long-term lease agreements, obtaining approval from the property owner should not be an undue burden.

208. COMMENT: N.J.A.C. 7:26C-7.2(d) requires the person responsible for conducting the remediation and the statutory permittee to terminate the existing deed notice, file for new deed notice, and file for a new remedial action permit within 30 days after municipal subdivision approval. Subdivisions are often for new construction and the new deed notice and remedial action permit cannot be filed until after new engineering controls are in place. The

30-day timeframe is onerous and will create the need for additional remedial action permit modifications (once at subdivision approval and again after construction is completed). The revisions/modifications to the deed notice and remedial action permit should be due at the time of the next Biennial Protectiveness Certification, similar to N.J.A.C. 7:26C-7.7(a)5. The timeframe should account for time needed to construct/repair engineering controls. The Department should allow for 90 days, unless an LSRP submits a remedial action workplan with timeframes to complete construction/modification of engineering controls. (3)

RESPONSE: As discussed above in the Response to Comments 193 and 202, when a tax block and lot that is the subject of a remedial action permit is subdivided, the permit and deed notice no longer accurately reflect the location for which the permit was obtained. N.J.A.C. 7:26C-7, Deed Notices, Ground Water Classification Exceptions Areas, and Remedial Action Permits, is designed to ensure that permits and deed notices accurately describe the real property that is subject to the permit. Subdivision of a tax lot may be the precursor for immediate redevelopment, or redevelopment may be delayed for years following the subdivision. Since timing for redevelopment varies widely, it is not appropriate to base timeframes on the possibility of an immediate redevelopment. Requiring the person responsible for conducting the remediation to apply for the new and modified remedial action permits within 30 days ensures that the Department and the public have the correct information necessary to be able to determine that a remedial action remains protective.

209. COMMENT: N.J.A.C. 7:26C-7.3(h) establishes a virtual ground water classification exception area for historically applied pesticides, similar to historic fill, and does not require a remedial action permit. This proposed change is supported. (5, 12, and 17)

210. COMMENT: The proposed change to Model Deed Notice Paragraph 7A (Alterations, Improvements, and Disturbances), which acknowledges that, where the disturbance is temporary and the site will be restored to the condition described in the exhibits, a soil remedial action permit modification is not required, and that temporary disturbances will be included in the next biennial certification, is supported. (5, 12, and 17)

RESPONSE TO COMMENTS 209 and 210: The Department acknowledges the commenters' support for the adopted rules.

211. COMMENT: Model Deed Notice Paragraph 7Aiii requires a soil remedial action permit modification prior to any permanent alteration to the property and requires submission of several documents within 30 days after the occurrence of the permanent alteration. The documents include: a Remedial Action Workplan; a Remedial Action Report and Termination of Deed Notice; and a revised Deed Notice and Remedial Action Permit Modification. The 30-day timeframe seems unrealistic, especially obtaining a copy of a recorded deed notice within 30 days. (3)

RESPONSE: An owner, operator, lessor, or lessee implementing a permanent alteration, improvement, or disturbance to areas restricted due to the presence of contamination at

concentrations that do not allow for unrestricted use should plan for the proposed actions in advance. Such planning includes the retention of an LSRP to develop a remedial action workplan or linear construction project notification and final report form, as applicable. As part of the planning process, the LSRP should identify the timelines necessary to comply with the proposed requirements. It should be possible to obtain a copy of a recorded deed notice within 30 days; however, if the person responsible for conducting the remediation promptly files the new deed notice, but does not receive a recorded copy within the time necessary to satisfy the rule's requirement, the person responsible for conducting the remediation should inform the Department within the 30-day timeframe of the deed notice filing date, and forward the copy of the recorded deed notice when it is received.

212. COMMENT: Model Deed Notice Paragraph 7Aiii contains contradictory language, in that proposed amended 7Aiii requires a soil remedial action permit modification be submitted prior to any permanent alteration, improvement, or disturbance, but Paragraph 7Aiii(C) requires the soil remedial action permit modification or termination form be submitted within 30 days after the permanent alteration, improvement, or disturbance has occurred. (3)

RESPONSE: The Department is modifying Paragraph 7Aiii of the Model Deed Notice upon adoption to remove the contradiction. The adopted paragraph identifies that a soil remedial action permit modification is required for, rather than prior to, any permanent alteration, improvement, or disturbance to a restricted use remedial action.

Final Remediation Documents

213. COMMENT: At N.J.A.C. 7:26C-6.2(a), is there any flexibility in well abandonment prior to submittal of an unrestricted response action outcome? A more appropriate time to abandon wells for the unrestricted response action outcome is when the Department has acknowledged the unrestricted response action outcome and converted the status of the project on Data Miner, the Department's online information reporting system. Until that time, the Department may review the report and require additional sampling. Sealing the wells earlier may result in unnecessary costs to re-install wells for further testing. (15)

214. COMMENT: The proposed amendment to N.J.A.C. 7:26C-6.2(a) regarding well decommissioning should not be adopted. There are circumstances when all or some wells may be needed post-response action outcome not related to a remedial action permit. The concern is that this may result in the premature closing of monitoring wells that are utilized as back-up wells that are not part of the ground water remedial action permit monitoring program. In addition, these back-up wells can be utilized to demonstrate that the ground water is protective in the event that an audit identifies otherwise. Another concern is when ground water contamination from an off-site source is detected in wells (and is properly documented through multiple lines of evidence); a response action outcome letter may be appropriate, but those same wells would presumably be needed by the entity responsible for investigating the source and nature of the off-site contamination. Also, this change will cause further delay in property

transactions that are dependent upon the issuance of a response action outcome. The LSRP should be allowed to properly decommission monitoring wells that are no longer used for remediation after the three-year audit period of the response action outcome, or Appendix D should be modified to include language to clarify a third option: wells not abandoned and not associated with a remedial action permit. (5, 12, and 17)

RESPONSE TO COMMENTS 213 AND 214: Pursuant to the Well Construction and Maintenance; Sealing of Abandoned Wells rules, N.J.A.C. 7:9D-1.5, Definitions, an "abandoned well" includes any well that "no longer serves its intended use as demonstrated by the permit issued for its construction." Pursuant to N.J.A.C. 7:9D-3.1(a)1, the Department may order the decommissioning of any well that is abandoned. The response action outcome is valid when the LSRP issues it to the person responsible for conducting the remediation. The presumption is that the remediation is complete, and, therefore, there is no need for wells used as part of the remediation to remain open. Additionally, once the response action outcome is issued, the Department no longer has a means of ensuring that the wells are properly decommissioned.

If the person responsible for conducting the remediation believes that a monitoring well needs to remain open and be included as part of a ground water monitoring program required as part of a remedial action permit, then the person responsible for conducting the remediation should include that well in the ground water monitoring plan.

If someone other than the person responsible for conducting the remediation wants to continue using the well, then a new well permit will be required. For example, the owner of

property A is remediating a discharge on property A. During that remediation, a well is installed on property A, which demonstrates that a separate discharge is coming from property B. Before property A can be issued a response action outcome for the discharge on property A, all wells must be decommissioned, including that well that demonstrates the separate discharge from property B. If the owner of property B wants to continue using that well as part of a remediation for property B, then the owner of property A is required to apply for a new well permit from the Department, which states that the well will be used for the remediation of property B.

The Department acknowledges that decommissioning all wells used in the remediation is another step to complete. However, it is the responsibility of the person responsible for conducting the remediation and the LSRP to factor the need to decommission wells into the schedule. Proper decommissioning of all wells is an important part of completing the remediation, as open wells continue to act as conduits for contamination to impact ground water. The Department is not modifying the rule on adoption.

215. COMMENT: Proposed N.J.A.C. 7:26C-6.2(a)4 requires that all wells no longer used for remediation be properly decommissioned or otherwise accounted for pursuant to N.J.A.C. 7:9D, Well Construction and Maintenance; Sealing of Abandoned Wells, before a response action outcome is issued. The Department should clarify the intent of the phrase “all wells no longer used for remediation.” (5, 11, and 12)

RESPONSE: "All wells" refers to all wells that were permitted by the Department and installed for the purposes of conducting the remediation. For example, if a well was permitted by the Department and installed for the purposes of delineating or monitoring ground water contamination, that well was installed for the purposes of conducting the remediation. If that well is not being monitored in accordance with a remedial action permit, then that well is no longer being used for remediation and is required to be properly decommissioned before the LSRP issues the response action outcome to the person responsible for conducting the remediation. However, if, for example, an existing permitted potable well was sampled as part of the remediation, this well would not need to be decommissioned prior to the LSRP issuing the response action outcome to the person responsible for conducting the remediation, as its intended permitted use was not for remediation, but for drinking water purposes.

216. COMMENT: The Department formalizes eight additional notices for the Model Response Action Outcome Document. These proposed changes are supported. The notices from the Department's Commingled Plume Technical Guidance Document (dated April 24, 2017) should also be added to N.J.A.C. 7:26C, Appendix D – Model Response Action Outcome. (5, 12, and 17)

RESPONSE: The Department acknowledges the commenters' support for the adopted rule. If the Department determines that it is appropriate to amend N.J.A.C. 7:26C, Appendix D – Model Response Action Outcome to add the notices in the Commingled Plume Technical Guidance Document, it will do so in a subsequent rulemaking.

Penalties and Violations

217. COMMENT: N.J.A.C. 7:26C-9.5(b) states that each specified violation of a mandatory timeframe is subject to a $20,000 penalty. The Department should clarify whether this only applies to sites that are subject to direct oversight. (3)

218. COMMENT: The Department should clarify how timeframes specified in N.J.A.C. 7:26C-6.4(c) might result in accelerated enforcement action and penalties pursuant to N.J.A.C. 7:26C-9.5(b). (3)

219. COMMENT: N.J.A.C. 7:26C-9.5(b) provides a summary of rule violations and corresponding penalties, which includes new penalties for failure to complete the remedial investigation within the statutory/mandatory timeframe ($20,000), failure to confirm protectiveness of a remedy ($20,000), failure to hire an LSRP to conduct remediation ($15,000), and failure to conduct additional remediation after a response action outcome has been invalidated/withdrawn or a no further action letter has been rescinded ($20,000). These penalties are unjustified and contrary to both the Governor's Executive Order No. 2 and the efforts of the Red Tape Review Commission, which strive to reduce the burdens on industry. In addition, these penalties will apply equally to complex, multi-media investigations by large companies with consulting expertise, as well as to small "mom and pop" operations or heirs of such companies attempting to address legacy issues associated with historic family-owned businesses.

The proposed penalties fail to distinguish between smaller scale remediation sites that seek to address contamination problems and more complex investigations by consultants with larger available technical expertise. Moreover, imposing onerous penalties for administrative related violations, such as the failure to retain a replacement LSRP within 48 hours (as proposed) will not promote the ultimate goal of fostering completion of remediation of contaminated sites, and, rather, will act as an obstacle to meeting such mandated statutory goals by removing funds and resources that would otherwise be available for remediation.

Since the Department has no discretion to deviate from the amount or the issuance of the penalty, these penalties should not be adopted. (5, 11, 12, and 17)

RESPONSE TO COMMENTS 217, 218, AND 219: The purpose of penalties is to deter non-compliance. Remediating parties that are liable under any one of the various State statutes governing remediation must understand that there are consequences for failing to comply. LSRPs are responsible for communicating these consequences to their clients under certain scenarios further described in the Regulations of the New Jersey Site Remediation Professional Licensing Board, N.J.A.C. 7:26I, with the intent to encourage their clients to remain in full compliance, including conducting the remediation in a timely manner. N.J.A.C. 7:26C-9.5(b) provides that resource to LSRPs, which facilitates this communication.

The penalties listed at N.J.A.C. 7:26C-9.5(b) do not represent burdens on industry, provided industry carries out its obligations to remediate sites in compliance with the law and the implementing rules. Adoption of these penalties is consistent with N.J.S.A. 13:1D-125 et

seq. The Department would prefer that a person responsible for remediation use its funds to comply with the remediation requirements and clean a contaminated site, rather than incur penalties for non-compliance. This preference, however, will not prevent the Department from issuing and collecting penalties and using other enforcement tools to encourage persons responsible for remediation to return to compliance.

The Department's rules do consider the degree of site complexity by allowing additional time to extend remediation timeframes for sites involving multi-media and various complexity factors. In addition, extensions can be requested by the person responsible for conducting remediation pursuant to N.J.A.C. 7:26C-3, Remediation Timeframes and Extension Requests, when additional time is necessary to carry out their remedial obligations, which helps avoid non-compliance and penalty exposure. The impacts of contamination on public health and the environment do not differ based on whether the site is owned by a family business or a large corporation. For example, sites that contribute to immediate environmental concern conditions, whether owned by a "mom and pop" or a multi-national corporation, must apply the same obligation to remediate those conditions expeditiously.

The violations at N.J.A.C. 7:26C-9.5(b) related to the timeframes described at N.J.A.C. 7:26C-3.3(a) and (b) pertain to sites that are in direct oversight based on missing either a statutory timeframe established at N.J.S.A. 58:10C-27a(3) or a mandatory timeframe established at N.J.A.C. 7:26C-3.3, Statutory and mandatory remediation timeframes. To be

clear, a consequence of missing either a statutory timeframe or a mandatory timeframe is direct oversight.

Although the Department is not adopting proposed new N.J.A.C. 7:26C-6.4(c), in general, any missed requirement or timeframe triggers a violation for which a penalty can be assessed.

Adjudicatory Hearings

220. COMMENT: Proposed new N.J.A.C. 7:26C-9.10, Adjudicatory hearings, would establish new procedures for adjudicatory hearings. The proposed timeframe of only 20 days from receipt of the document being contested for a hearing request is a very short timeframe to obtain all the relevant information pertaining to that document and, therefore, should be increased. (5, 11, 12, 15, and 17)

221. COMMENT: Proposed new N.J.A.C. 7:26C-9.10(b) violates due process rights and has the "effect of an admission," as provided where:

- "A general denial of some or all of the findings shall have the effect of an admission or each finding generally denied" at sub-subsection (b)3ii(1);
- "Any failure to provide a factual and legal basis for a denial shall have the effect of an admission of the finding" at sub-subsection (b)3ii(2);
- "A denial that does not meet the substance of the finding denied shall have the effect of an admission of the finding" at sub-subsection (b)3ii(3); and

- "If a person fails to either admit or deny any specific finding or portion of any finding, this shall have the effect of an admission of that finding" at subsection (b)3iii;

There are also concerns with the proposed requirement that "all such compliance" be demonstrated to the Department when the person claims to have complied with some of the applicable requirements.

The Department should confirm whether a withdrawal of a response action outcome also entitles someone to request an adjudicatory hearing. Currently, only invalidation of a response action outcome is included on the list. (5, 11, 12, and 17)

RESPONSE TO COMMENTS 220 AND 221: The requirement to request a hearing within 20 calendar days is established in the site remediation statutes. See the Spill Act at N.J.S.A. 58:10-23.11u.c., Industrial Site Recovery Act at N.J.S.A. 13:1K-13.1b, and the Water Pollution Control Act at N.J.S.A. 58:10A-10d(2).

The purpose of providing an alleged violator the right to a hearing is to afford that person due process. The adopted rule provides the alleged violator the opportunity to be heard, but also establishes how the Department will interpret a response that does not meet the standard established in the rule.

The Department prepares findings in its enforcement actions that are focused and specific to law or rule. The Department's experience has been that, far too often, the response to an enforcement action finding is inadequate. If the alleged violator intends to deny such a finding, the response needs to include facts, a legal basis for the alleged violator's position, and

supporting documentation. Otherwise, the Department cannot evaluate the alleged violator's position. Moreover, a complete and specific response to the findings in the enforcement document can save the alleged violator and the Department both time and resources. If the alleged violator provides complete information in the adjudicatory hearing request, the Department can better understand the alleged violator's denial, which could result in the Department rescinding or modifying the enforcement action, or the parties reaching an early settlement. Further, when the alleged violator responds fully, truthfully, and completely to the findings in the enforcement action, the administrative law judge who conducts the hearing (if any) has a more complete factual record at the start of the case.

The requirements of N.J.A.C. 7:26C-9.10(b)3 and 4 mirror the requirements for answering a complaint in the New Jersey Superior Court. For example, New Jersey Court Rule *R.* 4:5-3 states that the person answering shall state his or her "defenses to each claim asserted" and shall "admit or deny the allegations upon which the adversary relies." The person answering "may not generally deny all allegations but shall make the denials as specific denials of designated allegations or paragraphs." Moreover, all denials must "fairly meet the substance of the allegations denied." Under *R.* 4:5-5, all allegations in a complaint except the amount of damages "are admitted if not denied in the answer thereto." The Department, therefore, disagrees with the commenters that the requirement to provide specific denials violates due process.

The withdrawal of a response action outcome does not entitle a person to an adjudicatory hearing. The withdrawal of a response action outcome is not an action taken by the Department, but is rather an action taken by the retained LSRP. Only the retained LSRP that issued the response action outcome can withdraw it.

Direct Oversight

222. COMMENT: The Department should clarify the proposed requirement at N.J.A.C. 7:26C-4.7(a)4 that the person responsible for conducting the remediation shall pay Department oversight costs when the person responsible incurred oversight costs prior to May 7, 2009, since annual remediation fees have been applicable since 2012. (3)

RESPONSE: N.J.A.C. 7:26C-4.7(a)4 applies only to those situations where there are outstanding oversight costs incurred prior to May 7, 2009. Payment of oversight costs incurred on or after May 7, 2009, is covered by the other provisions of N.J.A.C. 7:26C-4.7(a).

223. COMMENT: If the Department's intent is taking over the remediation in the case of compulsory direct oversight, what is the purpose of having an LSRP? Especially since the LSRP has no authority to perform the remediation. If the responsible party in compulsory direct oversight chooses not to hire or retain an LSRP for the remediation, then the Department should prepare an agreement or consent order that specifically lists and states what the

responsible party needs to perform and/or complete to satisfy the Department's intent in compulsory direct oversight. (15)

RESPONSE: The Brownfield Act at N.J.S.A. 58:10B-1.3.a clearly establishes an affirmative obligation to remediate, and N.J.S.A. 58:10B-1.3.b clearly defines when an LSRP must be retained and by whom. A person subject to N.J.S.A. 58:10B-1.3 must retain an LSRP, regardless of whether the site is subject to direct Department oversight. The requirements for direct oversight are established by SRRA at N.J.S.A. 58:10C-27.c. SRRA does not exempt persons who are in direct oversight from the requirement to obtain an LSRP. A person in direct oversight, whether that oversight is compulsory or discretionary, must retain an LSRP that provides professional services in accordance with SRRA at N.J.S.A. 58:10C-16, and the Regulations of the New Jersey Site Remediation Professional Licensing Board, N.J.A.C. 7:26I. The LSRP conducts/oversees the remediation, but in direct oversight the work of the LSRP is to be submitted simultaneously to the Department and the person responsible for conducting the remediation. The Department reviews and approves each submission, and selects the remedial action. For a site subject to direct oversight because of non-compliance, the person responsible for conducting the remediation loses the authority to make remedial decisions, and the Department closely reviews the work of the LSRP.

224. COMMENT: As stated in N.J.A.C. 7:26C-14.2(b)1, if a site is subject to direct oversight, the person responsible for conducting the remediation is being required to hire an LSRP within

14 days after the applicable event in N.J.A.C. 7:26C-14.2(a). This contradicts the requirement that the person responsible for conducting the remediation must hire an LSRP within 45 days. The Department would still have the ability to order that the person responsible for conducting the remediation hire an LSRP, and could do so in an order if that time period has expired. The proposed rule should be changed to reflect the language at N.J.A.C. 7:26C-2.3(a)2. (5, 12, 15, and 17)

225. COMMENT: In N.J.A.C. 7:26C-14.2(b)2i through v, based on going into direct oversight, various items need to be completed within 90 days (that is, remediation cost review, receptor evaluation, summary of all data, and schedule with dates listing when the response action outcome is to be submitted). The 90-day timeframe is onerous and may be difficult to comply with in complex cases. Consider an extension of the timeframe, or identify circumstances under which a site is eligible for an extension. (3)

RESPONSE TO COMMENTS 224 AND 225: The requirement to retain an LSRP within 14 days pursuant to N.J.A.C. 7:26C-14.2(b)1, if one has not already been retained, does not contradict N.J.A.C. 7:26C-2.3(a)2. N.J.A.C. 7:26C-14.2(b)1 is a new requirement applicable to a person responsible for conducting the remediation of a site that is in direct oversight. Because the site is in direct oversight, the timeframe to retain an LSRP found at N.J.A.C. 7:26C-2.3(a)2 does not apply.

Once in direct oversight, the person responsible for conducting the remediation has the obligation to comply with N.J.A.C. 7:26C-14.2(b)2 within 90 days. It should be noted that the

adopted rule increases from the previous rule the timeframe to submit a public participation plan from 30 days to 90 days, and the timeframe to submit an initial remediation cost review from 60 days to 90 days.

The timeframes in N.J.A.C. 7:26C-14, Direct Oversight, cannot be extended, unlike regulatory and mandatory remediation timeframes. The purpose of direct oversight is to ensure that the remediation is finally completed. The site is in direct oversight because the person responsible for conducting the remediation has demonstrated non-compliance; therefore, requiring strict adherence to the timeframe set forth at N.J.A.C. 7:26C-14.2(b)2 is appropriate.

226. COMMENT: N.J.A.C. 7:26C-14.2(b)2v requires that a direct oversight remediation summary report be submitted within 90 days of a site becoming subject to direct Department oversight. This requirement is burdensome, onerous, and redundant since all the same information is currently required in the case inventory document. The proposed change at N.J.A.C. 7:26C-14.2(b)2v should not be adopted. (5, 12, and 17)

RESPONSE: The direct oversight summary report required in N.J.A.C. 7:26C-14.2(b)2v may contain some of the same information found in the case inventory document; however, the case inventory document contains no more than 4,000 characters (the limitation of the electronic form), and is intended to be a concise document that does not include a complete history of the site. The direct oversight summary report is usually longer, and must include a

summary of all data and information concerning remediation conducted at the site as of the date the site became subject to direct oversight. This report will also include a proposed schedule for future work. This report must provide enough information to allow a Department case manager to fully understand and direct the remediation such that the submission can be reviewed and approved. It is in the best interest of the person responsible for conducting the remediation to ensure that the LSRP provides enough information in the report to allow the Department to approve disbursements from the direct oversight remediation trust fund.

227. COMMENT: The proposed changes at N.J.A.C. 7:26C-14.4(a), which offer relief of certain direct oversight requirements, are supported. The Department should develop a direct oversight “off-ramp” mechanism for sites when the person responsible for conducting the remediation comes back into full compliance. This mechanism would place such sites back under LSRP oversight, which would free the Department’s limited resources to address sites that are still in need of direct oversight or other regulatory options to ensure their prompt remediation and return to productive use. (5, 12, and 17)

228. COMMENT: At N.J.A.C. 7:26C-14.4(a), use of the word "may" is not the same as the word "shall" with respect to the lessening of the direct oversight requirements. The language should be clear that when the person responsible for conducting the remediation achieves compliance with the cause of the direct oversight, the Department shall, without the words "in its sole discretion," dismiss direct oversight. (15)

RESPONSE TO COMMENTS 227 AND 228: The Department acknowledges the commenters' support for the proposed amendment. The Department may, at its sole discretion, adjust the direct oversight requirements when the person responsible for the remediation meets the requirements of the direct oversight rules. SRRA does not provide a mechanism for a site to be fully released from direct oversight; the site must remain in direct oversight until a final response action outcome is issued for the full scope of remediation.

Cost Recovery

229. COMMENT: The Department should clarify to which sites the requirements at N.J.A.C. 7:26C-9.12, Procedures for assessment, attainment, and settlement of assessment of cleanup and removal costs in notices of administrative assessment of State costs, apply. (3)

RESPONSE: The Department can assess State costs whenever the Department incurs "cleanup and removal costs," as defined pursuant to the Spill Act at N.J.S.A. 58:10B-23.11b. The requirements of N.J.A.C. 7:26C-9.12, Procedures for assessment, attainment, and settlement of assessment of cleanup and removal costs in notices of administrative assessment of State costs, apply to any site at which the Department has expended State funds for the remediation of a discharge, and for preparing and successfully enforcing a civil administrative penalty.

Fees

230. COMMENT: Proposed N.J.A.C. 7:26C-4.2(b)4ii removes the Category 2 fee exception for sites at which the contaminated areas of concern are limited to a single regulated heating oil tank system. The proposed amendment should not be adopted. The Department agreed to the exception for the single regulated heating oil tank in the very first drafts of this rule. This exception was not an accidental insertion, but rather is based on the absolute fact that remediation of a single regulated heating oil tank, in the vast majority of cases, represents a single area of concern and fully comports to a Category 1 site, as defined.

The proposed amendment to N.J.A.C. 7:26C-4.2(b)4i, Category 1 site, which is expanded to include remediation at a site "to be used as a child care" further supports this position. The Department is well aware child care center sites can pose any number of areas of concern and the failure to fully address the numerous areas of concern that may be identified can result in serious consequences. It makes little sense that a site on which many areas of concern can be identified during the required site investigation can remain a Category 1 site, yet a site with a single regulated heating oil tank and a single area of concern, and for which an entire site response action outcome is not sought, is somehow arbitrarily defined to be a Category 2 site. (6 and 7)

RESPONSE: The decision to define "a single regulated heating oil tank system" as a Category 2 was not arbitrary. As explained in the notice of proposal Summary at 49 N.J.R. 2074, the Department treats these regulated tanks the same as all other regulated tanks for purposes of assigning a category; therefore, they are assigned Category 2.

231. COMMENT: The Department should provide a timeframe for when the Annual Site Remediation Reform Act Program Fee Calculation Report is posted to its website, or a link to where the most recent report can be found. (3)

RESPONSE: The Annual Site Remediation Reform Act Program Fee Calculation Report is usually published in the New Jersey Register in early to mid-June of each year, and is applicable to the next fiscal year (which runs from July 1 to June 30; for example, the report published in June 2018, will apply to Fiscal Year 2019, which runs from July 1, 2018 to June 30, 2019). As stated at N.J.A.C. 7:26C-4.2(c), the Annual Site Remediation Reform Act Program Fee Calculation Report is available on the Department website at www.nj.gov/dep/srp/fees.

232. COMMENT: The proposed amendment at N.J.A.C. 7:26C-4.3(j), that a person responsible for conducting the remediation does not have to pay a contaminated media fee after the preliminary assessment and site investigation confirm that the sole source of contamination is historic fill, is supported. (5, 11, 12, and 17)

RESPONSE: The Department acknowledges the commenters' support for the adopted rules.

Remediation Funding Sources and Financial Assurance

233. COMMENT: The inclusion of the International Standards on Auditing as a recognized standard for self-guarantee requirements at N.J.A.C. 7:26C-5.8(a)4 is supported. Self-

guarantees should be available as a source of financial assurance at N.J.A.C. 7:26C-5.8(a). Excluding self-guarantees only creates unnecessary expenses for persons responsible for conducting remediation and increases costs, without any direct benefit to protecting the environment or public health. For some companies, this results in hundreds of thousands of dollars in additional costs that will not help remediate sites more quickly, but merely benefit financial institutions. (5, 11, 12, and 17)

RESPONSE: The Department acknowledges the commenters' support for the adopted amendment.

The Department recognizes that costs are associated with using financial mechanisms other than the self-guarantee. However, a predictable long-term, stable source of funding must be available to the Department over the life of the engineering control permit. In the event that the person responsible for conducting the remediation fails to meet the long-term obligations pursuant to the permit, the Department must have ready access to funds in order to pay for the operation, maintenance, and inspection of the remedy; this is not possible with a self-guarantee.

234. COMMENT: The proposed amendment to N.J.A.C. 7:26C-5.11(e)2iii, which provides that financial assurance will be returned when a modified remedial action permit reflects the LSRP's determination that a remedy is protective of the environment and public health without the use of an engineering control, is supported. (5, 11, 12, and 17)

RESPONSE: The Department acknowledges the commenters' support for the adopted rules.

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

General Information

235. COMMENT: New N.J.A.C. 7:26E-1.3(b) does not allow an LSRP to remediate a heating oil tank system using his or her professional judgment. There are instances where an LSRP is, and should be, required to remediate a discharge from a heating oil tank system, including as part of a site-wide investigation. This language precludes a number of required instances. This proposed language should be modified to allow an LSRP to use the Technical Requirements. (15)

RESPONSE: An amendment to N.J.A.C. 7:26E-1.3(b) to specifically exempt an LSRP from the Heating Oil Tank System Remediation Rules requirement, and allow the remediation of a heating oil tank system to proceed consistent with the Technical Requirements, is not necessary. The Heating Oil Tank System Remediation Rules at N.J.A.C. 7:26F-1.10, Variance from the requirements of this chapter, allows for variances from the requirements of the Heating Oil Tank System Remediation Rules, thereby allowing an LSRP to exercise his or her professional judgment in remediating discharges from a heating oil tank system. In addition, the Department is adding a new N.J.A.C. 7:26F-1.11, Use of Department technical guidance documents, on adoption, as discussed in the Response to Comment 95, to provide for deviation

from Department technical guidance, further allowing an LSRP to exercise his or her professional judgment.

The Department recognizes there are situations where it makes sense for an LSRP to follow the Technical Requirements when remediating a heating oil tank system. The Heating Oil Tank System Remediation Rules address these situations at N.J.A.C. 7:26F-1.2(d)2 (sites where all areas of concern, including a heating oil tank system, are being remediated) and 3 (sites that are being remediated pursuant to the ISRA Rules, N.J.A.C. 7:26B) and 3.7(b) (sites where a limited restricted or restricted use soil remedial action is being implemented).

236. COMMENT: The proposed amendment to N.J.A.C. 7:26E-1.6(b)6ii replaces practical quantitation level with reporting limit. This proposed amendment contravenes other rule requirements, such as the Ground Water Quality Standards rules, N.J.A.C. 7:9C, that are based on practical quantitation levels. The Department should allow reporting at practical quantitation levels or method detection limits at the discretion of the LSRP, if the project data quality objectives require. (5, 12, 15, and 17)

237. COMMENT: At N.J.A.C. 7:26E-1.6(b)6ii, the proposed amendment to require notation on data summary tables where reporting limits exceed remediation standards is reasonable and is clearly applicable to soil and ground water in upland areas. However, deleting the text regarding use of the method detection limit or practical quantitation limit may unnecessarily reduce flexibility for presentation of data supporting other types of investigations, such as

ecological evaluations, surface water and sediment investigations, and risk assessment. The latter types of investigations typically involve comparison of data to screening criteria and surface water standards that are often well below the reporting limits and practical quantitation levels attainable by even the most current analytical methods and technology.

The Department should consider including the proposed text regarding the reporting limit without deleting the existing text to facilitate the data presentation for other types of investigations as noted above. (3)

RESPONSE TO COMMENTS 236 AND 237: Practical quantitation levels are established using data gathered from multiple laboratories and multiple published sources of analytical methods where available. As a functional effect of statistics, not all laboratories will be able to meet the published practical quantitation levels in all situations. Having laboratories list practical quantitation levels to demonstrate their analytical sensitivity has the potential to cause a level of doubt regarding the values reported and used to demonstrate compliance with applicable standards, especially in those instances of low analytical sensitivity.

The Department in the Remediation Standards, N.J.A.C. 7:26D, has used practical quantitation levels as standards for contaminants in soil and ground water in those instances where a health-based criterion for a given contaminant is less than the sensitivity of readily available analytical methods.

The Department has determined that the most appropriate mechanism by which a laboratory can demonstrate that analytical sensitivity has been attained, specifically regarding

meeting (or not meeting) an applicable standard, is to provide empirical evidence. That evidence is the reporting limit. Simply stated, in instances where the lowest level of analytical sensitivity is required, one could view a reporting limit as an empirically determined laboratory specific practical quantitation level.

It should be noted that the majority of data being submitted to and reviewed by the Department for ecological evaluations, surface water and sediment investigations, and risk assessments now includes the use of reporting limits as proof of analytical capability regarding the attainment of an applicable standard. When practical quantitation level data are included in reports, they are usually used as the practical quantitation levels referenced in ground water or surface water standards and not the analytical level attainable by a laboratory. As such, practical quantitation levels may be used in submissions to the Department, but not as proof of analytical sensitivity, or lack thereof, as is the Department's intent in establishing this requirement.

Reporting to a method detection limit should rarely if ever be used to demonstrate analytical sensitivity. Method detection limits are theoretical values that are statistically determined and are not always reflective of actual analytical conditions and analytical sensitivity regarding actual environmental samples. When used in conjunction with a reporting limit (or a practical quantitation level) a method detection limit provides usability information as to whether reported values at the low end of analytical sensitivity are reliable and usable.

Accordingly, the Department agrees that reporting method detection limits is of value. The Department is modifying the rule on adoption to retain the requirement at N.J.A.C. 7:26E-1.6(b)6ii to identify each contaminant in any sample for which there is a method detection limit that exceeds a remediation standard.

238. COMMENT: At N.J.A.C. 7:26E-1.6(b)8iii, the term "water bearing zone" is not defined. The definition of "aquifer" in the Ground Water Quality Standards at N.J.A.C. 7:9C-1.4 is sufficient. Perched waters, which are not defined as an aquifer, are localized, and it is not feasible to construct reliable contour maps for such. Delete the inserted words "water bearing zone." (15)

RESPONSE: While it is true that many perched waters are localized, there are also situations in which the perched water zone is thick and laterally extensive enough for the ground water to migrate, possibly causing receptor concerns. In addition, most perched zones are connected in some way to the more regional aquifer. In these situations, it is important to understand those conditions and determine where the ground water is flowing. If the perched zone is very localized, the LSRP should report that as such. Further information on evaluating perched water zones can be found in the Department's Ground Water Technical Guidance: Site Investigation, Remedial Investigation, Remedial Action Performance Monitoring, available from the Department's website at www.nj.gov/dep/srp/guidance.

239. COMMENT: Regarding the definition of a potable water “immediate environmental concern” found at N.J.A.C. 7:26E-1.8, Definitions, the addition of the words "potable well or irrigation" well is not necessary, and would be contradictory because there are production wells used to bottle water or beverages not regulated by the Safe Drinking Water Act, 42 U.S.C. § 300f et seq., (that is, for potable purposes) that would not be included. The proposed addition of "potable well or irrigation" (well) should be deleted. (15)

RESPONSE: The Department proposed the amendment to be consistent with N.J.A.C. 7:26E-1.14(b), and to clarify that irrigation wells that are or may be used for potable purposes are considered potable wells. In the absence of the amendment, the regulated community could be confused whether an irrigation well could be considered a potable well. The same confusion does not apply to production wells from which water is bottled or used in the production of beverages. The Department is not deleting the phrase “potable or irrigation” from the definition of “immediate environmental concern.”

240. COMMENT: In the definition of a potable water “immediate environmental concern” at N.J.A.C. 7:26E-1.8, Definitions, the broader cross-reference to the "minimum ground water remediation standards" does not address the contradictions between the Class IIA ground water quality standards and the Department’s Safe Drinking Water Act maximum contaminant levels. The language should be revised to state the higher of the Ground Water Quality

Standards and the Safe Drinking Water Act maximum contaminant levels, where applicable.

(15)

RESPONSE: The amendment at N.J.A.C. 7:26E-1.8, Definitions, changes the definition of "immediate environmental concern" from referencing "Class II ground water quality standards" to "ground water remediation standards." SRRA defines an immediate environmental concern as confirmed contamination in a well used for potable purposes at a concentration at or above a ground water remediation standard. Further, as stated in the Remediation Standards at N.J.A.C. 7:26D-2.2(a)1, the ground water remediation standards are the ground water quality standards. This amendment, therefore, more accurately reflects the use of remediation standards to define an "immediate environmental concern." The Department recognizes that for a limited number of contaminants there are ground water remediation standards and drinking water maximum contaminant levels that are not the same. However, as immediate environmental concern cases fall under the purview of site remediation, the ground water remediation standards are the most appropriate standards to define an immediate environmental concern condition.

241. COMMENT: The Department should not delete or change the definition of "'practical quantitation level' or 'PQL'" in the Technical Requirements, N.J.A.C. 7:26E. "'Practical quantitation level' or 'PQL'" is a valid quantitative limit that is used by the Department to establish soil and ground water remediation standards. In both cases, the applicable

remediation standards are the higher of the practical quantitation level or the health-based criteria determined for a substance. Practical quantitation levels are fundamental to the Remediation Standards, N.J.A.C. 7:26D, which define the terms "'practical quantitation level' or 'PQL'" by reference to the definition of practical quantitation level in the Technical Requirements, N.J.A.C. 7:26E-1.8, Definitions. Thus, removing the definition of "'practical quantitation level' or 'PQL'" will effectively delete the definition from the Remediation Standards regulation, which would appear to be a negative, unintended consequence. (3) RESPONSE: In order to prevent a conflict with the Remediation Standards, N.J.A.C. 7:26D, the Department is not adopting the proposed amendment to delete the definition of "'practical quantitation level' or 'PQL'" from N.J.A.C. 7:26E-1.8, Definitions.

242. COMMENT: The proposed amendments to the definition of "reporting limit" in the Technical Requirements at N.J.A.C. 7:26E-1.8, Definitions, should not be adopted. The proposed changes are overly detailed and unnecessary to meet the objective of the Technical Requirements and proposed revisions to the use of reporting limits in other parts of the proposed rule. The proposed definition is also incomplete and overly complicated for the required regulatory objective, and, therefore, likely to cause confusion and/or unintended consequences and additional costs for the regulated community, as it leaves out analytical parameters that are neither organic nor inorganic (for example, specific conductance, suspended solids, etc.). Any clarifications or nuances to the definition of "reporting limit"

should be made in the appropriate analytical methods technical guidance where it can be vetted for technical accuracy, completeness, and functionality at the appropriate technical level by a proper stakeholder process. Note that the changes to the definition proposed by the Department are already implemented in the Department's analytical methods technical guidance. Therefore, the proposed change is redundant; the current definition is in no way contradictory to the Department's analytical methods guidance and the detail is unnecessary at the regulatory level. (3)

RESPONSE: The prior definition of "reporting limit" was general and, in the case of inorganics/metals, not appropriate. The adopted definition of "reporting limit" at N.J.A.C. 7:26E-1.8, Definitions, captures its intended purpose and use, which is to empirically demonstrate analytical sensitivity on a laboratory specific basis for those analytical procedures (predominately routinely performed organic and inorganic methods) that generate data that are used to compare the results to a numerical standard. For a contaminant that has no numerical standard, a standard that is a range, or for which analytical sensitivity is not an issue, calculation and reporting of a reporting limit would not be necessary. For enforcement purposes, the Department is mandating its use by codifying it in the Technical Requirements.

243. COMMENT: N.J.A.C. 7:26E-1.11(a)3i(4) and (5) should not be amended to allow subsurface evaluators to submit documents to the Department for an immediate environmental concern. The subsurface evaluator certification process is not sufficient to allow

for the use of professional judgment needed to determine if an immediate environmental concern exists, and the steps that are necessary to protect human health. The proposed insertion of the subsurface evaluator should be deleted. (15)

RESPONSE: The Heating Oil Tank System Remediation Rules, N.J.A.C. 7:26F, contain prescriptive requirements concerning ground water receptor evaluation at N.J.A.C. 7:26F-6.2, Receptor evaluation – ground water, and vapor intrusion receptor evaluation at N.J.A.C. 7:26F-6.3, Receptor evaluation – vapor intrusion. A certified subsurface evaluator should be able to follow these prescriptive requirements. N.J.A.C. 7:26F directs the owner to follow the immediate environmental concern requirements in the Technical Requirements at N.J.A.C. 7:26E-1.11, Immediate environmental concern requirements, if a potential immediate environmental concern for ground water is identified (N.J.A.C. 7:26F-6.2(a)2iv(1)), or if a potential immediate environmental concern for vapor intrusion is identified (N.J.A.C. 7:26F-6.3(f)2). Once an immediate environmental concern is identified, the Department will assign a Department case manager, who will provide assistance to the certified subsurface evaluator in addressing the immediate environmental concern condition. The Department is not making the commenter's suggested change.

244. COMMENT: N.J.A.C. 7:26E-1.14(b) should be amended to ensure that exceedance of an interim generic ground water criterion is not a trigger for an immediate environmental concern. (3)

RESPONSE: It has been Department policy not to trigger a potable water immediate environmental concern condition at a site, solely based on an exceedance of an interim generic ground water criterion. The Department is modifying N.J.A.C. 7:26E-1.14(b) upon adoption to state that exceedance of a ground water remediation standard derived pursuant to the Ground Water Quality Standards, N.J.A.C. 7:9C-1.7(c)6 (that is, an interim generic ground water criterion) , is not a trigger for an immediate environmental concern condition.

Quality Assurance

245. COMMENT: At proposed N.J.A.C. 7:26E-2.1(a)7i, the Department should clarify what is specifically required as part of the lab blank for vapor intrusion sampling, and whether the vapor intrusion lab blank is the responsibility of the lab or is something that is required to be prepared in the field. (15)

RESPONSE: There is no mention of lab blank in N.J.A.C. 7:26E-2.1(a)7. Subparagraph (a)7i requires the use of a laboratory control sample, which is a quality control sample that is the responsibility of the laboratory.

246. COMMENT: At N.J.A.C. 7:26E-2.1(a)9i, the proposed reference to the USEPA Method 524.2 is too specific for regulations. Methods change from time-to-time and it is unreasonably cumbersome to revise the regulations to keep up with these revisions. Also, the Department should include a six-month phase-in period after initial publication for when updates to

methods apply to allow for adjustments to work plans and ongoing investigations. The Department should reference "524" in place of "524.2" and indicate using the latest version within six months of publication by the USEPA (for example, "currently Method 524.2").

The proposed requirement to include tentatively identified compounds for analysis of samples by Method 524 is unclear, since tentatively identified compounds can be run/reported in several ways. The Department should confirm its intent to require consistent reporting of tentatively identified compounds, that is, report the highest 15 tentatively identified compounds. (3)

RESPONSE: The Department's reference to USEPA Method 524.2 is intentional, as the method is used to define the list of analytes that are to be analyzed for potable waters during an initial phase of an investigation where little is known about the site. Other revision numbers may contain additional or different compounds that are not of interest to the program. Simply referencing Method 524 does not provide the level of specificity necessary.

Regarding tentatively identified compounds, the Department is modifying N.J.A.C. 7:26E-2.1, Quality assurance requirements, upon adoption, to include tentatively identified compounds, to be consistent with the tentatively identified compound analysis requirements at N.J.A.C. 7:26E-2.1 Table 2-1.

247. COMMENT: Proposed N.J.A.C. 7:26E-2.1(c)2 will require that the entire suite of potential contaminants, including the forward library search, be analyzed when a potable well is

identified in an area where ground water contamination is identified. This will create uncertainty among persons responsible for conducting the remediation about identifying other sources of contaminated ground water that are not related to the impacted area of concern, and will result in additional costs in the event that other unrelated contaminants are identified that exceed the Ground Water Quality Standards. The proposed language should require that only the contaminants of concern identified in the site investigation/remedial investigation phases need to be analyzed. (15)

RESPONSE: Adopted N.J.A.C. 7:26E-2.1(c)2 does not require an entire suite of analytes to be analyzed. N.J.A.C. 7:26E-2.1(c)2 specifically allows the analysis to be fraction-specific, based on the identities of the contaminants suspected to be present. Pursuant to N.J.A.C. 7:26E-2.1(c)4, once the compound(s) of concern at the site have been identified, only analysis of those compounds is required.

248. COMMENT: The Technical Requirements at N.J.A.C. 7:26E-2.1 Table 2-1, removes the requirement that tentatively identified compounds be analyzed for ground water samples associated with a discharge of No. 2 fuel oil, and maintains the requirement that tentatively identified compounds be analyzed for diesel fuel. The removal of tentatively identified compounds for No. 2 fuel oil is supported.

Diesel is the same product as No. 2 heating oil, but No. 2 heating oil is dyed red to prevent its use in diesel equipment. The Department has always regulated diesel and No. 2

heating oil as the same product with regards to analytical parameters. Separating the analytical requirements for these two identical products is completely arbitrary and capricious. In addition, heavier heating oils (such as No. 4 and No. 6 heating oils) are relatively insoluble and usually do not have elevated tentatively identified compounds. Ground water sample analyses related to discharges of diesel fuel and these heavier oils also should not include tentatively identified compounds. (5, 12, 15, and 17)

249. COMMENT: There will be potential health risks where impacted ground water could lead to a vapor intrusion situation or in potable well use areas. Heating oil is a mix of many different compounds and sometimes unexpected compounds are only detected through the tentatively identified compound analysis. The proposal to eliminate the requirement to analyze for tentatively identified compounds should not be adopted. (1)

RESPONSE TO COMMENTS 248 AND 249: The Department has reviewed Comments 248 and 249, as well as Comments 113 through 119 regarding the Heating Oil Tank System Remediation Rules at N.J.A.C. 7:26F-2.2 Table 2-1, and determined that the requirement to analyze for tentatively identified compounds in ground water samples associated with discharges of No. 2 heating oil should not be deleted from the Technical Requirements at N.J.A.C. 7:26E-2.1 Table 2-1. Accordingly, the Department is not adopting the proposed deletion of this requirement.

250. COMMENT: The Technical Requirements at N.J.A.C. 7:26E-2.1 Table 2-1 at footnote 3 states, “(except that analyses of fuel oil No. 2 shall not include a library search of the 15 highest

tentatively identified compounds, but instead include the analysis of 1,2,4-Trimethylbenzene)." Footnote 3 refers to semi-volatile compounds, but 1,2,4-Trimethylbenzene is not analyzed as a semi-volatile compound, but as a volatile organic compound. The statement "but instead include the analysis of 1,2,4-Trimethylbenzene" should be transferred to footnote 2, which addresses volatile organic compounds. (2)

RESPONSE: As the commenter states, it is appropriate to analyze 1,2,4-trimethylbenzene as a volatile organic compound. Therefore, the Department is modifying the Technical Requirements at N.J.A.C. 7:26E-2.1 Table 2-1 at footnotes 2 and 3 upon adoption to state that 1,2,4-trimethylbenzene is to be analyzed as a volatile organic compound.

251. COMMENT: There is a discrepancy between the Heating Oil Tank System Remediation Rules at N.J.A.C. 7:26F-2.2 Table 2-1 and the Technical Requirements at N.J.A.C. 7:26E-2.1 Table 2-1. Specifically, the Heating Oil Tank System Remediation Rules at N.J.A.C. 7:26F-2.2 Table 2-1 do not require analysis for naphthalene or 2-methylnaphthalene in soil samples related to a discharge of kerosene, but these compounds are still included in the Technical Requirements, N.J.A.C. 7:26E-2.1 Table 2-1. The Department should resolve this discrepancy. (3)

RESPONSE: The Department inadvertently failed to include the analysis of naphthalene and 2-methylnaphthalene in soil contaminated by discharges of kerosene in the Heating Oil Tank System Remediation Rules at N.J.A.C. 7:26F-2.2 Table 2-1. The Department is modifying N.J.A.C.

7:26F-2.2 Table 2-1 upon adoption to be consistent with the analytical requirements for kerosene discharges contained in the Technical Requirements at N.J.A.C. 7:26E-2.1 Table 2-1.

Remedial Investigations

252. COMMENT: N.J.A.C. 7:26E-4.10(f) states that regulatory timeframes in this section do not apply to any discharge identified or that "should have been identified" prior to May 7, 1999. The phrase "should have been identified" has no definitive meaning and should be deleted. (3) RESPONSE: The Department included the phrase “should have been identified” and the parenthetical example “(for example, through a preliminary assessment or site investigation)” in N.J.A.C. 7:26E-4.10, Remedial investigation regulatory timeframes, to indicate to the regulated community that the provisions of this subsection apply to discharges that occurred prior to May 7, 1999, even if such discharges were not identified but would have been identified had a required activity, such as a preliminary assessment or site investigation, been conducted, but the person responsible for conducting the remediation failed to do so. The Department is not deleting the phrase “should have been identified” from N.J.A.C. 7:26E-4.10.

Remedial Actions

253. COMMENT: N.J.A.C. 7:26E-5.1(b)2 should be revised to state that a person responsible for conducting the remediation shall implement a remedial action if the concentration of any “contaminants of potential ecological concern at the site or area of concern” exceeds an

ecological risk-based remediation goal approved by the Department when an environmentally sensitive natural resource is present. In addition, the Department should clarify whether the end goal of remediation is meeting the ecological screening criterion or the ecological risk-based remediation goal. (5, 12, and 17)

RESPONSE: For clarity, the Department is modifying N.J.A.C. 7:26E-5.1(b)2 upon adoption to refer specifically to contaminants of potential ecological concern at the area of concern, rather than to "contaminants." The person responsible for conducting the remediation has the option of remediating contamination subject to N.J.A.C. 7:26E-5.1(b)2 to either the ecological screening criterion or the site-specific ecological risk-based remediation goal.

254. COMMENT: Proposed N.J.A.C. 7:26E-5.2(b) outlines new requirements for the use of alternative fill, including that written pre-approval from the Department must be obtained prior to the importation of alternative fill from an off-site source that does not meet the specified proposed requirements. Changing the process for approval to use alternative fill and requiring clean fill would slow down the pace and significantly increase the cost of brownfield redevelopment, particularly in flood zones that require grade increases to meet Department approvals. Additionally, clean fill is a limited resource that is not needed, especially on a contaminated site that will be capped.

The Department should withdraw the proposed amendments given the broad-based concerns raised by the affected groups, and replace them with a proposed checklist, as

discussed with Department staff on several occasions. The checklist addresses all the Department's stated concerns and allows the site LSRP to use their professional judgment to approve the use of alternative fill, provided the LSRP completes and submits the form to the Department. This proposed checklist is an acceptable resolution that is protective of public health and safety, and the environment, while enabling redevelopment projects to move forward. (5, 8, 11, 12, and 17)

RESPONSE: Based on the Department's experience, the Department is not disposed to allow approval of the use of alternative fill without Department oversight. While checklists have merit in ensuring necessary information is provided, the Department does not think it appropriate to rely solely on a checklist for approval purposes. Site-specific conditions and differing remedial actions typically result in unique circumstances for each project. The implications and potential courses of action go beyond a checklist approach, as a checklist does not really consider the historical and current contexts within which appropriate decision making is conducted.

The Department has experienced situations where alternative fill has been improperly used as part of a remedial action. In such cases, the Department has initiated enforcement action against the person responsible for conducting the remediation or has required the removal of the alternative fill from the site. Once the alternative fill is on the site, removal of the material may not be practicable, thereby complicating Department enforcement action. This has resulted in significant delays to these projects, as well as additional costs being

incurred by the person responsible for conducting the remediation, including enforcement penalties. To avoid these circumstances, it is essential that the person responsible for conducting the remediation obtain prior approval from the Department for the use of alternative fill that does not meet the requirements of N.J.A.C. 7:26E-5.2(b).

The Department anticipates that this revised process for Department prior approval to use alternative fill that does not meet the requirements of N.J.A.C. 7:26E-5.2(b) may delay remediation in some cases. In the Department's experience, persons responsible for conducting the remediation have caused delays in the review process by not providing information to the Department in a timely manner. The time it takes the Department to complete the review will also depend on several factors, including how many documents require review, and the quality of the information in those documents. However, from the Department's perspective, such a delay is justified because Department prior approval prevents further contamination of the site, and it also prevents the person responsible for conducting the remediation from incurring additional costs from the misuse of alternative fill. To ensure that the person responsible for conducting the remediation submits to the Department an approvable proposal to use alternative fill that does not meet the requirements of N.J.A.C. 7:26E-5.2(b), the person should communicate with the Department early in the remedial process so that the person does not expend significant time, resources, and capital without knowing whether the Department will approve the proposal.

Further, the Department is changing its Fill Material Guidance for SRP Sites technical guidance to encourage the person responsible for conducting the remediation to communicate with the Department earlier in the remedial process when that person intends to use alternative fill as part of the remedial action.

255. COMMENT: The proposed change to N.J.A.C. 7:26E-5.2(b)3, to affirm that any alternative fill brought on-site beyond what is needed to restore the pre-remediation topography and elevation of the receiving area of concern is considered an excessive volume of alternative fill, is unduly restrictive. The Department's Fill Material Guidance for SRP Sites (April 2015, Version 3.0) acknowledges the following reasonable considerations that should be addressed in the amendment of N.J.A.C. 7:26E-5.2(b)3: Raising the elevation of the site to an elevation to preclude flooding that might compromise the integrity of the selected remedial alternative, use of alternative fill to meet the elevation requirements of a Department permit (such as to meet 100-year floodplain elevations for activities pursuant to the Department's Flood Hazard Control Act rules at N.J.A.C. 7:13), and leveling of the grade where insufficient material is on site and where reasonable changes in design will not eliminate the need for the material. Placement of excess fill may be required by other rules, such as building code and flood levels. Adjust the rule to allow for legitimate uses, such as complying with flood elevation rules. (15)

RESPONSE: The use of alternative fill is for the purposes of remediating a contaminated site, not for the development of that contaminated site. The purpose of N.J.A.C. 7:26E-5.2(b)3 is to allow the use of alternative fill as part of a remedial action without requiring Department approval prior to the importation of the fill, provided that the volume to be used is only that which is necessary to return the site to pre-remediation topography. N.J.A.C. 7:26E-5.2(c) allows for the use of a volume of alternative fill that exceeds that which is necessary to return the site to pre-remediation topography; however, such use requires written approval from the Department prior to bringing the material onto the site. Site-specific conditions dictate the minimum amounts of alternative and clean fill needed for remedial purposes, which could include returning a remediated site to pre-existing grade. The Department does not prohibit other types of development-related filling using clean fill, but such may be subject to other regulatory requirements outside the scope this rule.

256. COMMENT: The Department should clarify that the requirements of N.J.A.C. 7:26E-5.2(b), specifically, the requirement that the contaminant concentrations in the alternative fill material be less than the 75th percentile of the contaminant concentrations found at the receiving area of concern and the requirement that the volume of alternative fill that can be placed at the receiving area of concern cannot exceed the volume required to restore the topography and elevation to pre-remediation levels, do not apply to N.J.A.C. 7:26E-5.2(d)2. (15)

RESPONSE: In general, the 75th percentile and volume limitations set forth in N.J.A.C. 7:26E-5.2(b) do not apply to N.J.A.C. 7:26E-5.2(d)2. However, as stated in N.J.A.C. 7:26E-5.2(d)2, onsite movement of contaminated material to an uncontaminated area of concern requires prior written approval from the Department, with the Department determining the acceptability of the contaminant concentrations and volumes of alternative fill that can be placed in such areas.

257. COMMENT: The proposed amendment to N.J.A.C. 7:26E-5.2(d)1 clarifies that alternative fill from an on-site source used as part of a remedial action at an area of concern does not require prior written approval from the Department, provided that the individual contaminants present in the alternative fill are also present at the receiving area of concern at concentrations above the applicable remediation standards. This amendment does not account for the presence of natural background, which the Department does not regulate. At N.J.A.C. 7:26E-5.2(d)1, the phrase “individual contaminants present” should be changed to read, “each individual contaminant above its applicable soil remediation standard” are also present at the receiving area of concern at concentrations above the applicable remediation standards. (15)

RESPONSE: Natural background is still part of the evaluation process. N.J.A.C. 7:26E-3.8, Site investigation – natural background investigation of soil and ground water, is the relevant regulatory basis regarding investigation of natural background and the need to remediate. As stated in the Department’s Fill Material Guidance for SRP Sites technical guidance, material

from such natural sources may not be used as clean fill at site remediation sites, unless the receiving area of concern and the donor material are from the same natural geologic formation (for example, both are greensands) or have the same contaminant concentrations. The Department is not making the commenter's suggested modification to the rule upon adoption.

258. COMMENT: The proposed amendment to N.J.A.C. 7:26E-5.5(a), which removes the 60-day pre-implementation remedial action workplan submission requirement, is supported. (5, 12, and 17)

RESPONSE: The Department acknowledges the commenters' support for the adopted rule.

259. COMMENT: At N.J.A.C. 7:26E-5.6(b), the requirement to include the information listed at N.J.A.C. 7:26E-1.6(a)1 and 2, or the name, address, and consent of each property owner if the person responsible for conducting the remediation does not own the property, will complicate and extend the remediation process by inserting a requirement for additional reviews and consents. While the person responsible for conducting the remediation is waiting for approval, timeframes should be suspended, or the requirement should not be adopted. (15)

RESPONSE: The Department proposed this new requirement at N.J.A.C. 7:26E-5.6(b) to clarify the general permit conditions found at existing N.J.A.C. 7:14A-6.2(a)6 regarding property rights, not to require property owners to review and approve discharge proposals. The Department is

modifying N.J.A.C. 7:26E-5.6(b) upon adoption to clarify that all property owners must have granted access to the property to the person responsible for conducting the remediation for the purpose of allowing the permitted discharges to occur. The information that the person responsible for conducting the remediation provides to the Department may be a statement by the LSRP identifying the document that grants the appropriate legal access.

260. COMMENT: The proposed amendments to N.J.A.C. 7:26E-5.6(b) require written consent or approval from the owner of the property where a permit-by-rule discharge to ground water authorized discharge is to occur. Certain governmental agencies operate large facilities with multiple remediation projects underway upon land owned by various municipalities but effectively owned and operated by the agency under long-term lease. The requirement to obtain municipal approval is an undue burden that will delay remediation and result in unnecessary cost to taxpayers and toll payers. Exempt governmental agencies with long-term leases from the requirement. (3)

RESPONSE: See the Response to Comment 207 regarding the modification to N.J.A.C. 7:26E-5.6(b) on adoption.

261. COMMENT: The requirements imposed by N.J.A.C. 7:26E-5.6(b)1 through 8 are excessive and will delay remediation. In-situ treatment technologies are no longer innovative, but rather well known and mature technologies. Some transient impacts to the formation, due

to the injection of reagents is to be expected, but such impacts dissipate quickly. Remove these proposed additions. (15)

RESPONSE: The adopted rules will not significantly delay remediation, as most of the amendments clarify existing requirements and will increase efficiency by reducing the amount of time Department staff spend requesting this additional information. These amendments codify existing Department guidance, which explains the Ground Water Quality Standards and NJPDES rule requirements applicable to discharges that are part of in situ treatment technologies and other discharges.

In addition, available permit monitoring data document that, while many impacts from approved discharges are short-term, some unintended impacts are significant enough that exceedances of ground water quality criteria (for example, for sodium) can persist beyond the deadline for submittal of a remedial action report and a ground water remedial action permit application. Moreover, the impacts of some remedial technologies on ground water quality (for example, on pH or iron concentrations) are intended to persist for a relatively longer period in order to continue in situ treatment processes long enough to significantly reduce site contaminant mass and concentrations.

262. COMMENT: N.J.A.C. 7:26E-5.6(b) indicates submittal of the remedial investigation report along with the permit-by-rule to present site conditions. The Department should specify what would be required in lieu of the remedial investigation report if a permit-by-rule is requested

prior to the submittal of the remedial investigation report. This requirement should allow for submittal of either the remedial investigation report or adequate site assessment information for review and approval. (15)

RESPONSE: N.J.A.C. 7:26E-5.6(b)1 states that the person responsible for conducting the remediation can submit either a summary of the remedial investigation or an already completed remedial investigation report.

263. COMMENT: The amendment to N.J.A.C. 7:26E-5.6(c)3, which reduces the newspaper publication duration from 45 days to 35 days, is supported. (5, 12, and 17)

RESPONSE: The Department acknowledges the commenters' support for the adopted rules.

Laboratory Deliverables

264. COMMENT: At N.J.A.C. 7:26E, Appendix A, I(b)1vii, the collection of laboratory control sample data is not required by USEPA Method TO-15, but only the Department's method. Since the Department's Data of Known Quality Protocols Technical Guidance emphasizes the collection of data that meet the data quality objectives, this additional quality assurance sample is not necessary. The Department's Office of Data Quality returns its comments regarding this stated issue at least one year after transmission of the data to the Department; this is generally too late for the investigator to take corrective action. Adding this requirement to the rule after

the fact is inappropriate. The additional laboratory control sample data requirement should be deleted. (15)

RESPONSE: The adopted rule requires the analysis of a laboratory control sample. Laboratory control samples are used in all methods as a definitive test to demonstrate a laboratory is able to detect the compounds of concern. Comparing the percent recoveries of the compounds in the laboratory control sample to the control limits assists in determining whether the laboratory is capable of making accurate and precise measurements. As Method TO-15 has no such requirement, it is necessary to include one.

The comment that it can take the Office of Data Quality up to one year to report the failure to analyze a laboratory control sample for Method TO-15 further supports its codification in a rule, so that the analysis of a laboratory control sample becomes an analytical requirement that is incorporated into a laboratory's routine analytical procedures.

265. COMMENT: At N.J.A.C. 7:26E, Appendix A, I(a), the requirements for potable water full laboratory deliverables reference the Department's contract laboratory specification. The contract specifications are not readily available on the Department's website. For laboratories not participating in a State contract, this is a guidance document that is not enforceable. The full laboratory deliverables description should be placed back into the rule to assure that the laboratory community provides reliable data. (15)

RESPONSE: The Department did not propose to amend N.J.A.C. 7:26E, Appendix A, I(a). It should be noted that the contract laboratory specifications are referenced in the rule and, as such, apply to all laboratories. Laboratory contracts are issued by the New Jersey Department of the Treasury. To assist the regulated community, the Department will add a link on the Department's Site Remediation and Waste Management Program's website to facilitate easier accessibility to the contract specifications.

Summary of Agency-Initiated Changes:

The Department is correcting an error at N.J.A.C. 7:26E-2.1(c)2 to replace the singular "compound" with the plural "compounds." The Department is also correcting errors at N.J.A.C. 7:26E-5.8(b)1 and (b)2 upon adoption to provide a proper cross-reference to N.J.S.A. 58:10C-27a(3).

At N.J.A.C. 7:26F-1.5 and 2.2 Table 2-1 of the Heating Oil Tank System Remediation Rules, and the Technical Requirements at N.J.A.C. 7:26E-2.1 Table 2-1, the Department is modifying upon adoption the references to "fuel oil" and "heating oil" to be consistent with the use of the term "No. 2 heating oil" in the ISRA Rules, N.J.A.C. 7:26B, ARRCS, N.J.A.C. 7:26C, and the Remediation Standards, N.J.A.C. 7:26D.

Federal Standards Analysis

Executive Order No. 27 (1994) and the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 through 21 (P.L. 1995, c. 65), require State agencies that adopt, readopt, or amend State rules that exceed any Federal standards or requirements to include in the rulemaking document a Federal standards analysis.

Only the adopted amendments discussed below are related to Federal regulatory programs. The remaining adopted amendments, new rules, and repeals are not promulgated in order to comply with any Federal law or standard.

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

The adopted NJPDES rules do not exceed Federal law or standards. The Department adopts amendments related to discharges to ground water, which are governed primarily by State statutes, including the New Jersey Water Pollution Control Act, which has no Federal counterpart, except regarding underground injection wells. The USEPA regulates injection wells under its rules for the Federal Underground Injection Control Program created pursuant to the Federal Safe Drinking Water Act (42 U.S.C. §§ 300(f) et seq.). The adopted amendments to the NJPDES rules do not exceed Federal underground injection control mandates.

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

The Department's Underground Storage Tank rules at N.J.A.C. 7:14B implement the Federal rules governing regulated underground storage tank systems, 40 CFR Part 280;

however, the Federal rules govern only those underground storage tanks with a capacity greater than 2,000 gallons that are used to store hazardous substances. The Federal rules do not apply to tanks containing heating oil stored for on-site consumption.

The adopted amendments to the Underground Storage Tank rules require the owner or operator to identify an LSRP on the spill response plan, rather than to retain an LSRP in advance. The adopted amendments also require that an LSRP must issue a response action outcome at the completion of a "clean" tank removal, clarifying that the investigation that is associated with a "clean" tank removal is considered remediation. These adopted amendments do not result in the State's rules being more stringent than the Federal rules relating to Federally regulated underground storage tanks. The remaining provisions related to underground storage tanks are not enacted under the authority of or in order to comply with a program established under Federal law.

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

The adopted amendments to ARRCS, N.J.A.C. 7:26C, do not implement, comply with, or enable the State to participate in any program established under Federal law, standards, or requirements.

Adopted amendments to ARRCS at N.J.A.C. 7:26C-3.3 include the statutory timeframes pursuant to SRRA at N.J.S.A. 58:10C-27.a(3) for completing various stages of a remediation. The mandatory timeframes are more stringent than are provided in equivalent Federal programs,

such as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 and the Resource Conservation and Recovery Act (RCRA), which apply timeframes on case-by-case bases. Mandatory timeframes are required by SRRA at N.J.S.A. 58:10C-28. Like the Federal remediation programs, the existing Department's rules allow the remediation of contaminated sites to be conducted on site-specific schedules. The Department has found that this practice has allowed cleanups to be extended unnecessarily and has prolonged the remediation process. The Department believes that there will be an overall cost savings associated with the adopted 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 more expeditiously, such sites can be put to better use and often may result in higher ratables for local and State government.

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

The Department has determined that the adopted amendments to the Technical Requirements do not require any specific action that is more stringent than comparable Federal rules. Comparable Federal laws provide only generic procedural requirements on how to investigate and remediate contaminated sites. For example, the National Contingency Plan, 40 CFR Part 300, which contains the implementing regulations for the Comprehensive Environmental Response, Compensation, and Liability Act, provides possible options for

conducting the remedial investigation, but the National Contingency Plan does not detail the minimum steps that must be taken before an area of concern can be considered to have been adequately evaluated. Accordingly, no further analysis is required.

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

7:14A-7.5 Authorization of discharges to ground water by permit-by-rule

(a) – (d) (No change from proposal.)

(e) For discharges to ground water subject to (b) above, the Department shall invalidate its approval of a discharge to ground water proposal if:

1. The approved discharge *[contravenes]* ***violates any provision of *** the Ground Water Quality Standards at N.J.A.C. 7:9C;

2. The approved discharge *[contravenes]* ***violates any provision of *** the Surface Water Quality Standards at N.J.A.C. 7:9B; or

3. (No change from proposal.)

(f) (No change from proposal.)

7:14A-8.4 Prohibition of movement of fluid into underground sources of drinking water

(a) – (e) (No change from proposal.)

(f) If at any time the Department learns that a Class V well as described in N.J.A.C. 7:14A-8.5(b)11 may cause a violation of the Safe Drinking Water Act Rules, N.J.A.C. 7:10, or ***violates any provision of*** the Ground Water Quality Standards, N.J.A.C. 7:9C, then the Department ***may take enforcement action and*** shall require the owner or operator to implement one or more of the following:

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

3. Take any appropriate actions to prevent the violation ***of N.J.A.C. 7:9C or 7:10***, which may include closure of the injection well.

(**Agency Note:** The text of N.J.A.C. 7:14B-5.5 below reflects the adoption of amendments effective January 16, 2018 (see 49 N.J.R. 1121(a); 50 N.J.R. 409(a)).)

7:14B-5.5 Release response plan

(a) The owner and operator shall prepare, and update as necessary to reflect changes to the facility and to regulations governing response plans, a release response plan which includes the following information:

1.-2. (No change.)

3. The procedures to be followed in the event of a leak or discharge of a hazardous substance, pursuant to N.J.A.C. 7:14B-7.3 and 8, including the procedures to address alarms associated with release detection equipment; and

4. The name and telephone number of the owner or operator's contractor to implement a release response plan, including, but not limited to, *[a]* a licensed site remediation professional to conduct the remediation, and an individual certified pursuant to N.J.A.C. 7:14B-13 or 16 to address system closure and equipment failure, and a contractor with hazardous material emergency response capability.

7:14B-7.2 Investigating a suspected release

(a) (No change.)

(b) If the investigation *[that the owner or operator]* conducted in accordance with (a) above is inconclusive in confirming or disproving a suspected release, the owner and operator *[shall immediately notify the Department hotline at 1-877-WARNDEP (1-877-927-6337) that the owner or operator is conducting the site investigation of a suspected release, and]* shall, in accordance with the schedule in the Technical Requirements for Site Remediation, at N.J.A.C. 7:26E-3.14, conduct and complete a site investigation ***designed to confirm or disprove a suspected discharge*** in accordance with the Technical Requirements for Site Remediation, at N.J.A.C. 7:26E-3.3. If a discharge is confirmed, the owner or operator shall *[comply with]* ***initiate action pursuant to*** N.J.A.C. 7:14B-7.3. The owner or operator shall keep documentation of an investigation in accordance with this section that disproves a suspected discharge at the facility and

make it available for inspection by the Department for the operational life of the underground storage tank system.

***(c) If the owner or operator concludes in the site investigation report submitted pursuant to N.J.A.C. 7:26E-3.14 that no further remediation is required, then the licensed site remediation professional shall issue a response action outcome to the owner or operator pursuant to the Administrative Requirements for the Remediation of Contaminated Sites at N.J.A.C. 7:26C-6.**

(d) If the owner or operator concludes in the site investigation report submitted pursuant to N.J.A.C. 7:26E-3.14 that further remediation is required, then the owner or operator shall conduct additional remediation pursuant to the Administrative Requirements for the Remediation of Contaminated Sites at N.J.A.C. 7:26C, and the Technical Requirements for Site Remediation at N.J.A.C. 7:26E.*

7:14B-9.5 Reporting and recordkeeping requirements

(a) – (b) (No change.)

(c) Along with the site investigation report submitted pursuant to (b) above, if the owner or operator concludes in the site investigation report that no further remediation is required, then ***the licensed site remediation professional shall issue a response action outcome to*** the owner or operator *[shall submit a response action outcome]* pursuant

to the Administrative Requirements for the Remediation of Contaminated Sites at N.J.A.C. 7:26C-6.

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

7:14B-12.1 Penalties

(a) – (b) (No change.)

(c) *[Notwithstanding (d) below, upon]* ***Upon*** a finding that any individual or business firm who is certified pursuant to N.J.A.C. 7:14B-13 or 16 has failed to comply with any requirement of the State Act or N.J.A.C. 7:14B-1, 3, ***or*** 7 through 11 or 7:26F, the Department may:

1. – 3. (No change from proposal.)

*[(d) Upon a finding that any individual or business firm, certified in subsurface evaluation of unregulated heating oil tank systems pursuant to N.J.A.C. 7:14B-16, has failed to properly perform underground tank services pursuant to the Heating Oil Tank System Remediation Rules, N.J.A.C. 7:26F, the Department may assign penalty points, as described in Table 12-1 below.

(e) When the Department assigns a penalty point to the individual and business firm, the Department:

1. Shall send to the individual and business firm written documentation of the noncompliance, the applicable citation of the rule that was violated, and the associated penalty points; and

2. Shall post the following information on its unregulated heating oil tank system website, www.nj.gov/dep/srp/unregulatedtanks/:

i. The name of the individual;

ii. The name of the business firm;

iii. A brief description of the noncompliance;

iv. The number of penalty points assigned to the individual and business firm for the noncompliance; and

v. The cumulative number of penalty points assigned to the individual and business firm during a three-year calendar period.

Table 12-1

Certified Subsurface Evaluator Penalty Point Assignment Schedule

Major Deficiencies (20 Points Each)

1. Submitting a request for a heating oil tank system no further action letter determination, pursuant to N.J.A.C. 7:26F-7.3, when further remediation is required;

2. Failing to apply the applicable soil and ground water remediation standards pursuant to N.J.A.C. 7:26F;

3. Compositing post-excavation soil samples;

4. Failing to provide direct on-site supervision of remediation activities to ensure compliance with N.J.A.C. 7:26F;

5. Failing to properly dispose of wastes (including, but not limited to, improper waste classification, delivery of wastes to an improper waste facility, failure to provide complete paperwork or providing paperwork that contains errors, or improper reuse of waste material);

6. Failing to conduct a ground water investigation pursuant to N.J.A.C. 7:26F-4.2 and 3.3;

7. Failing to evaluate potable water wells pursuant to N.J.A.C. 7:26F-6.2; or

8. Failing to evaluate vapor intrusion impacts pursuant to N.J.A.C. 7:26F-6.3.

Moderate Deficiencies (10 Points Each)

1. Failing to indicate depth to ground water and/or bedrock in the remedial action report;

2. Failing to obtain soil samples from a proper depth or interval, as identified in N.J.A.C. 7:26F-3.4 and 3.5;

3. Failing to properly locate soil sampling points, as identified in N.J.A.C. 7:26F-3.4 and 3.5;

4. Failing to properly collect samples, in accordance with N.J.A.C. 7:26F-3.4 and 3.5;

5. Failing to collect the required number of soil samples, as identified in N.J.A.C. 7:26F-3.4 and 3.5;

6. Failing to use the proper sample preservation method, in accordance with N.J.A.C. 7:26F-2.2(a)2;

7. Using improper fill when backfilling a tank excavation, in accordance with N.J.A.C. 7:26F-3.3(f)2;

8. Failure to manage excavated soil in accordance with N.J.A.C. 7:26F-3.3(d);

9. Failing to perform required analytical analyses;

10. Failing to use approved analytical methods, as identified in N.J.A.C. 7:26F-2.2, Table 2-1, to evaluate a soil or water sample;

11. Using a laboratory that is not certified to perform the analytical method, as identified in N.J.A.C. 7:26F-2.2(a)1; or

12. Failing to follow other applicable regulations or laws, pursuant to N.J.A.C. 7:26F-1.2(e) and (f).

<u>Minor Deficiencies (Five Points Each)</u>

1. Submitting incomplete or inaccurate maps to the Department;

2. Failing to submit soil boring logs and/or soil descriptions to the Department;

3. Failing to properly field screen soil borings/samples/excavations, pursuant to N.J.A.C. 7:26F-3.5;

4. Stockpiling known contaminated soil or potential contaminated soil based on visual or field screening evidence, on site for a period that violates the storage timeframes set forth in the Solid Waste rules at N.J.A.C. 7:26 or the Hazardous Waste rules at N.J.A.C. 7:26G;

5. Failing to address data usability issues identified pursuant to N.J.A.C. 7:26F-7.2(a)11v and vi;

6. Failing to submit reports to the Department in the format required by N.J.A.C. 7:26F-7.2; or

7. Failing to submit all required documentation to the Department as required by the Petroleum Underground Storage Tank Remediation Upgrade and Closure Fund pursuant to N.J.A.C. 7:26F-9.]*

7:26C-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

...

"Residual contamination" has the meaning as defined in the Heating Oil Tank System Remediation Rules at N.J.A.C. 7:26F-1.5.

...

7:26C-1.4 Applicability and exemptions

(a) – (b) (No change from proposal.)

(c) The requirements of this chapter do not apply to any person who is:

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

4. Except as provided in N.J.A.C. 7:26F-1.2(d)2 and 3, 1.6(b), and *[3.7(e)]* ***3.7(b)1***, remediating a discharge from a heating oil tank system in accordance with N.J.A.C. 7:26F.

(d) Unless notified in writing by the Department that additional remediation is necessary, the person responsible for conducting the remediation of any of the following types of discharges is exempt from the requirements at N.J.A.C. 7:26C-2.3 to use the services of a licensed site remediation professional or to submit documents to the Department:

1. A petroleum surface spill *[or a surface spill of]****, including*** mineral oil ***containing less than 50 parts per million of polychlorinated biphenyls*** from a transformer, of less than 100 gallons, that does not reach the waters of the State of New Jersey provided that:

i. – ii. (No change.)

2. – 3. (No change.)

(e) (No change from proposal.)

NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE AUGUST 6, 2018 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

7:26C-1.5 Signatures and certifications

(a) – (b) (No change from proposal.)

(c) The person responsible for conducting the remediation shall make the following certification on each form that that person submits to the Department:

"I certify under penalty of law that:

...

- *[*I have the authority to prevent a violation of the Site Remediation Reform Act, N.J.S.A. 58:10C, or of the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C, as well as to correct any such violation should one occur;*]*

...

7:26C-1.7 Notification and public outreach

(a) – (f) (No change from proposal.)

(g) To document compliance with this section, the person responsible for conducting the remediation shall submit one copy of each of the following to the Department within 14 days after the timeframes set forth in (h) and (*l*) below, with the appropriate form found on the Department's website at www.nj.gov/dep/srp/srra/forms:

1. – 2. (No change from proposal.)

3. The display advertisement required at (*l*)3 below or a photograph of the notification sign required in (h) below. ***If the display advertisement cannot be provided to the Department within 14 days after the timeframes set forth in (h) and (*l*) below, then:**

i. Within 14 days after the timeframes set forth in (h) and (*l*) below, provide a copy of the advertisement that has been submitted to the newspaper, the name of the newspaper, and the date the advertisement is to be published; and

ii. Provide proof of publication of the display advertisement in the subsequent applicable remedial phase report.*

(h) – (i) (No change from proposal.)

(j) The person responsible for conducting the remediation of any heating oil tank system in accordance with N.J.A.C. 7:26F, except as provided in N.J.A.C. 7:26C-1.4(c)4, or the person responsible for conducting an emergency response action, shall comply only with the notification requirements of (a) through *[(d)]* ***(c)*** above.

(k) – (q) (No change from proposal.)

7:26C-2.3 Requirements for the person responsible for conducting the remediation

(a) – (b) (No change from proposal.)

(c) The person responsible for conducting the remediation and the licensed site remediation professional shall notify the Department, on a form found on the Department's website at www.nj.gov/dep/srp/srra/forms:

1. Within *[48 hours]* ***two business days*** after the dismissal, resignation, or incapacity of that licensed site remediation professional, in cases where there is an immediate environmental concern; and

2. (No change from proposal.)

(d) (No change from proposal.)

7:26C-7.2 Administrative requirements for using a deed notice in a remedial action

(a) – (c) (No change from proposal.)

(d) The person responsible for conducting the remediation *[and]* ***or*** the statutory permittee shall, within 30 days after municipal subdivision approval of such a site that triggers a remedial action permit termination application pursuant to N.J.A.C. 7:26C-7.13(c):

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

7:26C-7.5 Application for a remedial action permit

(a) – (d) (No change.)

(e) The permittee shall, within 30 days after municipal subdivision approval for the site that triggers a remedial action permit termination application pursuant to N.J.A.C. 7:26C-7.13(c), simultaneously apply for:

1. A remedial action permit termination of the existing remedial action permit (including paying the applicable remedial action permit *[application]* ***termination*** fee) *[for

each site created by the subdivision upon which an engineering or institutional control exists]*; and

2. A new remedial action permit *[for the modified remedial action permit]* (including paying the applicable remedial action permit application fee) for each site ***created by the subdivision*** upon which an engineering or institutional control exists.

7:26C-7.6 Remedial action permit application schedule

(a) – (b) (No change.)

(c) The Department shall issue a remedial action permit when a person implements a restricted use remedial action, a limited use restricted remedial action, or any other remedial action that includes an engineering or institutional control if the person responsible for conducting the remediation does not *[timely apply]* ***submit an application*** for a remedial action permit pursuant to this section.

(d) The Department shall issue a modified remedial action permit if the person responsible for conducting the remediation does not *[timely apply]* ***submit an application*** for a remedial action permit modification *[to make the existing remedial action permit:]* ***pursuant to N.J.A.C. 7:26C-7.12.***

*[1. Consistent with the requirements of this subchapter; or

2. Conditions adequate to monitor the effectiveness of the remedial action necessary to ensure the protection of the public health and safety and the environment.]*

(e) (No change from proposal.)

7:26C-9.5 Civil administrative penalty determination

(a) (No change.)

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

	Subchapter and Violation	Citation	Type of Violation	Grace Period Days	Base Penalty
	. . .				
6	Final Remediation Documents				
	*[Failure to confirm the protectiveness of the remedy.	7:26C-6.4(c)	NM		$20,000

Failure to hire a licensed site remediation professional to conduct remediation and submit the required form.	7:26C-6.4(c)	NM	$15,000]*
Failure to conduct additional remediation after a response action outcome has been invalidated or withdrawn, or after the Department rescinds a no further action letter.	7:26C-6.4*[(c)]* ***(d)***	NM	$20,000

. . .

(**Agency Note:** The text of N.J.A.C. 7:26C Appendix B follows with new text indicated in boldface with asterisks ***thus***; and deletion indicated in cursive braces with asterisks *{thus}*):

APPENDIX B

MODEL DEED NOTICE

_____

Instrument Number

. . .

DEED NOTICE

This Deed Notice is made as of the _____ day of _____, ____, by [*Insert the full legal name and address of each current property owner*] (together with his/her/its/their successors and assigns, collectively "Owner").

1. – 6B. (No change from proposal.)

7A. ALTERATIONS, IMPROVEMENTS, AND DISTURBANCES.

i. – ii. (No change from proposal.)

iii. A soil remedial action permit modification is required *{prior to}* ***for*** any permanent alteration, improvement, or disturbance and the owner, lessor, lessee or operator shall submit the following within 30 days after the occurrence of the permanent alteration, improvement, or disturbance:

(A) – (C) (No change from proposal.)

iv. (No change from proposal.)

7B. – 15. (No change from proposal.)

7:26E-1.6 General reporting requirements

(a) (No change.)

(b) The person responsible for conducting the remediation shall include, in each remedial phase workplan and report, the following information:

1. – 5. (No change.)

6. A summary table(s), organized by area of concern, of all sampling results, including sample location, medium, sample depth, field and laboratory identification numbers, analytical results, and comparison to remediation standards, and the following:

i. (No change.)

ii. For each sample, identification of each contaminant for which there is a reporting limit ***or a method detection limit*** that exceeds a remediation standard, along with an explanation in the table key; and

iii. (No change from proposal.)

7. – 10. (No change from proposal.)

7:26E-1.8 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless context clearly indicates otherwise:

...

"Practical quantitation level" or "PQL" means the lowest quantitation level of a given analyte that can be reliably achieved among laboratories within the specified limits of precision and accuracy of a given analytical method during routine laboratory operating conditions.

...

"Residual contamination" has the meaning as defined in the Heating Oil Tank System Remediation Rules at N.J.A.C. 7:26F-1.5.

…

7:26E-1.14 Receptor evaluation – ground water

(a) (No change from proposal.)

(b) If any contaminant is identified in excess of the minimum ground water remediation standards at N.J.A.C. 7:26D-2.2(a)1***, except for any ground water remediation standard derived pursuant to N.J.A.C. 7:9C-1.7(c)6,*** in any potable or irrigation well that may be utilized for potable purposes, then the person responsible for conducting the remediation shall conduct all actions pursuant to N.J.A.C. 7:26E-1.11, according to the schedule in that section.

(c) (No change.)

7:26E-2.1 Quality assurance requirements

(a) The person responsible for conducting the remediation shall ensure that all sampling and laboratory analysis are conducted, and results are reported, as follows:

1. – 8. (No change from proposal.)

9. Analyze all potable water samples as follows:

i. For volatile organic contaminants, use USEPA Method 524.2, incorporated herein by reference, in effect on the date of analysis, plus TICs ***(up to 15 organic**

compounds of greatest concentration which are not surrogates, internal standards, or targeted compounds listed under the method)*;

ii. For organic contaminants other than volatiles, analyze the samples for the non-volatile Target Compound List compounds, using the methods that meet the data quality objectives specified in the site specific QAPP, plus TICs ***(up to 15 organic compounds of greatest concentration which are not surrogates, internal standards, or targeted compounds listed under the method)***; and

iii. (No change from proposal.)

10. – 15. (No change from proposal.)

(b) (No change.)

(c) The following requirements apply for selection of analytical parameters for all environmental media:

1. (No change.)

2. Initial potable water samples shall be analyzed for the following compound***s*** and all results shall be reported in the applicable remediation phase report submitted to the Department:

i. If volatile organic compounds are of concern, samples shall be analyzed for the compounds listed in USEPA Method 524.2 in effect on the date of analysis, incorporated herein by reference, plus TICs ***(up to 15 organic compounds of**

greatest concentration which are not surrogates, internal standards, or targeted compounds listed under the method)*;

ii. If semi-volatile organic compounds are of concern, the samples shall be analyzed for all semivolatile TCL compounds plus TICs ***(up to 15 organic compounds of greatest concentration which are not surrogates, internal standards, or targeted compounds listed under the method)***;

iii. – v. (No change.)

3. Initial vapor intrusion samples (sub-slab, indoor air, and ambient air) shall be analyzed for the compound list in Table 1 of the NJDEP Method LLTO-15, plus TICs ***(up to 15 organic compounds of greatest concentration which are not surrogates, internal standards, or targeted compounds listed under the method)***. In addition, when vapor intrusion samples (sub-slab, indoor air or ambient air) are taken due to petroleum contamination other than all gasolines or light petroleum distillates, the samples shall be analyzed for naphthalene in addition to any other site specific contaminant that may be present. All results are to be reported; and

4. (No change.)

(d) – (e) (No change.)

TABLE 2-1

ANALYTICAL REQUIREMENTS FOR PETROLEUM STORAGE AND DISCHARGE AREAS

Petroleum Product	Soil/Sediment	Water
...		
[Fuel Oil] No. 2 ***Heating Oil, Diesel Fuel***	EPH[4]. Analyze 25 percent of samples where EPH is detected over 1,000 mg/kg for 2-Methyl Naphthalene and Naphthalene[8]	VO***+TICs***[2], SVO***+TICs***[3]
*[Diesel Fuel	EPH[4]. Analyze 25 percent of samples where EPH is detected over 1,000 mg/kg for 2-Methyl Naphthalene and Naphthalene[8]	VO+TICs[2], SVO+TICs[3]]*

TABLE 2-1

ANALYTICAL REQUIREMENTS FOR PETROLEUM STORAGE AND DISCHARGE AREAS

Petroleum Product	Soil/Sediment	Water
[Fuel Oil] Nos. 4 & 6 ***Heating Oil***, Hydraulic Oil, Cutting Oil, Lubricating Oil	EPH[4]. Analyze 25 percent of samples where EPH is detected over 100 mg/kg for PAH[5,8]	VO+TICs[2], SVO+TICs[3]
. . .		

Footnotes

1. (No change from proposal.)

2. EPA Target Compound List volatile organic compounds excluding 1,2-Dibromo-3-chloropropane, 1,2-Dibromoethane, and 1,4-Dioxane with a library search of the 15 highest TICs (except that analyses of *[Fuel Oil]* No. 2 ***heating oil*** shall *[not]* include ***the analysis of 1,2,4-Trimethylbenzene*** *[a library search of the 15 highest TICs)]*.

Tentatively Identified Compounds (TICs) for volatiles - Identify up to 15 organic compounds of greatest concentration which are not surrogates, internal standards, or targeted compounds listed under TCL.

3. EPA Target Compound List semivolatile organic compounds including 1-Methyl *[Napthalene]***Naphthalene***, but excluding phenol and substituted phenols, with a library search of the 15 highest TICs that are not alkanes unless otherwise specified by analytical protocol *[(except that analyses of Fuel Oil No. 2 shall not include a library search of the 15 highest TICs, but instead include the analysis of 1,2,4-Trimethybenzene)]*.

Tentatively Identified Compounds (TICs) for semivolatiles - Identify up to 15 organic compounds of greatest concentration which are not surrogates, internal standards, or targeted compounds listed under TCL.

4. – 8. (No change.)

7:26E-5.1 Remedial action requirements

(a) (No change.)

(b) The person responsible for conducting the remediation shall implement a remedial action when:

1. (No change.)

2. An environmentally sensitive natural resource is identified pursuant to N.J.A.C. 7:26E-1.16, in which the concentration of any contaminant***s of potential ecological concern at the site or area of concern*** exceeds any aquatic surface water quality standard, any ecological screening criterion, or site-specific ecological risk-based remediation goal approved by the Department pursuant to N.J.A.C. 7:26E-4.8(c)3; or

3. (No change.)

(c) – (f) (No change from proposal.)

7:26E-5.6 Permit identification and requirements for discharge to ground water proposals

(a) (No change from proposal.)

(b) For each discharge to ground water that is subject to the New Jersey Pollutant Discharge Elimination System permit-by-rule at N.J.A.C. 7:14A-7.5(b), the person responsible for conducting the remediation shall submit a discharge to ground water proposal with a completed form found on the Department's website at www.nj.gov/dep/srp/srra/forms. The person responsible for conducting remediation shall include in each such submission the information listed at N.J.A.C. 7:26E-1.6(a)1 and 2 and, if the person responsible for conducting the remediation does not own the property where any discharge will occur, include the name and address of each owner of that property, and *[documentation indicating]* ***information documenting*** that each owner of such property *[consents to any discharge proposed on]* ***has provided legal access to*** the property ***for the purpose of allowing such discharges to proceed***. The person responsible for conducting the remediation shall also include the following in the submission:

1. – 8. (No change from proposal.)

(c) – (e) (No change from proposal.)

7:26E-5.8 Remedial action regulatory timeframes

(a) (No change.)

(b) The person responsible for conducting the remediation shall complete the implementation of the remedial action and submit a remedial action report for a contaminated site within the following regulatory timeframes:

1. Except as provided in (b)2 below, for sites subject to the statutory requirement at N.J.S.A. 58:10C-*[27(3)]***27.a(3)*** to complete the remedial investigation on or before May 7, 2014:

i. For the remediation of a discharge that only resulted in soil contamination, *[(six months from the effective date of these amendments)]* ***February 6, 2019***; or

ii. (No change from proposal.)

2. For sites subject to the statutory requirement at N.J.S.A. 58:10C-*[27(3)]***27.a(3)*** to complete the remedial investigation on or before May 7, 2014, and that obtained and maintained an extension to complete the remedial investigation on or before May 7, 2016, pursuant to N.J.S.A. 58:10C-27.1:

i. – ii. (No change from proposal.)

3. (No change from proposal.)

(c) – (d) (No change.)

7:26F-1.2 Applicability and exceptions

(a) (No change from proposal.)

(b) When there has been a surface discharge of less than 100 gallons of heating oil from a heating oil tank system that does not reach the waters of the State, the owner shall notify the Department in accordance with N.J.A.C. 7:26F-1.6, and shall either:

1. (No change from proposal.)

2. Remediate the discharge in accordance with this chapter, if ***either:***

i. The local authorities refer the oversight of the remediation to the Department*[.]****; or***

ii. The owner wants the Department to issue a heating oil tank system no further action letter for the remediation. In this situation the owner shall either request that the local authority refer oversight of the remediation to the Department, or contact the Department Hotline at 1-877 WARNDEP (1-877-927-6337) and request that the Department oversee the remediation.*

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

7:26F-1.5 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

...

"Extractable petroleum hydrocarbons" or "EPH" means extractable aliphatic and aromatic petroleum hydrocarbons determined using the Department's "Extractable Petroleum Hydrocarbons Methodology," as amended or supplemented, currently available at www.nj.gov/dep/srp/guidance/srra/eph_method.pdf. EPH includes, but is not limited to, No. 2 *[fuel]* ***heating*** oil, diesel fuel, and heavier petroleum products, but excludes the lighter petroleum products, including gasoline and mineral spirits.

...

***"Licensed quarry/mine material" means sand, gravel, or rock: (1) excavated from undisturbed geologic formations; (2) obtained from a licensed quarry/mine; (3) not located on or impacted by other contaminant sources; (4) not comingled with any other material; (5) not known or suspected of being contaminated; (6) not adversely impacted by discharges of hazardous materials or chemical application; (7) not affected by conditions or processes that would result in the introduction of contaminants into the licensed quarry/mine material in concentrations above regulatory concern; and (8) not affected by conditions or processes that would increase the concentrations of contaminants already present in the licensed quarry/mine material to concentrations above regulatory concern.**

...

"Small, non-residential above ground heating oil tank system" means any one or a combination of tanks*[, including]* ***with a capacity of 2,000 gallons or less**, **and*** appurtenant pipes, lines, fixtures, and other related equipment, *[with a capacity of 2,000 gallons or less,]*

used to store heating oil for on-site consumption in a non-residential building, the volume of which, including the volume of the appurtenant pipes, lines, fixtures, and other related equipment, is less than 10 percent below the ground.

...

7:26F-1.9 Certification of a submission to the Department

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

(d) A property owner who implements a remedial action that allows residual contamination pursuant to N.J.A.C. 7:26F-3.7 shall include the following certification in the remedial action report:

"Prior to ***or during*** the implementation of the remedial action, my environmental professional informed me that residual contamination would remain in certain areas of my property. *{Property owner shall choose one of the following statements*:

I have recorded a deed notice modeled after Appendix B of the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C

OR

Upon Department approval of a draft deed notice modeled after Appendix A of this chapter, I will record that deed notice

OR

I am choosing the small quantity exception for residual contamination pursuant to N.J.A.C. 7:26F-3.7, and I acknowledge that the heating oil tank system no further action letter will reference the small quantity exception for residual contamination with a diagram of the location(s) of that contamination.*}*"

***7:26F-1.11 Use of Department technical guidance**

An owner conducting remediation pursuant to this chapter shall apply, pursuant to N.J.A.C. 7:26C-1.2(a)3, any available and appropriate technical guidance concerning site remediation as issued by the Department, or shall provide a written rationale and justification for any deviation from guidance. The Department's technical guidance can be found on the Department's website at www.nj.gov/dep/srp/srra/guidance.*

7:26F-*[1.11]***1.12*** (No change in text from proposal.)

7:26F-2.1 General remediation requirements

(a) When there is a discharge from a heating oil tank system, the owner shall:

1. (No change from proposal.)

2. Within *[48 hours]* ***two business days*** after the discovery of the discharge:

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

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

7:26F-2.2 Sample analysis

(a) The owner shall have all soil and water samples collected in accordance with the requirements for Quality Assurance for Sampling and Laboratory Analysis in the Technical Requirements for Site Remediation at N.J.A.C. 7:26E-2.

[(a)] ***(b)*** (No change in text from proposal.)

Table 2-1

Analytical Requirements for Samples from Heating Oil Tank System Discharges

Type of Heating Oil	Soil	Water
[Heating Oil] No. 2 ***Heating Oil***	Extractable petroleum hydrocarbons (EPH)[1] Analyze 25 percent of samples that contain EPH greater than 1,000 mg/kg for Naphthalene[7] and 2-Methyl Naphthalene[7, 8]	VO*[[2]]***+TICs[2]***, SVO*[[4]]***+TICs[4]***
[Heating Oil] No. 4 and No. 6 ***Heating Oil***	Extractable petroleum hydrocarbons (EPH)[1] Analyze 25 percent of samples for PAH[6] when EPH is detected over 100 mg/kg[7]	VO+TICs[3], SVO+TICs[5]

Kerosene	VO+TICs[3]***, Naphthalene, 2-Methyl Naphthalene***	VO+TICs[3], SVO+TICs[5]

Footnotes

1. (No change from proposal.)

2. United States Environmental Protection Agency (EPA) Target Compound List volatile organic compounds including 1,2,4-Trimethylbenzene, but excluding 1,2-Dibromo-3-chloropropane, 1,2-Dibromoethane, and 1,4-Dioxane *[(except that analyses of Fuel Oil No. 2 shall not include]* ***with***a library search of the 15 highest Tentatively Identified Compounds (TICs)*[)]*.

TICs for volatiles - Identify up to 15 organic compounds of greatest concentration that are not surrogates, internal standards, or targeted compounds listed under TCL.

3. EPA Target Compound List volatile organic compounds excluding 1,2-Dibromo-3-chloropropane, 1,2-Dibromoethane, and 1,4-Dioxane with a library search of the 15 highest TICs.

TICs for volatiles - Identify up to 15 organic compounds of greatest concentration that are not surrogates, internal standards, or targeted compounds listed under TCL*[, except that analyses of Fuel Oil No. 2 shall not include a library search of the 15 highest TICs]*.

4. EPA Target Compound List semi-volatile organic compounds including 1-Methyl *[Napthalene]***Naphthalene***, but excluding phenol and substituted phenols ***with a library search of the 15 highest TICs***.

TICs for semi-volatiles - Identify up to 15 organic compounds of greatest concentration that are not surrogates, internal standards, or targeted compounds listed under TCL.

5. EPA Target Compound List semi-volatile organic compounds excluding phenol and substituted phenols with a library search of the 15 highest TICs.

TICs for semi-volatiles - Identify up to 15 organic compounds of greatest concentration that are not surrogates, internal standards, or targeted compounds listed under TCL*[, except that analyses of Fuel Oil No. 2 shall not include a library search of the 15 highest TICs]*.

6. – 8. (No change from proposal.)

7:26F-3.2 Free product remediation

(a) The owner shall, within 60 days after identifying the presence of free product:

1. (No change from proposal.)

2. *[Excavate]* ***Treat or remove*** all free product saturated soil ***to the extent practicable, or contain free product when treatment or removal is not practicable***.

(b) The owner shall:

1. – 2. (No change from proposal.)

3. Remediate free product until either there is no observable sheen, or there is only a discontinuous sheen. A discontinuous sheen is an observable amount of heating oil on the surface of the water in any well or excavation, that is*[:

i. Broken]* ***broken*** or intermittent and does not cover the majority of the water surface; *[and

ii. Less than 0.25mm thick as measured using an interface probe;]*

4. – 5. (No change from proposal.)

7:26F-3.3 Soil remediation, generally

(a) The owner shall remediate soil contaminated by a discharge from a heating oil tank ***system*** until soil sampling indicates that the property meets the requirements for unrestricted use at N.J.A.C. 7:26F-3.6 or, the residual contamination requirements at N.J.A.C. 7:26F-3.7.

(b) (No change from proposal.)

(c) The owner shall investigate soil contaminated by a discharge from a heating oil tank system as follows:

1. (No change from proposal.)

2. Analyze the soil samples for the *[substances]****applicable parameters*** listed in N.J.A.C. 7:26F-2.2, Table 2-1; and

3. (No change from proposal.)

(d) – (e) (No change from proposal.)

(f) When backfilling an excavation, the owner shall:

1. Use fill material that is:

i. Not contaminated above any remediation standard, pursuant to N.J.A.C. 7:26D***, as determined based on appropriate sampling of the fill material as referenced in the Fill Material Guidance for SRP Sites, available at www.nj.gov/dep/srp/guidance/***;

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

2. (No change from proposal.)

(g) The owner shall obtain a permit from the Department prior to *[implementing any soil remedial action where dewatering or in situ treatment of contaminated soils is proposed, or for any other remedial action for which a permit is required.]* ***initiating any discharge to surface water, discharge into the ground, injection of fluids into injection wells, or any other activity that currently requires a permit from the Department, as follows:**

1. An on-scene coordinator discharge authority permit where water generated from dewatering is treated and then discharged to surface water;

2. A discharge to ground water permit-by-rule where in situ treatment includes the injection or placement of compounds into soil or ground water;

3. A discharge to ground water permit-by-rule where treated water will be reinjected to ground water; or

4. Any other permit required to complete the remedial action.*

7:26F-3.4 Initiating soil remediation with delineation during excavation

(a) An owner electing to initiate soil remediation by excavating contaminated soil while delineating the extent of soil contamination shall:

1. (No change from proposal.)

2. For a discharge from an unregulated heating oil tank system, collect post-excavation soil samples on the same day as the excavation of the contaminated soil, as follows:

i. If the discharge is from the tank, the owner shall:

(1) – (3) (No change from proposal.)

(4) If *[contamination]* ***the excavation*** extends to ***within two feet of either*** bedrock or *[if]* ground water *[is encountered in the excavation]*, then collect a ground water sample pursuant to N.J.A.C. 7:26F-4.2; and

ii. (No change from proposal.)

3. For a discharge from a residential above ground heating oil tank system or a small, non-residential above ground heating oil tank system, collect post-excavation soil samples on the same day as the excavation of the contaminated soil, as follows:

i. – iii. (No change from proposal.)

iv. If *[contamination]* ***the excavation*** extends to ***within two feet of either*** bedrock or *[if]* ground water *[is encountered in the excavation]*, then collect a ground water sample pursuant to N.J.A.C. 7:26F-4.2.

4. – 6. (No change from proposal.)

7:26F-3.5 Initiating soil remediation with delineation

(a) An owner electing to initiate soil remediation by first delineating contaminated soil shall:

1. – 2. (No change from proposal.)

3. Continue to install additional soil borings horizontally and vertically and conduct field screening until ***field screening indicates*** no further contamination *[is observed]* or until bedrock is encountered;

4. (No change from proposal.)

5. Collect a ground water sample pursuant to N.J.A.C. 7:26F-4.2 when contamination extends to ***within two feet of either*** bedrock or ground water *[is encountered]*.

(b) – (d) (No change from proposal.)

7:26F-3.6 Unrestricted use soil remedial action

(a) – (b) (No change from proposal.)

(c) For a discharge of kerosene, the owner may implement an unrestricted use soil remedial action when, for each soil sample, *[each]* ***the following conditions are met:***

1. There are no impacts to ecological receptors, as determined by N.J.A.C. 7:26F-6.4; and

2. Each* volatile organic compound is less than or equal to the most stringent of either:

Recodify proposed 1.-2. as ***i.-ii.*** (No change in text from proposal.)

7:26F-3.7 Residual contamination

(a) If an owner does not implement an unrestricted use soil remedial action pursuant to N.J.A.C. 7:26F-3.6, an owner may implement a soil remedial action pursuant to one of the alternatives at (b) below, which allow residual contamination to remain, if:

1. (No change from proposal.)

2. As to ground water:

i. (No change from proposal.)

ii. The owner conducted a ground water *[remedial]* investigation that did not identify any ground water contamination above the applicable ground water remediation standards, N.J.A.C. 7:26D-2; or

iii. (No change from proposal.)

(b) An owner shall implement one of the following:

1. A limited restricted or restricted use soil remedial action, as applicable, pursuant to the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C, and the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, which shall include, without limitation:

i. If the property *[upon which the residual contamination remains]* is owned by another person, obtaining the property owner's written agreement for the owner to implement a soil remedial action *[by which]* ***where*** residual contamination remains on the property ***or containment is the remedy for free product***;

ii. Recording, or having the person who owns the property record, a deed notice, pursuant to N.J.A.C. 7:26C-7.2, for the area *[of soil contaminated above all of the applicable residential use soil remediation standards, N.J.A.C. 7:26D]* ***where residual contamination remains on the property or containment is the remedy for free product***;

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

2. A soil remedial action for a residential property at which remediation of an on-site discharge is impeded because the soil contamination is located under a residential building, a paved area, or a capped easement (for example, a sidewalk containing utilities), provided:

i. – ii. (No change from proposal.)

iii. There is no free product remaining;

Recodify proposed iii.-iv. as ***iv.-v.*** (No change in text from proposal.)

3. A soil remedial action for a residential property at which remediation of an on-site discharge results ***in*** less than 15 cubic yards of residual contamination under a residential building, provided that:

i. – iii. (No change from proposal.)

(c) – (d) (No change from proposal.)

7:26F-4.2 Ground water investigation requirements

(a) The owner shall investigate ground water pursuant to (b) below to determine whether the discharge from a heating oil tank system contaminated the ground water when:

1. Any portion of the heating oil tank system is located within the seasonal high ground water table or within two feet of either ground water or bedrock; ***or***

*[2. Soil sampling conducted pursuant to N.J.A.C. 7:26F-3 indicates the presence of a heating oil-related contaminant above the site-specific impact to ground water soil remediation standard determined by both soil water partitioning and Synthetic Precipitation Leachate Procedure for that contaminant as set forth at N.J.A.C. 7:26F-3; or

3. Bedrock or ground water is encountered while excavating contaminated soil.]*

2. As required pursuant to N.J.A.C. 7:26F-3.4(a)2i(4) and (a)3iv and 3.5(a)5.*

(b) To investigate ground water contamination, the owner shall:

1. (No change from proposal.)

2. Install each ground water sampling point as follows:

i. For an unconsolidated formation:

(1) For monitoring wells, extend the well screen to five feet above the ground water table and 10 feet below the ground water table***, and otherwise install the well pursuant to the Well Construction and Maintenance; Sealing of Abandoned Wells rules at N.J.A.C. 7:9D***;

(2) (No change from proposal.)

ii. (No change from proposal.)

3. Sample ground water in accordance with the most recent version of the Department's Field Sampling Procedures Manual available at www.nj.gov/dep/srp/srra/guidance and, if, the excavation was not backfilled pursuant to N.J.A.C. 7:26F-3.3(f) prior to *[(the effective date of this chapter)]* ***August 6, 2018***, then include the volume of water that fills the excavation when determining the volume of water to be purged prior to sampling, in accordance with the Department's Field Sampling Procedures Manual in effect on the date that the ground water sampling is performed;

4. Analyze all ground water samples for the *[substances]****applicable parameters*** listed in N.J.A.C. 7:26F-2.2, Table 2-1; and

5. (No change from proposal.)

(c) (No change from proposal.)

7:26F-4.3 Ground water remedial action requirements

(a) The owner shall perform a remedial action for ground water contaminated by a discharge from a heating oil tank system by:

1. (No change from proposal.)

2. Remediating all ground water contamination in excess of the applicable ground water remediation standard, N.J.A.C. 7:26D, to a concentration at or below that applicable ground water remediation standard***, as demonstrated by two confirmation samples collected 90 days apart***.

(b) – (c) (No change from proposal.)

(d) If the ground water remedial action includes a discharge to ground water, the owner shall obtain a New Jersey Pollutant Discharge Elimination System permit pursuant to the New Jersey Pollutant Discharge Elimination System rules at N.J.A.C 7:14A-7.5(b) and ***submit*** a discharge to ground water proposal pursuant to the Technical Requirements for Site Remediation at N.J.A.C. 7:26E-5.6(b) and (c);

(e) (No change from proposal.)

(f) If the owner implements a ground water remedial action that will not be completed prior to submitting the remedial action report to the Department, then the owner shall:

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

4. Submit a copy of the ground water remedial action permit, including all attachments, as part of the remedial action ***report*** pursuant to N.J.A.C. 7:26F-7.2.

(g) (No change from proposal.)

7:26F-6.2 Receptor evaluation – ground water

(a) If the owner detects ground water contamination exceeding any applicable ground water remediation standard at N.J.A.C. 7:26D-2.2(a), then the owner shall:

1. (No change from proposal.)

2. If there are any potable wells or irrigation wells used for potable purposes within 100 feet of the known extent of the ground water contamination, then the owner shall:

i. (No change from proposal.)

ii. Analyze each well sample ***for the appropriate analytes listed in N.J.A.C. 7:26F-2 Table 2.1*** pursuant to the Technical Requirements for Site Remediation at N.J.A.C. 7:26E-2.1(a)9;

iii. – iv. (No change from proposal.)

7:26F-6.3 Receptor evaluation – vapor intrusion

(a) If, within 180 days after the discovery of the discharge, the owner does not remediate the free product and ground water contaminant concentrations to below the vapor intrusion ground water screening levels, which are available on the Department's website at www.nj.gov/dep/srp/guidance/vaporintrusion/index.html, then the owner shall, within 240 days after the discovery of the discharge, conduct a vapor intrusion investigation by:

1. – 3. (No change from proposal.)

4. Analyzing those samples ***for the analytes listed in the Technical Requirements for Site Remediation at N.J.A.C. 7:26E-2.1(c)3*** pursuant to the Technical Requirements for Site Remediation at N.J.A.C. 7:26E-2.1(a)7; and

5. (No change from proposal.)

(b) – (d) (No change from proposal.)

7:26F-6.4 Receptor evaluation – ecological

(a) An ecological receptor evaluation is required***, except as provided in the Technical Requirements for Site Remediation at N.J.A.C. 7:26E-1.16(d),*** when:

1. – 2. (No change from proposal.)

(b) The owner shall conduct an ecological receptor evaluation*[, except as provided in the Technical Requirements for Site Remediation at N.J.A.C. 7:26E-1.16(d),]* as follows:

1. – 3. (No change from proposal.)

7:26F-7.2 Remedial action reports

(a) The owner shall prepare a remedial action report that includes the following:

1. – 8. (No change from proposal.)

9. The following documentation *[of the]****, if*** clean fill material ***is*** used in the excavation, including:

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

iv. A brief history of the source of the clean fill; *[and]*

v. A copy of the certificate of destruction for contaminated soil that has undergone treatment; ***and**

vi. A statement from the environmental professional that the clean fill is of equal or lesser permeability than the soil removed from the heating oil tank system excavation;

10. The following information, if licensed quarry/mine material is used in the excavation:

i. Identification of the source of the delivered licensed quarry/mine material;

ii. A statement from the quarry operator that the licensed quarry/mine material has not been subject to a discharged hazardous substance at any time;

iii. A description of any steps taken to document or confirm the statement in (a)10ii above; and

iv. A statement from the environmental professional that the licensed quarry/mine material is of equal or lesser permeability than the soil removed from the heating oil tank system excavation;*

[10.] ***11.*** (No change in text from proposal.)

[11.] ***12.*** All analytical data, including:

i. Soil sample results in tabular form including sample depth, the applicable soil remediation standard(s), *[and]* the date on which each sample was collected***, and the sample name, data qualifier(s), and reporting limit(s)***;

ii. Ground water sample results in tabular form including sample depth, the applicable ground water remediation standard(s), *[and]* the date on which each sample was collected, *[if applicable]* ****and the sample name, data qualifier(s), and reporting limit(s)***;

iii. Potable well or irrigation well used for potable purposes sample results in tabular form for each well that had no exceedance of any ground water remediation standard, including the applicable ground water remediation standard, the date on which each sample was collected, ****the sample name, data qualifier(s), and reporting limit(s),*** and a copy of the explanation given to each property owner and occupant (if applicable) of the potable well sample results, if applicable;

iv. – viii. (No change from proposal.)

Recodify proposed 12. – 17. as ****13. – 18.**** (No change in text from proposal.)

7:26F-9.3 Financial assistance for reimbursement of prior remediation costs

(a) An applicant may remediate a discharge from an unregulated heating oil tank system and then apply for financial assistance for reimbursement of remediation costs provided that:

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

3. For remediation conducted prior to *[(the effective date of this chapter)]* ****August 6, 2018****, the remediation associated with the remediation costs was conducted in compliance with

the rules in effect at the time the remediation was conducted and with the Underground Storage Tank Finance Act, N.J.S.A. 58:10A-37.1 through 37.23; and

4. For remediation conducted on or after *[(the effective date of this chapter)]* ***August 6, 2018***, the remediation associated with the remediation costs was conducted in compliance with this chapter and with the Underground Storage Tank Finance Act, N.J.S.A. 58:10A-37.1 through 37.23.