

Below is attendance list of second Chemistry Council meeting with DEP on July 16, 2004. The DEP meeting notes reveal that focus was on industry proposal for relief "multi-discharger variance" and exemption for "site remediation program", to avoid compliance with wildlife standards. The DEP agreed, and presented DEP's 7/13/04 draft variance rule proposal.

DEP- CCNJ Wildlife Criteria
 July 16, 2004
 7th Floor - 401 East State Treaso

Name	Organization
Debra Hammond	DEP- Water Quality Stds
Karen Nowicki	AEA
Bert Ruter	Du Pont
Russ FURVARI	PSEG / NJ Chamber of Commerce
Tony RUSSO	Chemistry Council of NJ
Barry FRASCO	NJ DEP- SITE REMEDIATION
Jeffrey Reading	NJ DEP- NJ ADES
Leslie McGeorge	NJ DEP - WMTU
Carrie McGowan	ISP
Kevin Aiello	AEA
Ron Angus	B+T

Proposed Multiple Discharger Variance Rule: Mercury

Section 1. Findings and Purpose

New Jersey has determined that the cost for dischargers to install and operate wastewater treatment technology to meet water quality-based effluent limitations ("WQBEL") for mercury would be cause substantial and widespread social and economic impact. Therefore, this rule establishes a streamlined procedure to grant variances from the water quality criteria for mercury, and to establish alternative effluent limitations and conditions.

Section 2. Determining the Need for Mercury WQBELs

To determine whether WQBELs for mercury are necessary, the department shall conduct a reasonable potential analysis using representative data consisting of at least 12 monitoring results spaced over a period of at least two years.

Section 3. Initial Application

(a) If the department determines, in accordance with section 2, that a WQBEL for mercury is necessary, a discharger may submit an application to obtain a variance for mercury under this rule at any time. The application submission may be included as a permit condition at the discharger's request.

(b) A discharger seeking a variance under this rule shall submit the following application materials to the department:

(1) A completed application form as provided by the department.

(2) An explanation of the discharger's basis for concluding that there are no readily available means to comply with the WQBEL without installation and operation of wastewater treatment technologies.

(3) Representative effluent data consisting of at least 12 monitoring results spaced over a period of at least two years.

months

*Read
WVA*

NO

(4) A description of any measures taken to date to identify and evaluate potential sources of the pollutant, and/or to reduce or eliminate mercury sources.

(5) A plan of study and schedule to develop and implement a pollutant minimization program ("PMP"), in accordance with section 4. A PMP does not need to be completed during a single permit cycle. A discharger can extend PMP implementation into subsequent permit renewal terms, in accordance with the variance renewal requirements in sections 9 and 10.

Section 4. Development and Implementation of Pollutant Minimization Plan

(a) A PMP shall consist of three elements:

(1) a control strategy for locating, identifying and where practicable, reducing the sources of the pollutant that contribute to discharge levels. PMP strategies may include any cost-effective process for reducing pollutant levels, including pollution prevention, treatment, best management practices or other control mechanisms;

(2) effluent monitoring to track the progress of the PMP, and

(3) an annual report of the results of the PMP, including

(A) All minimization program monitoring results for the previous year;

(B) A list of potential sources of the pollutant, based upon currently available use information; and

(C) A summary of all actions taken under the PMP.

(b) A pollutant minimization program may include the submittal of pollution prevention strategies (e.g., changes in production process technology, materials, processes, operations, or procedures to reduce or eliminate the source of the pollutant).

(c) In determining appropriate practicable control measures to be considered in a pollutant minimization program, the permittee shall consider the following factors:

(1) Significance of sources;

(2) Economic and technical feasibility; and

(3) Treatability.

Section 5. Department Action on Initial Application

If a discharger submits an application that complies with the requirements of section 3, the department shall grant the variance and modify the discharger's permit to contain the following conditions:

- (1) Compliance with an alternative effluent limitation, established in accordance with section 7.
- (2) Requirement to develop and implement a pollutant minimization program, in accordance with the plan and schedule the discharger submitted with the initial application for the variance.
- (3) Duration of the variance, in accordance with section 8.

Section 6. Timing for Issuance of Variance

If a discharger submits an application with its application for a permit, or with comments on draft NPDES permit, the department shall act on the variance application such that if granted, the conditions in section 5 may be incorporated into permit upon its issuance to the discharger.

Section 7. Alternative Effluent Limitation

If the department grants the variance, the discharger will not be required to comply with the WQBEL. Rather, the permit shall contain an alternative effluent limitation established in accordance with this section. The alternative effluent limitation shall be expressed as a 12-month rolling average that is derived by using the highest daily value for mercury from a data set that includes at least 12 monitoring results spaced over a period of at least two years. The highest daily value will become the value for the 12-month rolling average effluent limitation.

Section 8. Variance Duration

The duration of the variance shall coincide with the term of the NPDES permit. If the duration of the variance is the same as the term of the NPDES permit, and the discharger has made a timely application for renewal of the NPDES permit, the variance shall remain in effect until the NPDES permit is reissued.

Section 9. Application for Renewal of Variance

(a) A variance may be renewed under the following conditions:

(1) Factors have not changed such that it is now possible to comply with the applicable WQBEL without causing substantial and widespread social and economic impact. It is not necessary for the discharger to make a demonstration. It is the responsibility of the department to periodically reevaluate the feasibility of attaining the applicable WQBEL.

(2) The discharger is implementing the PMP in accordance with the plan submitted in accordance with this rule.

(3) The level of mercury in the discharger's effluent does not exceed the maximum alternative effluent limitation established by the department pursuant to Section 10.

(b) A discharger seeking to renew a variance shall submit the following application materials with the NPDES permit renewal application:

(1) A summary of the PMP activities implemented during the previous permit term.

(2) A revised PMP plan and schedule, if applicable.

(3) Monitoring data collected during the previous permit term.

Section 10. Department Establishment of Maximum Alternative Effluent Limitation

The department shall compile and analyze effluent data collected by dischargers pursuant to Sections 2 and 4, to determine the maximum alternative effluent limitation. A discharger with an annual effluent concentration above the maximum alternative effluent limitation shall not be eligible for renewal of variance, except if the

discharger can show that its effluent is above that limitation due primarily to mercury levels in its intake water. However, the discharger may apply for and obtain a variance in accordance with N.J.A.C. 7:9B-1.8 or 7:9B-1.9.

Section 11. Renewal of Variance

If a discharger submits a renewal application that complies with the requirements of section 9, the department shall grant the variance and incorporate the following conditions into the discharger's renewal permit:

- (1) Compliance with an alternative effluent limitation, established in accordance with section 6. The department shall evaluate the most recent 2 years of monitoring data, as provided by the discharger in the renewal application, in establishing the alternative effluent limitation in the renewal NPDES permit.
- (2) Requirement to implement the revised PMP, in accordance with the plan and schedule the discharge submitted with the renewal application for the variance.
- (3) Duration of the variance, in accordance with section 8.

Proposed Multiple Discharger Variance Rule: PCBs

Section 1. Findings and Purpose

New Jersey has determined that the cost for dischargers to install and operate wastewater treatment technology to meet water quality-based effluent limitations ("WQBEL") for polychlorinated biphenyls ("PCBs") would cause substantial and widespread social and economic impact. Therefore, this rule establishes a streamlined procedure to grant variances from the water quality criteria for PCBs, and to establish alternative effluent limitations and conditions. This rule shall become applicable upon final adoption by the U.S. Environmental Protection Agency of a new analytical method that includes a method detection level less than the water quality criteria applicable to PCBs.

Section 2. Determining the Need for PCB WQBELs

To determine whether WQBELs for PCBs are necessary, the department shall conduct a reasonable potential analysis using representative data consisting of at least 12 monitoring results spaced over a period of at least two years.

Section 3. Initial Application

(a) If the department determines, in accordance with section 2, that a WQBEL for PCBs is necessary, a discharger may submit an application to obtain a variance for PCBs under this rule at any time. The application submission can be included as a permit condition at the discharger's request.

(b) A discharger seeking a variance under this rule shall submit the following application materials to the department:

(1) A completed application form as provided by the department.

(2) An explanation of the discharger's basis for concluding that there are no readily available means to comply with the WQBEL without installation and operation of wastewater treatment technologies.

(3) Representative effluent data consisting of at least 12 monitoring results spaced over a period of at least two years.

(4) A description of any measures taken to date to identify and evaluate potential sources of the pollutant, and/or to reduce or eliminate mercury sources.

(5) A plan of study and schedule to develop and implement a pollutant minimization program ("PMP"), in accordance with section 4. A PMP does not need to be completed during a single permit cycle. A discharger can extend PMP implementation into subsequent permit renewal terms, in accordance with the variance renewal requirements in sections 9 and 10.

Section 4. Development and Implementation of Pollutant Minimization Plan

(a) A PMP shall consist of three elements:

(1) a control strategy for locating, identifying and where practicable, reducing the sources of the pollutant that contribute to discharge levels. PMP strategies may include any cost-effective process for reducing pollutant levels, including pollution prevention, treatment, best management practices or other control mechanisms;

(2) monitoring to track the progress of the PMP, and

(3) an annual report of the results of the PMP, including

(A) All minimization program monitoring results for the previous year;

(B) A list of potential sources of the pollutant; and

(C) A summary of all actions taken under the PMP.

(b) A pollutant minimization program may include the submittal of pollution prevention strategies (e.g., changes in production process technology, materials, processes, operations, or procedures to reduce or eliminate the source of the pollutant).

(c) In determining appropriate practicable control measures to be considered in a pollutant minimization program, the permittee shall consider the following factors:

(1) Significance of sources;

- (2) Economic and technical feasibility; and
- (3) Treatability.

Section 5. Department Action on Application

If a discharger submits an application that complies with the requirements of section 3, the department shall grant the variance and modify the discharger's permit to contain the following conditions:

- (1) Compliance with an alternative effluent limitation, established in accordance with section 7.
- (2) Requirement to develop and implement a pollutant minimization program, in accordance with the plan and schedule the discharger submitted with the initial application for the variance.
- (3) Duration of the variance, in accordance with section 8.

Section 6. Timing for Issuance of Variance

If a discharger submits an application with its application for a permit, or with comments on draft NPDES permit, the department shall act on the variance application such that if granted, the conditions in section 5 may be incorporated into permit upon its issuance to the discharger.

Section 7. Alternative Effluent Limitation

If the department grants the variance, the discharger will not be required to comply with the WQBEL. Rather, the permit shall contain an alternative effluent limitation established in accordance with this section. The alternative effluent limitation shall be expressed as a 12-month rolling average that is derived by using the highest daily value for mercury from a data set that includes at least 12 monitoring results spaced over a period of at least two years. The highest daily value will become the value for the 12-month rolling average effluent limitation.

Section 8. Variance Duration

The duration of the variance shall coincide with the term of the NPDES permit. If the duration of the variance is the same as the term of the NPDES permit, and the discharger has made a timely application for renewal of the NPDES permit, the variance shall remain in effect until the NPDES permit is reissued.

Section 9. Application for Renewal of Variance

(a) A variance may be renewed under the following conditions:

(1) Factors have not changed such that it is now possible to comply with the applicable WQBEL without causing substantial and widespread social and economic impact. It is not necessary for the discharger to make a demonstration. It is the responsibility of the department to periodically reevaluate the feasibility of attaining the applicable WQBEL.

(2) The discharger is implementing the PMP in accordance with the plan submitted in accordance with this rule.

(3) The level of PCBs in the discharger's effluent does not exceed the maximum alternative effluent limitation established by the department pursuant to Section 10.

(b) A discharger seeking to renew a variance shall submit the following application materials with the NPDES permit renewal application:

(1) A summary of the PMP activities implemented during the previous permit term.

(2) A revised PMP plan and schedule, if applicable.

(3) Monitoring data collected during the previous permit term.

Section 10. Department Establishment of Maximum Alternative Effluent Limitation

The department shall compile and analyze effluent data collected by dischargers pursuant to Sections 2 and 4, to determine the maximum alternative effluent limitation. A discharger with an annual effluent concentration above the maximum alternative effluent limitation shall not be eligible for renewal of variance, except if the

discharger can show that its effluent is above that limitation due primarily to PCB levels in its intake water. However, the discharger may apply for and obtain a variance in accordance with N.J.A.C. 7:9B-1.8 or 7:9B-1.9.

Section 11. Renewal of Variance

If a discharger submits a renewal application that complies with the requirements of section 9, the department shall grant the variance and incorporate the following conditions into the discharger's renewal permit:

- (1) Compliance with an alternative effluent limitation, established in accordance with section 6. The department shall evaluate the most recent 2 years of monitoring data, as provided by the discharger in the renewal application, in establishing the alternative effluent limitation in the renewal NPDES permit.
- (2) Requirement to implement the revised PMP, in accordance with the plan and schedule the discharge submitted with the renewal application for the variance.
- (3) Duration of the variance, in accordance with section 8.

Proposed Multiple Discharger Variance Rule: Other Pollutants

Section 1. Findings and Purpose

(a) If the department makes findings, in accordance with subsection (b), to determine that the cost for dischargers to install and operate wastewater treatment technology to meet water quality-based effluent limitations ("WQBEL") for a particular pollutant would cause substantial and widespread social and economic impact, this rule establishes a streamlined procedure to grant variances from the water quality criteria for that pollutant, and to establish alternative effluent limitations and conditions. This rule shall become applicable upon final adoption by the U.S. Environmental Protection Agency of a new analytical method that includes a method detection level less than the water quality criteria applicable to the pollutant.

(b) The department may determine that a pollutant shall be subject to this rule upon making the following findings:

(1) Available information indicates that a substantial portion of dischargers within New Jersey would be unable to comply with WQBELs for the pollutant without installation of wastewater treatment technology.

(2) One of the following would occur:

(i) The cost to install and operate wastewater treatment technology would cause substantial and widespread social and economic impact; or

(ii) Currently available wastewater treatment technology is incapable of attaining the WQBEL for the pollutant.

Section 2. Determining the Need for WQBELs

To determine whether WQBELs for the pollutant are necessary, the department shall conduct a reasonable potential analysis using representative data consisting of at least 12 monitoring results spaced over a period of at least two years.

Section 3. Initial Application

(a) If the department determines, in accordance with section 2, that a WQBEL for the pollutant is necessary, a discharger may submit an application to obtain a variance under this rule at any time. The application submission can be included as a permit condition at the discharger's request.

(b) A discharger seeking a variance under this rule shall submit the following application materials to the department:

(1) A completed application form as provided by the department.

(2) An explanation of the discharger's basis for concluding that there are no readily available means to comply with the WQBEL without installation and operation of wastewater treatment technologies.

(3) Representative effluent data consisting of at least 12 monitoring results spaced over a period of at least two years.

(4) A description of any measures taken to date to identify and evaluate potential sources of the pollutant, and/or to reduce or eliminate mercury sources.

(5) A plan of study and schedule to develop and implement a pollutant minimization program ("PMP"), in accordance with section 4. A PMP does not need to be completed during a single permit cycle. A discharger can extend PMP implementation into subsequent permit renewal terms, in accordance with the variance renewal requirements in sections 9 and 10.

Section 4. Development and Implementation of Pollutant Minimization Plan

(a) A PMP shall consist of three elements:

(1) a control strategy for locating, identifying and where practicable, reducing the sources of the pollutant that contribute to discharge levels. PMP strategies may include any cost-effective process for reducing pollutant levels, including pollution prevention, treatment, best management practices or other control mechanisms;

(2) monitoring to track the progress of the PMP, and

(3) an annual report of the results of the PMP, including

(A) All minimization program monitoring results for the previous year;

(B) A list of potential sources of the pollutant; and

(C) A summary of all actions taken under the PMP.

(b) A pollutant minimization program may include the submittal of pollution prevention strategies (e.g., changes in production process technology, materials, processes, operations, or procedures to reduce or eliminate the source of the pollutant).

(c) In determining appropriate practicable control measures to be considered in a pollutant minimization program, the permittee shall consider the following factors:

(1) Significance of sources;

(2) Economic and technical feasibility; and

(3) Treatability.

Section 5. Department Action on Application

If a discharger submits an application that complies with the requirements of section 3, the department shall grant the variance and modify the discharger's permit to contain the following conditions:

(1) Compliance with an alternative effluent limitation, established in accordance with section 7.

(2) Requirement to develop and implement a pollutant minimization program, in accordance with the plan and schedule the discharger submitted with the initial application for the variance.

(3) Duration of the variance, in accordance with section 8.

Section 6. Timing for Issuance of Variance

If a discharger submits an application with its application for a permit, or with comments on draft NPDES permit, the department shall act on the variance application such that if granted, the conditions in section 5 may be incorporated into permit upon its issuance to the discharger.

Section 7. Alternative Effluent Limitation

If the department grants the variance, the discharger will not be required to comply with the WQBEL. Rather, the permit shall contain an alternative effluent limitation established in accordance with this section. The alternative effluent limitation shall be expressed as a 12-month rolling average that is derived by using the highest daily value for mercury from a data set that includes at least 12 monitoring results spaced over a period of at least two years. The highest daily value will become the value for the 12-month rolling average effluent limitation.

Section 8. Variance Duration

The duration of the variance shall coincide with the term of the NPDES permit. If the duration of the variance is the same as the term of the NPDES permit, and the discharger has made a timely application for renewal of the NPDES permit, the variance shall remain in effect until the NPDES permit is reissued.

Section 9. Application for Renewal of Variance

(a) A variance may be renewed under the following conditions:

(1) Factors have not changed such that it is now possible to comply with the applicable WQBEL without causing substantial and widespread social and economic impact. It is not necessary for the discharger to make a demonstration. It is the responsibility of the department to periodically reevaluate the feasibility of attaining the applicable WQBEL.

(2) The discharger is implementing the PMP in accordance with the plan submitted in accordance with this rule.

(3) The level of the pollutant in the discharger's effluent does not exceed the maximum alternative effluent limitation established by the department pursuant to Section 10.

(b) A discharger seeking to renew a variance shall submit the following application materials with the NPDES permit renewal application:

- (1) A summary of the PMP activities implemented during the previous permit term.
- (2) A revised PMP plan and schedule, if applicable.
- (3) Monitoring data collected during the previous permit term.

Section 10. Department Establishment of Maximum Alternative Effluent Limitation

The department shall compile and analyze effluent data collected by dischargers pursuant to Sections 2 and 4, to determine the maximum alternative effluent limitation. A discharger with an annual effluent concentration above the maximum alternative effluent limitation shall not be eligible for renewal of variance, except if the discharger can show that its effluent is above that limitation due primarily to levels of the pollutant in its intake water. However, the discharger may apply for and obtain a variance in accordance with N.J.A.C. 7:9B-1.8 or 7:9B-1.9.

Section 11. Renewal of Variance

If a discharger submits a renewal application that complies with the requirements of section 9, the department shall grant the variance and incorporate the following conditions into the discharger's renewal permit:

- (1) Compliance with an alternative effluent limitation, established in accordance with section 6. The department shall evaluate the most recent 2 years of monitoring data, as provided by the discharger in the renewal application, in establishing the alternative effluent limitation in the renewal NPDES permit.
- (2) Requirement to implement the revised PMP, in accordance with the plan and schedule the discharge submitted with the renewal application for the variance.
- (3) Duration of the variance, in accordance with section 8.

Proposal to Ensure that New Jersey's Water Quality Criteria for Protection of Wildlife for Mercury, PCBs, and Other Pollutants Are Not Used As Cleanup Objectives in State and Federal Remediation Programs

Background:

The New Jersey Department of Environmental Protection ("department") is proposing to adopt new wildlife water quality criteria for mercury, PCBs, and other pollutants ("proposed new criteria"). The proposed new criteria would apply to all FW2 (freshwater), SC (saline coastal), and SE (saline estuary) waters. The proposed new criteria for mercury and PCBs are:

Mercury: 530 pg/L

PCBs: 72 pg/L

State and federal remediation programs generally treat state surface water quality standards as cleanup objectives. However, it will be technically and economically infeasible to attain the proposed new criteria in all remediation projects. In addition, in many instances these standards are irrelevant because of the specific site conditions. Therefore, it will be necessary to provide that the proposed new criteria are not meant to be used as cleanup objectives in state and federal lead remediation programs conducted in the state.

New Jersey Site Remediation Program:

The Site Remediation Program is New Jersey's overarching remediation program under which the following three programs are included:

1. Voluntary Cleanup Program
2. Industrial Site Remediation Program
3. Underground Storage Tank Program
4. State Lead RCRA Remediations

Each of these programs is governed by the Site Remediation Programs Technical Rule ("Tech Rule"), found at New Jersey Administrative Code 7:26E. In January 2003, New Jersey adopted revisions to the Tech Rule. As part of those revisions, New Jersey specified the following:

For the first time, the new rules formally adopt cleanup standards for ground and surface waters. The newly revised Technical Rules ... incorporate New Jersey's Ground Water Quality Standards and Surface Water Quality Standards as the minimum remediation standards for ground and surface water.

The full text of the Tech Rule provision concerning surface water remediation standards follows:

7:26E-1.13 Minimum Ground Water and Surface Remediation Standards

(a) This section sets forth the minimum remediation standards that apply to ground water and surface water for purposes of the remediation of a contaminated site pursuant to this chapter.

.....

(e) The minimum surface water remediation standards are:

1. The more stringent of either the numeric New Jersey Surface Water Quality Standards pursuant to N.J.A.C. 7:9B-1.14(c) and (d) or the numeric Federal Surface Water Criteria, 40 CFR Part 131; and
2. The following narrative surface water remediation standards:
 - i. The general surface water quality policies included in N.J.A.C. 7:9B-1.5;
 - ii. The narrative surface water quality criteria included in N.J.A.C. 7:9B-1.14;
 - iii. The remediation requirements in N.J.A.C. 7:26E- 1 through 8 in order to both:
 - (1) Address the adverse impact of the contamination on the surface water itself; and
 - (2) Limit additional risks posed by the contamination to the public health and safety and to the environment;
 - iv. Removal, treatment, or containment of free and residual product pursuant to N.J.A.C. 7:26E-6.1(d); and
 - v. The following narrative criteria, as applicable on a site-specific basis, for selecting an appropriate surface water remedial action:
 - (1) The location of the contaminated site relative to surface water use;
 - (2) The potential human and environmental exposure to the surface water contamination;
 - (3) The present and projected surface water use at the site and in the area surrounding the site;
 - (4) Ambient surface water quality at the site and in the area surrounding the site resulting from both natural and human activities; and
 - (5) The physical and chemical characteristics of the contaminants of concern.

(f) The Department will not accept alternate numeric surface water remediation standards developed based on a site-specific risk assessment.

Therefore, under the current state law, the proposed new criteria would be considered the minimum remediation standards for cleanups conducted under the New Jersey Site Remediation Program.

The Tech Rule does contain a variance provision, which allows those responsible for conducting a remediation to petition the department for a variance from certain requirements of the Tech Rule. However, at present, the variance provision does not apply to the surface water remediation standards in 7:26E-1.13. Therefore, we recommend that New Jersey amend the Tech Rule to allow the variance provision to apply to the surface water remediation standards. Furthermore, because it is well-known that it will not be technically or economically feasible to achieve the proposed new criteria, the Tech Rule should contain an automatic variance for any pollutants for which the department has adopted a multiple discharger variance process in the water quality standards rules. We recommend that the Tech Rule be amended as follows (the current rule is the underlying language, with proposed revisions indicated in strikeout/underline format to show deletions and additions):

7:26E-1.6 Documenting compliance with the technical requirements

(d) Any person responsible for conducting the remediation may petition the Department for a variance from any of the requirements in N.J.A.C. 7:26E-1.13 and 7:26E-2 through 6 inclusive pursuant to the procedural criteria in (d)1 and the substantive criteria in (d)2, below. The petition shall include a request for use of an alternative approach to be utilized in place of the requirement for which the variance has been requested. The variance is not effective until it has been approved by the Department. The decision as to whether or not to grant the variance rests solely with the Department. A variance petition may be submitted within an oversight document executed in accordance with N.J.A.C. 7:26C, or pursuant to the program requirements of N.J.A.C. 7:26B or N.J.A.C. 7:26E-1.7 Criteria for going beyond the minimum technical requirements 7:14B. The Department shall make reasonable efforts to provide timely responses to variance petitions.

1. To petition for a variance from a requirement in N.J.A.C. 7:26E-1.13 and 7:26E-2 through 6, the petitioner shall submit the following information to the Department at the address in the applicable oversight document or in accordance with the program

requirements of N.J.A.C. 7:26B or N.J.A.C. 7:14B prior to the utilization of the alternate approach:

- i. The name and address of the person submitting the petition;
- ii. The name and address of the person conducting the remediation;
- iii. The names and addresses of the owner(s) and occupant(s) of the site which is the subject of the variance;
- iv. The street address and all tax block and lot numbers of the site which is the subject of the variance;
- v. A description of the proposed alternate approach and applicable N.J.A.C. 7:26E citation;
- vi. A description of site specific conditions applicable to the variance;
- vii. The technical basis for the variance pursuant to (c) above; and
- viii. Any other information or data the Department requests to thoroughly evaluate the petition.

2. The Department will evaluate the petition for a variance from the requirements of N.J.A.C. 7:26E-1.13 and 7:26E-2 through 6 according to the same criteria as those listed in (c) above for approval of alternate methods.

3. Verbal variances may be granted pursuant to N.J.A.C. 7:26E-3.4(a)4.

4. Notwithstanding the foregoing provisions in (d)1 through 3, the department hereby grants a variance from the requirement in 7:26E-1.13 concerning surface water remediation standards for the water quality criteria for which the department has adopted a multiple discharger variance process as specified in N.J.A.C. [FILL IN APPROPRIATE CITATIONS TO PROPOSED VARIANCE RULES]. Appropriate surface water remediation standards shall be established on a case-by-case basis.

CERCLA

Under CERCLA, applicable or relevant and appropriate requirements, or ARARs, are federal or state environmental standards or laws that a site in remediation must attain upon completion of the remedial action. See 42 U.S.C. § 9621(d). Note that applicable requirements are requirements that a private party would have to comply with by law if the same action were being taken apart from a CERCLA remediation action. See 40 C.F.R. § 300.5. Relevant and appropriate requirements are those cleanup standards that are not legally applicable, but that

can sensibly be applied to the site given the circumstances of the site and release. See 40 C.F.R. § 300.5. Only state standards that are identified in a timely manner and are more stringent than federal requirements are considered ARARs. A site may be subject to both applicable and relevant and appropriate requirements. In addition, a site may also be subject to other advisories, criteria, or guidances that an agency considers appropriate, known as “to be considered” or TBCs. See 40 C.F.R. § 300.400(g).

CERCLA does provide a set of waivers to ARARs, as follows:

42 U.S.C. § 9621(d)(4): The President may select a remedial action meeting the requirements of paragraph (1) that does not attain a level or standard of control at least equivalent to a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation as required by paragraph (2) (including subparagraph (B) thereof), if the President finds that -

(A) the remedial action selected is only part of a total remedial action that will attain such level or standard of control when completed;

(B) compliance with such requirement at that facility will result in greater risk to human health and the environment than alternative options;

(C) compliance with such requirements is technically impracticable from an engineering perspective;

(D) the remedial action selected will attain a standard of performance that is equivalent to that required under the otherwise applicable standard, requirement, criteria, or limitation, through use of another method or approach;

(E) with respect to a State standard, requirement, criteria, or limitation, the State has not consistently applied (or demonstrated the intention to consistently apply) the standard, requirement, criteria, or limitation in similar circumstances at other remedial actions within the State; or

(F) in the case of a remedial action to be undertaken solely under section 9604 of this title using the Fund, selection of a remedial action that attains such level or standard of control will not provide a balance between the need for protection of public health and welfare and the environment at the facility under consideration, and the availability of amounts from the Fund to respond to other sites which present or may present a threat to

public health or welfare or the environment, taking into consideration the relative immediacy of such threats.

The President shall publish such findings, together with an explanation and appropriate documentation.

It would appear that at least two waiver provisions would be available concerning use of the proposed new criteria as ARARs: (C) technical impracticability; and (E) State criteria that are not intended to be applied to remedial actions.

RCRA

Many of the requirements under RCRA do not concern remediation. However, there are certain provisions governing remediation in corrective action, closure, and post-closure of certain RCRA-regulated facilities; spills; and hazardous waste permitting. RCRA does not specify clean up objectives for surface water. In practice, surface water cleanup objectives are established by taking into consideration the state's surface water quality standards. If New Jersey makes the recommended revisions to the Tech Rule, and also specifies that the proposed new wildlife water quality criteria are not intended to be used as cleanup objectives, that should satisfy any issues related to RCRA corrective action and closure.

Proposed Addition to Water Quality Standards Rules Concerning Remediation

Consistent with the recommendation to amend the New Jersey Site Remediation Program to specify that the proposed new criteria should not be considered surface water remediation standards, New Jersey should also adopt language in its water quality criteria rules to specify that New Jersey does not intend the new criteria to apply to CERCLA and RCRA actions:

New Jersey does not intend the water quality criteria for protection of wildlife, as set forth in N.J.A.C. 7:9B-1.14(c)(13), to apply to remedial actions conducted pursuant to the New Jersey Site Remediation Program, the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9601 et. seq.), or the Resource Conservation and Recovery Act (42 U.S.C. § 6901 et. seq.). At this time, it is technically impracticable from an engineering perspective to expect all remedial actions to achieve these criteria. Appropriate surface water remediation standards should be established on a case-by-case basis.