

A MEMORANDUM OF AGREEMENT BETWEEN THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION II, AND THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION ESTABLISHING TERMS, CONDITIONS, AND AGREEMENTS RELEVANT TO THE ADMINISTRATION AND ENFORCEMENT OF THE STATE'S NPDES PROGRAM UTILIZING NEW JERSEY POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMITS.

Introduction

The United States Environmental Protection Agency (hereinafter referred to as EPA) has promulgated regulations requiring the development of program elements necessary for State administration of the National Pollutant Discharge Elimination System (hereinafter referred to as NPDES) permit program. These regulatory requirements can be found at 40 CFR Parts 122, 123, and 124. The requirements for the NPDES permit program were prepared pursuant to the authority contained in Section 304(i)(2) of the Clean Water Act of 1977 (hereinafter referred to as the Federal Act). The requirements for the program were published as final regulations in the Federal Register on May 19, 1980, Volume 45, Number 98. Various sections of the regulations, in particular 40 CFR § 123.6, require the Commissioner of the New Jersey Department of Environmental Protection and the Regional Administrator of EPA, Region II to execute a Memorandum of Agreement setting forth the manner in which State assumption of Section 402 authority is to be undertaken. This document is the required Memorandum of Agreement.

The parties to this Memorandum of Agreement (hereinafter referred to as the MOA) are EPA, Region II, and the New Jersey State Department of Environmental Protection (hereinafter referred to as the DEP).

The definitions used in this MOA shall be the same as those found in Title 40, Code of Federal Regulations Parts 122, 123, and 124 (40 CFR Parts 122, 123, and 124) promulgated May 19, 1980. In addition, for the purposes of this MOA the following definitions apply: "NJPDES permit" means a permit issued by DEP regulating those discharges subject to the provisions of Sections 318, 402 and 405 of the Federal Act (N.B. This MOA only applies to NJPDES permits issued for discharges, including indirect discharges, to surface waters. The permitting program of DEP administered pursuant to the "Regulations Concerning the New Jersey Pollutant Discharges Elimination System," N.J.A.C. 7:14A-1 et seq. (NJPDES Regulations) regulates other types of discharges as well as discharges to the surface waters of the State.); "Regional Administrator" means the Regional Administrator of EPA, Region II, or his or her designated representative; and "Commissioner" means the Commissioner of DEP, or his or her designated representative.

The purpose of this MOA is to establish a basis upon which EPA, Region II and DEP shall agree, in accordance with 40 CFR Section 123.6, to implement and perform the following:

- I. Transmit data and forms from the Regional Administrator to the Commissioner;

- II. Transfer the administration of existing NPDES permits from EPA to DEP;
- III. Transmit data and forms from the Commissioner to the Regional Administrator;
- IV. Establish procedures for EPA access to DEP and permittee information;
- V. Establish provisions specifying classes and categories of permit applications, draft permits, and proposed permits as well as permit modifications, revocations and reissuances, terminations and reissuances that DEP will send to the Regional Administrator for review, comment, and where applicable, objection.
- VI. Establish monitoring, recordkeeping, and reporting requirements and procedures by which compliance schedule reports shall be sent to EPA from DEP;
- VII. Establish DEP/EPA procedures for permit enforcement;
- VIII. Define DEP and EPA responsibilities for establishing and enforcing National Pretreatment Standards; and
- IX. Modify the MOA, when needed.

Part One

General Responsibilities

It is the policy of the State of New Jersey as stated in the New Jersey "Water Pollution Control Act" (hereinafter referred to as the State Act) "to restore, enhance, and maintain the chemical, physical, and biological integrity of its waters; to protect public health; to safeguard fish and aquatic life, scenic and ecological values; and to enhance the domestic, municipal, recreational, industrial, and other uses of water." It is also the goal and policy of DEP to coordinate and cooperate with EPA, Region II in order to eliminate water pollution within the State of New Jersey.

It is recognized that upon program approval by the Administrator of EPA (hereinafter referred to as the Administrator) the primary responsibility for the issuance of NPDES permits in the State of New Jersey shall lie with DEP. DEP shall utilize NJPDES permits to replace NPDES permits issued by EPA. The Regional Administrator shall suspend the issuance of NPDES permits by EPA, Region II at the time of the Section 402 program approval. Based on this approval, the Commissioner shall, under existing State statutes and regulations, process and issue NJPDES permits which are consistent and compatible with the Federal and State Acts and any regulations and guidelines promulgated thereunder. EPA shall transfer existing NPDES permits to DEP for administration in accordance with provisions set forth in Part Two of the MOA.

The Commissioner shall administer the NJPDES program consistent with this MOA, the Federal and State Acts, current and future Federal and State regulations, and promulgated effluent guidelines. EPA shall, as part of its statutory oversight duty, assure that such administration is consistent with this MOA and all applicable requirements embodied in current regulations, policies and Federal law. In addition, the MOA, the annual program grant and the State/EPA Agreement should be consistent. If the State/EPA Agreement or the annual program grant indicates that a change is needed in the MOA, the latter may be amended as provided for in Part Eight of this MOA. Any State/EPA Agreement or annual program grant may not override this MOA.

The parties agree to maintain a high level of cooperation and coordination between DEP and EPA staff persons in a partnership to assure successful and effective administration of the NJPDES program. In this partnership, the Regional Administrator shall provide to the Commissioner, on a continuing basis, assistance on the interpretation and implementation of Federal regulations, policies and guidelines, including technical matters.

The Commissioner is responsible for the issuance, modification, reissuance, compliance monitoring and enforcement of all NJPDES permits in the State. Upon program approval and unless stated otherwise in this MOA, the Commissioner shall be responsible for the modification, reissuance, compliance monitoring and enforcement of all NPDES permits issued by the Regional Administrator prior to the date of program approval by the Administrator. This includes all NPDES permits issued to Federal facilities, aquaculture projects (pursuant to Section 318 of the Federal Act) and discharges resulting from the disposal of municipal sewage sludge (pursuant to Section 405(a) of the Federal Act) and for the implementation of pretreatment requirements in the State. The DEP agrees it shall not modify a permit based upon N.J.A.C. 7:14A-2.13(a)7 where modification to delete the inconsistency would result in a less stringent permit condition, as determined by DEP. Any individual NPDES permit issued by the Regional Administrator pursuant to 40 CFR § 123.75(h) shall be the responsibility of EPA until such time as the responsibility for administering such NPDES permit is transferred to DEP by EPA in accordance with the transfer mechanisms set forth in Subpart I of Part Two of this MOA.

The strategies and priorities for issuance, compliance monitoring and enforcement of permits, as established in this MOA, may be set forth in more detail in future Working Agreements between EPA and DEP. If requested by either party, meetings between DEP and EPA shall be scheduled at reasonable intervals to review specific operating procedures, resolve problems, or discuss mutual concerns involving the administration of the NJPDES program.

The Regional Administrator shall assess DEP's administration of the NJPDES program, including the pretreatment program, on a continuing basis for consistency with the Federal Act, this MOA, and all applicable Federal regulations and policies. This assessment shall

generally be accomplished by the review of permits, reports, and enforcement actions submitted by the Commissioner in accordance with this MOA, applicable Federal regulations (including 40 CFR § 122.18) and policies, and any Working Agreements.

In order to clearly define paths of communications between DEP and EPA, Region II, Appendix A designates those persons by position who are in charge of various areas of responsibility at the Federal and State levels. If there is an alteration in the designation by either EPA or DEP, that party will notify the other party within seven days of the alteration.

Part Two

NPDES Program

I. Transfer of NPDES Data and Primary Responsibility from the EPA to DEP.

A. EPA-issued permits with expiration dates after the date of program approval

DEP and EPA agree to transfer EPA-issued NPDES permits with expiration dates after the date of program approval by the Administrator, except as provided below. DEP shall send to EPA lists of those NPDES permits for which DEP wishes to assume program responsibility. After reviewing each list, EPA will send a letter to DEP listing those permits which shall be transferred to DEP. The effective date of transfer of management of the permits will be set forth in EPA's letter. EPA will also notify the appropriate NPDES permittees of the transfer. Both agencies expect that three months from the date of program approval by the Administrator all NPDES permits, except those for which EPA has retained jurisdiction, will be managed by DEP. It is recognized that administrative delays may cause the three-month period to be extended. However, both agencies will endeavor to insure that the time frame is met. After the three-month time period is completed, EPA shall provide DEP with a list of EPA-issued permits over which EPA will continue to retain jurisdiction.

B. EPA-issued permits with expiration dates which have passed before the date of program approval

Except for permits listed in or added to Appendix B, jurisdiction (primary enforcement and permit processing authority) over EPA-issued permits which have expired before the date of program approval but have continued in force under 5 U.S.C. Section 558(c) and 40 CFR § 122.5(a), (b), and (c), shall be

automatically transferred to DEP on the date of program approval. When jurisdiction over a permit which has been federally extended is transferred to DEP under this paragraph, the permittee shall still have a valid discharge permit, but it will be an NJPDES permit, as provided by N.J.A.C. 7:14A-2.3 and 10.2. EPA will notify the NPDES permittees subject to this paragraph of the transfer of jurisdiction to DEP. EPA will provide DEP with a list of such permittees as soon as possible after program approval.

EPA and DEP agree that until any permit appeal, modification request, or variance request is resolved for those permits listed in Appendix B, EPA will retain jurisdiction over these permits. Retention of jurisdiction does not imply that EPA may issue permits after program approval. However, EPA and DEP agree to work in concert to assure that any resolution of a permit appeal, modification request or variance request is incorporated into any NJPDES permit issued by DEP. Other NPDES permits may be added to Appendix B upon the written agreement of the Regional Administrator and the Commissioner. Such agreement must be effective prior to the expiration date of the permit at issue.

C. Subsequent transfer of permits

EPA-issued permits over which EPA retains jurisdiction pursuant to Paragraph A or B may be transferred to DEP at any time upon the agreement of the Regional Administrator and the Commissioner. The date of the transfer will be set forth in EPA's letter to DEP confirming the agreement and EPA will notify the NPDES permittee of the transfer of jurisdiction to DEP.

D. Incomplete files

If the Commissioner finds that any DEP file is incomplete with respect to any EPA-issued permit where jurisdiction has been transferred to DEP, the Commissioner shall so notify the Regional Administrator, and the Regional Administrator shall ensure that a copy of the final permit (including all changes, modifications and corrections thereto) or other missing materials shall be furnished to DEP within 60 days of such notification.

E. Transfer of Files of unissued NPDES permits

Commencing promptly after the date of NPDES program approval, the Regional Administrator shall transmit to the Commissioner a list of all NPDES permit applications received by EPA for which permits have never been issued. This list shall include the name and address of each discharger, SIC code, application number, an indication of those applications which

EPA has determined are administratively complete, and the current stage of the application in the permit process, (e.g., public notice, public hearing, etc.). Within 30 days of receipt of the list, the Commissioner shall indicate the priority for EPA transmittal of the permit application files to DEP. The application file shall include the NPDES permit application and any other pertinent data collected by EPA. EPA shall retain one copy of each file. All new applications received by the Regional Administrator subsequent to the date of NPDES program approval shall be promptly transmitted upon receipt to the Commissioner.

F. Non-Filers

No later than 30 days after the date of EPA's approval of DEP's NPDES program, the Regional Administrator shall submit to the Commissioner a complete list of all non-filers and potential non-filers known to the Regional Administrator within the State of New Jersey. This list shall include the name and address of the non-filer, any information available which is relative to the non-filer's type of operation, steps taken by the Regional Administrator to obtain NPDES permit applications from said non-filers, and the current status of each non-filer.

II. Transmittal of the Draft NPDES Permit, Comments from EPA, and the Final Issued Permit.

The Regional Administrator waives the right to review, object to, or comment upon the sufficiency of NJPDES permit applications, proposed permits, draft permits and final permits for all discharges or proposed discharges except as follows:

1. Discharges into the territorial sea or contiguous zone;
2. Discharges which may affect the waters of another State other than the one in which the discharge originates;
3. Discharges proposed to be regulated by general permits;
4. Discharges from publicly owned treatment works with a daily average discharge exceeding one million gallons per day;
5. Discharges of uncontaminated cooling water with a daily average discharge exceeding 500,000,000 gallons per day;
6. Discharges from any major discharger as defined by EPA;
7. Discharges from any discharger within any of the industrial categories listed in Appendix A to 40 CFR Part 122; and
8. Discharges from other sources with a daily average discharge of process wastewater exceeding 0.5 (one-half) million gallons per day.

The Regional Administrator retains the right to terminate the foregoing waiver as to future permit actions, in whole or in part, by written notice to the Commissioner. Termination of this waiver shall not affect any action taken by DEP prior to notice of termination. This waiver does not affect the duty of DEP to transmit a copy of every issued final NJPDES permit to EPA.

DEP is responsible for expeditiously drafting, circulating, issuing, modifying, revoking and reissuing, and terminating NJPDES permits and shall do so in conformance with 40 CFR § 123.7(a) and (d). DEP and EPA agree that the following groups of dischargers shall receive high priority in all NJPDES permitting: major dischargers, discharges not classified as major which are new sources, (e.g., priority energy projects), and discharges which may be endangering public health. EPA and DEP shall set additional priorities for permitting in annual agreements between DEP and EPA, e.g., State/EPA Agreement or Working Agreements.

Promptly after the receipt of a completed NJPDES permit application, DEP will forward a copy of the application to EPA for those categories of permits where EPA has not waived its right of review. At the time of the issuance of the public notice of a draft NJPDES permit subject to EPA review, DEP shall transmit to the Regional Administrator for review a copy of the draft permit, the public notice, the statement of basis, and the fact sheet (if required). In the case of draft permits for possible new sources under Section 306 of the Federal Act, DEP shall submit with the draft permit a copy of its findings as to whether the source is a new or an existing source. In accordance with 40 CFR § 123.74(a), when requested by EPA, DEP shall supply EPA with copies of permit applications as well as other documents pertaining to NJPDES permits for which EPA review has been waived. For all draft general permits and proposed general permits, except those for separate storm sewers, the above material shall also be transmitted to the EPA Deputy Assistant Administrator for Water Enforcement or the appropriate official in EPA Headquarters. DEP shall provide for transmission by the Commissioner to EPA of a copy of any significant comments presented in writing pursuant to the public notice of a draft permit and a summary of any significant comments presented at any hearing on any draft permit (except those comments regarding permits for which permit review has been waived and for which EPA has not otherwise requested receipt), if (1) the Regional Administrator requests this information, or (2) the proposed permit contains requirements significantly different from those contained in the tentative determination and draft permit, or (3) significant comments objecting to the tentative determination and draft permit have been presented at the hearing or in writing pursuant to the public notice.

DEP shall consult with EPA from time to time prior to the issuance of public notice, in connection with the development of draft permits, in order to ensure that the permits shall comply with

Federal guidelines and requirements. DEP may transmit to EPA appropriate portions of working documents in connection with such consultation.

Upon receipt of a draft permit, the Regional Administrator shall have an initial time period of 45 days for a major discharger or 30 days for all other non-waived categories to comment upon, object to, or make recommendations with respect to the draft permits in accordance with 40 CFR §§ 123.74 and 123.75. EPA may make a general objection in the initial time period by written notice, to the Commissioner from the Regional Administrator. Such notice shall include at minimum a one paragraph statement setting forth the grounds for objection to the permit. A request by EPA during the initial time period for more information from DEP constitutes an interim objection to the draft permit. On the date that EPA receives the information necessary to satisfy its query, the initial time for EPA review recommences. A written request from EPA for additional time to review an individual draft permit submitted during the initial time period shall constitute a general objection. Requests for additional time shall only be made under exceptional circumstances.

Whenever EPA files a general objection to a draft permit within the initial time period, the Regional Administrator shall have additional time, but no more than 90 days from the date of receipt of the draft permit, to supply the specific reasons for objections in accordance with 40 CFR § 123.75(c) and the actions that must be taken by the Commissioner to eliminate the objections. EPA shall attempt to provide to the Commissioner the specific grounds for objection to a draft non-major discharge permit within 45 days of supplying the written notice of the general objection to the Commissioner. If the Regional Administrator fails to provide a written objection to a draft permit within the initial time period or fails to provide timely written notice of the specific grounds for objection to a draft permit after making a general objection, EPA shall be deemed to have waived its right to object to permit terms and conditions.

If DEP proposes to issue a permit which is different from a draft permit reviewed by EPA, if EPA has objected to a draft permit, or if there is significant public comment on a draft permit, DEP shall propose and transmit the proposed permit to the Regional Administrator. The timing of any specific or general objection to the proposed permit shall be as stated above for a draft permit. EPA objections to draft or proposed permits shall be governed by 40 CFR § 123.75(c) through (i).

In the case of draft general permits, EPA shall have 90 days from the date of receipt of the draft general permit to comment upon, object to, or make recommendations with respect to the draft general permit in accordance with 40 CFR §§ 123.74 and 123.75. If EPA fails to provide an objection to a draft general permit within

90 days from the receipt of the draft permit, EPA shall be deemed to have waived its right to object to permit terms and conditions. The EPA Deputy Assistant Administrator for Water Enforcement or the appropriate official in EPA headquarters may comment upon, object to, or make recommendations with respect to any draft general permits, except those for separate storm sewers, on EPA's behalf.

If DEP proposes to issue a general permit which is different from a draft general permit reviewed by EPA, if EPA has objected to a draft general permit, or if there is significant public comment on the draft general permit, the State shall transmit the proposed permit to the Regional Administrator. (Except for general permits for separate storm sewers, an additional copy of the proposed general permit shall be sent to the EPA Deputy Assistant Administrator for Water Enforcement or the appropriate official in EPA headquarters.) The timing of any objection to the proposed general permit shall be as stated above for a draft general permit. EPA objections to draft or proposed permits shall be governed by 40 CFR § 123.75(c) through (i).

The Commissioner shall submit, bi-weekly, a package containing any NJPDES permit applications, draft permits, public notices, statements of basis, fact sheets (if required), and any other pertinent documents to the Regional Administrator. Accompanying these items shall be a cover letter containing a summary of weekly totals.

After the public notice period has expired, the DEP shall consider all comments received as a result of the public notice, including those comments from EPA, and may revise the draft NJPDES permit as it considers appropriate. Public hearings may be held as provided for in N.J.A.C. 7:14A-8.1 et seq. If a public hearing is held, the DEP shall consider all comments and may revise the draft NJPDES permit as it considers appropriate. If EPA has made a specific objection to a draft or proposed permit and that objection is not resolved within the time limits set forth in 40 CFR § 123.75(h), DEP may not issue the NJPDES permit and exclusive authority to issue the permit passes to EPA.

In accordance with 40 CFR § 123.6(g)(2), the Commissioner shall transmit a copy of every issued final NJPDES permit to EPA no later than 30 days after the issuance of such permit. The Commissioner shall work closely with EPA to ensure that all required information is entered into EPA's computer system.

The Commissioner shall notify the Regional Administrator whenever the Commissioner proposes to modify, revoke and reissue, or terminate any NJPDES permit for those categories of discharges where the Regional Administrator has not waived the right to review, comment upon or object to the permit. All procedures set forth above with respect to draft permits shall be followed with respect to a proposed modification, revocation and reissuance, or ter-

mination of a permit. In addition, within 30 days of any final action with respect to a proposed modification, revocation and reissuance, or termination of a permit, the Commissioner shall notify the Regional Administrator of such action. Notification shall include a description of the final action and a copy of the final permit, if necessary. Also, the Commissioner shall notify the Regional Administrator of any final action with regard to a proposed modification, revocation and reissuance, or termination of NJPDES permit for those categories of discharges where the Regional Administrator has waived the right to review, comment upon, or object to the permit.

For any NJPDES permit for which EPA has not waived its right of review, DEP will inform the arbiter of any court or administrative appeal action which may affect the terms of a NJPDES permit that EPA may object to said terms pursuant to Section 402(d)(2) of the Federal Act. If the terms of any permit are affected in any manner by court action or by the final disposition of an administrative appeal, the Commissioner shall promptly transmit to the Regional Administrator a copy of the modified permit and the supporting judicial or administrative decision. The procedures set forth above for general and specific objections by the Regional Administrator shall be followed with respect to NJPDES permit issuance, modification, revocation or reissuance, or termination as required by a judicial or administrative decision.

Part Three

Transmittal of Data from the Commissioner to the Regional Administrator

Submission of information and reports from the Commissioner to the Regional Administrator shall be accomplished in a manner consistent with this MOA, any Working Agreement between EPA and DEP, 40 CFR § 122.18, applicable portions of 40 CFR Part 123 (including 40 CFR § 123.74), and other agreed upon procedures. DEP shall allow EPA to routinely review DEP's records, reports, and files relevant to the administration and enforcement of the NJPDES program. EPA shall provide reasonable notice prior to such review.

Whenever either party requests information concerning a specific discharger and the requested information is available from the files, that information shall be provided within 20 days of receipt of the request. If the requested information is not available, the party to whom the request was directed shall promptly notify the requestor. Both parties to this MOA shall have access to either party's files relevant to the administration of the NJPDES program.

Part Four

Compliance Monitoring

The DEP compliance monitoring program shall conform with 40 CFR § 123.8. Where EPA has not waived its right to comment upon, object to, or review NJPDES permits, DEP agrees to include a provision in such permits requiring submission to EPA of all reports necessary to assess compliance with the Federal Act, including the DMR's.

DEP shall operate a timely and effective compliance monitoring information system (ADP and/or manual) to track compliance with permit conditions. For purposes of this MOA the term compliance monitoring shall refer to all efforts associated with assuring full compliance with NJPDES program requirements. EPA will work with DEP in developing a modified WERS system which will be installed at the NJ Department of Transportation data center. DEP's modified system will store existing data items in the same manner they are stored at EPA so that data transfer can take place without a conversion. Upon completion of its system, DEP will automatically transfer data to EPA's WERS system on a monthly basis and will be fully responsible for the maintenance and update of the WERS data base.

DEP shall maintain an accurate and complete record of all reports required by permit compliance schedules. DEP shall conduct a timely and substantive review of all such reports to determine compliance status. DEP shall initiate appropriate enforcement actions when the required performance is not achieved or when reports are not received. Priorities for reviewing these reports and for initiating enforcement actions shall be determined by the Commissioner and may be set by any Working Agreement between DEP and EPA.

DEP shall operate a system to determine if: 1) the self-monitoring reports required by permits are submitted; 2) the submitted reports are complete and accurate; and 3) the permit conditions are met. DEP will utilize EPA's computer program for compliance tracking until DEP develops its own tracking system. EPA will assist in the transfer of information from the EPA system to the DEP system.

DEP shall conduct a timely and substantive review of all self-monitoring reports received and evaluation of the compliance status of the dischargers in accordance with 40 CFR § 123.8(e). When required reports are not submitted, DEP shall initiate appropriate enforcement actions. A compliance sampling inspection is a survey performed to assess compliance with all NJPDES permit conditions and includes effluent sampling and evaluation of the facility's monitoring and analysis program. A compliance evaluation inspection is an inspection which is designed to verify that the permittee is meeting permit requirements for records maintenance, operation of the facility, compliance schedules, self-monitoring, maintenance of the facility, reporting, and other items as appropriate. Initial priorities for reviewing self-monitoring and inspection reports, listing permittees to be surveyed for compliance, including compliance sampling inspections and compliance evaluation inspections, and for initiating enforcement action shall be determined by the Commissioner. Priorities shall be set by an annual Working Agreement between DEP and EPA. Any

joint list developed by the Commissioner and the Regional Administrator shall not limit either agency's right to survey other permittees not listed.

DEP agrees to use EPA's standard Discharge Monitoring Report ("DMR") form. EPA shall supply preprinted DMR forms and associated computer software upon request.

As part of its pretreatment program, DEP shall carry out inspection, surveillance, and monitoring procedures which will determine, independent of information supplied by Industrial Users or POTW's, whether the Industrial Users and POTW's are in compliance with National Pretreatment Standards or pretreatment conditions in their permits, respectfully. The number of inspections to ascertain compliance shall be determined by the Commissioner and may be the subject of the annual Section 106 planning process.

Except in emergency situations, EPA and DEP shall provide each other with 7 days notice prior to any inspection. This does not abrogate either agency's right to perform any inspection whenever it has cause to believe a discharger is not in compliance. Within 45 days following an inspection, the party performing the inspection shall prepare a written report which shall be sent to the other party within 7 days of completion. In addition to all compliance inspections, DEP shall maintain a compliance evaluation program in accordance with 40 CFR § 123.8(e).

DEP shall submit to EPA on a semi-annual basis a summary report of all of its compliance inspections. The summary report shall include a list of all facilities inspected during the time period covered by the report, what type of inspection was undertaken, i.e., a compliance evaluation inspection and/or a compliance sampling inspection, and the results of the inspection, i.e., in compliance or out of compliance. If a facility is out of compliance, the list shall indicate the type of violation which was responsible for the non-compliance and what type of enforcement action was initiated. The DEP shall submit its first report six months from the effective date of NPDES program approval by the Administrator of EPA.

Part Five
Enforcement

DEP agrees to maintain a vigorous enforcement program, including a program to assess compliance by dischargers, and to take timely and appropriate enforcement action in every case where such action is warranted. Discharges endangering public health shall receive immediate and paramount attention.

DEP is responsible for taking timely and appropriate enforcement action against persons discharging without a permit or who are in violation of compliance schedules, effluent limitations, other permit conditions, and other NJPDES program requirements. This includes violations detected by State or Federal inspections. DEP shall maintain procedures for receiving and ensuring proper consideration of information submitted by the public about violations. In addition, DEP shall request that the Attorney General not claim that DEP adequately represents members of the public who file a motion to intervene in any enforcement proceeding pursuant to the New Jersey Court Rules, R. 4:33. DEP shall comply with 40 CFR § 123.9 for the assessment of penalties. In doing so, whenever DEP petitions the Attorney General to file a criminal complaint for an alleged violation of a NJPDES permit pursuant to N.J.S.A. 58:10A-10(f), DEP shall request a fine of not less than \$10,000.00 per day of violation. DEP agrees to assess civil penalties for violations of the State Act in the equivalent of the amount which would be assessed pursuant to the EPA Penalty Policy as established in the memorandum of the Assistant Administrator for Enforcement dated July 18, 1980 and as set forth in 40 CFR § 123.9(c) for violations of any statutory deadline in the Federal Act or any final permit compliance deadline. The complaint for civil action shall require the payment of penalties in conformance with 40 CFR § 123.9(c). These provisions shall also apply to any violations of the pretreatment requirements in 40 CFR Part 403 and 40 CFR Chapter I, Subchapter N. DEP agrees to include in all NJPDES permits a condition that any violation of a NJPDES permit shall subject a permittee to the provisions of 40 CFR § 122.60(a)(2), (c)(2) and (d).

If EPA has commenced an enforcement action against any NPDES permittee or other person subject to the provisions of the Federal Act prior to the date of program approval or transfer of jurisdiction, whichever date is applicable, EPA shall continue that enforcement action until it is resolved. EPA shall, within 30 days of the date of program approval, furnish DEP with a list of dischargers and permit numbers, if any, against which it has initiated enforcement action in the form of an administrative order or civil referral to the U.S. Department of Justice. EPA shall provide DEP with informal status reports every 90 days until such actions are resolved. Informal status reports include telephone conversations. DEP agrees to maintain the confidentiality of such information. EPA will inform DEP of any criminal enforcement action which has been filed by the U.S. Attorney's Office.

Because DEP will have primary management responsibility, DEP agrees to provide EPA with copies of all documents it receives and to consult with EPA before it takes any action pertaining to any person against whom EPA is pursuing an enforcement action. Actions about which DEP will inform EPA include the processing of permit applications or renewals, appeals, modification requests or variance requests, and contemplated State enforcement actions. DEP and EPA agree that this consultation and coordination is important in the pursuit of a unified enforcement strategy and to avoid the duplication of effort.

Upon the effective date of NPDES program approval, EPA recognizes that DEP shall have primary enforcement responsibility for violations of the Federal Act. This does not, however, preclude EPA from taking whatever enforcement action it deems appropriate under Sections 309 or 504 of the Federal Act. Nonetheless, DEP and EPA shall make every effort to coordinate enforcement, avoid unnecessary duplication, and utilize resources in an efficient manner. In order to do so, the Enforcement Division Director of Region II of EPA and the Administrator of the Enforcement and Regulatory Services Element of Division of Water Resources, DEP, through their respective staffs, shall inform each other of actions each intends to pursue. Copies of every formal enforcement document, including directives, notices of violation, and orders to show cause, shall be sent at the time of issuance to the non-initiating agency. Copies to EPA shall be sent to the attention of the Chief, Water Enforcement Branch, Enforcement Division. Copies to DEP shall be sent to the attention of the Administrator, Enforcement and Regulatory Services Element, Division of Water Resources and the Assistant Director, Water Quality Management Element, Division of Water Resources, DEP.

Either agency may request the other to take independent or joint enforcement action on any case. Unless there may be an imminent and substantial endangerment to human health or welfare or the environment, any such request shall be in writing and a response shall be given within 30 days of receipt.

Every two months, commencing two months from the date of NPDES program approval by the Administrator, the Chief of the Water Enforcement Branch, Enforcement Division, Region II, EPA, and the Administrator, Enforcement and Regulatory Services Element, Division of Water Resources, DEP shall hold a conference to discuss enforcement procedures, pending enforcement actions, and any other matters of concern pertaining to enforcement activities. Such conferences may be conducted by telephone. This formal arrangement shall not preclude the use of informal telephone conferences or meetings when either agency determines that more immediate coordination is necessary.

DEP agrees to implement the Municipal Management System (MMS) as required by EPA and as described in the program description.

Part Six

Public Access to Information

All claims of confidentiality for information submitted to DEP shall be subject to 40 CFR § 122.19(b) and (c). Any information obtained or used by DEP regarding its NJPDES Program shall be made available to EPA upon request without restriction. If the information has been submitted to DEP under a claim of confidentiality, DEP must inform EPA of the claim. Any information obtained from DEP shall be treated by EPA in accordance with 40 CFR Part 2. If EPA obtains information from DEP that is not claimed to be confidential, EPA may make that information available to the public without further notice.

Part Seven

Pretreatment

This Part is intended to define DEP and EPA responsibilities in carrying out the establishment and enforcement of National Pretreatment Standards (NPS) for new and existing sources under Section 307(b) and (c) of the Federal Act.

DEP shall have primary responsibility for ensuring that the following is undertaken:

- a. Enforcement against discharges prohibited by 40 CFR § 403.5;
- b. Application and enforcement of any NPS established by the Administrator in accordance with Section 307(b) and (c) of the Federal Act;
- c. Review, approval, and oversight of Publicly-Owned Treatment Works (POTW's) Pretreatment Programs in accordance with the procedures in 40 CFR §§ 403.9 and 403.11;
- d. The incorporation of pretreatment programs in NJPDES permits issued to POTW's as provided in 40 CFR § 403.8 and Section 402(b)(8) of the Federal Act; and
- e. Review and approval of modification of Categorical NPS to reflect removal of pollutants by POTW's in accordance with 40 CFR § 403.9(c) and the enforcement of related conditions in the POTW's permit.

DEP will make the determination as to which POTW's will be required to submit a pretreatment program. In those cases where DEP will develop local Pretreatment Programs, DEP will have primary responsibility pursuant to 40 CFR § 403.10(e) to insure that the pretreatment requirements are met for the POTW's.

DEP shall review, pursuant to 40 CFR § 403.6 (NPS Categorical Standards), requests from an Industrial User (IU) for industrial subcategory determinations received within 30 days after the effective date of an NPS for the subcategory under which an IU believes itself to be included. DEP shall make a written determination as to whether the IU does or does not fall within that particular subcategory. DEP shall forward its findings together with a copy of the request and necessary supporting information to EPA. If EPA does not modify DEP's decision within 60 days after receipt thereof, DEP's findings are final. Where the request is submitted to EPA or where EPA elects to modify the DEP decision, EPA's decision is final. Where the final determination is made by EPA, a copy of this determination shall be sent to DEP.

DEP shall review POTWs' applications to revise discharge limits for users who are (or may in the future be) subject to categorical NPS (40 CFR § 403.7), and POTW's requests for approval of POTW's Pretreatment Programs pursuant 40 CFR § 403.9. DEP shall submit its findings together with the application and supporting information to EPA for review. Pursuant to 40 CFR § 403.11(d), no POTW's Pretreatment Program or request for revised discharge limits shall be approved by DEP, if, during the 30 day (or extended) evaluation period provided for in 40 CFR § 403.11(b)(1)(ii), EPA objects in writing to the approval of such submission.

DEP shall conduct an initial review of any request for a fundamentally different factors (FDF) variance from the Categorical NPS applicable to an IU (40 CFR § 403.13). If DEP's determination is to deny the request, this determination shall be forwarded to the IU. If DEP's determination is that FDF do exist, the request and recommendation for approval shall be sent to EPA for final action. If EPA determines that FDF do exist, a variance reflecting this determination shall be made. If EPA determines that FDF do not exist, the request shall be denied and EPA shall notify DEP in writing, indicating the reasons the request was denied. DEP may petition for reconsideration to the Regional Administrator within 30 days following receipt of the denial.

DEP shall review POTWs' applications to revise user discharge limits for a specific pollutant(s) covered in a categorical pretreatment standard pursuant to 40 CFR §§ 403.7 and 403.11. The Regional Administrator waives the right to review and object to any submission for authority to revise discharge limits pursuant to 40 CFR § 403.7(e)(3). This waiver shall not restrict the Regional Administrator's right to comment upon or object to permits issued to POTW's except to the extent permitted under 40 CFR § 123.6(e) and Part Two of this MOA.

Upon request, copies of all notices received by DEP from POTW's that relate to the new introduction of pollutants or changes in the volume or character of pollutants will be provided to EPA.

Nothing in this MOA is intended to affect any pretreatment requirement, including any standards or prohibitions, established by

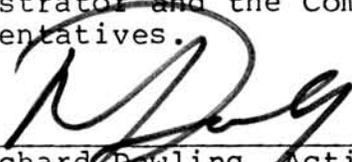
State or local law, so long as the State or local requirements are not less stringent than any set forth in the NPS or other requirements or prohibitions established under the Federal Act or applicable regulations.

Part Eight

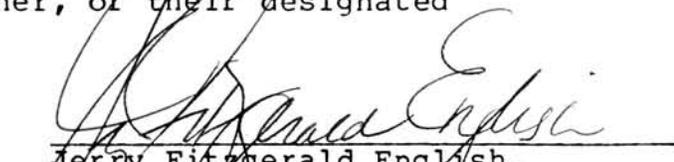
Execution and Modification of the Memorandum of Agreement

This MOA shall take effect upon approval by the Administrator after execution by the Commissioner and the Regional Administrator. It shall remain in effect for the duration of the NJPDES program approval by the Administrator pursuant to Section 402(b) of the Federal Act. If DEP voluntarily or involuntarily withdraws from the NPDES program pursuant to 40 CFR §§ 123.14 and 123.15, this MOA shall terminate upon the date when the withdrawal becomes effective.

DEP and EPA may modify this MOA from time to time in order to simplify or and refine the procedures contained herein. Pursuant to 40 CFR § 123.13(a), DEP shall keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, forms, procedures, or priorities. DEP is proposing amendments to the NJPDES Regulations. The proposed amendments shall appear in the November 2, 1981 New Jersey Register (See Appendix C). DEP and EPA agree that the § 402 program can not be approved until after these regulations have been adopted. No later than in the November 1982 New Jersey Register, DEP agrees to concurrently propose the annual fee schedule (which by regulation requires a public hearing) and the re-adoption of the NJPDES Regulations. DEP agrees that the re-adoption shall propose a "sunset" provision such that the regulations do not expire for an additional five years or DEP may seek a waiver to the sunset provision which is required by Executive Order No. 66 signed by Governor Brendan T. Byrne on April 14, 1978. The MOA shall be revised, as made necessary by the adoption of such modifications. Any revisions to this MOA and any program revisions shall comply with 40 CFR § 123.13. The MOA should be reviewed on a annual basis by both the Regional Administrator and the Commissioner, or their designated representatives.



Dr. Richard Dewling, Acting
Regional Administrator
Environmental Protection
Agency Region II, New York



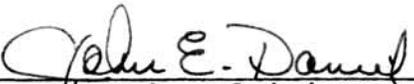
Jerry Fitzgerald English,
Commissioner
Department of Environmental
Protection

Date: 12/15/81

Date: 12/15/81

By the powers vested in me pursuant to Section 402 of the Clean Water Act, this Memorandum of Agreement is approved.

Date: APR 13 1982



Anne M. Gorsuch, Administrator
United States Environmental
Protection Agency

WQM60-C/2:caz

Appendix A

Areas of Responsibility

General Administration:

DEP- Director, Division of Water Resources

EPA- Chief, Permits Administration Branch, Division of Planning and Management

General Permitting:

DEP- Assistant Director, Water Quality Management Element, Division of Water Resources

EPA- Chief, Water Facilities Branch, Enforcement Division

Industrial Permits:

DEP- Bureau Chief, Bureau of Industrial Waste Management, Division of Water Resources

EPA- Chief, New Jersey Section, Water Facilities Branch, Enforcement Division

Municipal Permits:

DEP- Bureau Chief, Bureau of Municipal Waste Management, Division of Water Resources

EPA- Chief, Municipal Section, Water Facilities Branch, Enforcement Division

Enforcement:

DEP- Administrator, Enforcement and Regulatory Services Element, Division of Water Resources

EPA- Chief, Water Enforcement Branch, Enforcement Division

Litigation:

DEP- Chief, Environmental Section, Department of Law and Public Safety

EPA- Chief, Water Enforcement Branch, Enforcement Division

Appendix B

<u>NAME OF PERMIT</u>	<u>NPDES PERMIT NO.</u>	<u>EXPIRATION DATE ON PERMIT</u>
Harbison-Walker Refractories	NJ 0005487	9/30/79
Public Service Electric and Gas (PSE&G) - Linden	NJ 0000663	1/30/80
PSE&G - Sewarren	NJ 0000680	1/30/80
Exxon - Bayway	NJ 0001511	1/31/80

Appendix C

DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF WATER RESOURCES AND
DIVISION OF ENVIRONMENTAL QUALITY

New Jersey Pollutant Discharge Elimination System Regulations
Hazardous Waste Management Regulations

Authorized By: Commissioner Jerry Fitzgerald English

Authority: N.J.S.A. 58:10A-1 et seq. specifically N.J.S.A.
58:10A-2, 4, 5, 6, 7, 9, and 10
N.J.S.A. 58:11-49 et seq., specifically N.J.S.A.
58:11-51
N.J.S.A. 13:1E-1 et seq.

DEP Docket No. 050-81-10

SUMMARY

The purpose of the proposed regulatory amendments is to comply with requirements which have been established by the United States Environmental Protection Agency (hereinafter "USEPA"). The New Jersey Department of Environmental Protection (hereinafter "NJDEP") is mandated to comply with the USEPA requirements in order to receive state program approval for the National Pollutant Discharge Elimination System (NPDES) program pursuant to the "Clean Water Act" 33 U.S.C. 1251 et seq. and interim authorization under the "Resource Conservation and Recovery Act" 42 USC 6901 et seq. The proposed amendments enable the Department to comply with procedures established concerning the use and treatment of confidential information in enforcement, permitting and rulemaking proceedings under the New Jersey Pollutant Discharge Elimination System permit program and the Hazardous Waste Management program.

The proposed amendments also clearly establish that the Department has fully adopted all of the federal pretreatment requirements for all users of domestic treatment works which are mandated by the Clean Water Act.

SOCIAL IMPACT

The proposed amendments concerning the use and treatment of confidential information in enforcement, permitting, and rulemaking proceedings affect any person who makes a claim of confidentiality in relation to any proceeding under the New Jersey "Water Pollution Control Act" N.J.S.A. 58:10A-1 et seq. and under the "Solid Waste Management Act," N.J.S.A. 13:1E-1 et seq. concerning the regulation of hazardous waste. This affects all persons who make a claim of confidentiality and who discharge pollutants to the surface or groundwaters of the State or who treat, store or dispose of hazardous waste. Persons who may be affected are primarily industry, due to an interest in protecting trade secrets. However, municipalities, sewerage authorities, commercial facilities, haulers, etc. may also choose to make a claim. Neither the Department or USEPA receive many claims of confidentiality. The proposed amendments allow Department disclosure of the information claimed to be confidential in order for the State to administer the federal NPDES program and receive interim authorization of the RCRA program and implement the purposes of the relevant statutory authority.

ECONOMIC IMPACT

The purpose in making a claim of confidentiality is usually to protect "trade secrets". Often it is a particular unique process or product which gives one company an economic advantage. The interests of those persons making a claim of confidentiality is protected to the extent that specific procedures are provided for a Departmental determination of relevancy and notice and comment prior to disclosing any information claimed to be confidential. In addition, such disclosure may be limited to the parties of record, which in most cases does not include competing industry. Also, in judicial and adjudicatory proceedings there are provisions for protective measures concerning the use of confidential information. Due to the limited number of persons who will be affected the economic impact of this proposed amendment has been determined to be insignificant.

Full text of the proposed amendments follows (addition indicated by underlining, deletions in bracket **thus**) :

SUBCHAPTER 11 - PUBLIC ACCESS TO INFORMATION AND REQUIREMENTS FOR DEPARTMENT DETERMINATION OF CONFIDENTIALITY

11.1 Public access to information

- (a) All permit applications, documented information concerning actual and proposed discharges, comments received from the public, and draft and issued permits shall be made available to the public for inspection and duplication in accordance with Section 9 of the State Act **and pursuant to N.J.S.A. 13:1E-1 et seq.**

11.2 Confidentiality

- (a) The Department shall protect from disclosure any information, other than effluent data and the types of information listed in Section 11.1, upon a showing by any person that the information, if made public, would divulge methods or processes entitled to protection as trade secrets of such person. The Department's decision on the claim of confidentiality shall be made in accordance with the substantive criteria listed in Section 11.6.
- (b) Included among those items for which claims of confidentiality will be denied are the following:
1. The name and address of any permit applicant or permittee;
 2. Permits;
 3. Effluent data as defined in Section 1.10;
 4. For permits under the UIC program, information which deals with the existence, absence, or level of contaminants in drinking water;
 5. Information required by NJPDES application forms provided by the Department under **[Section] N.J.A.C. 7:14A-2.1. and required in application form pursuant to N.J.A.C. 7:26-12.1.** This includes information submitted on the forms themselves and any attachments used to supply information required by the forms.

11.3 Procedures for asserting or reasserting confidentiality

- (a) Reasserting a confidentiality claim. With regard to NPDES permits issued by EPA and taken over by the Department upon the date of EPA approval of the State NPDES program (NJPDES/DSW) or RCRA program (including interim authorization of Phase I) : any person who has made a confidentiality claim under 40 CFR Part 2 shall reassert such claim as follows:
1. Within 60 days of the effective date of **[these regulations] program approval and/or interim authorization of Phase I a NPDES or RCRA permittee shall submit the appropriate fee in accordance with [Section] N.J.A.C. 7:14A-11.4** if the permittee desires to maintain the claim of confidentiality which was previously made to EPA. Failure to submit such fee as required shall not entitle the permittee to such claim of confidentiality in accordance with the State Act and these regulations.

2. Failure to reassert. If the claim is not reasserted in the above manner, the Department shall notify the affected person by certified mail (return receipt requested) or by telegram that such person must reassert the confidentiality claim and submit the proper fee within 10 days of receipt of the notice. Failure to timely reassert the confidentiality claim shall result in a waiver of the claim and the release of the information into the public file.
- (b) Asserting a confidentiality claim. Any person who submits information other than effluent data and the types of information listed in Section 11.1, may assert a confidentiality claim covering part or all of the information by following the procedures set forth in subsections (c) through (g) of this section.
 - (c) Any person submitting information to the Department and asserting a confidentiality claim covering any of the information shall submit two sets of documents to the Department. The first set shall contain all information requested by the Department, including any information which the person alleges to be entitled to confidential treatment. The second set, which will go into the public file, shall be identical to the first set except that it shall not contain information which the person alleges to be entitled to confidential treatment. In order to provide the public notice that information has been omitted from the second set under a claim of confidentiality, the second set shall indicate where such deletions have been made.
 - (d) The top of each page of the first set containing the information which the person alleges to be entitled to confidential treatment shall display the heading "CONFIDENTIAL" in bold type or stamp.
 - (e) All parts of the text of the first set which the person alleges to be entitled to confidential treatment shall be underscored or highlighted in a clear manner. Translucent ink markers are acceptable for this purpose.
 - (f) The outside of the envelope containing the first set containing the information which the person alleges to be entitled to confidential treatment shall display the word "CONFIDENTIAL" in bold type on both sides.
 - (g) The person submitting the sets of information shall send them to the Department by certified mail (return receipt requested), by personal delivery, or by other means which allows verification of the fact of receipt and the date of receipt.

11.4 Fees.

Any person submitting documents to the Department under a claim of confidentiality, or reasserting a confidentiality claim under Section 11.3(a), must submit a check in the amount of \$250 for the first fifty (50) confidential pages and \$1 for each page thereafter, to cover the additional costs of processing and protecting the confidential information.

11.5 Procedure for confidentiality determinations.

(a) Information for which a confidentiality claim has been asserted will be treated by the Department as entitled to confidential treatment~~[,]~~ unless:

1. the Department determines that the information is not entitled to confidential treatment as provided in this section; or

2. A claim of confidentiality has been made on an IWMP permit application or an application required pursuant to N.J.A.C. 7:26-12.1 et seq.

i. The following procedures apply to such a claim:

(1) Claims of confidentiality for permit application information must be substantiated at the time the application is submitted and in the manner prescribed in the application instructions.

(2) If a submitter does not provide substantiation, the Department will notify it by certified mail of the requirement to do so. If the Department does not receive the substantiation within 10 days after the submitter receives the notice, the Department shall place the unsubstantiated information in the public file.

~~[(a)]~~ b. The Department shall determine whether information is entitled to confidential treatment whenever the Department:

1. Receives a request under the Right to Know Law, N.J.S.A. 47:1A-1 et seq., to inspect or copy such information; or
2. Desires to determine whether information in its possession is entitled to confidential treatment, even though no request to inspect or copy such information has been received.

~~[(b)]~~ c. Initial determination of entitlement to confidential treatment is as follows:

1. If, in connection with any person's claim, the Department determines that the information may be entitled to confidential treatment, the Department shall:

- i. Furnish the notice of opportunity to submit comments prescribed by **【paragraph】** (c) (d) below **【of this section】** to each person who is known to have asserted an applicable claim and who has not previously been furnished such notice with regard to the information in question;
 - ii. Furnish, to any person whose request for release of the information is pending under N.J.S.A. 47:1A-1 et seq., a determination: that the information may be entitled to confidential treatment under this subpart, that further inquiry by the Department pursuant to this subpart is required before a final determination on the request can be issued, that the person's request is therefore initially denied, and that after further inquiry a final determination will be issued by the Department.
2. If, in connection with all applicable claims, the Department determines that the information clearly is not entitled to confidential treatment, the Department shall take the actions required by **【paragraph (f)】** (g) **【below of this section】**.

【(c)】d. Notice to affected persons; opportunity to comment.

1. Whenever required by **【(b)】** c. 1.i. above **【of this section】** the Department shall promptly furnish each affected person a written notice stating that the Department is determining under this subchapter whether the information is entitled to confidential treatment, and that the affected person shall substantiate the claim by submitting comments. The notice shall be furnished by certified mail (return receipt requested), or by other means which allows verification of the fact and date of receipt. The notice shall state the address of the office to which the affected person's comments shall be addressed, the time allowed for comments, and the method for requesting a time extension under **【sub-paragraph 2.ii. of this paragraph】** 1.ii. below. The notice shall further state that the Department will construe a person's failure to furnish timely comments as a waiver of the person's claim.
- 【2.】** i. If action under this section is occasioned by a request for the information under N.J.S.A. 47:1A-1 et seq., the period for comment shall be 10 working days after the date of the affected person's receipt of the written notice. In other cases, the period for comment shall be 20 working days after the person's receipt of the written

notice. In all cases, the notice shall reference the provisions of [subparagraph 2.ii.] (d) 1.ii. [of this paragraph.] below.

- ii. The period of submission of comments may be reasonably extended if, before comments are due, a request for an extension of the comment period is made by the affected person and approved by the Department. Except in extraordinary circumstances, the Department shall not approve such an extension without the consent of any person whose request for release of the information under N.J.S.A. 47:1A-1 et seq. is pending.

[3.] 2.

The written notice required by [subparagraph 1. of this paragraph] 1. above shall inform the affected person of the requirement to submit comments on the following points subject to [subparagraph 4.] d. below [of this subsection)]:

- i. Measures taken by the person to guard against undesired disclosure of the information to others;
- ii. The extent to which the information has been disclosed to others, and the precautions taken in connection therewith;
- iii. Pertinent confidentiality determinations, if any, by the Department, by EPA or by other agencies, and a copy of any such determination, if available, or reference to it;
- iv. Whether the person asserts that disclosure of the information would be likely to result in substantial harmful effects on the person's competitive position, and if so, what those harmful effects would be, why they should be viewed as substantial, and an explanation of the causal relationship between disclosure and such harmful effects; and
- v. The period of time for which confidential treatment is desired by the person.

[4.] 3.

Confidential treatment of comments. If information submitted to the Department by an affected person as part of his or her comments under [this section], N.J.A.C. 7:14A-11.5 pertains to the person's claim, is not otherwise possessed by the Department, and is marked when received in accordance with [Section] N.J.A.C. 7:14-A 11.3, it will be regarded by the Department as entitled to confidential treatment, except as provided in N.J.A.C. 7:14A-11.5(a)2 and will not be disclosed by the

Department without the person's consent, unless its disclosure is duly ordered by a court, notwithstanding other provisions of this subchapter to the contrary.

[(d)](e) [1.] Waiver of claim[.] is as follows:

1. If the Department finds that a person has failed to furnish comments as required under **[this section] N.J.A.C. 7:14A-11.5**, it shall determine that the person has waived his or her claim, and that the information is therefore not entitled to confidential treatment under this subchapter and is available to the public.
2. In all other cases, the Department shall determine with respect to each claim whether or not the information is entitled to confidential treatment for the benefit of the person that asserted the claim.

[(e)](f) Determination that information is entitled to confidential treatment.

1. If, in accordance with the criteria listed in **[Section] N.J.A.C. 7:14A-11.6**, the Department determines that the information is entitled to confidential treatment, it shall maintain the information in confidence (subject to court order, any applicable court rules, **[Sections] N.J.A.C. 7:14A -11.9, 11.10, 11.12, 11.13** or other provisions of this subchapter which authorize disclosure in specified circumstances), and the Department shall so inform the affected person. If any person's request for the release of the information is then pending under **N.J.S.A. 47:1A-1 et seq.**, the Department shall issue a determination denying that request, which shall state the basis for the determination and that it constitutes final agency action.

[(f)](g) Determination that information is not entitled to confidential treatment; notice, waiting period; release of information.

1. If, in accordance with the criteria listed in **[Section] N.J.A.C. 7:14A-11.6**, the Department determines that the information is not entitled to confidential treatment, the Department shall so notify the affected person. Such notice of denial (or partial denial) of a confidentiality claim shall be written, and shall be furnished by certified mail (return receipt requested).
2. The notice shall state the basis for the determination, that it constitutes final agency action concerning the

confidential claim, and that the Department shall make the information available to the public ten (10) days after the date of the affected person's receipt of the notice.

[(g)] h. Emergency situations. If the Department finds that disclosure of information covered by a confidentiality claim would serve to alleviate a situation posing an imminent and substantial danger to public health or safety, it may:

1. Prescribe and make known to interested persons such shorter comment period ([subparagraph (c)2. of this section] (d) 1. above), post-determination waiting period ([subparagraph (f)]2. of this section] (g) 2. above), or both, as it finds necessary under the circumstances; or
2. Disclose confidential information to any person whose role in alleviating the danger to public health or safety necessitates that person's knowing the information. Any such disclosure shall be limited to the minimum information necessary to enable the person to whom it is disclosed to carry out his or her role in alleviating the dangerous situation.
3. Any disclosure made pursuant to this section shall not be deemed a waiver of a confidentiality claim, nor shall it of itself be grounds for any determination that information is no longer entitled to confidential treatment.

[(h)] i. If the Department receives a request under the Right to Know Law, N.J.S.A. 47:1A-1 et seq., for information submitted to the EPA regarding a NPDES or RCRA (including Part A and/or Part B) permit which the Department has since taken over, and, in the Department's opinion, the person might be expected to assert a claim if he or she knew that the Department proposed to disclose the information, but no claim of confidentiality was asserted, the Department shall contact the person to learn whether he or she asserts a claim covering the information.

However no such inquiry need be made to any person:

1. Who failed to assert a claim covering the information when responding to an EPA request or demand, or supplying information on an EPA form, which contained the substance of the statements prescribed by 40 CFR Section 2.203 (a); or
2. Who otherwise failed to asserted a claim covering the information after being informed by EPA or the Department that such failure could result in disclosure of the information to the public; or

3. Who has otherwise waived or withdrawn a claim covering the information.

11.6 Substantive criteria for confidentiality determinations.

A determination made under [Section] N.J.A.C 7:14A-11.5 shall hold that information is entitled to confidential treatment if:

- (a) The person has asserted a confidentiality claim;
- (b) The person has satisfactorily shown that he has taken reasonable measures to protect the confidentiality of the information, and that he intends to continue to take such measures;
- (c) The information is not, and has not been, reasonably obtainable, without the person's consent, by other persons (other than governmental bodies) using legitimate means (other than discovery based on a showing of special need in a judicial or quasi-judicial proceeding);
- (d) No statute requires disclosure of the information; and
- (e) The person has satisfactorily shown that disclosure of the information would be likely to cause substantial harm to the person's competitive position.

11.7 Class determinations

- (a) The Department may make a determination that a certain class of information is or is not entitled to confidential treatment under this section if it finds that:
 1. The Department possesses, or is obtaining, related items of information; and
 2. One or more characteristics common to all such items of information will necessarily result in identical treatment for each such item, and that it is therefore proper to treat all such items as a class.
- (b) A class determination shall clearly identify the class of information to which it pertains.
- (c) A class determination shall state that all of the information in the class:
 1. Fails to satisfy one or more of the applicable criteria in Section 11.6 of this subchapter, and is therefore ineligible for confidential treatment; or
 2. Satisfies the applicable criteria in Section 11.6 of this subchapter, and is therefore eligible for confidential treatment.

11.8 Access to and safeguarding of confidential information.

- (a) Unless specifically provided for by Federal law, State law, court order, or applicable court rule, no person shall have access to information which has been determined to be entitled to confidential treatment, other than: the designated Department personnel; Federal or other State agencies, subject to the provisions of 【Section】 N.J.A.C. 7:14A-11.9 or 11.12 of this subchapter; or authorized representatives of the Department, subject to the provisions of 【Section】 N.J.A.C. 7:14A-11.10 【of this subchapter】.
- (b) Each Department officer or employee who has custody or possession of confidential information shall take appropriate measures to properly safeguard such information and to protect against its improper disclosure.
- (c) No Department officer or employee may disclose, or use for his or her private gain or advantage, any confidential information which came into his or her possession, or to which he or she gained access, by virtue of his or her official position of employment, except as authorized by this subpart.
- (d) If the Department finds that any person has violated the regulations of this subchapter, it may:
 - 1. Commence a civil action in Superior Court for a restraining order and an injunction barring that person from further disclosing confidential information.
 - 2. Pursue any other remedy available to it by law.
- (e) In addition to any other penalty that may be sought by the Department, violation of this subchapter by a Department employee, thereby exceeding the scope of his or her authority, shall constitute grounds for dismissal, suspension, fine, or other adverse personnel action.

11.9 Disclosure of confidential information to 【Federal, Interstate, and other State agencies】 State, Interstate, and Federal agencies, with the exception of EPA and the U.S. Department of Justice.

- (a) The Department may disclose information which has been determined to be entitled to confidential treatment to 【Federal, Interstate, and other State agencies】 State, Interstate, and Federal agencies, with the exception of EPA and the U.S. Department of Justice if:
 - 1. The Department receives a written request for disclosure of the information from a duly authorized officer or employee of the other agency;

2. The request sets forth the official purpose for which the information is needed;
 3. The Department notifies the other agency of its determination that the information is entitled to confidential treatment;
 4. The other agency has first furnished to the Department a written opinion from the agency's chief legal officer or counsel stating that under applicable law the agency has the authority to compel the person who submitted the information to the Department to disclose such information to the other agency; and
 5. The other agency agrees not to disclose the information further, unless the other agency has statutory authority both to compel production of the information and to make the proposed disclosure.
- (b) Except as provided in **[Section] N.J.A.C. 7:14A-11.5[(g)],(h)** (emergency disclosure) and N.J.A.C. 7:14A-11.12 the Department shall notify the affected person in writing of its intention to disclose information which has been determined to be entitled to confidential treatment, **[it]** to any other governmental agency at least ten (10) working days in advance of the disclosure.

11.10 Disclosure of confidential information to authorized agents

- (a) The Department may disclose information which has been determined to be entitled to confidential treatment to an authorized agent of the Department: if the Department determines that such disclosure is necessary in order for the agent to carry out the work required by the contract, if the Department notifies the affected person, and, if the affected person so requests, the agent contracts with the affected person to protect the confidentiality of the information.
- (b) No information shall be disclosed under subsection (a) of this section unless the contract in question provides that the agent and the agent's employees shall use the information only for the purpose of carrying out the work required by the contract, shall refrain from disclosing the information to anyone other than the Department, and shall return to the Department all copies of the information (and any abstracts or extracts therefrom) upon request by the Department or whenever the information is no longer required by the agent for the performance of the work required by the contract.
- (c) Violation of the contractual provisions of subsection (b) by the agent or the agent's employee in question shall consti-

tute grounds for debarment or suspension, as provided in "Debarment, Suspension and Disqualification from Department Contracting," N.J.A.C. 7:1-5.1 et seq.

11.11 Designation by person of an addressee for notices and inquiries.

- (a) Any affected person who wishes to designate a specific person or office as the proper addressee of communications from the Department under this subpart may do so by furnishing in writing to the Department the following information: the name and address of the person making the designation; the name, address, and telephone number of the designated person or office; and a request that Department inquiries and communications (oral and written) under this subpart be furnished to the designee pursuant to this section. Only one person or office may serve at any one time as an affected person's designee under this subpart.
- (b) If an affected person has named a particular designee under this section, the following department inquiries and notices to the affected person shall be addressed to the designee:
 1. Notices to submit comments, under **[Section] N.J.A.C. 7:14A-11.5[(c)](d)**;
 2. Notices of denial of confidential treatment and proposed disclosure of information, under **[Section] N.J.A.C. 7:14A-11.5[(f)](g)**;
 3. Notices concerning shortened comment and/or waiting periods under **[Section] N.J.A.C. 7:14A-11.5[(g)](h)**; and
 4. Notices to affected persons under **[Sections] N.J.A.C. 7:14A-11.9 and 11.10**.

11.12 Access to Information for EPA and the U.S. Department of Justice

- (a) Any information obtained or used in the administration of the NJPDES and RCRA programs shall be available to EPA and U.S. Department of Justice upon request without restriction. If the information has been submitted to the Department under a claim of confidentiality, the Department shall submit that claim to EPA when providing information as required above.

11.13 Use of confidential information in rulemaking, permitting, and enforcement proceedings

- (a) Notwithstanding any other provision of this Subchapter, the Department may use confidential information in rulemaking, permitting and enforcement proceedings.

(b) Where the Department determines that there shall be an adjudicatory hearing, information determined to be eligible for confidential treatment pursuant to N.J.A.C. 7:14A-11.5 and 11.6 may be used in any enforcement and permitting proceeding subject to the protection from making the information available to the public as provided in N.J.A.C. 1:1-1.1 et seq.

(c) Where the Department determines that there shall not be an adjudicatory hearing information determined to be eligible for confidential treatment pursuant to N.J.A.C. 7:14A-11.5 and 11.6 may be used in any enforcement, permitting, or rulemaking proceedings provided the procedures set forth below are followed:

1. The affected person shall be informed that the Department is considering using the information in connection with the proceeding and shall afford the person a reasonable period for comment; and

2. The Department, after consideration of any timely comments submitted by the person, determines that the information is relevant to the subject of the proceeding; and

3. The Department determines that the public interest shall be served by use of the information in the proceeding; and

4. The Department shall give the affected person at least 5 days notice prior to using the information which may result in the information being made available to the public.

N.J.A.C. 7:14A-13 Additional Requirements For Users Of Domestic Treatment Works (DTWs)

N.J.A.C. 7:14A-13.1 Purpose and Scope

(a) The Department herein provides notice that it adopts the "General Pretreatment Regulations for Existing and New Sources of Pollution", 40 CFR Part 403 upon the effective date of these regulations. All users shall comply with the requirements of 40 CFR Part 403.

(b) The Department herein provides further notice that the Department adopts the National Pretreatment Standards for existing and new sources of pollution, 40 CFR 403.5 and Chapter I, Subchapter N (including all subsequent amendments and supplements). All users shall comply with these requirements.

[(b)] (c) This subchapter also provides the specific NJPDES permit requirements for a significant industrial user (SIU), as defined in **[(Section)]** N.J.A.C. 7:14A-1.9 [1/10].

N.J.A.C. 7:26-1 General Provisions

N.J.A.C. 7:26-1.8 **【Reserved】** Public access to information and requirements for Department determination of confidentiality

(a) Any confidential information obtained or used in the administration of the state hazardous waste program, as provided in Section 3006 The Resource and Conservation and Recovery Act of 1976, 42 U.S.C. 3251 et seq., and amendments thereto, shall be treated in accordance with N.J.A.C. 7:14A-11.1 et seq.

N.J.A.C. 7:26-12 Hazardous Waste Facility Permit Requirements

N.J.A.C. 7:26-12.2 Permit Application

(a) Any person who is required to have a permit (including new applicants and permittees with expiring permits) shall complete, sign and submit an application to the Department as described in this section. Procedures for applications, issuance and administration of emergency permits are found exclusively in N.J.A.C. 7:26-12.9 Procedures for claiming confidentiality are found in N.J.A.C. 7:14A-11.1.

Interested persons may submit in writing, relevant to the proposed amended rules on or before December 2, 1981. These submissions, and any inquiries about submissions and responses, should be addressed to:

Dr. Marwan M. Sadat, P.E.
Assistant Director, Water Quality Management
Division of Water Resources
CN 029
Trenton, N.J. 08625

The Department thereafter may adopt this proposal without further notice (see N.J.A.C. 1:30-3.5). The adopted rules become effective upon publication in the Register of a notice of adoption. This proposal is known as PRN 1981 -

Jerry Fitzgerald English
Commissioner

Date: October 9, 1981