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September 29, 2017

VIA ELECTRONIC MAIL
rulemakingcomments@dep.nj.gov
Alice.Previte@dep.nj.gov
Alice A. Previte, Esq.
Attention: DEP Docket Number 10-17-06
Office of Legal Affairs
Mail Code 401-07
Department of Environmental Protection
401 East State Street, P.O. Box 402
Trenton, NJ 08625-0402

RE: COMMENTS ON NJDEP PROPOSED AMENDMENTS TO SITE REMEDIATION AND WASTE MANAGEMENT PROGRAM RULES (DEP DOCKET NO. 10-17-06, PROPOSAL NO. PRN 2017-134)

Dear Ms. Previte:

On behalf of our members, the Chemistry Council of New Jersey (CCNJ) and the Site Remediation Industry Network (SRIN) appreciate the opportunity to provide comments to the New Jersey Department of Environmental Protection (NJDEP, the Department) on the proposed amendments to Site Remediation & Waste Management Program (SRWMP) rules, including Discharges of Petroleum and Other Hazardous Substances (DPHS), Heating Oil Tank System (HOTS) Remediation Rules, Administrative Requirements for the Remediation of Contaminated Sites (ARRCS), and Technical Requirements for Site Remediation (Tech Regs) published in the New Jersey Register on July 17, 2017.

We thank the NJDEP for granting an extension of the comment period to September 29, 2017, which allowed time for preparation of more comprehensive comments by stakeholders. However, we continue to have concerns regarding the transparency of this rulemaking process.

Though meetings were held with stakeholders in the past, we are disappointed that there were no more recent opportunities given to stakeholders to share and address particular concerns and topics in a public forum with the NJDEP's rule development team. As a result, the NJDEP could not give serious consideration to stakeholder feedback as they were drafting these amendments.

Below are CCNJ/SRIN's comments on the above-referenced rule proposal, which include attachments.

PROCEDURAL COMMENTS

- **COMMENT #1:** This rulemaking package fails to comply with the requirements and the spirit of the New Jersey Administrative Procedure Act (APA) 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 proposal. Regarding true stakeholder input, we must question the openness and transparency of this process.

- **COMMENT #2:** This rulemaking package contains many miscellaneous, unrelated, and potentially significant provisions that were not previously vetted in any way with the regulated community. A public comment package of over 300 pages that contains such varied provisions, and no or minimal compliance with the procedural protections of the APA with regard to each change, does not provide meaningful notice to the regulated community of what new regulations and obligations the NJDEP is seeking to impose.

COMMENTS ON DISCHARGES OF PETROLEUM AND OTHER HAZARDOUS SUBSTANCES (DPHS) RULES
(N.J.A.C. 7:1E)

Subchapter 5 – Discharge Notification, Response and Reporting
5.7 – Discharge response

- 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 (DCR) plan or ARRCS/Tech Regs.

    - **COMMENT #3:** CCNJ/SRIN supports this proposed change.

    - **COMMENT #4:** Please clarify how discharges cleaned up in accordance to DCR plans will be appropriately identified in NJEMS and the NJDEP DataMiner database so that cases managed this way are not erroneously flagged for compliance and/or enforcement actions; CCNJ/SRIN recommends that the NJDEP identify these cases as "Referred – [insert Department Bureau]", similar to how incidents referred to the SRWMP are categorized.

COMMENTS ON UNDERGROUND STORAGE TANKS (UST) RULES
(N.J.A.C. 7:14B)

Subchapter 7 – Release Reporting and Investigation
7.2 – Investigating a suspected release

- N.J.A.C. 7:14B-7.2(b) requires the owner or operator to immediately notify the NJDEP if the investigation is inconclusive in confirming or disproving a suspected release.

    - **COMMENT #5:** The NJDEP proposes to modify the above citation to specify that the investigation of a suspected release is reported to the NJDEP. However, this rulemaking includes a proposed change at N.J.A.C. 7:26C-1.7(d) whereby the NJDEP proposes to amend N.J.A.C. 7:26C-1.7(d)2 so that notification is required only if there is a confirmed discharge. Page 25 of the preamble states "The Department is only concerned with confirmed discharges, not suspected discharges." CCNJ/SRIN recommends that the NJDEP proceed with the proposed change to the rule at N.J.A.C 7:26C-1.7(d)2 and the proposed change at N.J.A.C. 7:14B-7.2(b) should not be adopted.

Subchapter 9 – Out-of-Service Underground Storage Tank Systems and Closure of Underground Storage Tank Systems
9.5 – Reporting and recordkeeping requirements

- N.J.A.C. 7:14B-9.5(c) allows the owner or operator to submit a Response Action Outcome (RAO) pursuant to ARRCS if the site investigation report is submitted and the owner or operator concludes that no further remediation is required.

    - **COMMENT #6:** CCNJ/SRIN supports this proposed change.

Subchapter 12 – Penalties, Remedies, and Administrative Hearing Procedures
12.1 – Penalties

- N.J.A.C. 7:14B-12.1(d) and (e) state that the NJDEP may assign penalty points, as described in Table 12-1, if a subsurface evaluator has failed to properly perform underground tank services pursuant to the HOTS Remediation Rules.

    - **COMMENT #7:** CCNJ/SRIN disagrees with this proposed change. Though we encourage the NJDEP to enforce under N.J.A.C. 7:14B-12.1(c), we believe this penalty point system is subjective in nature, cumbersome to administer, and flawed in that it fails to establish the benchmarks or limits at which the NJDEP will impose administrative penalty or initiate revocation of certification. For example, minor deficiency #4 (stockpiling impacted soil that violates timeframes for storage) should be qualified for situations entirely within the Subsurface

Evaluator's control; obviously, if the Person Responsible for Conducting the Remediation (PRCR) does not have the funding or chooses not to pay for soil disposal in a timely manner, it should not be a penalty against the Subsurface Evaluator. In addition, there is no provision for the certified individual or firm to dispute/challenge the NJDEP's action. CCNJ/SRIN recommends that the proposed changes at N.J.A.C. 7:14B-12.1(d), N.J.A.C. 7:14B-12.1(e), and Table 12-1 should not be adopted.

COMMENTS ON ADMINISTRATIVE REQUIREMENTS FOR THE REMEDIATION OF CONTAMINATED SITES (ARRCS)
(N.J.A.C. 7:26C)

Subchapter 1 – General Information
1.3 – Definitions

- 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 (LLC) or general partner of a partnership.

    - **COMMENT #8:** CCNJ/SRIN disagrees with this proposed change. The proposed revision is improper, *ultra vires*, unsound public policy, vague and inconsistent with established law providing for a "corporate veil". Accordingly, the proposed change should not be adopted.

      The proposed rule change would create liability for shareholders and corporate officials in all situations, whereas under well-established law liability must be established under specific and limited scenarios when piercing the "corporate veil" is justified. The proposed rule improperly seeks to remove that shield broadly and in turn completely removes the well-established concept of a corporate veil. In so doing, the Department is acting without legislative authority and is usurping the role of the Legislature to modify centuries of established law. Clearly, our Legislature has not sought fit to provide broad authority for the Department to pierce the corporate veil for all "responsible corporate officials."

      Further, the proposed rule is clearly not authorized by the enabling legislation. For example, "person" is defined under the Spill Compensation and Control Act as:

      "Person" means 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.

      The definitions of other related environmental statutes are substantively identical. The statutory definitions do not include language that includes corporate officials or shareholders. The 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.

As noted below, the distinct 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 have been well-established. As a general matter, "[t]he rule of law that has evolved in New Jersey is that the corporate form as a wholly distinct and separate entity will be upheld." *Coppa v. Taxation Div. Director*, 8 N.J. Tax 236, 246 (Tax Ct. 1986). As such, "a primary reason for incorporation is the insulation of shareholders from the liabilities of the corporate enterprise." *State Dep't of Envtl. Prot. v. Ventron Corp*., 94 N.J. 473, 500 (1983).

The proposed rule is inconsistent with the well-established protections afforded human beings acting in their capacity as a corporate official or a managing member of a limited liability company or limited liability corporation or other corporate entity. *United States v. Bestfoods*, 542 U.S. 51 (1998) and see, for example, *New Jersey Dep't of Envtl. Prot. v. Navillus Group,* No. A-4726-13T3, 2016 N.J. Super. Unpub. LEXIS 77 (N.J. Super. Ct. App. Div. Jan. 14, 2016), in which the court rejected the Department's efforts to hold a corporate official responsible for actions in the Kiddie Kollege site. The Department should identify the basis for the rule proposal, including whether the proposed revision is meant as a response to the court's decision in the *Navillus* matter.

Further, the proposed rule 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 a corporate official's authority, including 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 vesting 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. More pointedly, given the long-standing and well-established limits on imposing liability on corporate officials and shareholders for actions of the corporate entity, the term "responsible" is misplaced and unnecessary. As noted below, exceptions exist that allow for the piercing of the corporate veil on a case

specific basis. The Department has failed to identify the authority for seeking to bypass those long-standing exceptions. Similarly, the Department has failed to establish 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 in the capacity as corporate officers directly contradicts the fundamental and sound purposes for which those protections were established. These protections were created to ensure that individuals would be shielded from liability so that corporate entities could function as independent entities fostering investment under the corporate form rather than as individuals. The existence of a corporate entity as distinct from the individuals who effectuate that entities actions is both intentional and a fundamental component of our system of laws. The proposed rule would ignore that intentional and fundamental distinction.

Further, the protections shielding corporate officials and shareholders can be removed if (**and only if**) the established exceptions are proven. By way of 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. *Saltiel v. GSI Consultants, Inc*., 170 N.J. 297, 3030 (2002). Under the "tort participation theory", liability can attach even if the officer's acts were performed for the corporation's benefit and the officer did not personally benefit. Id. However, the "tort participation theory" has specific parameters that are ignored by the proposed rule. As such, the proposed rule improperly seeks to circumvent established law. Again, the Department has not identified its authority for so doing.

Subchapter 1 – General Information

1.4 – Applicability and exemptions

- N.J.A.C. 7:26C-1.4(d) clarifies that a discharge of mineral oil is a petroleum discharge that, under certain circumstances, is exempt from Licensed Site Remediation Professional (LSRP) retention and document submittal requirements.

    - **COMMENT #9:** CCNJ/SRIN recognizes that the NJDEP has confirmed a discharge of mineral oil is a petroleum discharge exempt from LSRP retention and document submittal requirements. To be consistent with NJDEP regulations and guidance which define mineral oil as a petroleum product, CCNJ/SRIN recommends that the regulation be revised as follows:

- "A petroleum surface spill ~~or a surface spill of~~**, including** mineral oil from a transformer, of less than 100 gallons, that does reach the waters of the State of New Jersey provided that:..."

  - **COMMENT #10:** Mineral oil, a petroleum product, is widely used as transformer fluid. Current regulations provide that, for certain discharges of transformer fluid from a transformer which does not contain Polychlorinated Biphenyls (PCBs) in concentrations of 50 parts per million (ppm) or greater ("non-PCB"), no notification to the NJDEP hotline is required. As referenced above, current (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. CCNJ/SRIN requests confirmation that a discharge of less than 100 gallons of non-PCB mineral oil from a transformer is exempt from LSRP retention and document submittal requirements, assuming it is has not reached a water of the State, is remediated within 90 days, and appropriate records are maintained.

- N.J.A.C. 7:26C-1.4(d)1i provides the following exemption from LSRP retention and document submittal requirements: 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.

  - **COMMENT #11:** CCNJ/SRIN requests clarification that "remediated within 90 days" means initiating the remedial process, which includes responding to a known or suspected discharge and any applicable interim measures.

Subchapter 1 – General Information

1.5 – Signatures and certifications

- N.J.A.C. 7:26C-1.5(c) amends the language of the certification that the PRCR must include in submission to the NJDEP.

  - **COMMENT #12:** CCNJ/SRIN disagrees with this proposed change. The Department's proposal to add the following language to **all** required certifications and forms (?) for submissions of documents 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. 45 NJR 2067. The proposed language will substantially limit the submission of mandated documents, and is contrary to sound public policy.

"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 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. See proposed N.J.A.C. 7:26C-1.5(c)."

This portion of the proposed rule 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 rule proposal at N.J.R. 2067, the revised certification language is tied to the proposed insert into the definition of "person" to include: "for the purposes of enforcement, also include responsible corporate official, which includes a managing member of a limited liability company." As noted above, the effort to impose personal liability for all certification signatories acting in their individual capacity is also improper. The comment above is therefore also applicable to the proposed changes to the certification language.

The proposed additional certification language is not specific to the particular information that is being submitted with that certification. Rather, the language seeks to impose upon the certification signatory personal responsibility for any violation of the Site Remediation Reform Act (SRRA) or ARRCS, even if such violation is not specifically associated with the information contained in the document with which the certification is submitted. Hence, 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. Hence, the certification, as written, would arguably apply to any violation of SRRA or ARRCS *anywhere*.

The proposed language 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 such to being reasonable, practical, and within the signatory's power. Hence, 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 to, not only "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 PRCR for which the certification is being made. Clearly, there are some violations that are beyond the ability of some PRCRs 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 take action 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. Hence, 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 rule proposal summary background at 45 NJR 2055, 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." 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.

Subchapter 1 – General Information

1.7 – Notification and public outreach

- N.J.A.C. 7:26C-1.7(c) states that a PRCR is not required to notify the NJDEP if the only discharge is historic fill.
    - **COMMENT #13:** CCNJ/SRIN supports this proposed change.
- N.J.A.C. 7:26C-1.7(d)2i removes the requirement for the owner or operator to call the NJDEP hotline if there is only a suspected (vs. confirmed) discharge.
    - **COMMENT #14:** CCNJ/SRIN supports this proposed change.
    - **COMMENT #15:** CCNJ/SRIN recommends also removing this requirement at N.J.A.C. 7:14B-7.2(b) for consistency.
- 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.
    - **COMMENT #16:** CCNJ/SRIN disagrees with this proposed change. We are concerned 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 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. CCNJ/SRIN recommends that the proposed change at N.J.A.C. 7:26C-1.7(h)2 should not be adopted.

Subchapter 3 – Remediation Timeframes and Extension Requests

3.3 – Statutory and mandatory remediation timeframes

- N.J.A.C. 7:26C-3.3(a) states "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 May7, 1999, shall complete the remedial investigation of the entire site and submit the remedial investigation report by the following applicable date:"
    - **COMMENT #17:** CCNJ/SRIN requests clarification on discharges that "should have been identified" prior to May 7, 1999. As an example, an owner (seller) removed a UST prior to the September 3, 1986 UST registration deadline and reported no discharge. During a property transaction in 2017, a buyer conducts a due diligence and discovers soil contamination in the former UST area. Is the seller responsible in that they "should have identified the contamination" prior

to May 7, 1999 and, therefore, not compliant with the statutory timeframe? Is the site automatically subject to direct oversight?

Subchapter 3 – Remediation Timeframes and Extension Requests
3.5 – Extension of a mandatory or an expedited site specific remediation timeframe

- N.J.A.C. 7:26C-3.5(d) states that the NJDEP may grant an extension of a mandatory remediation timeframe by granting approval in writing when an extension is needed as a result of a delay in obtaining access to property, site-specific circumstances such as on-going litigation or insufficient monetary resources, or other circumstances such as fire or flood.

    - **COMMENT #18:** CCNJ/SRIN recommends that the NJDEP add a fourth criterion for when an extension is needed: site complexity. In many instances, the timeframes imposed by the NJDEP 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 exists great disparity in the size, nature, and complexity of contaminated sites that exist in New Jersey. Also, being placed in direct oversight does not serve to further the NJDEP's goal of expediting the effective remediation of contaminated sites.

    - **COMMENT #19:** Please confirm that a site which obtains an approval from the NJDEP for an extension to their mandatory timeframe, is not in direct oversight at that point in time.

Subchapter 4 – Fees and Oversight Costs
4.3 – Annual remediation fee

- N.J.A.C. 7:26C-4.3(j) states that a PRCR 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.

    - **COMMENT #20:** CCNJ/SRIN supports this proposed change.

Subchapter 5 – Remediation Funding Source and Financial Assurance
5.8 – Self-guarantee requirements

- N.J.A.C. 7:26C-5.8(a)4 includes the International Standards on Auditing as a recognized standard for self-guarantee requirements.

    - **COMMENT #21:** CCNJ/SRIN supports this proposed change.

- **COMMENT #22:** CCNJ/SRIN recommends that self-guarantee be included as an option for financial assurance. We believe that this exclusion creates unnecessary expenses for PRCRs, with no benefit to 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.

Subchapter 5 – Remediation Funding Source and Financial Assurance
5.11 – Changes in the remediation funding source or financial assurance amount or type and return of the remediation funding source or financial assurance

- N.J.A.C. 7:26C-5.11(e)2iii states that financial assurance will be returned when a modified Remedial Action Permit (RAP) reflects the LSRP's determination that a remedy is protective of the environment and public health without the use of an engineering control.

  - **COMMENT #23:** CCNJ/SRIN supports this proposed change.

Subchapter 6 – Final Remediation Documents
6.2 – Response action outcomes

- 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 before an RAO is issued.

  - **COMMENT #24:** Please clarify the intent of "all wells".

  - **COMMENT #25:** CCNJ/SRIN disagrees with this proposed change. There are circumstances when all or some wells may be needed post-RAO not related to a RAP. We are concerned because this may result in the premature closing of monitoring wells that are utilized as back-up wells which are not part of the groundwater RAP monitoring program. In addition, these back-up wells can be utilized to demonstrate that the groundwater is protective in the event that an audit identifies otherwise. Another concern is when groundwater contamination from an off-site source is detected in wells (and is properly documented through multiple lines of evidence); an RAO 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, we believe this change will cause further delay in property transactions that are dependent upon the issuance of an RAO. CCNJ/SRIN recommends requiring the LSRP to properly decommission monitoring wells that are no longer used for remediation after the three-year audit period of the RAO, or modifying Appendix D to include

language to clarify a third option: wells not abandoned and not associated with a RAP.

Subchapter 6 – Final Remediation Documents

6.4 – Correction, rescission, withdrawal, and invalidation of a final remediation document

- N.J.A.C. 7:26C-6.4(a) states that a remedial action may not be protective of the public health and safety and the environment if one of the enumerated circumstances occurs.

    - **COMMENT #26:** The proposed change to N.J.A.C. 7:26C-6.4(a) modifying the words "is not protective" to "may not be protective" accurately reflects that the enumerated situations that follow may or may not be indications that the Remedial Action that was the subject of a Final Remediation Document (FRD) was not protective of human health and the environment.

- N.J.A.C. 7:26C-6.4(a)10 states that the NJDEP amends a remediation standard after the issuance of a final remediation document and the difference between the level or concentration of the new remediation standard and the residual level or concentration of a contaminant at the contaminated site or area of concern differs by an order of magnitude or more.

    - **COMMENT #27:** Please confirm whether the "remediation standard" pertains to both soil and groundwater media.

    - **COMMENT #28:** The NJDEP issued an Order of Magnitude Guidance (dated August 10, 2009) that requires an Order of Magnitude evaluation for sites. Section 6 specifically provides the response on how to conduct an Order of Magnitude evaluation for sites with Remedial Action Work Plan Approval but not No Further Action (NFA) Approval and for sites with NFA Approval (conditional NFA and unconditional NFA). The NJDEP clearly distinguishes conditional and unconditional NFAs for the Order of Magnitude evaluation. This new requirement is overreaching and burdensome because it creates a new trigger for unrestricted RAO letters to be overturned where previously an Order of Magnitude evaluation was only needed in certain circumstances (i.e. ISRA trigger, daycare license RAO). Please clarify.

- N.J.A.C. 7:26C-6.4(a)11 states that a remedial action may not be protective if the permittee fails to certify, pursuant to N.J.A.C. 7:26c-7.8(d), that a remedy remains protective.

    - **COMMENT #29:** This requirement requires clarification of what is meant by "not being protective". For example, does this mean a site condition revealed as part of an Order of Magnitude evaluation, new data exceeding an established

remediation standard, or a condition that represents an Immediate Environmental Concern? Please confirm that this requirement is limited to the evaluation of the protectiveness of the soil RAP.

- N.J.A.C. 7:26C-6.4(b) allows for a review of the circumstances and possible amendment or withdrawal of an RAO and N.J.A.C. 7:26C-6.4(c) addresses what the PRCR is required to do upon learning that the remedial action may not be protective of the public health and safety and the environment.

    - **COMMENT #30:** The proposed changes to N.J.A.C. 7:26C-6.4(b) and (c) are *ultra vires*, contrary to the intent of the Legislature, create process which is violative of due process, include unnecessary and unrealistic timeframes, and improperly shifts authority to LSRPs regarding the invalidation of RAOs.

      SRRA specifically establishes the basis for invalidating an RAO and specifically directs that determinations regarding invalidation be made by the Department:

      "58:10C-22. Invalidation of response action outcome
      The department shall invalidate a response action outcome issued by a licensed site remediation professional if the department determines that the remedial action is not protective of public health, safety, or the environment or if a presumptive remedy was not implemented as required pursuant to the provisions of subsection g. of section 35 of P.L.1993, c.139 (C.58:10B-12). However, if a presumptive remedy is not implemented as required pursuant to the provisions of subsection g. of section 35 of P.L.1993, c.139 (C.58:10B-12), but the department determines the remedial action is as protective of the public health, safety, and the environment as the presumptive remedy, the department shall not invalidate the response action outcome."

      SRRA specifically defines that it is the role of the NJDEP to invalidate an RAO if "the department determines that the Remedial Action is not protective." SRRA does not authorize LSRPs to invalidate or withdraw RAOs. Further, SRRA does not identify criteria governing when an LSRP would act to invalidate or withdraw an RAO. The absence of such criteria or authority for LSRPs to invalidate or withdraw an RAO in SRRA is glaring particularly in light of the specificity provided in N.J.S.A. 58:10C-22 establishing authority for invalidation solely with the Department and establishing a specific standard as to when the Department would invoke that authority.

      A critical element of SRRA was that RAOs would remain valid once issued by an LSRP unless invalidated by the NJDEP "if the Department determines that the remedial action is not protective of public health, safety, or the environment."

Mandating withdrawal by LSRPs, particularly when the invalidation standard has not been established by the Department is clearly contrary to SRRA.

While in practice, LSRPs have been permitted to withdraw RAOs when the LSRP agrees that the RAO was improvidently issued or when a revised RAO is needed to more accurately reflect site conditions. SRRA does not authorize that LSRPs be mandated to withdraw RAOs. Mandating LSRPs to withdraw RAOs exposes LSRPs to liability for the implications of that RAO. That exposure is compounded by the language of the proposed rule that would mandate that an LSRP withdraw an RAO even when it is not clear that the remedial action that was the subject of the RAO was not protective. Accordingly, LSRPs would be compelled by the proposed rule to withdraw an RAO under circumstances when the Department could not invalidate the RAO. Hence, the proposed rule improperly circumvents the specificity established by the Legislature relating to the invalidation of an RAO.

The proposed rule compels the withdrawal of an RAO if additional facts arise that fall within the twelve scenarios in N.J.A.C. 7:26C-6.4(a) if the protectiveness of the remediation cannot be confirmed within thirty days of when those additional facts become known to the LSRP that issued the RAO or the entity to whom the RAO was issued. However, as the Department has correctly noted in the proposed revision to N.J.A.C. 7:26C-6.4(a), the twelve scenarios may or may not be an indication that the remedy that was the subject of an RAO is not protective. Hence, the rule as proposed would compel the withdrawal of an RAO even when remedial action that was the subject of the RAO was protective and remains protective.

It is quite clear that the RAO recipients could be adversely impacted by a withdrawal of an RAO that ultimately was not warranted but for the mandates of the proposed rule. Yet, the proposed rule does not provide for any mechanism for challenging such a withdrawal or for compensating a party damaged by an improvidently withdrawn RAO. Similarly, the Department has not identified whether any protections would exist for LSRPs that are sued for improvidently withdrawing an RAO by operation of the proposed rule. Accordingly, the proposed rules create a regulatory scheme with mandates unchecked by any form of procedural or substantive due process. Such a scheme should not be imposed particularly absent clear statutory authority.

Mandating the withdrawal of RAOs by LSRPs (or mandating that the PRCR request that the Department invalidate an RAO) subverts the statutory framework differentiating the respective responsibilities and authority of the Department and LSRPs (and PRCRs). Among the implications of the improper imposition of mandatory withdrawals is the limitation (and potential preclusion)

of the parties impacted by a withdraw to the administrative and judicial reviews afforded under the APA and the state and federal Constitutions. Invalidation of an RAO by the Department would be subject to the right to challenge that decision as permitted under the APA and to our courts. Is it the Department's position that a withdrawal of an RAO by an LSRP that is mandated under the proposed rules would also be subject to the same challenges as would a determination by the Department and what is the basis for that position?

The Department has also failed to establish the basis for the 30 day time frame for action under the proposed rule. The mere passage of time does not equate to an absence of facts. However, the proposed rule established a non-rebuttable presumption that if the protectiveness of a remedy cannot be confirmed in 30 days, the remedy is not protective. Such a presumption could have been established by the Legislature, but was not. The proposed rule must be withdrawn.

The proposed 30-day timeframe is also unnecessary. The Department clearly has been vested with the authority to investigate whether a remedy that was the subject of an FRD remains protective if new information arises. SRRA established that the burden for invalidation was placed on the Department. The proposed rule improperly shifts the burden to LSRPs and the recipients of FRDs.

If the proposed rule is not withdrawn, then at the minimum, the 30-day timeframe should be removed or the timeframe should be subject to automatic extensions as long as the new information continues to be being assessed. Again, the Department already has the authority to take action if the Department can conclude that the remedy is no longer protective.

Invalidation or withdrawal would be inappropriate based solely on new conditions or changed circumstances after the RAO was issued if the basis for the RAO was valid at the time the RAO was issued. RAOs are based on conditions at the time of the RAO issuance and are not a prognostication of future conditions or a guarantee against changed conditions. Further, recipients of RAOs are provided with specific statutory protections that are subject to specific and limited exceptions or re-openers. The twelve scenarios in N.J.A.C. 7:26C-6.4(a) do not uniformly fall within those specific and limited re-openers.

Finally, the Department has frequently determined that new circumstances or new conditions do not mandate the invalidation of a previously issue FRD (such as a NFA determination), but rather, warrant review as a new Area of Concern. By mandating withdrawal, the proposed rules improperly presume that all such new circumstances or new conditions cannot be considered as new Areas of Concern contrary to past Department approach. The Department has failed to

identify why new circumstances or new conditions should not be treated as a new Area of Concern.

- N.J.A.C. 7:26C-6.4(c) requires a PRCR to inform the NJDEP within two days after the discovery that a remedial action may not be protective of the public health and safety and the environment, retain an LSRP within seven days after the discovery, and have the LSRP amend or withdraw their RAO or request that the NJDEP invalidate the RAO within 30 days after the discovery.

    - **COMMENT #31:** CCNJ/SRIN requests that the NJDEP provide flexibility to these timeframes, which are inappropriate and prescriptive. The requirement requires clarification of what is meant by "not being protective". The necessity to respond to new findings or site conditions is reasonable, but the timing of the response by a PRCR should be dictated by the finding/condition itself. A framework of appropriate responses given a scenario cannot be developed without further discussion on this topic and what constitutes "not being protective".

Appendix D – Model Response Action Outcome Document

- The NJDEP formalizes eight additional notices for the Model RAO Document.

    - **COMMENT #32:** CCNJ/SRIN supports this proposed change.

    - **COMMENT #33:** CCNJ/SRIN recommends that the recently issued "Commingled Plume" notices (dated April 24, 2017) be added to Appendix D – Model Response Action Outcome.

Subchapter 7 – Deed Notices, Ground Water Classification Exception Areas, and Remedial Action Permits

7.2 – Administrative requirements for using a deed notice in a remedial action

- N.J.A.C. 7:26C-7.2(c) requires the PRCR 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.

    - **COMMENT #34:** Re: the deed notice: CCNJ/SRIN strongly disagrees with this proposed change. We are concerned because 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 PRCR but for the property

owner as well. How a PRCR chooses to address this issue with a property owner should not be mandated by the NJDEP, and the signature of the owner on the deed notice should be sufficient. CCNJ/SRIN strongly urges that the proposed change at N.J.A.C. 7:26C-7.2(c) should not be adopted.

- **COMMENT #35:** CCNJ/SRIN is also concerned about the NJDEP reviewing and potentially commenting on the signed property owner written agreements, which are negotiated contracts. In addition, CCNJ/SRIN does not believe such documents should be available to the public via an OPRA request. CCNJ/SRIN recommends that the proposed changes should not be adopted.

- **COMMENT #36:** Re: the notice in lieu of a deed notice: CCNJ/SRIN strongly disagrees with this proposed change. In the August 15, 2011 proposed rule, the NJDEP proposed the notice in lieu of a deed notice for State or Federal entities occupying the property, or for local, county, or State highways, where there may not exist a deed to which a deed notice may be attached. On May 7, 2012, the NJDEP finalized the notice in lieu of a deed notice by requiring the PRCR to provide a copy of the notice prepared in lieu of a deed notice to the listed governments entities where State or Federal entities or the US Department of Defense are occupying the property or where a roadway is owned by a local, county, or State entity. The intent of the notice in lieu of a deed notice is to inform and advise the existing and subsequent land owners 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 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. We believe that 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 PRCR 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 PRCR 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 PRCR being non-compliant for timeframes and thus subject to direct oversight, fines, and other penalties. CCNJ/SRIN recommends that the proposed change should not be adopted, or the NJDEP provide a PRCR with a certain amount of time to dispute the proposed institutional control with a technical justification.

Subchapter 7 – Deed Notices, Ground Water Classification Exception Areas, and Remedial Action Permits

7.3 – Administrative requirements for establishing and removing a ground water classification exception area in a remedial action

- N.J.A.C. 7:26C-7.3(h) establishes a virtual groundwater classification exception area for Historically Applied Pesticides, similar to historic fill, and does not require a RAP.

    - **COMMENT #37:** CCNJ/SRIN supports this proposed change.

Subchapter 7 – Deed Notices, Ground Water Classification Exception Areas, and Remedial Action Permits

7.6 – Remedial action permit application schedule

- N.J.A.C. 7:26C-7.6(c) states that the NJDEP will automatically issue RAPs to PRCRs who do not submit applications in accordance with their timeframes.

    - **COMMENT #38:** Please clarify how the NJDEP will determine and identify the PRCR for their issuance of RAPs. Who is the permittee – the owner of the property where the institutional/engineering control is located, the property tenant, or the discharger of the spill (even if, for example, they may have received a No Further Action letter and are now recalcitrant)?

    - **COMMENT #39:** Please clarify how the NJDEP will require financial assurance from the PRCR in this scenario (i.e. automatic issuance of RAP) as this is part of the RAP application process.

    - **COMMENT #40:** Please clarify how the NJDEP will handle/address permit conditions that are not able to be satisfied (e.g. a PRCR who did not realize they needed a RAP, which includes monitoring requirements for groundwater wells that may no longer exist).

    - **COMMENT #41:** Please clarify/define what the NJDEP considers “not timely”.

- N.J.A.C. 7:26C-7.6(d) states that the NJDEP will automatically issue RAP modifications to PRCRs who do not submit applications in accordance with their timeframes.

    - **COMMENT #42:** Please clarify/define what the NJDEP considers “not timely”.

- N.J.A.C. 7:26C-7.6(e) requires that the permittee pay the applicable RAP fee pursuant to N.J.A.C. 7:26C-4.6 within thirty days after the NJDEP issues a RAP or modification.

- **COMMENT #43:** Please clarify how the permittee will remit payment (i.e. complete/submit a form or pay an invoice issued by the NJDEP).

Appendix B – Model Deed Notice

- Paragraph 7A. (Alterations, Improvements, and Disturbances) acknowledges that, where the disturbance is temporary and the site will be restored to the condition described in the exhibits, a soil RAP modification is not required. In addition, temporary disturbances will be included in the next biennial certification.

    - **COMMENT #44:** CCNJ/SRIN supports this proposed change.

Subchapter 9 – Enforcement
9.5 – Civil administrative penalty determination

- 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 the 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 an RAO has been invalidated/withdrawn or a No Further Action letter has been rescinded ($20,000).

    - **COMMENT #45**: CCNJ/SRIN believes these additions are not justified, and are 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. Since the NJDEP has no discretion to deviate from the amount or the issuance of the penalty, CCNJ/SRIN recommends that these penalties should not be adopted.

Subchapter 9 – Enforcement
9.10 – Adjudicatory hearings

- N.J.A.C. 7:26C-9:10 replaces existing regulations with new procedures, which provide greater detail when and how to request an adjudicatory hearing and how the NJDEP will grant or deny such a request.

    - **COMMENT #46:** Please confirm whether a withdrawal of an RAO also entitles a person to request an adjudicatory hearing; currently, only invalidation of an RAO is included on the list.

Subchapter 14 – Direct Oversight
14.2 – Compulsory direct oversight

- N.J.A.C. 7:26C-14.2(b)1 requires the PRCR to hire an LSRP "within 14 days after the applicable event in (a) above, if one has not yet been retained;"

    - **COMMENT #47:** CCNJ/SRIN disagrees with this proposed change. For consistency, CCNJ/SRIN recommends that the PRCR hires an LSRP in accordance to N.J.A.C. 7:26C-2.3(a).

- N.J.A.C. 7:26C-14.2(b)2v includes a Direct Oversight Remediation Summary Report in the submittal requirements.

    - **COMMENT #48:** CCNJ/SRIN disagrees with this proposed change. This requirement is burdensome, onerous, and redundant since all of the same information is currently required in the Case Inventory Document (CID). CCNJ/SRIN recommends that the proposed change at N.J.A.C. 7:26C-14.2(b)2v should not be adopted.

Subchapter 14 – Direct Oversight
14.4 – Adjustments in direct oversight

- N.J.A.C. 7:26C-14.4(a) offers relief of certain direct oversight requirements.

    - **COMMENT #49:** CCNJ/SRIN supports this proposed change.

    - **COMMENT #50:** CCNJ/SRIN recommends the development of a direct oversight "off-ramp" mechanism for sites that are in full compliance. This mechanism would place compliant sites back under LSRP oversight, which would free the NJDEP'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.

COMMENTS ON TECHNICAL REQUIREMENTS FOR SITE REMEDIATION (TECH REGS) (N.J.A.C. 7:26E)

Subchapter 1 – General Information

1.6 – General reporting requirements

- N.J.A.C. 7:26E-1.6(b)6ii replaces Practical Quantitation Limit (PQL) with Reporting Limit (RL).

    - **COMMENT #51:** This proposed change contravenes other rule requirements, such as the Ground Water Quality Standards Rules, that are based on PQLs. CCNJ/SRIN recommends that the NJDEP allow reporting at PQLs or Method Detection Limits (MDLs) at the discretion of the LSRP, if the project Data Quality Objectives require.

Subchapter 2 – Quality Assurance for Sampling and Laboratory Analysis

2.1 – Quality assurance requirements

- N.J.A.C. 7:26E-2.1, Table 2-1 removes the requirement that tentatively identified compounds (TICs) be analyzed for No. 2 fuel oil, and maintains the requirement that TICs be analyzed for diesel fuel.

    - **COMMENT #52:** Table 2-1 proposes to separate No. 2 heating oil and diesel fuel as different fuels for the purpose of groundwater assessments; specifically, water samples for No. 2 heating oil investigations no longer require analysis of TICs for the volatile organic (VO) or semi-volatile organic (SVO) scans. The NJDEP discusses rationale in the summary section on page 33 that, out of tens of thousands of cases (presumably mostly residential), most of the compounds on the TIC list are of low risk to public health and safety and the environment, readily degrade, and remediation of TICs has resulted in the expenditure of unnecessary time and money with only minor benefits. The NJDEP has not provided any technical support for their contention that TICs are of low risk to public health and safety and the environment and readily degrade. Because TICs can include numerous compounds, it is impossible to conclude that all conceivable TICs are low risk, especially since TICs can include benzene isomers. 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 NJDEP 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. If the NJDEP truly believes most of the compounds on the TIC list are of low risk to public health and safety and the environment, readily degrade, and remediation of TICs has resulted in the expenditure of unnecessary time and money with only minor benefits, then TICs

should be removed from the requirements for diesel fuel investigations as well. Therefore, CCNJ/SRIN supports the removal of TICS for both No. 2 fuel oil and diesel fuel.

- **COMMENT #53:** In addition, heavier heating oils such as #4 and #6 are relatively insoluble and usually do not have elevated TICs. Therefore, CCNJ/SRIN proposes that sample analysis for these heavier oils should not include TICs.

Subchapter 5 – Remedial Action
5.1 – Remedial action requirements

- N.J.A.C. 7:26E-5.1(b)2 requires that a remedial action must be implemented if the concentration of any contaminant exceeds an ecological risk-based remediation goal approved by the NJDEP when an environmentally sensitive natural resource is present; this will connect with N.J.A.C. 7:26E-1.16 and 4.8.

  - **COMMENT #54:** CCNJ/SRIN recommends that the regulation be revised as follows to make consistent with the Ecological Evaluation Technical Guidance:
    - "An environmentally sensitive natural resource is identified pursuant to N.J.A.C. 7:26E-1.16, in which the concentration of any ~~contaminant~~ **Contaminants of Potential Ecological Concern (COPEC) at the site or Area of Concern (AOC)** 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"

  - **COMMENT #55:** Please clarify whether, in the above situation, the end goal of remediation is meeting the ecological screening criterion or the ecological risk-based remediation goal.

Subchapter 5 – Remedial Action
5.2 – Specific remedial action requirements

- 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 first be obtained for alternative fill from an off-site source that does not meet the specified proposed requirements.

  - **COMMENT #56:** CCNJ/SRIN disagrees with this proposed change. As the Department is well aware and as explained in the attached prior letter, CCNJ and other trade and professional groups representing the regulated community's stakeholders' interests have conveyed the industry's serious concerns, particularly on several large-scale projects that are underway now and are relying on the current process. Changing the process for approval to use

alternative fill and requiring clean fill would slow down the pace and significantly increase the costs of brownfields redevelopment, particularly in flood zones that require grade increases to meet Department approvals that will lead to unnecessary uncertainty.

CCNJ/SRIN requests that the Department withdraw the proposed changes given the broad-based concerns raised by the affected groups, and recommends that the Department replace them with the attached proposed checklist, as discussed with Department staff on several occasions. The checklist addresses all of 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 NJDEP. We believe that our proposal is an acceptable resolution that is protective of human health and the environment, while enabling redevelopment projects to move forward.

Subchapter 5 – Remedial Action
5.5 – Remedial action workplan requirements

- N.J.A.C. 7:26E-5.5(a) removes the sixty-day pre-implementation remedial action workplan submission requirement.
    - **COMMENT #57:** CCNJ/SRIN supports this proposed change.

Subchapter 5 – Remedial Action
5.6 – Permit identification and requirements for discharge to ground water proposals

- N.J.A.C. 7:26E-5.6(c)3 reduces the newspaper publication duration from 45 days to 35 days.
    - **COMMENT #58:** CCNJ/SRIN supports this proposed change.

COMMENTS ON HEATING OIL TANK SYSTEM (HOTS) REMEDIATION RULES (PROPOSED N.J.A.C. 7:26F)

General Comment
Citations and definitions

- N.J.A.C. 7:26F references various citations to and definitions from different site remediation regulations and statutes.

    - **COMMENT #59:** CCNJ/SRIN recommends restating the different site remediation regulations and statutes into the new proposed rule. We believe that containing all definitions and citations in the new proposed rule will make it easily understood by the tank owners and the practitioners. In addition, this provides the regulatory 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.

Subchapter 2 – General Remediation Requirements
2.1 – General remediation requirements

- 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.

    - **COMMENT #60:** CCNJ/SRIN disagrees with this proposed change. We are concerned because of how unrealistic this timeframe is. 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. CCNJ/SRIN recommends that the owner hires an environmental professional in accordance to N.J.A.C. 7:26C-2.3(a).

    - **COMMENT #61:** "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. Please clarify.

    - **COMMENT #62:** "Hire" is vague and is not defined. Please clarify.

Subchapter 3 – Soil and Free Product Remediation Requirements
3.2 – Free product remediation

- 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.

    - **COMMENT #63:** CCNJ/SRIN supports this proposed change.

    - **COMMENT #64:** CCNJ/SRIN recommends incorporating the free product remediation into the Tech Regs for all petroleum products.

Subchapter 3 – Soil and Free Product Remediation Requirements
3.3 – Soil remediation, generally

- N.J.A.C. 7:26F-3.3(f)1(iii) states that when backfilling an excavation, the owner shall use backfill "of equal or lesser permeability than the soil removed."

    - **COMMENT #65:** CCNJ/SRIN disagrees with this proposed change. Permeable backfill material such as 3/4" stone is often used when excavations extend into groundwater 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 does not adsorb residual oil impacts and is ideal when excavation does not completely remove all impacted soil. The permeability of stone is also beneficial if in-situ chemical or biological injections will be performed or if groundwater pump and haul/treat will be utilized. Often it is not known if residual soil and/or groundwater impacts remain at the time of backfilling and stone is often the default choice of backfill. 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 groundwater, around utilities or hard to reach areas, is problematic. Fine grained backfill also tends to adsorb any residual impacts thus reducing the effectiveness of treatment technologies. Permeable backfill allows better water and air exchanges thus enhancing natural remediation of any residual impacts. This requirement of "of equal or lesser permeability" is a counterproductive and overreaching requirement. CCNJ/SRIN recommends that the clean fill requirements in the Tech Regs and the guidance document apply to the HOTS rule.

- 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."

- **COMMENT #66:** CCNJ/SRIN disagrees with this proposed change. This requirement is counterproductive, overreaching, and prescriptive. The NJDEP should not be mandating the compaction of backfill as that decision should be left for the environmental professionals in charge of the project. CCNJ/SRIN recommends that the proposed change should not be adopted.

Subchapter 3 – Soil and Free Product Remediation Requirements
3.4 – Initiating soil remediation with delineation during excavation

- N.J.A.C. 7:26F-3.4(a)1 states that contaminated soil must be excavated until contamination is no longer detectable by methods including, but not limited to, field instrumentation, sight, or smell.

    - **COMMENT #67:** CCNJ/SRIN believes that these methods are solely based on subjectivity of the environmental professional conducting the work; N.J.A.C. 7:26F-3.3(a) requires excavating contaminated soil "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." CCNJ/SRIN recommends that this citation be revised as follows:
        - "Unless the owner leaves residual contamination pursuant to N.J.A.C. 7:26F-3.7, excavate contaminated soil until ~~contamination is no longer detectable by~~ **field screening** methods**,** including~~, but not limited to,~~ field instrumentation, sight, or 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**;"

Subchapter 3 – Soil and Free Product Remediation Requirements
3.5 – Initiating soil remediation with delineation

- 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);"

    - **COMMENT #68:** This requirement is far too prescriptive. CCNJ/SRIN recommends that the NJDEP allow the environmental professional to use professional judgment as each unique situation warrants.

- N.J.A.C. 7:26F-3.5(c)2 states "where the originally contaminated area exceeds two feet in depth, collecting two additional soil samples per 300 square feet, or fraction thereof, of the originally delineated area for each additional two feet of depth;"

    - **COMMENT #69:** As most discharges begin near the invert of an UST and can extend far vertically, this requirement seems misguided or geared more for

surface discharges. CCNJ/SRIN recommends that this requirement be modified as follows:

- "where the originally contaminated area exceeds two feet in ~~depth~~ **thickness**, collecting ~~two~~ additional soil samples ~~per 300 square feet, or fraction thereof, of the originally delineated area~~ for each additional two feet of ~~depth~~ **thickness**".

Subchapter 4 – Ground Water Remediation Requirements

4.2 –Ground water investigation requirements

- N.J.A.C. 7:26F-4.2(b)3 states "sample ground water in accordance 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), 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;"

    - **COMMENT #70:** NJDEP 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% porosity) would have a pore volume of 1,000 cubic feet or approximately 7,500 gallons and thus 3 pore volumes would be 22,500 gallons. This such scenario may not be uncommon, but would be an excessive requirement and would serve no additional protectiveness of the environment and public health. CCNJ/SRIN recommends that the NJDEP removes "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 provides consistency with the Department's Field Sampling Procedures Manual for groundwater samples.

Subchapter 6 – Receptor Evaluation

6.2 –Receptor evaluation – ground water

- 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:"

- **COMMENT #71:** The proposed change that a door-to-door survey to identify any well used for potable purposes within 14 days is too short of a timeframe. The well search timeframes at N.J.A.C 7:26E-1.14 provide 90 days to conduct a door-to-door survey, which is more realistic. CCNJ/SRIN recommends that the proposed door-to-door survey requirement should be consistent with the requirements at N.J.A.C 7:26E-1.14. This provides the regulatory community consistent timeframes and provides a benefit to the owners and environmental professionals.

Subchapter 6 – Receptor Evaluation

6.3 –Receptor evaluation – vapor intrusion

- N.J.A.C. 7:26F-6.3(a) states "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:"

    - **COMMENT #72:** CCNJ/SRIN recommends that the proposed vapor intrusion requirement should be consistent with the requirements at N.J.A.C. 7:26E-1.15. This provides the regulatory community consistent timeframes and provides a benefit to the owners and environmental professionals.

Subchapter 7 – Remedial Action Report and Heating Oil Tank System No Further Action Letter Request Requirements

7.2 Remedial action reports

- N.J.A.C. 7:26F-7.2(a)9 states what documentation of the clean fill material used in the excavation must be prepared.

    - **COMMENT #73:** CCNJ/SRIN recommends that the proposed clean fill material requirement should be consistent with the requirements at N.J.A.C. 7:26E-5.8.

We would like the record to reflect our support of any comments submitted by members of CCNJ and SRIN, as well the Fuel Merchants Association of New Jersey (FMANJ).

Thank you for your consideration of our comments on this very important issue. We look forward to continuing to work with the NJDEP on this and other matters of critical importance to CCNJ/SRIN members. If I can be of further assistance, please let me know.

Sincerely,

Dennis Hart
Executive Director

Attachments