

**STATE
ENVIRONMENTAL LAWS AFFECTING
NEW JERSEY AGRICULTURE**

*(See NASDA's website for
Federal Environmental Laws Affecting U.S. Agriculture)*

A Project of the

**National Association of State Departments
of Agriculture Research Foundation**

through the

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Research and Information**



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The Project Participants

National Association of State Departments of Agriculture Research Foundation

The National Association of State Departments of Agriculture (NASDA) is a nonprofit, nonpartisan association of public officials comprised of the Commissioners, Secretaries, and Directors of the fifty State Departments of Agriculture in the fifty states and the territories of Puerto Rico, Guam, American Samoa, and the Virgin Islands. NASDA's mission is to represent the State Departments of Agriculture in the development, implementation, and communication of sound public policy and programs which support and promote the American agricultural industry while protecting consumers and the environment. The NASDA Research Foundation is a 501(c)(3) nonprofit, tax-exempt corporation for educational and scientific purposes.

National Center for Agricultural Law Research and Information

The National Center for Agricultural Law Research and Information (NCALRI) was created in 1987 under Public Law 100-202, 101 Stat. 1329-30 to address the complex legal issues that affect American agriculture. The NCALRI focuses its efforts on research, writing, publishing, development of library services, and the dissemination of information to the public. The NCALRI is located at the University of Arkansas School of Law in Fayetteville, Arkansas.

Natural Resources Conservation Service

The Natural Resources Conservation Service (NRCS), formerly known as the Soil Conservation Service (SCS), is a federal agency within the U.S. Department of Agriculture (USDA). NRCS conservationists work with private landowners and operators to help them protect their natural resources.

U.S. Environmental Protection Agency

The U.S. Environmental Protection Agency (EPA) is a federal agency with primary responsibility for implementation of most federal laws designed to protect, enhance, and conserve the nation's natural resources.

Disclaimer

This guide is designed for use by farmers, ranchers, landowners, and their consultants in understanding the effect environmental laws have on agricultural operations. It is not a substitute for individual legal advice. Agricultural producers should always confer with their own attorneys, consultants, or advisors as well as federal, state, and local authorities responsible for the applicable environmental laws.

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Although every effort has been made to ensure the accuracy of the information contained in this book, environmental statutes, regulations, and ordinances are constantly changing. In addition, the overwhelming complexity and extent of environmental law make it impossible for a single book to describe in complete detail and depth all of the environmental laws and regulations impacting agricultural operations. The following material is simply a basic primer on environmental law for agricultural producers. For these reasons, the utilization of these materials by any person constitutes an agreement to hold harmless the authors, the National Center for Agricultural Law Research and Information, the University of Arkansas, the United States Department of Agriculture, the National Association of State Departments of Agriculture Research Foundation, the Natural Resources Conservation Service, and the United States Environmental Protection Agency for any liability, claims, damages, or expenses that may be incurred by any person or organization as a result of reference to, or reliance on, the information contained in this book. The background research and final documents were completed in March 2003.

Anyone with comments concerning the guide should contact the NASDA Research Foundation at 1156 15th Street, N.W., Suite 1020, Washington, D.C. 20005, or phone (202) 296-9680.

Quick Reference Guide

Producer Note: The following chart is intended as a quick reference guide to permits which may be necessary for a particular operation. If a permit is necessary, refer to the page numbers listed referencing this document for further information and contact the agencies listed in the final column information on applications and procedures for securing a permit for an operation. A list of agencies and contact information is also provided in Appendix A.

Regulatory Area	Type of Activity	Permit Required	Agency
Water Quality <i>pp. 1-30</i>	Livestock and aquaculture operations, depending on size	National Pollutant Discharge Elimination System (NPDES) permit or New Jersey Pollutant Discharge Elimination System (NJPDES)	U.S. Environmental Protection Agency (U.S. EPA) and New Jersey Department of Environmental Protection (DEP)
	Wetlands dredge and fill activity or dam or bridge building activities	Section 404 Clean Water Act (CWA) permit	U.S. Army Corps of Engineers with U.S. EPA and DEP
Groundwater <i>pp. 30-34</i>	Groundwater protection	No permit, but Best Management Practices (BMPs) must be followed, loans for remediation or alternate water supply	DEP
	Water well construction and use	No permit or drilling license required, but construction standards must be followed, voluntary well testing available for potable waters	DEP and New Jersey Department of Health and Senior Services (DHSS)

Regulatory Area	Type of Activity	Permit Required	Agency
Air Quality <i>pp. 34-49</i>	Installation, construction, or modification of equipment and facilities with potential to release air emissions	Permit to operate required if emissions are not de minimis	DEP and local municipalities
	General agricultural operations including odor, dust, or flies	No permit required, but could be subject to nuisance suits if right to farm defense does not apply	U.S. EPA and DEP
	Burning	Burning permit usually required	DEP and local municipalities
Solid Waste and Hazardous Waste <i>pp. 49-62</i>	Storage, treatment, and disposal of solid waste	Permit usually required	DEP
	Underground storage tanks	Annual registration required, servicers, installers, testers, removers, etc., must be certified	DEP
	Storage, treatment, and disposal of hazardous waste	Permit required for disposal, treatment, or storage activities	DEP
Pesticides and Chemigation <i>pp. 62-66</i>	Application and use of pesticides	Annual registration fee but an agricultural and horticultural exemption may exist for some persons when certified as private applicator	U.S. EPA and DEP
	Use of pesticides around farmworkers	No permit required, but training and notification is required	U.S. EPA and DEP
	Record keeping	No permit required, but all requirements must be met	U.S. EPA and DEP
Wildlife Protection <i>pp. 70-74</i>	Taking of wildlife	Permit required if endangered or threatened species may be affected	U.S. Fish and Wildlife Service and DEP

STATE ENVIRONMENTAL LAWS AFFECTING NEW JERSEY AGRICULTURE

Producer Note: The information on environmental regulation provided in this guidebook is presented for the purpose of educating agricultural producers on the breadth and scope of environmental laws which may impact their daily production activities. Environmental regulation is a complex area with both federal, state, and often local government involvement. Rapid changes in industrialization, computer-based technology, and market dynamics also affect agricultural producers in a number of ways and present many challenges. Staying informed is the producer's most useful tool for meeting these challenges.

Producer Note: Agricultural producers are faced with many challenges in today's rapidly changing world. Changes in industrialization, computer-based technology, market dynamics, and environmental regulation are affecting producers in a number of ways. Environmental regulation is a complex area with both federal and state government involvement. Staying informed is the producer's most useful instrument for meeting the challenges of today's agriculture. This information on environmental regulation is provided to educate producers on the breadth and scope of environmental laws which may impact production activities.

I. WATER QUALITY

Producer Note: In order for agricultural producers to maintain compliance with water quality legislation, they must be aware of not only federal water quality standards, NPDES permit requirements, wetland permits, and oil spill liability issues but also state water quality standards, state permit requirements, state and local nonpoint source pollution programs, state environmental liability issues, and whether there are any waters requiring special protection in their area. The states take active roles in ensuring that agricultural producers comply with environmental requirements.

A. New Jersey Water Quality Laws

1. *New Jersey Water Quality Planning Act*

The New Jersey Water Quality Planning Act (WQPA)¹ governs water quality planning and specifies the function, powers, and duties of the Department of Environmental Protection (DEP), county governments, and certain areawide planning agencies. The purpose of the WQPA

¹ N.J. STAT. ANN. §§ 58:11A-1 to 16 (1992).

is to restore and maintain the chemical, physical, and biological integrity of the waters of the state including groundwater. Areawide water quality management plans are proposed by the WQPA to better manage water resources from a broader base and to better protect their purity and quality.

The WQPA establishes that the people of the state have a paramount interest in the restoration, maintenance, and preservation of the quality of the waters of the state for the protection and preservation of:

- Public health and welfare;
- Food supplies;
- Public water supplies;
- Propagation of fish and wildlife;
- Agricultural and industrial uses;
- Aesthetic satisfaction;
- Recreation; and
- Other beneficial uses.

The WQPA establishes that the severity of the water pollution problem necessitates continuing water quality management planning in order to develop and implement water quality programs in concert with other social and economic objectives.

Pollution abatement programs under the WQPA are designed to consider natural and man-made conditions because water quality is dependent upon many factors including topography, hydrology, population concentration, industrial and commercial development, agricultural uses, transportation, and other factors that vary among and within the different watersheds and various regions of the state.

Wherever practicable and feasible, waste treatment management planning areas must be drawn along county boundaries so that county government can perform areawide waste treatment management planning. Even so, the DEP must:

- Conduct its own waste treatment management planning for all areas of the state;
- Establish a continuing planning process which encourages, directs, supervises, and aids areawide planning;

- Incorporates water quality management plans into a comprehensive and cohesive statewide program directed toward achievement of the water quality objectives.²

2. *New Jersey Water Pollution Policy*

Most states have enacted clean water legislation. While these state statutes usually contain provisions similar to those found in parallel federal legislation, there may be significant differences. In fact, state statutes may impose requirements that are even more restrictive than the federal law. Nonetheless, in all cases, federal Clean Water Act (CWA)³ requirements must be followed and enforced along with the state laws and state regulations implemented by that state's administrative agencies.

Subject to certain standards and conditions, the federal CWA authorizes the United States Environmental Protection Agency (U.S. EPA) to delegate administration of the federal National Pollutant Discharge Elimination System (NPDES), i.e., the point source water pollution permit program,⁴ to the individual states. Most states, including New Jersey, assume the responsibility for administering the federal point source discharge permit program but additionally administer their own state programs.

Under the federal NPDES program and the corresponding New Jersey state program, any person discharging an effluent into the surface or groundwaters is required to obtain and comply with a point source water pollution discharge⁵ permit. Point source water pollution derives from discharges from discernible, confined, and discrete sources but by legislative exclusion does not include runoff from stormwater and snowmelt from agricultural, urban, mined, and other lands. In contrast to point source water pollution, nonpoint source water pollution is defined as water pollution from all other sources other than point sources. Thus, nonpoint source water pollution

²Meaningful public participation must be provided during all phases of the water quality planning management process; *see* N.J. STAT. ANN. § 58:11A-2 (1992 & Supp. 2002).

³ 33 U.S.C. §§ 1251 *et seq.* (1994).

⁴ The term "point source" is defined in the CWA and means "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged; this term, however, does not include agricultural stormwater discharges and return flows from irrigation; *see* 33 U.S.C. § 1362(14); *see also* 40 CFR § 122.2 (1986) and N.J. STAT. ANN. § 58:10A-3(m) (1992 & Supp. 2002). In contrast to point source pollution that derives from discernable, confined, and discrete conveyances, non-point source pollution derives from non-discernable sources and is defined as all "other" pollution into waters of the state other than point source pollution sources.

⁵ The term "discharge" means an intentional or unintentional act or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying, or dumping of a pollutant into the waters of the state, onto land or into wells from which it might flow or drain into said waters or into waters or onto lands outside the state that later enters the state; discharge includes the release of any pollutant into a municipal treatment works; *see* N.J. STAT. ANN. § 58:10A-3(e) (1992 & Supp. 2002).

comes from diffuse sources rather than discernable sources. New Jersey state laws also regulate nonpoint source water pollution discharges.⁶

Caution: Because environmental laws and regulations change frequently, agricultural producers must stay in touch with both state and federal officials in order to remain in compliance and aware of changes in the law.

Producer Note: Often the specifics of environmental laws are found in state or federal agency regulations. In addition, agency regulations are likely to be amended frequently. As a result, agricultural producers must stay in contact with agency offices administering specific programs in order to keep up with all changes which may occur. In New Jersey, the primary agency for environmental issues is the Department of Environmental Protection (DEP). Within DEP, there are several divisions (See Appendix A, page NJ-76.) that administer specific environmental areas.

The state of New Jersey recognizes that pollution of surface water and groundwater continues to endanger public health; threaten fish and aquatic life; scenic and ecological values; and to limit the domestic, municipal, recreational, industrial, agricultural, and other uses of water even though a significant pollution abatement effort has been made in recent years. The policy of the state is:

- To restore, enhance, and maintain the chemical, physical, and biological integrity of its waters;
- To protect public health;
- To safeguard fish and aquatic life and scenic and ecological values; and
- To enhance the domestic, municipal, recreational, industrial, and other uses of waters.⁷

3. *New Jersey Water Pollution Control Act*

Under the New Jersey state Water Pollution Control Act (WPCA)⁸ and its amendments, the DEP is charged with the responsibility to administer the federal CWA and the federal Safe

⁶ N.J. STAT. ANN. § 58:10A-6(d)(5) (1992 & Supp. 2002).

⁷ N.J. STAT. ANN. § 58:10A-1 (1992 & Supp. 2002).

⁸ N.J. STAT. ANN. §§ 58:10A-1 to 60 (1992 & Supp. 2002).

Drinking Water Act (SDWA)⁹) as well as state water pollution control provisions in order to maintain, protect, and enhance the state's water quality. The WPCA addresses water pollution control, the authority of the DEP including rulemaking authority, the creation of a NJPDES permit program, and establishes penalties for violations of the act. The WPCA is intended to facilitate restoration and maintenance of unpolluted surface and groundwaters of the state in order to protect water and the environment.

a. Department of Environmental Protection

The DEP is the state agency established by the WPCA that has responsibility to administer and implement the state's WPCA as well as the federal CWA within New Jersey. The DEP is also the solid waste agency for New Jersey for all purposes of the federal Resource Conservation and Recovery Act (RCRA),¹⁰ the air pollution control agency for all purposes of the federal Clean Air Act (CAA),¹¹ the hazardous waste and superfund agency for purposes of the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),¹² and the environmental restoration agency concerning the federal Defense Environmental Restoration Program (DERP).¹³ Within the DEP, various offices and divisions carry out its many responsibilities including pollution prevention, environmental emergencies, public communications, environmental investigations and hearings, air pollution control, water pollution control, solid and hazardous waste management, laboratory analysis, and administrative functions and services.

Regarding water quality, the DEP has authority to adopt and enforce reasonable codes, rules, and regulations in order to prevent, control, or abate water pollution and to carry out the intent of the WPCA. The related DEP rules and regulations may address:

- Storage of any pollutant in a manner to prevent it from entering the waters of the state;
- Submission and approval of plans and specifications for the construction or modification of any treatment work;
- Classification of the surface waters and groundwaters of the state and the determination of water quality standards for each use classification;

⁹ 42 U.S.C. §§ 300f - 300j (1994).

¹⁰ 42 U.S.C. §§ 6901 *et seq.* (1994).

¹¹ 42 U.S.C. §§ 7401 *et seq.* (1994).

¹² 42 U.S.C. §§ 9601-9675 (1994); *see also* 40 CFR 300.505, Subpart F.

¹³ 10 U.S.C. §§ 2701 - 2708 (2000).

- Limitation of effluents;
- Determination of pretreatment standards; and
- Establishment of a civil penalty policy governing the uniform assessment of penalties.¹⁴

The DEP has authority to exempt certain categories of discharges from the permit requirement by promulgating and adopting regulatory exemptions including:¹⁵

- Additions of sewage, industrial wastes, or other materials into publicly owned wastewater treatment works (POTW) which are regulated by pretreatment standards;
- Discharges from marine vessels;
- Discharges of dredged or fill materials;
- Nonpoint source discharges;
- Uncontrolled nonpoint source discharges composed entirely of storm water runoff when these discharges are uncontaminated by any industrial or commercial activity unless these particular storm water runoff discharges have been identified by the DEP as a significant contributor of pollution;
- Discharges conforming to a nation contingency plan for removal of oil and hazardous substances; and
- Discharges resulting from agriculture activities including aquaculture¹⁶ activities.¹⁷

The DEP is also empowered to:

¹⁴ N.J. STAT. ANN. § 58:10A-4 (1992 & Supp. 2002).

¹⁵ Exemptions, however, do not limit the civil or criminal liability of the discharger under other provisions of state or federal law.

¹⁶ The term “aquaculture” means the propagation, rearing, and subsequent harvesting of aquatic organisms in controlled or selected environments, and the subsequent processing, packaging, and marketing and includes stocking, intervention in the rearing process to increase production, feeding, transplanting, and providing for protection from predators; the term does not include the construction of facilities and appurtenant structures that might otherwise be legally regulated; *see* N.J. STAT. ANN. § 58:10A-7.1 (1992 & Supp. 2002).

¹⁷ N.J. STAT. ANN. §§ 58:10A-6(d)(1 - 8) (1992 & Supp. 2002).

- Assess compliance of federal and state law requirements within the state pertaining to:
 - Discharge of dredged and fill material into waters of the state;
 - Protection of the environment;
 - Issuance, denial, modification, suspension, or revocation of permits required by section 404 of the CWA;
- Advise, consult, and cooperate with other agencies and affected governmental units, political subdivisions, groups, and industries in furtherance of the WPCA; and
- Administer grants to meet the goals and objectives of the WPCA.¹⁸

The DEP is not empowered to issue any permit for:

- Discharge of any radiological, chemical, or biological warfare agent or high level radioactive waste into the waters of this state:
- Any discharge the U.S. Secretary of the Army, through the Chief of Engineers, finds that would substantially impair anchorage or navigation;
- Any discharge to which the administrator of the CWA has objected; and
- Any discharge which conflicts with an area wide plan pursuant to the WPCA.¹⁹

The DEP may modify, suspend, or revoke a permit during its term of validity for cause including:

- Violation of any term or condition of the permit; or
- Obtaining a permit by misrepresentation or failure to disclose all relevant facts fully.²⁰

¹⁸ N.J. STAT. ANN. § 58:10A-5 (1992).

¹⁹ N.J. STAT. ANN. §§ 58:10A-6(e)(1 - 4) (1992 & Supp. 2002).

²⁰ N.J. STAT. ANN. § 58:10A-7(b)(1) (1992 & Supp. 2002).

Notice of every proposed suspension, revocation, renewal, or substantial modification of a permit notice must provide opportunity for a public hearing in the same manner as original permit applications. Notice of all modifications are published in the DEP Bulletin.²¹

Whenever the DEP finds that discharges from a point source or a group of point sources are within the lawful discharge limitations required by the federal CWA²² or state law, but the discharges interfere with the attainment and maintenance of applicable water quality standards, the DEP may establish more stringent discharge limitations. In such instances, the DEP must publish notice of its intent to impose more stringent limitations. A public hearing must be held to determine:

- If there is a reasonable relationship between the economic and social costs of achieving such limitations including any economic or social dislocation in the affected community and the social and environmental benefits to be obtained including the objective of restoring and maintaining the water quality of the state; and
- Whether such discharge limitations can be implemented with available technology or with other control strategies.²³

If the affected person demonstrates at the hearing that there is no reasonable relationship between the economic and social costs of compliance and the benefits to be gained, the DEP must modify the limitations as to that person.²⁴

The DEP establishes standards for water quality and administers a complete program for water conservation, pollution abatement, and pollution control. As part of the duties under the CWA, specifically Section 303(d), the DEP must prepare a list of impaired waters.

The DEP has a right of entry to all premises where discharge sources are or may be located or where monitoring equipment or required records are kept for the purpose of inspection, sampling, copying, or photographing.²⁵

The DEP has authority to request from any person whom the DEP has reason to believe possesses relevant information involving a discharge of a pollutant. The DEP must, however,

²¹ N.J. STAT. ANN. § 58:10A(7)(c) (1992 & Supp. 2002).

²² As stringent as the best available technology economically achievable as provided in the federal CWA.

²³ N.J. STAT. ANN. § 58:10A-8 (1992).

²⁴ N.J. STAT. ANN. § 58:10A-8 (1992).

²⁵ N.J. STAT. ANN. § 58:10A-6(g) (1992& Supp. 2002).

provide the person with written notice of its request.²⁶ If needed, the DEP may issue subpoenas requiring the person provide documents and testify under oath.²⁷ Destruction of records relating to a discharge within five (5) years of the discharge is prohibited without prior written permission from the DEP.²⁸

b. NJPDES Permits

In New Jersey, the water pollution control program for point source discharges is known as the New Jersey Pollutant Discharge Elimination System (NJPDES). The NJPDES is managed through the issuance of discharge permits. The permit constitutes a legally binding agreement between the permittee and the DEP. The permittee is allowed to discharge effluent into the state's waters under the specified terms and conditions contained within the language of the NJPDES permit. NJPDES permits may range from a rather simple document to an extraordinarily complex, scientific, and technical document. The permit sets forth:

- The specific pollutants, hazardous and nonhazardous, known to be present in a specific effluent discharge;
- The amount or concentration that the DEP determines may be discharged without harm to the receiving waters or to public health;
- The type and number of tests that must be performed; and
- The test results that must be reported to DEP to determine the permittee's compliance.²⁹

The NJPDES permit program is fully addressed by the New Jersey WPCA. NJPDES permits are of two types, either a general permit or an individual permit. Permits are valid for fixed periods of time up to five (5) years. Renewal of permits must be filed at least one hundred eighty (180) days prior to the permit expiration date.³⁰ Generally, a permit requires the permittee to treat the discharge in such a manner that it keeps the levels of pollutants below a figure expressed as a daily maximum (e.g., total maximum daily load or TMDL) or monthly maximum.

²⁶ N.J. STAT. ANN. § 58:10A-10.3(a) (1992).

²⁷ N.J. STAT. ANN. § 58:10A-10.3(b) (1992).

²⁸ N.J. STAT. ANN. § 58:10A-10.3(d) (1992). The WPCA allows the DEP to delegate its enforcement authority to local governmental agencies when the penalty involved is five thousand dollars (\$5,000.00) or less; *see* N.J. STAT. ANN. § 58:10A-10.4 (1992).

²⁹ The NJPDES permit program is based on self-reporting; most discharge monitoring reports are required to be submitted to DEP each month; *see* N.J. STAT. ANN. §§ 58:10A-1 to 60 (1992 & Supp. 2002).

³⁰ N.J. STAT. ANN. § 58:10A-7(a) (1992 & Supp. 2002).

The DEP is allowed to charge an annual administrative fee for the estimated cost of processing, monitoring, and administering NJPDES permits.³¹

The DEP provides public notice of every completed permit application. The notice is designed to inform interested persons, affected states, and appropriate government agencies of the proposed DEP determination to issue or deny a permit. The notice also sets forth that a comment period of at least thirty (30) days exists during which interested persons may request additional facts, submit written views, and request a public hearing on the proposed determination.³² During the thirty (30) day comment period, the permit application, any comments received, and any other documented information concerning the discharges is available to the public for inspection and duplication. Other discretionary information may be made available by the DEP. The DEP does not make information available to the public that is entitled to protection when it is shown by a person that it would divulge methods or processes.³³ The DEP must consider all testimony and documentary material submitted at hearings or received as comments.³⁴

In order to contest or appeal a DEP permit determination, a person must place the amount of any outstanding permit fees due in escrow.

No permit may be issued, renewed, or modified by the DEP that would relax any water quality standard or discharge limitation until the permit applicant or permittee has paid all fees, penalties, or fines due and owing pursuant to the WPCA.³⁵ A DEP determination to grant, modify, suspend, or revoke a permit may be contested, and the permittee or any other person considered a party to the action has an opportunity to contest the DEP determination in an administrative hearing provided the party submits a request within thirty (30) days of the publication of the notice of the DEP decision contested.³⁶ When a permittee contests a DEP determination regarding granting, denying, modifying, suspending, or revoking a permit, the permittee must place a sum of money in escrow equal to the amount of the permit fee.³⁷

While the DEP is reviewing a permit application, the New Jersey legislature declares that it is within the public interest to allow private entities who have applied for discharge permits to

³¹ N.J. STAT. ANN. § 58:10A-9 (1992 & Supp. 2002)

³² N.J. STAT. ANN. §§ 58:10A-9 (a-b) (1992 & Supp. 2002).

³³ N.J. STAT. ANN. § 58:10A-9(c) (1992 & Supp. 2002).

³⁴ N.J. STAT. ANN. § 58:10A-9(d) (1992 & Supp. 2002).

³⁵ Except by agreement with the DEP or with contested fees or penalties provided there is financial security posted N.J. STAT. ANN. § 58:10A(6)(k) (1992 & Supp. 2002).

³⁶ N.J. STAT. ANN. §§ 58:10A-7(d - e) (1992 & Supp. 2002).

³⁷ N.J. STAT. ANN. § 58:10A-7(f) (1992 & Supp. 2002).

undertake building, installing, maintaining, or operating any facility for the collection, treatment, or discharge of any pollutant or implementing any process modification provided the permit applicant clearly and fully understands that the permit applicant assumes all risks for unpermitted actions.³⁸

c. Clean Water Council

An eighteen (18) member Clean Water Council (CWC) serves as the primary New Jersey oversight and advisement body to the DEP on water pollution control. The CWC has authority to:

- Request any information that it deems necessary from the DEP concerning the water pollution control program;
- Consider any matters, provide advice to the DEP, and make recommendations that are related to the administration, preservation, and improvement of the WPCP including the related DEP regulations or technological capabilities; and
- Hold public hearings at least annually on technological capabilities and limitations of the WPCA statutes and related regulations and report its findings to the DEP.³⁹

Legislative oversight committees for the WPCA are the senate's Committee on Energy and Environment and the assembly's Committee on Agriculture and Environment.⁴⁰

d. Water Pollution Prohibitions

In New Jersey, it is unlawful for any person to:

- Discharge any pollutant except in conformity with a valid NJPDES permit that has been issued by the DEP pursuant to the WPCA or a valid NPDES permit issued by the CWA administrator; or
- Build, install, modify, or operate any facility for the collection, treatment, or discharge of any pollutant except after DEP approval pursuant to DEP regulations.⁴¹

³⁸ N.J. STAT. ANN. § 58:10A-6.2 (1992 & Supp. 2002).

³⁹ N.J. STAT. ANN. § 58:25-12 (1992).

⁴⁰ N.J. STAT. ANN. § 58:10A-14 (1992).

⁴¹ N.J. STAT. ANN. § 58:10A-6 (1992 & Supp. 2002).

e. Water Pollution Control Enforcement

Each permittee is required to demonstrate financial assurance, including the posting of a bond or other security approved by the DEP, in an amount that is necessary to carry out any remedial measures required for compliance.⁴²

The DEP responsibilities under the WPCA include the duty to establish uniform enforcement policy and penalty procedures based upon:

- The seriousness of the offense;
- The economic benefit of the violation to the violator; and
- The cooperation of the violator in remedying the violation. The DEP also prepares an annual report containing enforcement data regarding the water pollution control program including the identification of permittees determined to be significant noncompliers or serious violators.⁴³

f. Citizen Suits

The WPCA allows citizens, environmental groups, and public interest groups to participate in the implementation and enforcement of the state's water pollution control and prevention program although all judgments and payments realized from a citizen's suit must be used to further environmental goals consistent with the statute under which the suit was brought. The WPCA also requires persons receiving settlements and judgments to submit a plan to the court outlining the use of these funds prior to receiving these funds and report on the use after receiving these funds.⁴⁴

g. Injurious Discharge Reporting

The WPCA requires the reporting of any exceedance of any discharge limitation that causes injury to persons, or damage to the environment or poses a threat to human health or the environment within two (2) hours of its occurrence or of the permittee becoming aware of the occurrence. Subsequent to the exceedance of any discharge that involves a toxic pollutant, a permittee must provide the DEP with any additional information required including:

⁴² N.J. STAT. ANN. § 58:10A-6.1 (1992).

⁴³ N.J. STAT. ANN. §§ 58:10A-14.1 to 14.3 (1992).

⁴⁴ All judgments and settlements resulting from citizens' suits against POTWs must be deposited in the Wastewater Treatment Fund for use in financing improvements to POTWs; *see* N.J. STAT. ANN. § 58:10A-3 (1992 & Supp. 2002).

- An estimate of the danger posed by the discharge to the environment;
- Whether the discharge is continuing;
- The measures taken to remediate the problem or any damage to the environment; and
- The measures taken to avoid a repetition of the problem.⁴⁵

The WPCA requires a permittee to report a serious violation to the DEP within thirty (30) days and include a statement indicating that the permittee understands the civil administrative penalties required to be assessed. The statement should explain the nature of the serious violation and the measures taken to remedy the cause or prevent a recurrence.⁴⁶

h. Water Pollution Violations

Water pollution control violations are categorized by seriousness. Exceeding the discharge limit of a NJPDES permit by twenty percent (20%) or more for a hazardous pollutant⁴⁷ is considered a serious violation.

Another violation category is the designation of a permittee as a significant noncomplier (SNC). This category includes permit holders that are guilty of:

- A serious violation for the same pollutant at the same discharge point source in any two (2) months of any six (6) month period;
- Exceeding a permit's monthly average discharge limit in any four (4) months of any six (6) month period;
- Failure to submit a complete discharge monitoring report (DMR) in any two (2) months of any six (6) month period.⁴⁸

⁴⁵ N.J. STAT. ANN. § 58:10A-6(f)(8) (1992 & Supp. 2002).

⁴⁶ N.J. STAT. ANN. § 58:10A-6(f)(10) (1992 & Supp. 2002).

⁴⁷ The term "hazardous pollutant" means: 1) any toxic pollutant; 2) any substance regulated as a pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act or FIFRA (7 U.S.C. § 136 *et seq.* 2000); 3) any substance of which the use or manufacture is prohibited by the federal Toxic Substances Control Act or TSCA (15 U.S.C. § 2601 *et seq.* 2000); 4) any substance identified as a known carcinogen by the International Agency for Research on Cancer; 5) any hazardous waste defined under the Resource Conservation and Recovery Act or RCRA (42 U.S.C. § 6901 *et seq.* 1994); or 6) any hazardous substance defined by N.J. STAT. ANN. § 58:10-23.11b (1992 & Supp. 2002); *see* N.J. STAT. ANN. § 58:10A-3(u) (1992 & Supp. 2002).

⁴⁸ N.J. STAT. ANN. § 58:10A-3 (1992 & Supp. 2002).

Whenever the DEP finds that a person is in violation of the WPCA, it must either:

- Issue an order requiring the person to comply;
- Bring a civil action;
- Levy a civil administrative penalty;
- Bring an action for a civil penalty; or
- Petition the attorney general to bring a criminal action.⁴⁹

A DEP order to comply must state the specific WPCA provision or rule, regulation, water quality standard, discharge limitation, or permit term or condition plus the acts which caused the violation, and give notice to the person of their right to a hearing on the matter.⁵⁰ If an administrative hearing is held pursuant to a WPCA violation, the administrative judge must prepare and transmit its recommended decision and report to allow review by the head of the delegated local governmental agency when a delegated agency exists.⁵¹ A final decision or order issued from a local agency must be in writing. The final decision is appealable in the same manner as a final agency action of the DEP or a state agency.⁵²

When commencing a civil action, the DEP is allowed to seek different types of relief including:

- A temporary or permanent injunction;
- An assessment of the reasonable costs for any investigation, inspection, or monitoring survey which led to the establishment of the violation and for preparing and litigating the case;
- An assessment of reasonable costs incurred in removing, correcting, or terminating the adverse effects upon water quality resulting from any unauthorized discharge of pollutants;

⁴⁹ N.J. STAT. ANN. § 58:10A-10(a) (1992 & Supp. 2002).

⁵⁰ N.J. STAT. ANN. § 58:10A-10(b) (1992 & Supp. 2002).

⁵¹ N.J. STAT. ANN. § 58:10-10.6 (1992).

⁵² N.J. STAT. ANN. § 58:10A-10.7 (1992).

- An assessment of compensatory damages for any loss or destruction of wildlife, fish, or aquatic life, or other natural resources plus any actual damages caused by any unauthorized discharge; and
- An assessment for the actual amount of any economic benefits accruing to the violator from the commission of the violation.⁵³

i. Water Pollution Penalties

SNC⁵⁴ violators are subject to:

- Mandatory minimum penalties of five thousand dollars (\$5,000.00) for each violation;
- Increased DEP inspections;
- Publication of the permittee's identity in an annual DEP report and to newspapers.

Serious violations result in mandatory minimum civil administrative penalties of one thousand dollars (\$1,000.00) for each violation and five thousand dollars (\$5,000.00) for each violation that is designated a SNC violation.⁵⁵

Failure to report or include a required discharge on a DMR⁵⁶ subjects the violator to one hundred dollars (\$100.00) per day per unreported discharge.⁵⁷ The penalty begins to accrue on the fifth (5th) day following the DMR due date. The penalty may be waived or modified under extenuating circumstances provided the request is made within thirty days (30) of the required DMR. The maximum penalty for failure to include a required discharge in a DMR is fifty thousand dollars (\$50,000.00) for each violation.⁵⁸ Higher penalties for other violations are not limited.

⁵³ Economic benefits from the commission of a violation may include savings realized from avoided costs, any return earned on avoided costs, any benefits accruing from a competitive market advantage enjoyed by reason of the violation or any other benefits resulting from the violation; *see* N.J. STAT. ANN. § 58:10A-10(c) (1992 & Supp. 2002).

⁵⁴ SNC means significant noncomplier; *see* N.J. STAT. ANN. § 58:10A-3 (1992 & Supp. 2002).

⁵⁵ N.J. STAT. ANN. §§ 58:10A-10.1(a - c) (1992).

⁵⁶ DMR means discharge monitoring report; *see* N.J. STAT. ANN. § 58:10A-3 (1992 & Supp. 2002).

⁵⁷ N.J. STAT. ANN. § 58:10A-10.1(d) (1992).

⁵⁸ N.J. STAT. ANN. § 58:10A-10(d) (1992 & Supp. 2002).

Factors considered by the DEP when determining the penalty for violations includes:

- The type of violation, the seriousness, and the extent, toxicity and frequency of a violation based on the harm to public health or the environment;
- The economic benefits gained by the violator by committing the violation;
- The degree of cooperation or recalcitrance of the violator in remedying the violation;
- Any measures taken to avoid a repetition;
- Any unusual or extraordinary costs imposed upon the public;
- Any other pertinent factors that measure the seriousness or frequency of the violation or conduct of the violator.⁵⁹

The WPCA allows four degrees of criminal penalties for violations. A first degree violation consists of a purposeful or knowing violation which places a person in imminent danger of death or serious injury. A second degree crime consists of a purposeful, knowing, or reckless violation which causes a significant adverse environmental impact. A third degree crime consists of a purposeful, knowing, or reckless violation; and a fourth degree crime consists of a negligent violation of the act.

j. Violation Defenses

A permittee that would otherwise be a serious violator or SNC violator may be entitled by the WPCA to claim the permit violation occurred as a result of an “upset”⁶⁰ or a “bypass” or a testing or laboratory error.⁶¹ The person asserting the defense has the burden to demonstrate to the DEP’s satisfaction that the discharge violation was within the defenses allowed including that the violation was due to:

⁵⁹ Besides a civil administrative penalty, other costs may be assessed; however, no assessment is levied until after the violator is notified by certified mail or personal service; notice includes the WPCA or related section violated, the facts alleged, the imposed penalties, and the right to a hearing; the notice becomes a final order following a twenty (20) day period if no hearing is requested; payment of the penalty is due upon a final order; *see* N.J. STAT. ANN. § 58:10A-10(d)(1) (1992 & Supp. 2002).

⁶⁰ The term “upset” means an exceptional incident such as a storm or other natural event beyond scheduled maintenance or beyond the control of a permittee; the term “bypass” means the anticipated or unanticipated diversion of a discharge from a treatment works facility; *see* N.J. STAT. ANN. § 58:10A-3 (1992 & Supp. 2002).

⁶¹ N.J. STAT. ANN. § 58:10A-10.2 (1992).

- Unanticipated test interferences;
- Sample contamination;
- Analytical defects;
- Procedural deficiencies in sampling; or
- Other similar circumstances beyond the control of the permittee.⁶²

k. Appeals

Appeals of civil administrative penalties or assessments require the posting of a refundable bond or other security in the amount of the penalty or assessment.⁶³ A civil penalty is considered a debt. It may be collected or enforced by summary court proceedings. It is docketed with the clerk of the supreme court in the same manner as any judgment.⁶⁴

l. Clean Water Enforcement Fund

All penalties collected through DEP enforcement of the WPCA are deposited to the Clean Water Enforcement Fund. Monies from the fund may be used by the DEP to implement and enforce the state's water pollution control program. Unneeded funds are appropriated to the Wastewater Treatment Trust fund on an annual basis. The Wastewater Treatment Fund provides monies for loans to local governmental units to upgrade wastewater treatment facilities.⁶⁵

Ten percent (10%) of penalties from POTWs collected under the WPCA are deposited to a wastewater treatment operator's training account that serves as the funding source for training and continuing education for wastewater treatment plant operators.⁶⁶ An advisory committee on water supply and wastewater licensed operator training advises the DEP on operator training issues.⁶⁷

⁶² N.J. STAT. ANN. § 58:10A-10.2(f) (1992).

⁶³ N.J. STAT. ANN. § 58:10A-10.8 (1992).

⁶⁴ N.J. STAT. ANN. § 58:10A-10.8(d) (1992).

⁶⁵ N.J. STAT. ANN. § 58:10A-14.4 (1992).

⁶⁶ N.J. STAT. ANN. § 58:10A-14.5 (1992).

⁶⁷ N.J. STAT. ANN. § 58:10A-14.6 (1992).

m. Changes in Discharge Standards

The WPCA provides for public participation when any DEP administrative orders would relax NJPDES permit standards. The DEP is required to hold a public hearing and allow a public comment period in any instances where it would relax the discharge limits of a NJPDES permit for more than twenty-four (24) months.

n. Trade Secrets

The DEP makes all required records, reports, or other information obtained by the DEP pursuant to the WPCA and its related provisions available to the public unless the information would divulge methods or processes entitled to protection as trade secrets provided it was shown by the holder that it was entitled to protection as a trade secret.⁶⁸ In these instances, the DEP must consider the records, reports, or information to be confidential and limit access to authorized officers or employees.⁶⁹

o. Concentrated Aquatic Animal Production Facilities

The DEP is authorized in conjunction with the Department of Agriculture (DOAg) and the Aquaculture Advisory Council to issue general permits for the discharge of pollutants from concentrated aquatic animal production facilities and aquacultural projects. In establishing general permits, the DEP must consider:

- The source and receiving water quality;
- The type of aquaculture activity being conducted; and
- The priority of meeting best management practices (BMPs) instead of merely attaining numeric pollutant discharge parameter levels.⁷⁰

p. Remedial Action Discharge Permit

A remedial action discharge permit is required for the discharge of groundwater to surface water involving a groundwater remedial action⁷¹ necessitated by a discharge from an

⁶⁸ N.J. STAT. ANN. § 58:10A-19 (1992).

⁶⁹ N.J. STAT. ANN. § 58:10A-6(o) (1992 & Supp 2002). These provisions do not apply to discharges of petroleum to the surface waters of the state that occurs as a result of the cleanup of a petroleum discharge in compliance with federal or state on-scene coordinator; *Id.*

⁷⁰ N.J. STAT. ANN. § 58:10A-6(q) (1992 & Supp. 2002).

⁷¹ The term “groundwater remedial action” means the removal or abatement of one or more pollutants in a groundwater source; *see* N.J. STAT. ANN. § 58:10A-10.11(e) (1992 & Supp. 2002).

underground storage tank⁷² containing or involving petroleum products.⁷³ The DEP permit may be a general permit or an individual permit. The DEP may require the permittee to obtain an individual permit which may contain numeric pollutant discharge limits if the DEP determines that the permittee cannot perform the BMPs in order to obtain a general permit or that the performance of BMPs would not protect water quality as required by WPCA.⁷⁴

4. *New Jersey Wetlands*

a. *Coastal Wetlands*

In New Jersey, coastal wetlands⁷⁵ are protected by The Wetlands Act of 1970, (TWA).⁷⁶ Specifically, the purpose of the coastal wetland legislation is to protect the vital and productive areas between the sea and the land known as the estuarine zone. This area protects the land from the force of the sea, moderates the weather, provides a home for water fowl, fish, and shellfish, and assists in absorbing sewage discharge by the rivers. Preserving the ecological balance of this area and preventing its further deterioration and destruction is necessary to promote public health, safety, and welfare and protect public and private property, wildlife, marine fisheries, and the natural environment.⁷⁷

The TWA establishes the mapping by the DEP of all tidal wetlands, areas are areas that are at or below high water. These wetland maps are key to identifying which areas are governed by the TWA. The maps are filed in the county in which the wetland area is located.

⁷² Here, in reference to remedial actions, the term “underground storage tank” is somewhat different than elsewhere in the statutes in that it includes: 1) farm underground storage tanks of one thousand one hundred (1,100) gallons or less capacity used for storing motor fuel for noncommercial purposes; 2) underground storage tanks used to store heating oil for on-site consumption in a nonresidential building with a capacity of two thousand (2,000) gallons or less; and 3) underground storage tanks used to store heating oil for on-site consumption in a residential building; *see* N.J. STAT. ANN. § 58:10A-7.2(h) (1992 & Supp. 2002).

⁷³ In such cases, consent by the municipal treatment works is not required for the application process; *see* N.J. STAT. ANN. § 58:10A-7.2 (1992 & Supp. 2002).

⁷⁴ N.J. STAT. ANN. § 58:10A-7.2(d) (1992 & Supp. 2002).

⁷⁵ The term “coastal wetlands” are defined as any bank, marsh, swamp, meadow, flat, or other low lands subject to tidal action in New Jersey along the Delaware River and Bay, Raritan Bay, Barnegat Bay, Sandy Hook Bay, Shrewsbury River including the Navesink and Shark Rivers and the coastal inland waterways extending south from Manasquan Inlet to Cape May Harbor, or any inlet, estuary, or tributary waterways whose surface is at or below an elevation of one (1) foot above local extreme high water that grows, or is capable of growing, certain vegetation suited to such a habitat; the term “coastal wetlands” does not include any land or real property subject to the jurisdiction of the Hackensack Meadowlands Development Commission; *see* N.J. Stat. Ann. § 13:9A-2 (1991).

⁷⁶ N.J. Stat. Ann. §§ 13:9A-1 to 10 (1991 & Supp. 2002).

⁷⁷ N.J. Stat. Ann. § 13:9A-1 (1991 & Supp. 2002).

The DEP governs the coastal wetlands by adopting, modifying, or repealing orders. However, before an order may issue, notice⁷⁸ must be provided to each holder of a recorded interest in the property affected by the order at least twenty one (21) days in advance of a hearing, and a hearing must be held regarding the matter or subject of the order. Orders are considered judgments and are filed with the county clerk or where land records are indexed and recorded. Any person aggrieved by an order may object provided a written complaint is filed with the New Jersey Superior Court within ninety (90) days of receiving notice of the order. Orders are judicially reviewed to determine whether the order deprives the landowner of the land's practical use and, thus, whether the order is an unreasonable exercise of the state's police power. Considerations include the nature and extent of the order's interference with the landowner's ownership rights as a whole.⁷⁹ Violation of a DEP order results in a penalty up to one thousand dollars (\$1,000.00) plus an assessment for the restoration of any damage or adverse effects to the wetland.⁸⁰

Wetland activities regulated by the TWA include: draining; dredging; excavating or removing soil, mud, sand, gravel, or any other aggregate; depositing or dumping any rubbish or similar material or discharging liquid wastes; erecting structures; driving pilings; or placing obstructions whether or not the tidal ebb and flow is changed.⁸¹ All regulated activities are prohibited without a permit issued by the DEP authorizing the activity.⁸² Permit application results in notice being provided to all property owners of land within two hundred (200) feet of the wetland area in the application as well as electric and gas utilities. Any loss or disturbance of coastal wetland must be mitigated by the creation or restoration of a wetland at least the size of the are lost or disturbed.

⁷⁸ Notice must also be provided by publication in a newspaper of general circulation at least two times each week for three weeks prior to the hearing.

⁷⁹ N.J. Stat. Ann. § 13:9A-6 (1991).

⁸⁰ N.J. Stat. Ann. § 13:9A-9 (1991).

⁸¹ The term "regulated activity" does not include continuance of commercial production of salt hay or other agricultural crops or activities; *see* N.J. Stat. Ann. §§13:9A-4, 7 (1991 & Supp. 2002).

⁸² N.J. Stat. Ann. § 13:9A-4(b) (1991 & Supp. 2001).

b. Freshwater Wetlands

In New Jersey, freshwater wetlands⁸³ are protected by the Freshwater Wetlands Protection Act (FWPA)⁸⁴ It is the position of the legislature that freshwater wetlands protect and preserve drinking water supplies by purifying surface water and groundwater resources, prevent flood and storm damage by absorbing water during high runoff periods and by reducing flood crests, prevent soil erosion by serving as a transition zone between dry land and water courses, and provide essential breeding, spawning, nesting, and wintering habitats for fish and wildlife.⁸⁵

Freshwater wetlands are also mapped and available at the DEP and in the counties and municipalities where they are located. Since the boundaries in the maps are not definitive, before conducting any regulated activities, a letter of interpretation should be requested unless a permit has already been obtained.⁸⁶ Regulated activities in freshwater wetlands also includes the destruction of plant life which would alter the character of a freshwater wetland including the cutting of trees. Regulated activities conducted in transition areas between freshwater wetlands and dry lands require a transition area waiver.⁸⁷ Transition areas are important because the areas minimize adverse impacts on the wetland or serve as an integral component of the wetlands ecosystem. As with the TWA, regulated activities in freshwater are prohibited without a permit authorizing the activity.

The state's FWPA defines wetlands consistently with that of federal legislation. Wetlands are areas inundated or saturated frequently enough by water to support vegetation adapted for life in saturated water conditions.⁸⁸ Generally, the DEP examines hydrology, soils, and vegetation to make its determination of whether or not a land area is a wetland.⁸⁹ The

⁸³ The term "freshwater wetlands" means an area that is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, commonly known as hydrophytic vegetation; provided the DEP must use the three (3) parameter approach (i.e. hydrology, soils, and vegetation) enumerated in the April 1, 1987 interim-final draft "Wetland Identification and Delineation Manual" developed by the U.S. EPA, and any subsequent amendments thereto; *see* N.J. Stat. Ann. § 13:9B-3 (1991 & Supp. 2002).

⁸⁴ N.J. Stat. Ann. §§ 13:9B-1 to 30 (1991 & Supp. 2002).

⁸⁵ N.J. Stat. Ann. § 13:9B-2 (1991 & Supp. 2002).

⁸⁶ N.J. Stat. Ann. § 13:9B-8 (1991).

⁸⁷ N.J. Stat. Ann. § 13:9B- 12 (1991). Transition area waivers can reduce the area up to fifty percent (50%) when a proposed activity would have no substantial impact on the wetland or the waiver is necessary to avoid an extraordinary hardship to the applicant; *see* N.J. Stat. Ann. § 13:9B-16 to 18 (1991 & Supp. 2002).

⁸⁸ N.J. Stat. Ann. § 13:9B-3 (1991 & Supp. 2002).

⁸⁹ The DEP uses the most current 1989 federal manual for identification rather than the 1987 manual that the Corps of Engineers uses as directed by the U.S. Congress.

FWPA further classifies wetlands according to resource value.⁹⁰ Wetlands of exceptional resource value are:

- Connected to specific trout production waters or tributaries;
- Actual habitats for threatened or endangered species;
- Documented habitats for threatened or endangered species which remain suitable for feeding, resting, or breeding by these species during normal periods.⁹¹

Wetlands of exceptional resource value have transition areas of one hundred fifty (150) feet.⁹²

Wetlands of ordinary resource value include isolated wetlands, those where more than fifty percent (50%) of the wetland is surrounded by development and the wetland is less than five thousand (5,000) square feet in area, and man-made drainage ditches, swales, or detention facilities.⁹³ Ordinary resource value wetlands have no transition area.⁹⁴

Wetlands other than of ordinary resource and of exceptional resource value are considered intermediate value.⁹⁵ Intermediate resource value wetlands have a transition area of fifty (50) feet.⁹⁶

Regulation exemptions exist for certain activities including normal farming, silviculture, ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food and fiber, upland soil and water conservation practices; construction or maintenance of farm or stock ponds or irrigation ditches, maintenance of drainage ditches; construction or maintenance of farm roads or forest roads constructed and maintained in accordance with best management practices (BMPs);⁹⁷ normal harvesting of forest products in

⁹⁰ N.J. Stat. Ann. § 13:9B-7 (1991 & Supp. 2002).

⁹¹ N.J. Stat. Ann. § 13:9B-7(a) (1991 & Supp. 2002).

⁹² N.J. Stat. Ann. § 13:9B-16(b)(1) (1991 & Supp. 2002).

⁹³ N.J. Stat. Ann. § 13:9B-7(b) (1991 & Supp. 2002).

⁹⁴ N.J. Stat. Ann. § 13:9B-16 (1991 & Supp. 2002).

⁹⁵ N.J. Stat. Ann. § 13:9B-7(c) (1991 & Supp. 2002).

⁹⁶ N.J. Stat. Ann. § 13:9B-16(b)(2) (1991 & Supp. 2002).

⁹⁷ To assure that flow and circulation patterns and chemical and biological characteristics of freshwater wetlands are not impaired and that any adverse effect on the aquatic environment will be minimized, minor drainage projects, and other similar activities are allowed in wetlands and exempt from regulation; *see* N.J. Stat. Ann. § 13:9B-4(a) (1991 &

accordance with a forest management plan approved by the state forester;⁹⁸ areas otherwise regulated as a coastal wetland;⁹⁹ some projects with approvals from other authorities;¹⁰⁰ areas under the jurisdiction of the Hackensack Meadowlands Development Commission or the Pinelands Commission.¹⁰¹ Exemptions do not apply to any discharge of dredged or fill material into a freshwater wetland incidental to any activity which involves bringing an area into a new use, where the flow or circulation patterns of the waters may be impaired, or the reach of waters is reduced.¹⁰²

Statewide general permits exist for twenty-three (23) different activities. These activities are comparable but allow a narrower range of activities to those listed in federal nationwide general permits.¹⁰³ Thirty (30) working days prior notice must be given to the DEP before commencing any regulated activity that could be covered by a statewide general permit.¹⁰⁴ The DEP provides written notice when the DEP determine that the activity can be covered by a statewide general permit. Otherwise, if the activity may be approved by the DEP under an individual permit, the DEP provides written notice to that effect. Pre-application conferences with the DEP are recommended before applying for an individual permit. Applicants for individual permits must show the activity is in the public's best interest¹⁰⁵ and overcome a statutory rebuttable presumption that there are practicable alternatives to nonwater-dependent uses of freshwater wetlands.¹⁰⁶

Individual permit applications require:

- Detailed description of the project;
- Maps with names of adjacent landowners and claims of interest;

Supp. 2002).

⁹⁸ N.J. Stat. Ann. § 13:9B-4(b) (1991 & Supp. 2002).

⁹⁹ N.J. Stat. Ann. § 13:9B-4(c) (1991 & Supp. 2002).

¹⁰⁰ N.J. Stat. Ann. § 13:9B-4(d) (1991 & Supp. 2002).

¹⁰¹ N.J. Stat. Ann. § 13:9B-6 (1991).

¹⁰² N.J. Stat. Ann. § 13:9B-4(e) (1991 & Supp. 2002).

¹⁰³ N.J. Stat. Ann. § 13:9B-23 (1991 & Supp. 2002).

¹⁰⁴ N.J. Stat. Ann. § 13:9B-23(g) (1991 & Supp. 2002).

¹⁰⁵ See N.J. Stat. Ann. § 13:9B-11 (1991).

¹⁰⁶ N.J. Stat. Ann. § 13:9B-24(g) (1991 & Supp. 2002).

- A description of project alternatives;
- Reasons for rejecting project alternatives;
- Description of adverse environmental effects resulting from the proposed project;
- Proposed prevention or minimization of any resulting adverse environmental effects;
- Verification that proper notice has been provided to all state and local agencies as well as public notice by newspaper publication; and
- Any other information the DEP deem may be necessary in order to carry out its duties under the FWPA.¹⁰⁷

Temporary, emergency permits may be available under certain circumstances.¹⁰⁸

A Wetland Mitigation Council oversees the disbursement of funds to finance freshwater wetland mitigation projects for restoration of degraded freshwater wetlands and to preserve freshwater wetlands and transition areas of critical importance.¹⁰⁹

Violations of the FWPA result in civil administrative penalties up to ten thousand dollars (\$10,000.00) for each violation and each day of violation. Each day of a continuing violation is considered a separate and distinct violation. Failure to pay an administrative penalty results in a separate penalty up to ten thousand dollars (\$10,000.00) for each violation day. Willful or negligent violations result in a fourth (4th) degree crime with criminal penalties up to twenty-five thousand dollars (\$25,000.00) per violation. Subsequent willful or negligent violations escalate the penalty up to fifty thousand dollars (\$50,000.00). Knowingly making a false statement, representation, or certification or tampering with monitoring equipment results in penalties up to ten thousand dollars (\$10,000.00).

¹⁰⁷ N.J. Stat. Ann. § 13:9B-9 (1991 & Supp. 2002).

¹⁰⁸ N.J. Stat. Ann. § 13:9B-24 (1991 & Supp. 2002).

¹⁰⁹ N.J. Stat. Ann. § 13:9B-15 (1991 & Supp. 2002).

5. *New Jersey Underground Storage Tanks Containing Hazardous Substances*

a. *Legislative Policy*

The legislature declares that gasoline and other hazardous substances are stored in underground storage tanks¹¹⁰ that are leaking due to corrosion or structural defect and that this leakage is among the most common causes of groundwater pollution in the state. Thus, registration, systematic testing, and monitoring are required to detect leaks and discharges as early as possible in order to minimize further degradation of potable water supplies and protect the state's natural resources.¹¹¹ Registration information required includes:

- Name and address of the owner and operator of the facility;
- Site plan of the facility indicating the location and number of USTs;
- Date of installation of each of the USTs; and
- Any other relevant information requested by DEP.¹¹²

b. *UST Registration*

Owners and operators of USTs must register them with the DEP.¹¹³ DEP regulations require periodic recertification that the information contained in the registration remains

¹¹⁰ The term "underground storage tank" (UST) means any one or combination of tanks including appurtenant pipes, lines, fixtures, and other related equipment used to contain an accumulation of hazardous substances, the volume of which, including the appurtenances, is ten percent (10%) or more below the ground; the term for this provisional section does **not** include: 1) farm USTs of one thousand one hundred (1,100) gallons or less capacity used for storing motor fuel for noncommercial purposes; 2) USTs used to store heating oil for on-site consumption in a nonresidential building with a capacity of two thousand (2,000) gallons or less; 3) USTs used to store heating oil for on-site consumption in a residential building; 4) properly installed septic tanks; 5) pipelines including gathering lines otherwise regulated; 6) surface impoundments, pits, ponds, or lagoons; 7) storm water or wastewater collection systems otherwise regulated under the WPCA; 8) liquid traps or associated gathering lines otherwise regulated in oil or gas operations; 9) tanks in an underground area but situated above the surface of the floor including basements, cellars, mines, shafts, or tunnels provided they are equipped with secondary containment and are not covered to prevent visual inspection of the tank's exterior; and 10) any pipes, lines, fixtures, or other equipment connected to any exempted tank listed here and under the WPCA; *see* N.J. STAT. ANN. § 58:10A-22 (1992 & Supp. 2002).

¹¹¹ N.J. STAT. ANN. § 58:10A-21 (1992 & Supp. 2002).

¹¹² N.J. STAT. ANN. § 58:10A-23(b) (1992).

¹¹³ N.J. STAT. ANN. § 58:10A-23(a) (1992).

unchanged. Registration fees are charged for the initial registration and subsequent renewals. The fee schedule may vary according to the size, content, and location of the UST.¹¹⁴

c. Certified UST Servicers

Individuals must not perform UST testing, installation, removal, repair, installation of monitoring systems, or subsurface evaluation for corrective action, closure, and corrosivity unless the individual is certified to do so as provided by state and federal law.¹¹⁵ Businesses engaged in the business of performing services on USTs must be certified.¹¹⁶ The DEP establishes and conducts examinations for certifications.¹¹⁷ Certifications are valid for a three (3) year period. Renewals must be made to the DEP at least sixty (60) days prior to the expiration date of the certification and evidence must be presented that shows the individual attended a DEP approved training course within the most recent twelve (12) month period. Certification requires a modest fee paid to the DEP to cover the costs of administering and enforcing the UST provisions. If renewal of the certification does not occur within a ninety (90) day grace period following expiration of a certification, a new certification must be obtained. Evidence of financial responsibility is required for businesses.¹¹⁸ The DEP may deny, suspend, revoke, or refuse to renew a certification for good cause including a violation, making a false statement, and misrepresentation or fraud. Revoked certifications bar the applicant from certification for three (3) years. At anytime if the DEP has reason to believe that operation of an UST poses an imminent threat to the public health, safety, or welfare, it is authorized to order the certificate holder to cease operations until the outcome of a hearing is known.¹¹⁹

Routine maintenance performed on appurtenant pipes, lines, fixtures, and other related equipment on an unregulated heating oil tank may be performed by a person who is not certified.¹²⁰ All USTs located on a farm or an unregulated heating oil tank located on a farm are not subject to the certified servicer requirement but are subject to separate DEP guidelines for

¹¹⁴ N.J. STAT. ANN. § 58:10A-31 (1992 & Supp. 2002).

¹¹⁵ N.J. STAT. ANN. § 58:10A-21 (1992 & Supp. 2002) and 42 U.S.C. § 6991 *et seq.* (1994).

¹¹⁶ Certification requirements do not apply, however, to professional licensed engineers and plumbing contractors although both must attend a DEP approved training course about DEP rules and regulations; *see* N.J. STAT. ANN. § 58:10A-24.2 (1992 & Supp. 202).

¹¹⁷ N.J. STAT. ANN. § 58:10A-24.3 (1992 & Suppl 2002).

¹¹⁸ N.J. STAT. ANN. § 58:10A-24.4 (1992& Supp. 2002).

¹¹⁹ N.J. STAT. ANN. § 58:10A-24.5 (1992 & Supp. 2002).

¹²⁰ N.J. STAT. ANN. § 58:10A-24.1(a) (1992 & Supp. 2002).

tank closure addressed in DEP regulations in conjunction with the DOAg and the state Soil Conservation Committee.¹²¹

d. UST Penalties

The DEP may institute a civil action in any court of competent jurisdiction for injunctive relief or any other appropriate relief to prevent violations of UST provisions, and the court may proceed in a summary manner.¹²²

Civil administrative penalties for UST violations can vary. First time offenders are subject to fines up to five thousand dollars (\$5,000.00). Second time offenders are subject to fines up to ten thousand dollars (\$10,000.00). Third time or more offenders are subject to fines up to twenty-five thousand dollars (\$25,000.00). For continuing violations, each violation day after receipt of an order to cease constitutes another violation and penalty. Notice of violation is sent for any type of violation, and the notice becomes a final order twenty (20) days after receipt of the notice if the alleged violator does not submit a written request to the DEP for a hearing on the matter. Subsequent to a hearing, the DEP issues a final order if it determines that a violation has occurred. Payment of a penalty is due immediately upon issuance of the final order.¹²³

Civil administrative penalties do not preclude civil penalties from also being imposed. These civil penalties are similarly structured to the civil administrative penalties and the amounts replicate the penalty amounts for consecutive violations. All penalties and monies assessed and collected under UST provisions are deposited into the New Jersey Spill Compensation Fund.¹²⁴

e. DEP Enforcement

The DEP is authorized to adopt regulations to enforce UST¹²⁵ statutes that address:

- Standards for construction, installation, and operation of new and existing USTs including standards for monitoring, release detection, corrosion, spill prevention,

¹²¹ N.J. STAT. ANN. §§ 58:10A-24.1(b - c) (1992 & Supp. 2002).

¹²² N.J. STAT. ANN. § 58:10A-24.6(a) (1992).

¹²³ N.J. STAT. ANN. § 58:10A-24.6(b) (1992 & Supp. 2002).

¹²⁴ N.J. STAT. ANN. §§ 58:10A-24.6 (c - g) (1992 & Supp. 2002).

¹²⁵ The DEP also adopts rules and regulations that address standards for secondary containment monitoring systems, release detection systems, corrosion protection, spill prevention, overfill prevention, and other UST associated equipment consistent with the federal RCRA; *see* N.J. STAT. ANN. § 58:10a-29 (1992 & Supp. 2002).

and overflow prevention consistent with U.S. EPA regulations pursuant to the federal Resource Conservation Remediation Act (RCRA);¹²⁶

- UST facility testing schedules,¹²⁷ proximity to potable water supplies, soil resistivity, other conditions precipitating corrosion, undesirable discharges, and testing for structural integrity of secondary containment systems with no monitoring capability;
- Record maintenance;
- Discharge reporting;
- Corrective actions following a discharge;
- Closure plans;
- Financial responsibility; and
- UST notifications.¹²⁸

f. UST Monitoring and Records

UST monitoring systems must be inspected at least monthly to determine proper functioning.¹²⁹ Inventory records for each UST are required for daily hazardous substance transfers including a periodic average noted and kept for at least one (1) year.¹³⁰

An operator of an UST must report a leak or discharge to the DEP and the local health agency within twenty-four (24) hours of its discovery. Provided the leak or discharge is not an imminent threat to proximate groundwater resources or public health or safety, the DEP orders the owner of the UST to remove, replace, or repair the UST before a set date and to take any other action necessary to abate, contain, clean up, or remove the discharge. Any costs that

¹²⁶ 42 U.S.C. § 6901 *et seq.* (1994).

¹²⁷ Taking into account any hazardous substances stored.

¹²⁸ N.J. STAT. ANN. § 58:10A-25(a) (1992 & Supp. 2002).

¹²⁹ N.J. STAT. ANN. § 58:10A-26 (1992). USTs with a capacity greater than two thousand (2,000) gallons used to store heating oil for onsite consumption in a nonresidential building must enter into a contract with the DEP and agree to leak detection testing at least once every thirty-six (36) months and reporting of test results to the DEP within fifteen (15) days of the test; failure to do so is considered an UST violation; *see* N.J. STAT. ANN. § 58:10a-29.1 (1992 & Supp. 2002).

¹³⁰ N.J. STAT. ANN. § 58:10A-27 (1992).

accrues when the DEP issues orders to remove, replace, or repair an UST are imposed upon the UST owner.¹³¹

Although the DEP solely regulates USTs, the DEP may develop criteria for a municipal ordinance more stringent than DEP rules and regulations if the situation warrants the ordinance and the municipality, county, or political subdivision requests the ordinance by petitioning the DEP.¹³²

g. Remediation, Upgrade, and Closure Fund

Monies provided by legislative appropriation and from repayment of loans from the previous State Underground Storage Tank Improvement Fund are available to provide financial assistance to UST owners or operators for upgraded operation of USTs, closure of USTs, and any remediation of UST sites.¹³³ Both loans and grants are available to eligible UST owners and operators through the Underground Storage Tank Finance Act.¹³⁴ Up to two hundred fifty thousand dollars (\$250,000.00) is available for any one facility, and up to one million dollars (\$1,000,000.00) is available to one applicant. Loans and grants may cover up to one hundred percent (100%) of the eligible project cost.¹³⁵

6. *New Jersey Clean Ocean Education Act*

The Clean Ocean Education Act (COEA) authorizes the DEP to develop educational materials detailing the effects of plastic waste and other forms of pollution on ocean marine life. The DEP materials inform the public and create an awareness of activities on land that would minimize ocean and beach pollution problems. The DEP encourages biodegradable alternatives in place of nonbiodegradable substances that are prone to be disposed or littered into the ocean and on beaches as well as land. The DEP also encourages citizen participation through community programs to reverse such pollution. Materials and programs are primarily distributed

¹³¹ N.J. STAT. ANN. § 58:10A-28 (1992).

¹³² N.J. STAT. ANN. § 58:10A-35 (1992).

¹³³ N.J. STAT. ANN. § 58:10A-37.4 (Supp. 2002).

¹³⁴ N.J. STAT. ANN. §§ 58:10A-37.1 to 37.23 (Supp. 2002).

¹³⁵ Hardship loans or grants or combinations may be available on a hardship basis; agricultural producers should check with the DEP for the details and availability of funds for this program; the date of a discharge occurrence does not affect eligibility for assistance from the fund; past remediation financial assistance at the same site does disqualify further financial assistance through this fund; *see* N.J. STAT. ANN. §§ 58:10A-37.5, 35.7 (Supp. 2002). The DEP has regulations addressing the UST financing procedures; *see* N.J. STAT. ANN. § 58:10A-35.8 (Supp. 2002).

in the local school districts and integrated into the curricula where possible, but the materials and programs are not limited to schools¹³⁶.

II. GROUNDWATER

A. New Jersey Groundwater Laws

1. New Jersey Water Supply Policy

The paramount policy of the state of New Jersey is to protect the purity of the state's drinking water. The water supply policy focuses on the conservation and economy of the water resources of the state to the fullest extent reasonable for the benefit of its inhabitants. The federal SDWA establishes standards, technical assistance, and monitoring of potable water supplies.

The term "primary drinking water regulation" means a regulation which:

- Applies to public water systems;¹³⁷
- Specifies contaminants which may have an adverse effect on the health of individuals;
- Specifies for each such contaminant either a maximum contaminant level, if feasible to ascertain, or a treatment technique which sufficiently reduces the contaminant level to meet water purity requirements; and
- Contains criteria and procedures to assure a supply of drinking water including quality control, sampling frequencies, testing, and requirements for minimum quality allowed and siting for new public water supply facilities.¹³⁸

¹³⁶ N.J. STAT. ANN. §§ 58:10A-52 to 55 (1992). It is also unlawful to discharge sewage from a watercraft into any coastal water area designed as a no discharge area by the U.S. EPA; penalties are imposed for violations; *see* N.J. STAT. ANN. §§ 58:10A-10,- 56 (1992).

¹³⁷ The term "public water system" means a system providing the public with water for human consumption through pipes or other constructed conveyances when the system has at least fifteen (15) service connections or regularly serves at least twenty-five (25) individuals daily for at least sixty (60) days out of the year; *see* N.J. STAT. ANN. § 58:12A-3(l) (1992 & Supp. 2002).

¹³⁸ N.J. STAT. ANN. § 58:12A-3(k) (1992 & Supp. 2002).

2. *New Jersey Safe Drinking Water Act*

a. *Overview*

New Jersey's Safe Drinking Water Act (NJSDWA)¹³⁹ represents legislation that seeks to protect and secure the purity of the public supplies of potable waters in the state. The NJSDWA promotes public health and welfare through preservation of water quality and environment. It prohibits the discharge or placing of sewage, factory refuse, or other polluting matter into any stream from which cities, towns, boroughs, townships, or other municipalities receive water supply for domestic use above the point where a water is taken and fixes a penalty for a violation. It also authorizes the state board of health to enjoin the violation by bringing an action in chancery court.

The DEP is authorized to adopt regulations, implement, and enforce the NJSDWA provisions and to assume primary enforcement responsibility under the federal SDWA¹⁴⁰ to assure pure drinking water by filtration, treatment, or other methods that may be required. The DEP has the right to enter any premises during regular business hours in order to test, inspect, or sample and feature of a public water system to inspect, copy, or photograph any monitoring equipment or records required to be kept by the SDWA provisions.¹⁴¹ The statutes governing the quality of water for human uses must be liberally construed because they promote public health, safety, and welfare. No person may furnish any water for potable purposes until the source is approved by the state's Department of Health and Senior Services (DHSS). The commissioner of the DEP has authority in emergency circumstances to take all actions the commissioner deems is necessary including civil actions such as restraining orders or injunctions to protect the health of the people of New Jersey when the commissioner has information that a contaminant is present or likely to be present in a water system that would present an imminent and substantial endangerment to human health.¹⁴² The DEP is responsible for:

- Promulgating an adequate plan for providing safe drinking water during emergency circumstances;¹⁴³
- Educating the public as to the causes, effects, extent, prevention, and control of contaminants in drinking water; and

¹³⁹ N.J. STAT. ANN. §§ 58:12A-1 to 25 (1992 & Supp. 2002).

¹⁴⁰ 42 U.S.C. §§ 300 *et seq.* (1994).

¹⁴¹ N.J. STAT. ANN. § 58:12A-4(f) 1992 & Supp. 2002).

¹⁴² N.J. STAT. ANN. § 58:12A-6 (1992 & Supp. 2002).

¹⁴³ N.J. STAT. ANN. § 58:12A-7 (1992).

- Conducting research, investigations, experiments, demonstrations, surveys, and studies relating to the causes, effects, extent, prevention, and control of contaminants in drinking water.¹⁴⁴

b. Safe Drinking Water Violations

Violations of the NJSDWA can result in injunctions or other appropriate relief being issued by a civil court with jurisdiction to prohibit or prevent further violation. These actions may be brought about by DEP's petition to the court, and the court is authorized to proceed in a summary manner.¹⁴⁵

Civil administrative penalties may also be imposed upon violators in an amount up to five thousand dollars (\$5,000.00) for first offenses, up to ten thousand dollars (\$10,000.00) for second offenses, and up to twenty-five thousand dollars (\$25,000.00) for third and subsequent offenses. Each day of violation is considered a separate and distinct offense. Failure to pay a civil administrative penalty is itself a violation in an amount up to ten thousand dollars (\$10,000.00) per day of violation.¹⁴⁶

3. *New Jersey Private Well Testing Act*

The New Jersey Private Well Testing Act (PWTA) provides that local health departments cooperate with the DEP in developing voluntary procedures for the testing of water from homeowners' water wells when the well water is used as potable water and the homeowner is not served by a public community water system or served by a nonpublic water system. The homeowner bears the expense of testing.¹⁴⁷

4. *New Jersey Drinking Water Quality Institute*

New Jersey has a Drinking Water Quality Institute (DWQI) that consists of fifteen (15) members.¹⁴⁸ The DWQI responsibilities include:

¹⁴⁴ N.J. STAT. ANN. §§ 58:12A-9 (j - k) (1992).

¹⁴⁵ N.J. STAT. ANN. § 58:12A-10(a) (1992).

¹⁴⁶ N.J. STAT. ANN. §§ 58:12A-10 (b, d) (1992).

¹⁴⁷ N.J. STAT. ANN. §§ 58:12A-16, -26 (1992).

¹⁴⁸ The members are the commissioners of the DEP and DHSS, chairman of the Water Supply Advisory Council, directors of the Division of Water Resources and Office of Science and Research within the DEP, and the director of the Office of Occupational and Environmental Health within the DHSS who serve as ex officio members plus nine (9) appointed members, three (3) from each category representing water purveyors, the scientific community, and environmental health issues; see N.J. STAT. ANN. § 58:12A-20(a) (1992).

- Making recommendations for the implementation of the DEP’s Drinking Water Quality Program;
- Making recommendations for the contaminants which tests are required;
- Determining the maximum contaminant levels;
- Determining testing techniques and frequencies; and
- Reviewing all activities undertaken pursuant to the SDWA.¹⁴⁹

5. *New Jersey Water Supply Replacement Trust Fund*

Within the DEP, a non-lapsing revolving fund known as the Water Supply Replacement Trust Fund (WSRTF) exists to:

- Provide loans¹⁵⁰ to individuals, municipalities, or municipally-owned or privately-owned public water systems for the purposes of:
 - Providing alternate interim or permanent water supply to persons whose principal source of potable water is contaminated or is threatened with contamination by hazardous substances or fails to meet primary drinking water standards including standards for sodium, chloride, lead, mercury, iron, or manganese;¹⁵¹
- Provide funds to:
 - Conduct feasibility studies to determine appropriate remedies for contaminated potable water supplies;
 - Study the extent to which water supplies are contaminated or are threatened by contamination with hazardous substances in potable water;
 - Develop recommendations for remediating contaminated or threatened water supplies; and

¹⁴⁹ N.J. STAT. ANN. § 58:12A-20(d) (1992).

¹⁵⁰ Loans to local governmental units bear a rate that must not exceed two percent (2%) per year and a maximum term of twenty (20) years; *see* N.J. STAT. ANN. § 58:12A-22(b) (1992 & Supp 2002).

¹⁵¹ The term “hazardous substances” means any substance defined as a hazardous substance by the DEP pursuant to provisions of the state SDWA; *see* N.J. STAT. ANN. § 58:12A-22(c) (1992 & Supp. 2002).

- Defray administrative costs incurred by the DEP for its implementation of the SDWA provisions.¹⁵²

The Water Supply Remediation sub-account within the WSRTF provides zero percent (0%) interest loans in an amount up to ten thousand dollars (\$10,000.00) with terms up to ten (10) years to owners of single family residences whose source of potable water violates primary drinking water standards or standards for sodium, chloride, lead, mercury, iron, or manganese in order to provide an interim or permanent alternative potable water supply or adequate and appropriate treatment technology. The source of the contamination is not relevant, and purposes for which these loans may be used include:

- Sealing the contaminated well and replacing a contaminated well with a new well in order to obtain a permanent alternative potable water supply;
- Deepening, encasing, or otherwise modifying the contaminated well to prevent contamination; or
- Purchasing adequate and appropriate water treatment technology or equipment to render the well water potable.¹⁵³

III. AIR

A. Air Quality Laws

1. New Jersey Air Quality Policy

The state declares in its legislation that:

- Ozone continues to be a pervasive air pollution problem for New Jersey;
- Ozone problem results in most of the state being designated by the federal government as a severe nonattainment area according to federal ozone standards;
- Ozone formation poses a significant health threat to the state's citizens especially the young and the elderly;
- Ozone formation diminishes the quality of life for the state's citizens and adversely impacts the state's economic competitiveness by increasing health

¹⁵² N.J. STAT. ANN. § 58:12A-22(a) (1992 & Supp. 2002).

¹⁵³ N.J. STAT. ANN. § 58:12A-22.3 (1992 & Supp. 2002). Recipients of this loan under the Spill Compensation and Control Act must submit a claim against the New Jersey Spill Compensation Fund and any proceeds awarded must be utilized to repay the loan within seven (7) days of the payment; *see* N.J. STAT. ANN. § 58:12A-22.5 (1992).

costs, decreasing worker productivity, decreasing agricultural production, and forcing implementation of additional costly pollution control measures.

Furthermore, the state legislature declares that the adoption of a low emission vehicle program on a regional basis involving other surrounding states¹⁵⁴ along with other strategies to combat the ozone problem is in the state's best interests in reducing air pollution and will protect both the environmental and economic concerns.¹⁵⁵

It is the policy of the state of New Jersey to:

- Protect the public health, welfare, and the environment;
- Promote the careful operation and maintenance of equipment in facilities regulated by air pollution control statutes,¹⁵⁶ and
- Reduce the unnecessary burden of monetary penalties for violations caused by non-recurring equipment malfunction, equipment start-up, or equipment shutdown or during necessary equipment maintenance by providing an affirmative defense to liability for penalties:
 - When a facility is operated and maintained carefully;
 - When all reasonable steps are taken to minimize emission levels caused by a violation; and
 - When the emissions do not cause a potential threat to the public health, welfare, or the environment.¹⁵⁷

¹⁵⁴ The program does not include reformulated fuel.

¹⁵⁵ N.J. STAT. ANN. § 26:2C-8.6 (1996). The Ozone Transport Region comprises Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and Virginia plus the District of Columbia; *see* N.J. STAT. ANN. § 26:2C-8.7 (1996).

¹⁵⁶ N.J. STAT. ANN. §§ 26:2C-1 to -25.2 (1996 & Supp. 2002).

¹⁵⁷ N.J. STAT. ANN. § 26:2C-19.1 (1996).

2. *New Jersey Air Pollution Control Act*

a. *Overview*

The New Jersey Air Pollution Control Act (APCA)¹⁵⁸ addresses the control of air pollution.¹⁵⁹ The term “air pollution” means the presence in the outdoor atmosphere of one or more air pollutants of such quantities and characteristics and duration as to be, or likely be, injurious to public welfare, health of human health, plant or animal life, or property or unreasonably interfering with the enjoyment of life and property.

b. *Clean Air Council*

The Clean Air Council consists of seventeen (17) members and functions within the DHSS. Ex officio members are the commissioners or designees of the Commerce and Economic Growth Commission (CEGC), the Department of Community Affairs (DCA), and the Department of Agriculture (DOAg) plus six (6) citizens representing the general public and eight (8) members appointed by the governor from a list of state organizations’ nominees.¹⁶⁰ The council’s duties include:

- Considering any matter pertaining to the preservation and improvement of the Air Pollution Control Program and associated rules and regulations;
- Advising and making appropriate and necessary recommendations to the DEP regarding the Air Pollution Control Program; and
- Holding public hearings at least once per year with regard to the air pollution control statutes, codes, rules, and regulations plus technology capabilities and limitations and making a report to the DEP.¹⁶¹

¹⁵⁸ N.J. STAT. ANN. §§ 26:2C-1 to 25.2 (1996 & Supp. 2002).

¹⁵⁹ The term “air pollution” means the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as are injurious to human health or welfare, animal, or plant life, or property or would unreasonably interfere with the enjoyment of life or property and excludes all aspects of an employer-employee relationship as to health and safety hazards; the term “air contaminant” means any substance other than water or distillates of air present in the atmosphere as solid particles, liquid particles, vapors, or gases; *see* N.J. STAT. ANN. § 26:2C-2 (1996 & Supp. 2002).

¹⁶⁰ N.J. STAT. ANN. § 26:2C-3.2(a) (1996). The state organizations are: New Jersey Health Officers Association, State Chamber of Commerce, Society of Professional Engineers, Inc., Manufacturers Association, American Industrial Hygiene Association, State League of Municipalities, Freeholders’ Association, and the AFL-CIO; *see* N.J. STAT. ANN. § 26:2C-3.2(b) (1996).

¹⁶¹ N.J. STAT. ANN. § 26:2C-3.3 (1996).

c. *Air Pollution Control Agency*

The DEP has primary responsibility for air quality in New Jersey. The DEP administers the federal CAA and associated regulations along with the state APCA and promulgates related rules and regulations after public hearings to enforce the air quality legislation.¹⁶² DEP duties also include conducting monthly ambient air quality tests in every county of the state and reporting the results to county health officers, the legislature, and the news media.¹⁶³ To control air pollution, the DEP has broad authority to:

- Conduct research on air pollution;
- Educate the public on air pollution;
- Require registration and reporting by air pollution sources;¹⁶⁴
- Enter and inspect any building or place¹⁶⁵ for the purpose of investigating an actual or suspected source of air pollution to ascertain compliance or noncompliance with DEP codes, rules, or regulations;¹⁶⁶
- Receive or initiate complaints of air pollution;
- Hold hearings in connection with air pollution;
- Institute legal proceedings for the prevention of air pollution and the recovery of penalties in accordance with the APCA;
- Issue, renew, reopen, and revise operating permits;

¹⁶² Although hospital and medical disinfectants or agents of infectious disease control that are volatile organic compounds, they are excluded from codes, rules, and regulations that would diminish their efficacy for this purpose unless federal law, rule, regulation, code, or standard specifies otherwise; *see* N.J. STAT. ANN. §§ 26:2C-8, -8.11 (1996 & Supp. 2002).

¹⁶³ N.J. STAT. ANN. § 26:2C-9(a) (1996 & Supp. 2002).

¹⁶⁴ Reporting may include emission statements related to location, size and height plus rate and period of emission, composition of emission, and any other information relative to air pollution in accordance with applicable DEP codes, rules, and regulations; *see* N.J. STAT. ANN. § 26:2C-9 (1996 & Supp. 2002).

¹⁶⁵ Except private residences.

¹⁶⁶ Information relating to secret processes or methods of manufacture or production obtained in the course of an inspection, investigation, or determination must be kept confidential and is not admissible in evidence in any court proceedings except before the DEP; when samples are taken for analysis, a duplicate of the analytical results must be furnished promptly to the person suspected of causing air pollution; *see* N.J. STAT. ANN. §§ 26:2C-9(b)(1 - 4) (1996 & Supp. 2002).

- Enforce and certify compliance of all air pollution sources with the federal CAA and the state APCA;
- Establish, implement, and operate a small business stationary source compliance assistance program;¹⁶⁷ and
- Require the reporting and evaluation of emissions information for any air contaminant.¹⁶⁸

It is unlawful to obstruct, hinder, or delay or interfere with DEP personnel in the performance of a duty under the state APCA and related provisions or refuse to allow entrance to any premises at reasonable hours upon proper identification or presentation of a written DEP order.¹⁶⁹ It is unlawful to construct, reconstruct, install, or modify equipment or control apparatus and then use or operate it except in accordance with the APCA and related provisions.¹⁷⁰

d. Control Technology

When constructing, reconstructing, or modifying air emission equipment and control apparatuses, the state of New Jersey requires advanced air pollution control technology according to the kind and amount of air contaminant emitted, i.e., various levels of advanced technology are required according to emissions.¹⁷¹

To operate equipment and control apparatus with a potential to emit any hazardous air pollutant¹⁷² in amounts greater than the de minimis levels¹⁷³ or with a potential to emit five (5) tons or more per year of any other air contaminant, the air permit applicant must only document

¹⁶⁷ N.J. STAT. ANN. §§ 26:2C-9(5 - 9) (1996 & Supp. 2002).

¹⁶⁸ The term “regulated air contaminant” means the same as the term “regulated air pollutant” as defined by the EPA in rules and regulations adopted pursuant to the federal CAA at 40 CFR § 70.2; *see* N.J. STAT. ANN. § 26:2C-2 (1996 & Supp. 2002); odor is considered an “air contaminant.” Prior to requiring such information for any air contaminant not regulated by the EPA, the DEP must first make a determination and advise the public that the DEP concludes the regulation of that air contaminant is in the best interest of human health, welfare, and the environment by publishing that determination and justification in accordance with the New Jersey Administrative Procedure Act at N.J. STAT. ANN. §§ 52:14B-1 *et seq.* (2001 & Supp. 2002); *see* N.J. STAT. ANN. § 26:2C-9.2(i) (1996 & Supp. 2002).

¹⁶⁹ N.J. STAT. ANN. § 26:2C-9.1 (1996).

¹⁷⁰ N.J. STAT. ANN. §§ 26:2C-9.2(a - b) (1996 & Supp. 2002).

¹⁷¹ N.J. STAT. ANN. § 26:2C-9.2(b) (1996 & Supp. 2002).

¹⁷² The term “hazardous air pollutant” means any air pollutant listed in or pursuant to subsection (b) of section 112 of the federal Clean Air Act (CAA) at 42 U.S.C. §§ 7412 *et seq.* (1994).

¹⁷³ De minimis as specified by the EPA pursuant to the federal CAA.

the utilization of advances in technology. For air contaminants subject to the prevention of significant deterioration technology requirement, the air permit applicant's technology must be the best available control technology (BACT). For air contaminants that are non-attainment air contaminants and subject to significant emissions increases in a non-attainment area, the air permit applicant's technology must, at a minimum, demonstrate the lowest achievable emission rate (LAER). For hazardous air contaminants, the air permit applicant's technology must comprise the maximum achievable control technology (MACT). For other types of air contaminants, the technology and methods must be up-to-date technology and methods in order to minimize air contaminant emissions, and the technology must have been demonstrated for similar discharges to be reliable and available at reasonable costs commensurate with the reduction in air contaminant emissions.

To operate equipment and control apparatus with a potential to emit hazardous air pollutants at less than the de minimis levels¹⁷⁴ and with a potential to emit less than five (5) tons per year of any other air contaminant, the air permit applicant need not document advances in the art of air pollution control technology but must document compliance with:

- Reasonably available control technology (RACT) as defined by the DEP;
- Applicable new source performance standards; and
- Any other applicable state or federal standard, code, rule, or regulation.¹⁷⁵

In order to elicit public comment, the DEP periodically publishes the technology, methods, and performance levels of air pollution control to demonstrate advances in the technology of air pollution control for air permit applicants to use as a reference. A final technical manual is published in the New Jersey Register after any public comment has been considered.¹⁷⁶

Generally, air operating permits and operating certificates are valid for a period of five (5) years and are renewable unless earlier revoked. Grandfathered equipment or control

¹⁷⁴ De minimis as specified by the EPA pursuant to the federal CAA.

¹⁷⁵ N.J. STAT. ANN. §§ 26:2C-9.2(c)(1 - 2) (1996 & Supp. 2002). An option exists to establish within an operating permit a fifteen (15) year plan for reducing emissions beyond minimum air pollution control requirements in lieu of adhering to strict permit review schedules and less effective state requirements; the plan includes schedules setting forth milestones for reducing emissions from the facility and provides emission reduction credits from non-facility sources pursuant to a trading and banking program; *see* N.J. STAT. ANN. § 26:2C-9.2(c)(3) (1996 & Supp. 2002).

¹⁷⁶ N.J. STAT. ANN. § 26:2C-9.2(c)(4) (1996 & Supp. 2002). As an alternative to reliance on the technical manual, an air permit applicant may propose on a case by case basis, any advances in the technology of air pollution control applicable to a specific source operation; tests may be required at the expense of the applicant as a condition of issuance of a emission compliance in order to obtain an operating permit; *see* N.J. STAT. ANN. § 26:2C-9.2(c)(4) (1996 & Supp. 2002).

apparatus is not subject to the requirement to demonstrate the use of advances in the technology of air pollution control.¹⁷⁷

e. Exemptions

Some exemptions exist for air emission or pollution sources including:

- One or two family dwellings;
- Dwellings of six (6) or less family units where at least one (1) unit is occupied by the owner;
- Equipment and air control apparatus subject to a general air permit;
- Equipment and air control apparatus de minimus in terms of size or emission volume;¹⁷⁸ and
- Holders of a facility-wide air permit issued pursuant to the Pollution Prevention Act.¹⁷⁹

f. General Air Permits

A general air permit may be issued in lieu of any other air permit required by the APCA. Prior to issuing a general air permit, the DEP must provide public notice and an opportunity for public comment.¹⁸⁰ However, upon DEP's receipt of an application for the issuance or renewal of an air certificate, the DEP may allow the applicant to obtain a temporary air permit to operate for ninety (90) days.¹⁸¹

Except where specifically prohibited under the federal CAA, an applicant for an air permit to construct, reconstruct, install, maintain, or modify air pollution control equipment or air pollution control apparatus or implement air pollution control processes is allowed to

¹⁷⁷ N.J. STAT. ANN. §§ 26:2C-9.2(c)(6 -7) (1996 & Supp. 2002).

¹⁷⁸ N.J. STAT. ANN. § 26:2C-9.2(d) (1996 & Supp. 2002).

¹⁷⁹ See N.J. STAT. ANN. §§ 13:1D-35 *et seq.* (1991 & Supp. 2002) and N.J. STAT. ANN. § 26:2C-9.2(e) (1996 & Supp. 2002).

¹⁸⁰ N.J. STAT. ANN. § 26:2C-9.2(h) (1996 & Supp. 2002).

¹⁸¹ N.J. STAT. ANN. § 26:2C-9.2(8) (1996 & Supp. 2002).

anticipate DEP approval and to place the equipment or apparatus on the footings or foundation where it is intended to be used during the pendency of the permit application review process.¹⁸²

If the DEP does not grant approval to the applicant, the DEP and the applicant must enter into an agreement containing a schedule setting forth a date on which the applicant must modify, replace, or cease the operation of the air pollution control equipment or devices or processes. If the DEP and the applicant are unable to come to a mutual agreement, the DEP may issue a schedule setting forth a date on which the applicant must comply.¹⁸³ Failure to comply with the schedule constitutes a violation of the APCA and results in penalties. Civil or criminal penalties are not imposed, however, as long as the applicant's actions do not result in:

- Emission of an air contaminant in excess of the limitations contained in the air permit or certificate; or
- Exceedance of any air contaminant emission level in the permit or certificate.¹⁸⁴

g. Air Contaminant Emission Fees

The DEP is authorized to collect per-ton emission fees based on actual annual emissions of each regulated air contaminant except for carbon monoxide from a major facility or on the potential to emit air contaminants when actual emission data is unavailable. Emission fees are based on information in the emission statement from two (2) years earlier and adjusted by the Consumer Price Index established in 1989.¹⁸⁵ Generally, the DEP uses the emission fees to administer and enforce the APCA and related provisions although costs associated with program planning; collecting data; investigating; developing rules and regulations; reviewing, issuing, and administering operating permits; monitoring; enforcing compliance with laws, codes, rules, regulations, and permits; and any other activities with regard to major facilities required for compliance with APCA and the federal CAA.¹⁸⁶

¹⁸² N.J. STAT. ANN. § 26:2C-9.2(j) (1996 & Supp. 2002). The legislature declares that these procedures will enhance and improve the quality of the environment and protect and foster the public health of the citizens of New Jersey; applicants, however, assume all risks for their actions and must notify the DEP of their intent to act seven (7) days in advance if the act occurs before DEP approval; *see* N.J. STAT. ANN. § 26:2C-9.3, -9.4 (1996).

¹⁸³ N.J. STAT. ANN. § 26:2C-9.4 (1996).

¹⁸⁴ N.J. STAT. ANN. § 26:2C-9.4 (1996).

¹⁸⁵ N.J. STAT. ANN. § 26:2C-9.5 (1996).

¹⁸⁶ N.J. STAT. ANN. § 26:2C-9.6 (1996).

h. Annual Air Quality Report

The DEP is required to prepare an annual report¹⁸⁷ on:

- The status of New Jersey's air quality;
- The state's progress toward attainment with the federal CAA; and
- The operating permit program.

The annual report must include:

- An accounting of all costs incurred by the operating permit program; revenues received from fees;
- A list of all fees still owing;
- The amount of penalties imposed and collected the previous year;
- A DEP workload analysis of all components of the air pollution control program including the regulation, monitoring, and control or prevention of emissions of air contaminants.¹⁸⁸

i. Air Pollution Control Enforcement

Whenever the DEP has cause to believe that any person is violating any air pollution control code, rule, or regulation promulgated by the DEP, the DEP must institute a prompt investigation. If the DEP discovers a condition which is in violation, it is authorized to order the violation to cease and take necessary steps to enforce the order. The order is sent to the violator by certified mail or personal service and includes reference to the statute section or regulation, order, or permit condition violated; the amount of the imposed fine; a concise statement of the facts constituting the violation; and a statement of the right of the violator to a hearing regarding the matter. The recipient of the order must comply with the order within the time specified in the order.¹⁸⁹

¹⁸⁷ Notice of the preparation and submission of the annual report to the governor and the legislature is published in the New Jersey Register.

¹⁸⁸ The annual report must also identify any need for legislative action to adjust the emission fee schedule to ensure that the fee is adequate to fund the air pollution control program in accordance with the federal CAA and discuss the advantages and disadvantages of setting higher emission fees for hazardous air pollutants; *see* N.J. STAT. ANN. § 26:2C-9.7 (1996 & Supp. 2002).

¹⁸⁹ N.J. STAT. ANN. § 26:2C-14 (1996).

Any person aggrieved by a DEP order may request a hearing provided it is a written request delivered to the DEP within twenty (20) days following receipt of the order. Following the hearing, if a violation is determined to have occurred, a final order is issued to cease the violation. The final order specifies any assessed fine. Payment of the fine or penalty is due when the final order is issued or when the original order becomes a final order.¹⁹⁰ As part of its enforcement measures, the DEP has the authority to impose an administrative penalty for violations and to stay the operation by its order.¹⁹¹ Failure to pay an administrative penalty subjects the violator to a civil penalty imposed by an order of the court in an amount up to ten thousand dollars (\$10,000.00) for the first offense, up to twenty-five thousand dollars (\$25,000.00) for the second offense, and up to fifty thousand dollars (\$50,000.00) for the third offense and each offense thereafter. Each subsequent day of a violation for failure to pay an administrative penalty is considered a separate and distinct offense.¹⁹²

When a DEP administrative hearing is held, the hearing is conducted under oath and recorded stenographically, but the parties are not bound by the strict rules of evidence used by the courts of law and equity. Copies of the record and transcript made at the hearing are furnished upon request at the requesting party's expense.¹⁹³ The hearing is held before the commissioner or staff designee of the DHSS who possesses the power to subpoena witnesses and compel their attendance, administer oaths, and require the production of documents relating to the matter under investigation when requested by any respondent to a complaint.¹⁹⁴

When a violation occurs, the DEP may also institute a civil action in a court of competent jurisdiction for injunctive relief or any other appropriate relief to prohibit and prevent a violation, and the court is allowed to proceed in a summary manner. Violators are subject to civil penalties up to ten thousand dollars (\$10,000.00) for the first offense, up to twenty-five thousand dollars (\$25,000.00) for the second offense, and up to fifty thousand dollars (\$50,000.00) for the third offense and subsequent offenses. A continuing violation is considered a separate and distinct violation for each day of violation. Civil penalties are levied only after an administrative order has been properly served upon the violator as described supra.¹⁹⁵ The DEP

¹⁹⁰ N.J. STAT. ANN. § 26:2C-14.1 (1996).

¹⁹¹ N.J. STAT. ANN. § 26:2C-14.1 (1996).

¹⁹² N.J. STAT. ANN. § 26:2C-19(d). Any such penalty imposed may be recovered with costs in the law division of the superior court in a summary proceeding pursuant to the penalty enforcement law; *see* N.J. STAT. ANN. §§ 2A:58-1 *et seq.* (2000).

¹⁹³ N.J. STAT. ANN. § 26:2C-15 (1996).

¹⁹⁴ N.J. STAT. ANN. § 26:2C-17 (1996).

¹⁹⁵ N.J. STAT. ANN. §§ 26:2C-19(a - b) (1996 & Supp. 2002).

is authorized to act within its discretion to compromise and settle a penalty in order to ensure the penalty is appropriate and equitable under all of the circumstances.¹⁹⁶

j. Voluntary Notice of Air Contaminant Releases

Any person who causes any release of air contaminant in a quantity or concentration which poses a potential threat to public health, welfare, or the environment or which might result in citizen complaints must immediately upon the release notify the DEP. Failure to do so imposes liability upon that person to penalties and criminal enforcement procedures.¹⁹⁷

Criminal penalties in the third degree are imposed for purposely or knowingly violating the APCA and related provisions. Criminal penalties in the third degree plus enhanced fines of ten thousand dollars (\$10,000.00) per day are imposed for:

- Purposely or knowingly violating any federally mandated air pollution control requirement, any operating permit condition, or any fee or filing requirement imposed with an air permit to operate; and
- Purposely or knowingly making any false material statement, representation, or certification in any form, notice, statement, or report required within an air permit to operate; or
- Purposely or knowingly rendering inaccurate any monitoring device or method required within an air permit to operate.¹⁹⁸

Reckless violation of the APCA and its related provisions results in a criminal penalty in the fourth degree.¹⁹⁹

The DEP also has procedures for alternative dispute resolution as an option for settlement of contested cases involving violations. Alternative dispute resolution is voluntary and is not mandatory.²⁰⁰

¹⁹⁶ N.J. STAT. ANN. § 26:2C-19(c) (1996 & Supp. 2002).

¹⁹⁷ N.J. STAT. ANN. § 26:2C-19(e) (1996 & Supp. 2002).

¹⁹⁸ N.J. STAT. ANN. §§ 26:2C-19(f)(1 - 3) (1996 & Supp. 2002).

¹⁹⁹ N.J. STAT. ANN. § 26:2C-19(f)(4) (1996 & Supp. 2002).

²⁰⁰ N.J. STAT. ANN. § 26:2C-19(h) (1996 & Supp. 2002).

k. Odors

The determination of whether or not an odor rises to the level of a nuisance and unreasonably interferes with the enjoyment of life or property in violation of the APCA and its related provisions, falls within the authority of the DEP. The DEP must consider all of the relevant facts and circumstances including the character, severity, frequency, and duration of the odor plus the number of persons affected. The DEP publishes the guidelines and procedures utilized by the DEP for the investigation of citizen complaints regarding odors in the New Jersey Register.²⁰¹

l. Unavoidable Equipment Malfunctions

The New Jersey legislature realizes that equipment regulated by the APCA may malfunction or fail to perform optimally even when carefully maintained and operated and that violations of the APCA may occur due to an unforeseeable and unavoidable malfunctions during equipment start-up or shut-down or during necessary maintenance due to the inherently intricate nature of mechanical equipment and that these violations should not have penalties imposed as long as any resulting air emission causes no potential threat to the public health, welfare, or the environment. Thus, it is the policy of the state to protect the public health, welfare, and the environment and promote the careful operation and maintenance of equipment. In order to maximize this policy, the state provides an affirmative defense when a facility is operated and maintained carefully and all reasonable steps are taken to minimize emission levels and emissions do not cause a potential threat to the public health, welfare, or the environment.²⁰² A person is entitled to an affirmative defense for a violation of a condition, emission rate, limit, or standard within an air permit or a violation of the APCA or related provision when the violation occurs as a result of an equipment malfunction, an equipment start-up or shut-down or during the performance of necessary equipment maintenance provided the person complies with proper notification requirements. Proper notification requirements include notification to the DEP of the violation by 5:00 p.m. of the second (2nd) full calendar day after becoming aware of the occurrence and submitting a written documentation of the violation describing the circumstances of the violation within thirty (30) days and demonstrating how:

- The violation occurred and was caused by equipment malfunction, start-up, shut-down, or maintenance;
- The facility is operated with due care;
- The violation did not result from operator error or failure to maintain the equipment with due care;

²⁰¹ N.J. STAT. ANN. § 26:2C-19(g) (1996 & Supp. 2002).

²⁰² N.J. STAT. ANN. § 26:2C-19.1 (1996).

- The person took all reasonable steps to minimize levels of emissions caused by the violation; and,
- If the violation occurred due to malfunction, the malfunction is not part of a recurrent pattern.²⁰³

The affirmative defense is not available when the violation occurs due to excess quantity or concentration of air contaminants and causes a potential threat to public health, welfare, or the environment in the outdoor atmosphere.²⁰⁴ Limitations lie within the discretion of the DEP and upon the operating history of similar air emission sources on an industry basis as to the maximum frequency and extent that the affirmative defense may be asserted. Thus, violations that occur more frequently or persist for a longer duration than the maximum limitation are not subject to protection from liability.²⁰⁵ DEP final decisions are reviewable by appeal to a court of competent jurisdiction.²⁰⁶

m. Local Air Regulations

The state of New Jersey allows local governmental units to adopt air pollution control ordinances more stringent than the APCA and its related provisions. Penalties for violation of local ordinances, however, must not exceed two thousand five hundred dollars (\$2,500.00). Besides local penalties, local fees related to air pollution may be imposed provided they were in place as of June 15, 1995. The local fee, however, may not exceed one thousand dollars (\$1,000.00) per year. Local inspections of air emission facilities or research and development facilities may be conducted by the local governmental units in response to its citizen complaints.²⁰⁷

3. *New Jersey Small Business Compliance Advisory Panel*

To comply with the federal CAA, a Small Business Compliance Advisory Panel exists within the DEP which consists of seven (7) members which render advisory opinions to the DEP concerning the effectiveness of the DEP's program for assisting small business stationary sources with technical and environmental compliance issues related to air pollution control requirements, permits, and enforcement. The panel reviews information and air permit applications to assure that the information and applications are understandable to the layperson and determines if the DEP provides for the development and dissemination of advisory opinions

²⁰³ N.J. STAT. ANN. § 26:2C-19.2 (1996).

²⁰⁴ N.J. STAT. ANN. § 26:2C-19.3 (1996).

²⁰⁵ N.J. STAT. ANN. § 26:2C-19.5 (1996).

²⁰⁶ N.J. STAT. ANN. § 26:2C-20 (1996).

²⁰⁷ N.J. STAT. ANN. § 26:2C-22 (1996 & Supp. 2002).

and reports in accordance with the APCA.²⁰⁸ The panel also makes periodic reports to the DEP and the EPA concerning the compliance of the state's air pollution control program with the requirements of the federal Paperwork Reduction Act, the Regulatory Flexibility Act, and the Equal Access to Justice Act as it relates to small businesses.²⁰⁹

4. *New Jersey Industry and Environmental Air Pollution Control Work Groups*

The DEP establishes industry and environmental work groups to provide consultation on matters relating to the regulation of air pollution sources. The work groups consist of members of industry, environmental, and other interested and affected parties deemed appropriate by the DEP. A separate industry and environmental work group evaluates the effects of emission fees on emission reduction and makes recommendations concerning fee revenues and supplemental surcharge revenues. The fee work group also evaluates and recommends alternatives to funding the DEP air pollution control program with emission fee increases.²¹⁰

5. *New Jersey Air Pollution Emergency Control Act*

The state of New Jersey has an Air Pollution Emergency Act (APEA).²¹¹ The APEA provides for emergency air pollution controls and supplements the APCA. In particular, the APEA establishes the use of emergency powers to prevent or minimize disasters of unforeseeable proportions when air pollution may at certain times and in certain places so seriously affect the health of the public and directly threaten the lives of large portions of the population.²¹² An air pollution emergency may be determined to exist by the DHSS when air pollution in any county, locality, place, or other area constitutes an unreasonable and emergency risk to the health of those present. In order to bring the emergency powers into effect, the determination that an unreasonable and emergency risk exists must be communicated in writing with the factual findings of the determination to the governor, and upon being so advised, the governor, in turn, proclaims that an air pollution emergency exists. In the emergency area, the governor may issue orders to:

²⁰⁸ N.J. STAT. ANN. § 26:2C-25.1 (1996).

²⁰⁹ 44 U.S.C. §§ 3501 *et seq.* (1996), 5 U.S.C. § 601 *et seq.* (2000), and 5 U.S.C. §§ 504 *et seq.* (2000) and 28 U.S.C. §§ 2412 *et seq.* (1996), respectively.

²¹⁰ N.J. STAT. ANN. § 26:2C-25.2 (1996).

²¹¹ N.J. STAT. ANN. §§ 26:2C-26 to 36 (1996).

²¹² N.J. STAT. ANN. § 26:2C-27 (1996).

- Prohibit, restrict, or condition motor vehicle travel of every kind including trucks and buses;
- Prohibit, restrict, or condition the operation of retail, commercial, manufacturing, industrial, or similar activity;
- Prohibit, restrict, or condition the burning or other consumption of any type of fuel; and
- Prohibit, restrict, or condition any and all other activity within which contributes or may contribute to the air pollution emergency.²¹³

During an air pollution emergency, the governor's proclamation of the emergency must be given maximum publicity throughout the state.²¹⁴ The governor's orders may be amended or modified by further gubernatorial orders without any judicial order or other confirmation of any type so that the order may become effective immediately. The governor's order endures as set forth within the order, or if no time is specified, it remains in effect until the governor declares the emergency has terminated.²¹⁵ During an emergency the DHSS, Department of Defense, and the state and local police along with air pollution control personnel enforce the APECA. A good faith defense exists to protect these enforcement personnel when they are acting with authorization to enforce the governor's emergency order.²¹⁶ These personnel may use reasonable force and take reasonable steps to carry out the APECA. In particular, they may:

- Enter onto any property²¹⁷ or into any establishment believed to be violating the emergency order and, following a request for compliance, may cause compliance;
- Stop, detour, reroute, and prohibit motor vehicle traffic travel and traffic;
- Disconnect incinerator or other types of combustion facilities;
- Terminate all burning activities; and
- Close down or restrict the use of any business, commercial, retail, manufacturing, industrial, or other establishment.²¹⁸

²¹³ N.J. STAT. ANN. § 26:2C-29 (1996).

²¹⁴ N.J. STAT. ANN. § 26:2C-30 (1996).

²¹⁵ N.J. STAT. ANN. § 26:2C-31 (1996).

²¹⁶ N.J. STAT. ANN. § 26:2C-34 (1996).

²¹⁷ Except any single or double family homes or any dwelling unit within a multiple dwelling unit larger than a double family home.

²¹⁸ N.J. STAT. ANN. § 26:2C-32 (1996).

Violation of the governor's order issued under APECA with knowledge of the order results in criminal misdemeanor charges and a fine up to one hundred thousand dollars (\$100,000.00) or imprisonment up to ten (10) years, or both. The act of knowingly interfering with the enforcement of the governor's order is also considered a violation.²¹⁹

An aggrieved person upon application or request to the DEP must be granted a hearing on the question of whether or not the continuance of the governor's emergency order is unreasonable in the light of the prevailing conditions of air pollution. The DEP must consider the aggrieved person's particular activity and the purposes of the APECA. The public hearing must be conducted as soon as possible, and public notice of the hearing must be provided by the DEP. The DEP reports any findings and recommendations to the governor for any subsequent action.²²⁰

The DEP has a duty to promulgate a set of stand-by orders²²¹ which might be appropriate for use by the governor upon the declaration of an emergency contemplated by the APECA. After approval by the governor, these stand-by orders are distributed to the appropriate state agencies and to all commercial and industrial concerns throughout the state impacted by or concerned with the enforcement of the APECA. Contingency arrangements for the enforcement of these orders are distributed to the general public as well.²²²

IV. SOLID WASTE AND HAZARDOUS WASTE

Producer Note: There are many laws which control the use, disposal, and cleanup of solid and hazardous wastes. Agricultural producers who use hazardous chemicals, petroleum, or other products stored in storage tanks should be aware of requirements governing their actions.

²¹⁹ N.J. STAT. ANN. § 26:2C-33 (1996).

²²⁰ N.J. STAT. ANN. § 26:2C-35 (1996).

²²¹ These are proposed orders.

²²² N.J. STAT. ANN. § 26:2C-36 (1996).

A. Solid Waste Laws

1. New Jersey Solid Waste Management Act

a. Solid Waste Policy

It is the position of the state that the collection, disposal, and utilization of solid waste²²³ is a matter of grave concern to all citizens and that the health, safety, and welfare of the people require efficient and reasonable solid waste collection and disposal²²⁴ service or efficient utilization of such waste. Because solid waste planning and management were lacking area-wide structures, technical assistance, and guidelines for the county and inter-county plans, the legislature enacted the Solid Waste Management Act (SWMA)²²⁵ so that collection, disposal, and utilization activity could be coordinated.²²⁶

b. Solid Waste Agency

The responsibility of research and development for determining the most efficient, sanitary, and economical way of collecting, disposing, and utilizing solid waste rests with the DEP. The DEP is responsible for establishing the standards, codes, rules, and regulations concerning solid waste collection and disposal activities. While carrying out these duties, the DEP must be mindful of water quality, erosion control, revegetation, methane gas production at landfills, safety measures, plus rodent, insect, bird, dust, fire, and odor control programs. Every two (2) years, the DEP updates the statewide solid waste management plan. Within the DEP, the Division of Solid Waste Management along with Divisions of Hazardous Waste Management and Hazardous Site Mitigation carry out the necessary DEP duties and responsibilities.²²⁷

DEP codes, rules, and regulations related to solid waste collection and disposal have the full force and effect of law. Upon its finding that a person has violated the SWMA or any of its related provisions, the DEP may:

²²³ The term “solid waste” means garbage, refuse, and other discarded materials resulting from industrial, commercial, agricultural operations, plus domestic and community activities, and includes all other waste materials including liquids except animal and vegetable wastes collected by swine producers licensed by the DOAg to collect, prepare, and feed to swine on their own farms; *see* N.J. STAT. ANN. § 13:1E-3(a) (1991 & Supp. 2002).

²²⁴ The term “disposal” means the storage, treatment, utilization, processing, resource recovery, or discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid or hazardous waste into or on any land or water so that the waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters including groundwaters; *see* N.J. STAT. ANN. § 13:1E-2(c) (1991 & Supp. 2002).

²²⁵ N.J. STAT. ANN. §§ 13:1E-1 to 20 (1991 & Supp. 2002).

²²⁶ N.J. STAT. ANN. § 13:1E-2 (1991 & Supp. 2002).

²²⁷ N.J. STAT. ANN. § 13:1E-6 (1991 & Supp. 2002).

- Issue an order to comply;
- Impose a civil administrative penalty;
- Bring an action for a civil penalty; and
- Petition the attorney general to bring a criminal action.²²⁸

Furthermore, the DEP, a local board of health, or a county health department may institute an action or proceeding in the Superior Court for injunctive relief or other relief for any violation of the SWMA or its related provisions. The relief requested may include:

- Temporary or permanent injunction;
- Assessment for costs of an investigation, inspection, or monitoring survey plus litigation costs in the case;
- Assessment for costs incurred in removing, correcting, or terminating any adverse effects upon the water and air quality resulting from the violation;
- Assessment for compensatory damages for loss or destruction of wildlife, fish, or aquatic life plus any actual damages.²²⁹

c. Solid Waste Management Advisory Council

The New Jersey Solid Waste Management Advisory Council consists of fourteen (14) members, four (4) ex officio commissioners of state agencies and ten (10) citizens of the state. The advisory council considers matters to improve statewide and district solid waste management plans. The council also may:

- Make recommendations to the DEP for statutory and regulatory changes to implement the state's recycling plan goals;
- Study the state of the art and technology associated with solid waste management;
- Study the need for programs for technical support; and
- Hold public hearings for public input as to solid waste regulations and statutes and solid waste collection, disposal, or recycling activities.²³⁰

²²⁸ The order must specify the provision violated and give notice of the right to a hearing on the matter provided the hearing request is in writing and delivered to the DEP within twenty (20) days of receipt of the order; after the hearing and upon a finding that a violation did occur, the DEP order becomes final or if no hearing is requested, then the order becomes final after twenty (20) days from receipt of the order; the request for a hearing does not automatically stay the effect of order; *see* N.J. STAT. ANN. § 13:1E-9(c) (1991 & Supp. 2002).

²²⁹ N.J. STAT. ANN. § 13:1E-9(d) (1991 & Supp. 2002).

²³⁰ N.J. STAT. ANN. §§ 13:1E-7, 8 (1991 & Supp. 2002).

d. Solid Waste Violations and Penalties

The DEP is authorized to assess a civil administrative penalty up to fifty thousand dollars (\$50,000.00) in a multiple-day violation because each day of violation is considered a separate and distinct offense. The DEP, however, must not assess a civil administrative penalty in excess of twenty-five thousand dollars (\$25,000.00) for a single violation or two thousand five hundred dollars (\$2,500.00) for each day during which a violation continues unless the DEP adopts regulations that require consideration of:

- Operational history where the violation occurred;
- Severity of the violation;
- Measures taken to mitigate or prevent further violations;
- Whether the penalty will maintain an appropriate deterrent.

Furthermore, the DEP must notify the violator by certified mail or personal service and include:

- Reference to the statute section, rule, regulation, order, permit condition, or solid waste plan management plan alleged to be violated;
- Alleged facts constituting the violation;
- Amount of the civil administrative penalty to be imposed;
- Notice of the right to a hearing provided the request is written, made within twenty (20) days after receipt of the notice, and delivered to the DEP; if no hearing is requested, the notice becomes a final order after the twenty (20) day period.

Payment of a penalty assessment is due when a final order is issued following a hearing or when the notice becomes a final order. The DEP is authorized to compromise any civil administrative penalty imposed in an amount the DEP determines appropriate. The imposition of a civil administrative penalty is in addition to all other enforcement provisions in the SWMA.²³¹ Violation of an administrative order or failure to pay an administrative assessment results in a civil penalty up to one hundred thousand dollars (\$100,000.00) under a court's order. Violators of the SWMA are subject to fifty thousand dollars (\$50,000.00) per day in civil actions when commenced by local boards of health, county health departments, or the DEP.²³²

²³¹ N.J. STAT. ANN. § 13:1E-9(e) (1991 & Supp. 2002).

²³² N.J. STAT. ANN. § 13:1E-9(f) (1991 & Supp. 2002).

Penalties imposed for SWMA violations may be collected with costs in summary court proceedings pursuant to the penalty enforcement law.²³³ Violations of the SWMA that are charged as third (3rd) degree crimes and result in penalties up to fifty thousand dollars (\$50,000.00) for first offenses and one hundred thousand dollars (\$100,000.00) for second and subsequent offenses plus restitution and any other appropriate disposition authorized by the SWMA and include:

- Knowingly generating and causing or allowing any hazardous waste²³⁴ to be transported or transporting any hazardous waste to any site without DEP authorization to accept such waste;
- Knowingly disposing, treating, storing, or transporting hazardous waste without DEP authorization;
- Knowingly making any false or misleading statement to any person who prepares any hazardous waste application, label, manifest, record, report, design, or other document required to be submitted by the DEP; and
- Knowingly making any false or misleading statement on any hazardous waste.²³⁵

Fourth (4th) degree criminal charges are imposed against any person who, regardless of intent, generates and causes or allows any hazardous waste to be transported or received without completing and submitting a hazardous waste manifest to the DEP in accordance with the SWMA or its related provisions or who:

- Recklessly generates and causes or allows to be transported or transports any hazardous waste to a facility or any other place which does not have authorization from the DEP to accept such waste;
- Recklessly disposes, treats, stores, or transports hazardous waste without authorization from the DEP; or
- Recklessly makes any misleading statement on or to any person who prepares a hazardous waste application, label, manifest, record, report, design, or other document required to be submitted to the DEP.²³⁶

²³³ N.J. STAT. ANN. §§ 2A:58-1 *et seq.* (2000).

²³⁴ The term “hazardous waste” mean any waste or any combination of waste which poses a present or potential threat to human health, living organisms, or the environment and is not limited to waste material that is toxic, corrosive, irritating, sensitizing, radioactive, biologically infectious, explosive, or flammable; *see* N.J. STAT. ANN. § 13:1E-38(c) (1991 & Suppl 2002).

²³⁵ N.J. STAT. ANN. § 13:1E-9(g) (1991 & Suppl. 2002).

²³⁶ N.J. STAT. ANN. § 13:1E-9(h) (1991 & Suppl. 2002).

Conveyances used or intended for use in the willful discharge of any solid or hazardous waste in violation of the SWMA are subject to forfeiture to the state.²³⁷

e. Rewards for Solid Waste Violator Information

Any member of the public who supplies information to an enforcing authority which proximately results in the imposition and collection of a civil penalty as a result of a civil action brought pursuant to the SWMA and its related provisions is entitled to a reward of ten percent (10%) of the civil penalty collected or two hundred fifty dollars (\$250.00) whichever amount is greater. The reward is paid by the DEP.²³⁸

f. Solid Waste Emergency Orders

The DEP is authorized to issue an emergency order to the owner or operator of any site where solid waste is placed, processed, stored, or disposed if it presents an imminent threat to the environment or public health and safety. The emergency order must include the:

- Specific activities occurring at the site which presents an imminent threat;
- Description of the specific threats caused;
- Specific measures to immediately undertake to abate or eliminate the imminent threat; and
- DEP actions that will result including the revocation or suspension of a registration statement or license or limitation of access and egress from the site by vehicles or persons.²³⁹

The emergency order is effective upon its signing and compliance is required immediately upon receipt. Any action brought by a person seeking a temporary or permanent stay of an emergency order must be brought in Superior Court. The person bringing the action has the burden of demonstrating by clear and convincing evidence that the activity charged in the emergency order as an imminent threat does not present an imminent threat to the environment or public health and safety.²⁴⁰

²³⁷ N.J. STAT. ANN. § 13:1E-9(j) (1991 & Supp. 2002).

²³⁸ N.J. STAT. ANN. § 13:1E-9.2 (1991).

²³⁹ N.J. STAT. ANN. § 13:1E-9.5(a) (1991).

²⁴⁰ N.J. STAT. ANN. §§ 13:1E-9.5(b - c) (1991).

g. Solid Waste Experimental Projects

The state of New Jersey authorizes the DEP to make contracts and grants to any person engaged in solid waste collection, disposal, or utilization activities to experiment with new methods in dealing with solid waste including source reduction, recycling, and energy recovery demonstration projects.²⁴¹

h. Solid Waste Management Enforcement

The SWMA is enforced by the DHSS, county health departments, and the local boards of health. To assist in the enforcement, authority is given to enter the premises of a generator, transporter, or facility at any time in order to determine compliance with the SWMA. When the DEP determines that a violation has occurred, the DEP must carry out one or more of the following:

- Issue an order requiring compliance;
- Levy a civil administrative penalty;
- Bring a civil action against the violator; or
- Petition the attorney general to bring a criminal action.²⁴²

Whenever the DEP issues an order for a violation, the DEP:

- Specifies which SWMA provision was violated;
- Specifies the act that constituted the violation;
- Orders abatement of the violation; and
- Gives notice of the right to a hearing on the matter provided the alleged violator makes a request in writing within twenty (20) days from receipt of the order and delivers it to the DEP; a request for a hearing does not automatically stay the effect of the order, and if no hearing is requested, the order becomes final after expiration of the twenty (20) day period.²⁴³

²⁴¹ N.J. STAT. ANN. § 13:1E-30 (1991 & Supp. 2002).

²⁴² N.J. STAT. ANN. §§ 13:1E-48.20(a - b) (1991 & Suppl 2002).

²⁴³ N.J. STAT. ANN. § 13:1E-48.20(c) (1991 & Supp. 2002).

In civil actions, the DEP, DHSS, county health departments, or a local board of health may institute the action or proceeding in Superior Court for injunctive relief and other relief including the appointment of a receiver, and the court is allowed to proceed in a summary manner. In its proceedings, the court may grant temporary or interlocutory relief. Relief may also include singly or in combination:

- A temporary or permanent injunction;
- Assessment for costs of any investigation, inspection, or monitoring survey that led to the establishment of the violation, and for reasonable costs of preparing and litigating the case;
- Assessment for any cost incurred by the state in removing, correcting, or terminating the adverse effects upon environmental quality or public health; and
- Assessment for any loss or destruction of wildlife, fish, or aquatic life and for any other actual damages.²⁴⁴

2. *New Jersey Clean Communities and Recycling Act*

The New Jersey legislature declares its intent to continue to seek solutions to energy, environmental, and economic problems and to see that these solutions are properly managed as solid waste and for resource recovery because the generation of municipal solid waste is increasing while landfill capacity is decreasing. The siting of environmentally secure landfills is an area of serious concern and limited choice.

It is the position of the legislature that the planning and construction of waste-to-energy resource recovery facilities requires substantial capital expenditures and a guaranteed flow of processible and combustible waste and that the disposal of reusable waste materials is wasteful of valuable resources. Recycling of waste materials decreases waste flow, recovers valuable resources, conserves energy in the manufacturing process, and offers a supply of domestic raw materials for the state's industries. The legislature declares that a comprehensive recycling plan and program is necessary to achieve the maximum practicable recovery of reusable materials, reduce the amount of waste to landfills, realize significant cost savings in waste-to-energy recovery facilities, conserve energy and resources, and recover material for industrial uses.

The legislature establishes that:

- An uncluttered landscape is a priceless heritage;
- It is the duty of government to promote and encourage a clean and safe environment; and

²⁴⁴ N.J. STAT. ANN. § 13:1E-48.20(d) (1991 & Supp. 2002).

- Unseemly litter²⁴⁵ has an adverse economic effect on the state by making the state less attractive to tourists and new industry and residents.

Thus, it is the state's policy to develop and implement a comprehensive statewide recycling plan and to establish clean communities fund to assist in litter abatement and removal.²⁴⁶ This program is known as the Clean Communities and Recycling Act (CCRA).²⁴⁷

The CCRA creates a fund to assist recycling. Ten percent (10%) of the fund is used for litter pickup and removal; fifty percent (50%) is available to eligible municipalities with large housing units for litter pickup and removal, public education, and information regarding litter abatement and enforcement based upon the number of housing units; thirty percent (30%) is distributed to cities based upon municipal road mileage; and ten percent (10%) is distributed to eligible counties based upon road mileage. The DEP administers the CCRA.²⁴⁸

The Superior Court and every municipal court has jurisdiction to enforce laws prohibiting littering. Littering is throwing, dropping, discarding, or otherwise placing any litter of any nature upon public or private property other than in a litter receptacle. Littering is considered a petty disorderly person offense. Violators are subject to:

- Money judgments up to five hundred dollars (\$500.00) rendered against them;
- Community service obligations; and
- Mandatory litter pickup and removal from public or private property.

Subsequent violations that occur within a period of six (6) months result in civil penalties up to one thousand dollars (\$1,000.00) and up to sixty (60) days imprisonment plus mandatory litter pickup and removal. Payment is remitted to the chief financial officer of the municipality where the violation occurred.²⁴⁹

²⁴⁵ The term "litter" means any used or unconsumed substance or waste material which has been discarded whether made of aluminum, glass, plastic, rubber, paper, or other natural or synthetic material including any bottle, jar or can or a piece or part thereof; any cigarette, cigar, match or glowing material; any garbage, trash, refuse, debris, rubbish, grass clippings or other lawn or garden waste; newspapers or magazines; containers or other packaging; and construction material but not waste from primary mining processes, logging, sawmilling, farming, or manufacturing; *see* N.J. STAT. ANN. § 13:1E-94(d) (1991 & Supp. 2002).

²⁴⁶ N.J. STAT. ANN. § 13:1E-93 (1991).

²⁴⁷ N.J. STAT. ANN. §§ 13:1E-92 to 99.43 (1991 & Supp. 2002).

²⁴⁸ N.J. STAT. ANN. § 13:1E-99.2 (1991 & Supp. 2002).

²⁴⁹ N.J. STAT. ANN. § 13:1E-99.3 (1991 & Supp. 2002).

In an effort to reduce litter, the state enforces a law prohibiting metal beverage containers that have a detachable metal ring or tab unless it is constructed of tape, foil, or other soft material and a law prohibiting plastic devices that connect metal beverage containers that are not photodegradable.²⁵⁰

It is the state's position that establishing a mandatory statewide source separation and recycling program²⁵¹ plus increasing the purchase of recycled paper used by state agencies and government instrumentalities is in the public's best interest.²⁵²

3. New Jersey Scrap Automobile Tires

The determination of recommended disposal or recycling methods for scrap automobile tires rests solely upon the DEP. The DEP investigates various methods and makes a report to the governor and the legislature including a recommendation of a deposit imposed upon the tires if it is warranted by DEP findings.²⁵³

4. New Jersey Leaves and Vegetable Waste

Leaves collected by municipalities must be transported to leaf composting facilities. Vegetative waste must be transported to composting facilities or recycling centers authorized or approved by the DEP.

5. New Jersey Used Motor Oil

New Jersey imposes mandatory signage for persons that are selling or offering for sale any motor oil or lubricants in containers for off premise use.²⁵⁴ The state requires the conspicuous posting of a sign near the point of sale informing the public of the importance of proper collection and disposal of used oil plus how and where used oil may be properly disposed. These containers must be clearly marked or label as containing a material that can be recycled and must only be disposed after its use at a used oil collection center.²⁵⁵

²⁵⁰ N.J. STAT. ANN. § 13:1E-99.4 (1991).

²⁵¹ See New Jersey Statewide Mandatory Source Separation and Recycling Act N.J. STAT. ANN. §§ 13:1E-99.11 to 99.32 (1991 & Supp. 2002).

²⁵² N.J. STAT. ANN. § 13:1E-99.11 (1991 & Supp. 2002).

²⁵³ N.J. STAT. ANN. § 13:1E-99.20 (1991).

²⁵⁴ The person must sell more than five hundred (500) gallons of oil or lubricating oil for off the premise use for the requirement to apply.

²⁵⁵ N.J. STAT. ANN. § 13:1E-99.35 (1991 & Supp. 2002).

6. *New Jersey Used Lead Acid Batteries*

It is unlawful to dispose of used lead acid batteries as solid waste. Proper disposal requires delivery of a used lead acid battery to a:

- Retailer of lead acid batteries or a distributor or manufacturer engaged in wholesale sales of lead acid batteries;
- Secondary lead smelter;
- Scrap processing facility where used lead acid batteries are received, stored, processed, or transferred for the purpose of recycling; or
- Household hazardous waste collection site established pursuant to a county household waste collection program.²⁵⁶

Every retailer, including every distributor or manufacturer offering lead acid batteries for sale at wholesale, must accept used lead acid batteries from the public if the battery is offered in exchange related to the sale of a new lead acid battery.²⁵⁷

Every retailer of lead acid batteries must conspicuously post recycling signage near the point of sale giving notice to consumers that lead acid batteries can be recycled there and that it is illegal to discard an automotive or marine lead acid battery.²⁵⁸ The DEP addresses consumer complaints and administers a public education program regarding the proper disposal and recycling of lead acid batteries.²⁵⁹

B. *New Jersey Hazardous Waste Laws*

1. *New Jersey Hazardous Waste Policy*

The legislature declares that the proper treatment, storage, or disposal of hazardous waste generated in the state is now the exception rather than the rule and that improper treatment, storage, or disposal of hazardous waste results in substantial impairment of the environment and the public health. The legislature also declares that insuring the proper treatment, storage, or disposal of hazardous waste is a public purpose and in the best interests of all citizens and that the only way to accomplish this purpose is to provide for the siting, design, construction, operation, and use of environmentally acceptable major hazardous waste facilities. Because

²⁵⁶ N.J. STAT. ANN. § 13:1E-200 (1991).

²⁵⁷ N.J. STAT. ANN. § 13:1E-201 (1991).

²⁵⁸ N.J. STAT. ANN. § 13:1E-204 (1991).

²⁵⁹ N.J. STAT. ANN. § 13:1E-207 (1991).

certain environmentally sensitive areas must be preserved and excluded from consideration as sites for any major hazardous waste facilities because of the risk of irreversible ecological damage²⁶⁰ and because the risk is too great to be tolerated. Thus, the legislature declares that the choice of hazardous waste sites must not be indiscriminate nor illegal and that in order to carry out the best method for hazardous waste siting, there must be public participation as well as participation of elected and appointed officials at all levels of government to establish the proper mechanism for such facility siting. The legislature has established that these facilities must be located totally or partially above the ground in order to facilitate inspection and monitoring and that these facilities must be privately operated but subject to strict governmental regulation.²⁶¹

2. *New Jersey Major Hazardous Waste Facilities Siting Act*

Although the term solid waste within the SWMA was intended by the legislature to include hazardous waste,²⁶² the legislature determined that more precise legislation was needed to address the siting and inspection of major hazardous waste facilities²⁶³ for the protection of the environment and the best interests of the public. Thus, the Major Hazardous Waste Facilities Siting Act (MHWSA)²⁶⁴ was enacted.²⁶⁵ The purpose of the MHWSA is the protection of the environment and public health through the proper treatment, storage, or disposal of hazardous waste generated in the state of New Jersey and the maintenance of a proper balance between competing state and local interests.

The Hazardous Waste Facilities Siting Commission consists of nine (9) members who function within the executive branch of state government and independently within the DEP to act as an oversight body accessible to the public and to receive public comments regarding the siting of hazardous waste facilities.²⁶⁶

²⁶⁰ Despite the application of sound engineering practices.

²⁶¹ N.J. STAT. ANN. § 13:1E-50 (1991).

²⁶² The term “hazardous waste: means any waste or combination of wastes which poses a present or potential threat to human health, living organisms or the environment including waste material that is toxic, carcinogenic, corrosive, irritating, sensitizing, biologically infectious, explosive, or flammable plus any waste so designated by the EPA, but hazardous waste does not include radioactive waste; *see* N.J. STAT. ANN. § 13:1E-51(k) (1991 & Supp. 2002)

²⁶³ The term “major hazardous waste facility” means any commercial plant or other facility for the treatment, storage, or disposal of hazardous waste which has a total capacity of more than two hundred fifty thousand (250,000) tons of hazardous waste, but excluding recycling facilities of certain metals; *see* N.J. STAT. ANN. § 13:1E-51(l) (1991 & Supp. 2002).

²⁶⁴ N.J. STAT. ANN. §§ 13:1E-49 to 91 (1991 & Supp. 2002).

²⁶⁵ N.J. STAT. ANN. § 13:1E-49 (1991).

²⁶⁶ N.J. STAT. ANN. § 13:1E-52. 53 (1991 & Supp. 2002).

3. *New Jersey Hazardous Waste Advisory Council*

The Hazardous Waste Advisory Council consists of seventeen (17) members, including two (2) ex officio members of the state executive branch.²⁶⁷ The remaining fifteen (15) members are appointed by the governor with the advice and consent of the state senate. Council duties include:

- Advising the MHWSA commission concerning the preparation and adoption of the Major Hazardous Waste Facilities Plan, the site, and the implementation of the public information program;
- Advising the DEP on the preparation and adoption of siting criteria including applications for approval of registration statements and engineering designs for the facilities;
- Developing a protocol for the fiscal analysis and cleanup programs for hazardous waste facilities;
- Reviewing the cleanup program expenditures of the state program and making recommendations; and
- Reviewing all matters submitted by the MHWSA commission or the DEP for its comment and views.²⁶⁸

The advisory council may hold public meetings or hearings and review any matter relating to the siting, licensing, construction, operation, or closure of major hazardous waste facilities and make recommendations to the MHWSA commission or to the DEP as it deems appropriate. In carrying out its duties, the advisory council may avail itself of the services of state, county, and municipal employees, boards, commissions, or agencies as may be required for its purposes.²⁶⁹

The New Jersey Office of Management and Budget must annually conduct an analysis of the DEP's hazardous waste cleanup program to determine the most efficient use of funds. The state auditor reviews the cleanup program. The advisory council reviews the cleanup program and the state auditor's report regarding the clean up program and submits a report to appropriate legislative committees.²⁷⁰

²⁶⁷ The state auditor and the director of Office of Management and Budget within the Department of the Treasury.

²⁶⁸ N.J. STAT. ANN. §§ 13:1E-54, -55 (1991).

²⁶⁹ N.J. STAT. ANN. § 13:1E-56 (1991).

²⁷⁰ N.J. STAT. ANN. §§ 13:1E-55.1, 55.2 (1991).

With statutory guidance, the DEP in conjunction with the advisory council is responsible for establishing the criteria for the siting of new major hazardous waste facilities.²⁷¹

V. PESTICIDES AND CHEMIGATION

Producer Note: Use of pesticides and other farm chemicals is regulated by federal and state statutes plus most states have some form of pesticide licensing or certification requirements controlling those who use pesticides. Additionally, most states including New Jersey have laws that address safety concerns about pesticide use by agricultural employees or around agricultural employees.

A. New Jersey Pesticide Laws

1. *New Jersey Pesticide Control Act*

The Pesticide Control Act (PCA)²⁷² establishes regulation of pesticides by the DEP and a nine (9) member advisory Pesticide Control Council.²⁷³

a. *The Pesticide Control Council*

The Pesticide Control Council advises the DEP in matters relating to the control, regulation, and use of pesticides. It studies and considers any matter relating to the improvement of pesticide control programs including the use, application, and disposal of pesticides. The council also studies the state of the art and technical capabilities utilized in pesticide use and makes recommendations on its findings to the DEP. The council holds periodic public hearings concerning the use and application of pesticides in order to solicit new state of the art and technical capabilities utilized in pesticide use.²⁷⁴

²⁷¹ N.J. STAT. ANN. §§ 13:1E-57 to 62 (1991).

²⁷² N.J. STAT. ANN. §§ 13:1F-1 to 18 (1991 & Supp. 2002). The term “pesticide” means and includes any substance or mixture of substances labeled, designed, intended for or capable of use in preventing, destroying, repelling, sterilizing, or mitigating any insects, rodents, nematodes, predatory animals, fungi, weeds, and other forms of plant or animal life or viruses, except viruses on or in living man or other animals; the term “pesticides” includes any substance or mixture of substances labeled, designed, or intended for use as a defoliant, desiccant, or plant regulator; *see* N.J. STAT. ANN. § 13:1E-38(e) and N.J. STAT. ANN. § 13:1F-3(b) (1991 & Supp. 2002).

²⁷³ The council consists of the Secretary of Agriculture, Commissioner of Health, and the Dean of the College of Agriculture and Environmental Science of Rutgers, The State University, or their designees and six citizens representing the general public and appointed by the governor with at least one being a farmer, one being a toxicologist, and one being an ecologist; *see* N.J. STAT. ANN. § 13:1F-6 (1991).

²⁷⁴ N.J. STAT. ANN. §§ 13:1F-7, 8 (1991).

b. Legislative Considerations Regarding Pesticides

The legislature recognizes the importance of considering many factors with pesticides including any possibilities of disturbing natural ecological balance and long term effects on the environment as well as the safety and effectiveness of pesticides. Indiscriminate use of pesticides would constitute a serious threat to the environment. The DEP has authority to promulgate rules and regulations prohibiting, conditioning, and controlling the sale, purchase, transportation, labeling, use, and application of pesticides.²⁷⁵ Regarding its proposed rules and regulations, the DEP provides thirty (30) days notice and conducts public hearings as set forth in the Administrative Procedure Act²⁷⁶ before any rule or regulation may become effective.²⁷⁷

c. Pesticide Regulatory Authority

The DEP has the power to conduct and supervise research programs to identify the effects and hazards upon man and his environment when using and applying pesticides. The School of Agriculture of Rutgers utilized as a primary research source to assist DEP. The DEP is responsible for conducting and supervising statewide programs of pesticide control education including preparing and distributing information related to pesticide control.

The DEP is authorized to enter and inspect any building or place except private residences for the purpose of investigating an actual or suspected violation of law relating to pesticides to ascertain compliance or noncompliance with any rules, regulations, or orders of the DEP. The DEP also:

- Receives or initiates complaints of violations of applicable pesticide laws, rules, regulations, and orders;
- Institutes legal proceedings for the prevention of violations and the recovery of penalties;
- Utilizes any federal, state, local, or private funds for the study and control of pesticides;
- Sets forth any form of plant or animal life or virus which is injurious to plants, man, domestic animal, article, or substance in New Jersey as a pest;
- Determines whether pesticides are highly toxic to man;

²⁷⁵ N.J. STAT. ANN. §§ 13:1F-2, 4 (1991).

²⁷⁶ N.J. STAT. ANN. §§ 52:14B-1 *et seq.* (2001 & Supp. 2002).

²⁷⁷ N.J. STAT. ANN. § 13:1F-5 (1991).

- Determines the standards of coloring or discoloring for pesticides;
- Regulates embargoed or detained pesticides;
- Cooperates with other state and federal agencies for the purpose of carrying out the provisions of the PCA and achieving uniformity of regulations to avoid confusion and endangering the public's health particularly with regard to the labeling and coloring of pesticides and to avoid increased costs due to the necessity of complying with diverse requirements in the manufacture and sale of pesticides; and
- Charges fees that reflect the actual or projected expenses incurred by the DEP for any services it performs.²⁷⁸

d. Pesticide Control Violations

The DEP is authorized to institute a civil action in a court of competent jurisdiction for injunctive relief to prohibit and prevent pesticide control violations, and the court is allowed to conduct the proceedings in a summary manner. Violators are subject to civil penalties up to three thousand dollars (\$3,000.00) for each offense. If the violation is of a continuing nature, each day constitutes a separate and distinct offense. The DEP, however, is authorized to compromise and settle any claim involving a penalty in its discretion according to what is appropriate and equitable under all of the circumstances.²⁷⁹

e. Detained Pesticides

If the DEP or its agent has probable cause to believe that any pesticide is being sold, labeled, used, or applied in violation of the PCA or any of its related provisions, a tag or other appropriate marking that give notice that the pesticide is detained or embargoed may be attached to the pesticide. Once attached, the notice warns that the pesticide may not be removed, disposed, or used without DEP permission.²⁸⁰

f. Local Pesticide Regulation

Although the PCA does not preclude the right of any governing body of a municipality or county or board of health to adopt ordinances more stringent than the PCA, the PCA requires that the ordinances have DEP approval.²⁸¹

²⁷⁸ N.J. STAT. ANN. § 13:1F-9 (1991).

²⁷⁹ N.J. STAT. ANN. § 13:1F-10 (1991).

²⁸⁰ N.J. STAT. ANN. § 13:1F-11 (1991).

²⁸¹ N.J. STAT. ANN. § 13:1F-13 (1991).

g. Pesticide Registration

Every pesticide which is held, used, distributed, sold, or offered for sale within the state or delivered for transportation or transported in intrastate commerce or between points within the state through any point outside the state must be registered annually with the DEP. Registrations expire each year on December 31 unless they are renewed for one (1) additional year except when otherwise terminated. Registration of the pesticide may require revealing the complete pesticide formula and any other information the DEP deems may be necessary to enforce the PCA. When the DEP determines that the pesticide appears not to meet its proposed claims or labeling, the registrant must be notified of the deficiencies and given the opportunity to make the necessary corrections in order to comply. The DEP denies registration if compliance is not accomplished.²⁸²

The DEP may refuse to register a pesticide or cancel the registration of a pesticide upon satisfactory proof that the registrant is guilty of fraudulent and deceptive practices in evasion or attempted evasion of the PCA and its related provisions; however, the registrant must first be given a hearing before the DEP.²⁸³

A pesticide within intrastate commerce or within points within the state from any point outside the state may be impounded by DEP order if it is in violation of the PCA or any of its related provisions. Any person aggrieved by such order must be granted a hearing provided the aggrieved person applies for the hearing within fifteen (15) days after the issuance of the DEP order. After such hearing, it appears to the DEP that the pesticide was offered or exposed for sale, or intended for distribution or sale in violation of the PCA and its related provisions, the pesticide must be confiscated and disposed by destruction or sale as the court or judge may direct provided the sale is not contrary to the PCA. If the seized pesticide is of such character that when it is properly marked or branded its sale or distribution is not prohibited by the PCA, the pesticide must be delivered to the owner following the payment of the costs of the proceeding and delivery of a bond the DEP in an amount sufficient to the effect that it will not be sold or disposed contrary to the PCA or any laws of any state, territory, district, or the United States.²⁸⁴

The PCA does not restrict or prohibit sales or exchanges of pesticides between importers, manufacturers, or manipulators who mix pesticide materials for sale or prevent the free and unrestricted shipment of pesticides to manufacturers or manipulators who have registered their brands as required by the PCA.²⁸⁵

²⁸² N.J. STAT. ANN. §§ 13:1F-15(a - d) (1991).

²⁸³ N.J. STAT. ANN. § 13:1F-15(e) (1991).

²⁸⁴ N.J. STAT. ANN. § 13:1F-16 (1991).

²⁸⁵ N.J. STAT. ANN. § 13:1F-15(f) (1991).

h. Agricultural or Horticultural Exemption from Registration Fee

An exemption to the imposition of an annual registration fee charged to private pesticide applicators applies to any farmer certified as private applicators or to any certified private applicator who applies a pesticide on property or premises they own or rent provided the property or premises owned or rented are actively devoted to an agricultural or horticultural use.²⁸⁶ The term “land actively devoted to agricultural or horticultural use” means land, not less than three (3) acres, which is devoted to:

- In the case of agricultural use, the production of plants and animals useful to man offered for sale including forages and sod crops; grains and feed crops; dairy animals and dairy products; poultry and poultry products; livestock including beef cattle, sheep, swine, horses, ponies, mules, or goats for breeding or grazing of any or all such animals; bees and apiary products; fur animals; trees and forest products; or land devoted to and meeting the requirements and qualifications for payments or other compensation pursuant to a soil conservation program under an agreement with a federal government agency; and
- In the case of horticultural use, the production of fruits of all kinds including grapes, nuts, berries; vegetables; nursery, floral, ornamental, and greenhouse products; or land devoted to and meeting the requirements and qualifications for payments or other compensation pursuant to a soil conservation program under an agreement with a federal government agency.²⁸⁷

VI. PROTECTION OF WILDLIFE

Producer Note: Agricultural producers have responsibilities concerning wildlife and migratory birds which may have habitat on the producer's property. Federal and state laws contain measures designed to protect or enhance wildlife and wildlife habitat.

Producer Note: Many states have laws and regulations that either enhance the protections under federal laws or address issues peculiar to wildlife found within the state. States also may address frequent problems caused by wildlife. New Jersey has laws and regulations protecting wildlife.

²⁸⁶ N.J. STAT. ANN. § 13:1F-17 (1991).

²⁸⁷ N.J. STAT. ANN. § 13:1F-18 (1991).

A. New Jersey Wildlife Laws

1. New Jersey Wildlife Policy

Regarding wildlife²⁸⁸ and endangered species,²⁸⁹ it is the policy of the state of New Jersey:

- To manage all forms of wildlife to insure their continued existence and participation in the ecosystem;
- To accord special protection to species or subspecies of wildlife indigenous to the state which may be found to be endangered in order to maintain and enhance their numbers; and
- To assist in the protection of wildlife which are deemed to be endangered elsewhere by regulating their taking,²⁹⁰ possession, transportation, exportation, processing, sale, offering for sale, or shipment.²⁹¹

2. New Jersey Endangered Species Act

a. Wildlife Sustainability

Under the state's Endangered Species Act (ESA),²⁹² the DEP is charged with conducting investigations concerning wildlife in order to develop information relating to populations, distribution, habitat needs, limiting factors, and other biological and ecological data to determine management measures necessary for wildlife to continue to sustain themselves successfully. On the basis of these investigations, the DEP is charged with designing and developing these management programs.²⁹³

²⁸⁸ The term "wildlife" means any wild mammal, bird, reptile, amphibian, fish, mollusk, crustacean, or other wild animal or any part, product, egg or offspring, or the dead body or parts of such; *see* N.J. STAT. ANN. § 23:2A-3(f) (1997).

²⁸⁹ The term "endangered species" means any wildlife whose prospects of survival or recruitment are in jeopardy or are, within the foreseeable future, likely to become endangered due to any of the following factors: the destruction, drastic modification, or severe curtailment of its habitat; its over-utilization for scientific, commercial, or sporting purposes; the effects of disease, pollution, or predation; other natural or manmade factors affecting its prospects of survival or recruitment within the state; or any combination of the foregoing factors; the term also includes any wildlife appearing on any federal endangered species list; *see* N.J. STAT. ANN. § 23:2A-3(c) (1997).

²⁹⁰ The term "taking" means harassing, hunting, capturing, killing, or attempting to harass, hunt, capture, or kill wildlife; *see* N.J. STAT. ANN. § 23:2A-3(e) (1997).

²⁹¹ N.J. STAT. ANN. § 23:2A-2(a) (1997).

²⁹² N.J. STAT. ANN. §§ 23:2A-1 to 13 (1997).

²⁹³ N.J. STAT. ANN. § 23:2A-4(a) (1997).

b. State List of Endangered Species

Using DEP studies of wildlife as well as other available scientific and commercial data, the DEP is authorized to promulgate regulations that comprise a list of wildlife species and subspecies of wildlife indigenous to the state which are determined to be endangered. In compiling the state list of endangered species, the DEP provides both the common and scientific names by species and subspecies. The DEP periodically reviews the state list of endangered species and may by regulation amend the list making any additions or deletions as are deemed appropriate.²⁹⁴

c. DEP Duties and Authority

Under the state's ESA, the DEP is authorized to:

- Formulate and promulgate, adopt, amend, and repeal rules and regulations limiting, controlling, and prohibiting the taking, possession, transportation, exportation, sale, offering for sale, or shipment of any nongame species²⁹⁵ or any wildlife on the endangered species list;²⁹⁶
- Conduct periodic inspections in order to determine compliance with wildlife rules and regulations;
- Charge and collect fees in an amount sufficient to cover the costs of the inspections and services performed;²⁹⁷
- Establish conservation and management programs including acquisition of land or aquatic habitats for nongame and endangered species of wildlife;²⁹⁸
- Appoint a committee of experts including persons actively involved in the conservation of wildlife to advise and assist the DEP in carrying out the intent of the ESA.²⁹⁹

²⁹⁴ N.J. STAT. ANN. § 23:2A-4(b) (1997).

²⁹⁵ The term "nongame species" means any wildlife for which a legal hunting or trapping season has not been established or which has not been classified as an endangered species by statute or regulation of the state; *see* N.J. STAT. ANN. § 23:2A-3(d) (1997).

²⁹⁶ N.J. STAT. ANN. § 23:2A-5(a) (1997).

²⁹⁷ N.J. STAT. ANN. § 23:2A-5(b) (1997).

²⁹⁸ N.J. STAT. ANN. § 23:2A-7(a) (1997).

²⁹⁹ N.J. STAT. ANN. § 23:2A-7(e) (1997).

d. Wildlife Violations

It is unlawful to take, possess, transport, export, process, sell, offer for sale, ship, transport, or receive any species or subspecies of wildlife appearing on the state list of endangered wildlife, the state list of nongame species, and any federal list of endangered species.³⁰⁰ However, the DEP has authority to allow the taking, possession, transportation, exportation, or shipment of nongame species and wildlife on the state list of endangered species for scientific, zoological, or educational purposes, for propagation in captivity of such wildlife, or for other special purposes.³⁰¹

It is also unlawful for any person to obstruct, hinder, delay, or interfere with the work of the DEP or any of its personnel under the provisions of the state's ESA or refuse to allow DEP personnel to perform their duties by refusing them entrance to any premises after presentation of proper identification or a written DEP order.³⁰²

Whenever the DEP has cause to believe that any person is violating the state's ESA or any of its related provisions, the DEP must promptly investigate the matter.³⁰³ A violation of the ESA or any of its related rules, regulations, or orders provides grounds for the DEP to institute a civil action in a court of competent jurisdiction for injunctive relief to prohibit and prevent the violation. In these instances, the court is allowed to proceed in a summary manner.³⁰⁴ Violators are subject to civil penalties up to five thousand dollars (\$5,000.00) for each offense, and if the violation is one of a continuing nature, each day constitutes a separate and distinct offense.³⁰⁵ However, the DEP is authorized to compromise and settle penalties in an amount that appears to the DEP to be appropriate and equitable under all of the circumstances.³⁰⁶

³⁰⁰ However, any species or subspecies of wildlife appearing on any of the foregoing lists which enters the state from another state or from a point outside the United States which is transported across the state destined for a point beyond the state may be transported without restriction in accordance with the terms of any federal permit or permit issued under the laws or regulations of another state; *see* N.J. STAT. ANN. § 23:2A-6 (1997).

³⁰¹ N.J. STAT. ANN. § 23:2A-7(d) (1997).

³⁰² N.J. STAT. ANN. § 23:2A-8 (1997).

³⁰³ N.J. STAT. ANN. § 23:2A-9 (1997).

³⁰⁴ N.J. STAT. ANN. § 23:2A-10(a) (1997).

³⁰⁵ N.J. STAT. ANN. § 23:2A-10(b) (1997).

³⁰⁶ N.J. STAT. ANN. § 23:2A-10(c) (1997).

VII. OTHER NEW JERSEY STATUTES AFFECTING AGRICULTURE

Producer Note: Many other state statutes have the potential of impacting agricultural operations and their relationship to the environment. The following is a brief discussion of some of these state laws in New Jersey.

A. New Jersey Right to Farm Act

Due to urban growth and development, agricultural activities³⁰⁷ are increasingly the source of nuisance complaints as urban dwellers often live very near or adjacent to commercial agricultural industry. Nuisance claims are often based upon the following alleged objectionable activities:

- Odor from livestock, manure, fertilizer, or feed;
- Noise from livestock or farm equipment used in normal, generally acceptable farming procedures;
- Dust created during plowing or cultivation operations; and
- Use of chemicals when the chemicals and the method of their application conform to practices approved by the DEP.

In New Jersey, the state's Right to Farm Act (RTFA)³⁰⁸ provides agricultural producers some protection against nuisance claims. The agricultural or farming operation is irrefutably presumed not to constitute a private nuisance or a public nuisance when a commercial farm operation,³⁰⁹ establishment, or facility:

³⁰⁷ Agricultural activities includes production of agricultural and horticultural crops, trees, forest products, livestock, poultry, and other commodities as described in the Standard Industrial Classification for agriculture, forestry, fishing, and trapping; processing and packaging the agricultural output of the commercial farm; activities associated with the operation of a farm market including the construction of buildings and parking areas that are in conformance with municipal standards; replenishing soil nutrients and improving soil tilth; controlling pests, predators, and diseases of plants and animals; clearing woodlands utilizing open burning and other techniques; installing and maintaining vegetative and terrain alterations plus other physical facilities for water and soil conservation including surface water control in wetland areas; conducting on-site disposal of organic agricultural wastes; conducting agriculture-related educational and farm-based recreational activities provided that the activities are related to marketing the agricultural or horticultural output of the commercial farm; and engaging in any other agricultural activity as determined by the State Agricultural Development Committee (SADC); *see* N.J. STAT. ANN. § 4:1C-9 (1998 & Supp. 2002).

³⁰⁸ N.J. STAT. ANN. §§ 4:1C-1 to 10 (1998 & Supp. 2002).

³⁰⁹ The term "commercial farm" means (1) a farm management unit of no less than five (5) acres producing agricultural or horticultural products worth two thousand five hundred dollars (\$2,500.00) or more annually, and satisfying the eligibility criteria for differential property taxation pursuant to the Farmland Assessment Act of 1964, N.J.

- Follows generally accepted agricultural practices;³¹⁰
- Is in compliance with federal and state laws; and
- Operates where agriculture is a permitted use under municipal ordinances or has been operating since December 31, 1997.³¹¹

The RTFA does not apply nor provide protection when there is a threat to public health or safety.³¹²

The State Agricultural Development Committee (SADC) is created by the RTFA. The SADC functions within the DOAg although the SDAC is independent of any supervision or control by the State Board of Agriculture or by the DOAg. The SDAC consists of eleven (11) members; five ex officio members include the state’s secretary of agriculture, the commissioners of the DEP, the DCA, the state treasurer, and the dean of Cook College, Rutgers University, or their designees plus four individuals that represent active farming and farmland ownership and two citizens that represent the general public; all SADC members are appointed by the governor with the advice and consent of the Senate. Duties of the SADC include:

- Considering any matter relating to the improvement of farm management practices;
- Reviewing and evaluating the proposed rules, regulations, and guidelines of any state agency in terms of feasibility, effect, and conformance with the intentions and provisions of the RTFA;
- Studying and developing agricultural management practices regarding air and water quality control, noise control, pesticide control, fertilizer application, integrated pest management, and labor practices and recommending these agricultural management practices to the appropriate state departments and agencies;

STAT. ANN. §§ 54:4C-23.1 *et seq.*, or (2) a farm management unit less than five acres, producing agricultural or horticultural products worth fifty thousand dollars (\$50,000.00) or more annually and otherwise satisfying the eligibility criteria for differential property taxation pursuant to the Farmland Assessment Act of 1964; the term “farm management unit” means a parcel or parcels of land, whether contiguous or noncontiguous, together with agricultural or horticultural buildings, structures, and facilities producing agricultural or horticultural products and operating as a single enterprise; *see* N.J. STAT. ANN. § 4:1C-3 (1998 & Supp. 2002).

³¹⁰ As recommended by the State Agricultural Development Committee (SADC) ; *see* N.J. STAT. ANN. § 4:1C-4(a) (1998).

³¹¹ N.J. STAT. ANN. § 4:1C-10 (1998 & Supp. 2002).

³¹² N.J. STAT. ANN. § 4:1C-10 (1998 & Supp. 2002).

- Negotiating and mediating any conflict between the regulatory practices of any state instrumentality and the agricultural management practices recommended by the SADC;
- Recommending to the governor, the legislature, and appropriate state departments and agencies any actions which should be taken to provide a proper balance among the varied and sometimes conflicting interests of all lawful activities in the state; and
- Minimizing unnecessary constraints on essential agricultural activities while also considering and promoting the public's health, safety, and welfare.³¹³

The SADC establishes guidelines and criteria for identification of agricultural lands suitable for inclusion in agricultural development areas as well as lands suitable for funding within the farmland preservation program.³¹⁴

The SADC reviews state programs, proposals, and plans plus other public or private actions which would adversely affect the continuation of agriculture as a viable use of the land in agricultural development areas and recommends any administrative action, executive orders, or legislative remedies which may be appropriate to lessen any adverse effects.³¹⁵ The SADC reviews and approves all applications for funds pursuant to the RTFA and, generally, acts as an advocate and promotes the interests of productive agriculture and farmland retention.³¹⁶ Complaints regarding commercial agricultural operations are submitted to the SADC.³¹⁷

B. New Jersey Noise Control Act

The state of New Jersey enacted the Noise Control Act (NCA)³¹⁸ to control and abate noise. The NCA empowers the DEP to promulgate codes, rules, and regulations to administer and enforce the NCA provisions. The legislative position is that the people of the state are entitled to an environment free from noise which unnecessarily degrades the quality of life and

³¹³ N.J. STAT. ANN. § 4:1C-6 (1998).

³¹⁴ N.J. STAT. ANN. § 4:1C-7(a) (1998).

³¹⁵ N.J. STAT. ANN. § 4:1C-7(c) (1998).

³¹⁶ N.J. STAT. ANN. §§ 4:1C-7(e - f) (1998).

³¹⁷ N.J. STAT. ANN. § 4:1C-10.1(c) (1998 & Supp. 2002).

³¹⁸ N.J. STAT. ANN. §§ 13:1G-1 to 23 (1991 & Supp. 2002).

that the levels of noise in the state have reached the point to cause endangerment to the health, safety, and welfare of the people and the integrity of the environment.³¹⁹

A Noise Control Council³²⁰ is created by the NCA to consider any matter relating to the preservation, administration, and improvement of the noise control program and advise the DEP. The thirteen (13) member council makes recommendations to the DEP following its study and investigation of the state of the art and technical capabilities of noise control including long range technical support. The council holds public hearings at least once a year to allow public comment upon the noise control provisions and the technical capabilities of noise control. Procedurally, the council has veto power over any noise control code, rule, or regulation the DEP promulgates, adopts, or repeals.³²¹

The NCA gives the DEP the authority to address:

- Antidegradation provisions to prevent noisemakers from raising their noise output to the maximum allowable limit;
- Curfew provisions during particular hours or days;
- Spill-over provisions to prevent noise that spills over a property line;
- Zonal provisions that restrict noise to specified areas;
- Accessory provisions that prohibit use of vehicles or machines without quieting devices such as mufflers, insulation, or isolators; and
- License and permit provisions which require compliance in order to install or operate machinery known to emit obtrusive noise.³²²

The DEP also has the authority to require registration of persons involved in operations which may result in noise and to charge a registration fee up to two hundred fifty dollars (\$250.00). The DEP may enter and inspect any building or place except private residences for the purpose of investigating a source of noise or to ascertain compliance or noncompliance. If

³¹⁹ N.J. STAT. ANN. § 13:1G-2 (1991).

³²⁰ The Noise Control Council consists of four (4) ex officio members, the commissioners of the DCA, DHSS, Department of Labor and Industry, and the director of the Division of Motor Vehicles or their designees plus nine (9) members of the public appointed by the governor, one (1) of each being a medical doctor, an industrialist, an ecologist, a civil engineer, and a member of a local governmental body plus five (5) other citizens; *see* N.J. STAT. ANN. § 13:1G-17 (1991).

³²¹ N.J. STAT. ANN. §§ 13:1G-18, 19 (1991).

³²² N.J. STAT. ANN. § 13:1G-4 (1991).

tests are made to determine whether or not a violation has occurred, a duplicate of the test results is provided to the suspected violator. With regard to noise issues, the DEP receives and initiates complaints, holds hearings, and institutes legal proceedings for the prevention of noise and the recovery of penalties imposed upon violators of the NCA.³²³

When the DEP discovers or determines that a violation of the NCA has occurred, it may order the violation to cease and take any necessary steps to enforce the order. The order must state the items which are in violation and provide a reasonable specified time within which to cease the violation. Any person aggrieved by a DEP order is entitled to a hearing provided the hearing is requested within fifteen (15) days following the notice or order of violation. Within thirty (30) days following the hearing, the DEP must issue an appropriate final order that modifies, approves, or disapproves its prior order. A copy of the final order is served upon the alleged violator. Any testimony taken at the hearing is under oath and recorded stenographically; however, the parties are not bound by the strict rules of evidence prevailing in the courts of law and equity. Copies of any transcript and of any other record made at a hearing must be furnished to any party upon the party's request but at the party's expense. The hearing is before the DEP by one who has power to subpoena witnesses and compel their attendance, administer oaths and require the production of any documents related to the matter under investigation.³²⁴

The DEP also has authority to institute an action in a court of competent jurisdiction for injunctive relief to prohibit and prevent violations, and the court may proceed in a summary manner in the action. A violation of the NCA subjects the violator to a penalty up to three thousand dollars (\$3,000.00) for each offense. If the violation is one of a continuing nature, each day is constitutes a separate and distinct offense. Nonetheless, at the discretion of the DEP, the DEP is authorized to compromise and settle any claim regarding the imposed penalty in an amount that is appropriate and equitable.³²⁵

³²³ N.J. STAT. ANN. § 13:1G-5 (1991). The DEP consults with the Division of Motor Vehicles when promulgating, adopting, and repealing codes, rules, and regulations or when establishing standards and requirements for noise control from motor vehicles; *see* N.J. STAT. ANN. §§ 13:1G-6, 8 (1991). Operating a motor vehicle upon public highways that causes noise in excess of established standards subjects the operator to penalties up to one thousand dollars (\$1,000.00); *see* N.J. STAT. ANN. § 13:1G-9 (1991). The DEP cooperates with the DCA, DHSS, DOAg, Department of Labor and Industry, and Department of Transportation plus the Federal Aviation Administration and any other appropriate governmental agency when promulgating codes, rules, and regulations; *see* N.J. STAT. ANN. § 13:1G-16 (1991).

³²⁴ N.J. STAT. ANN. §§ 13:1G-11 to 13 (1991).

³²⁵ N.J. STAT. ANN. § 13:1G-14 (1991).

Appendix A - Agencies

Producer Note: State and federal agencies are available to answer questions regarding environmental matters and a producer's compliance with environmental laws and regulations. The following is a list of agencies which should be able to answer questions or provide materials for a producer.

State Agencies:

Department of Agriculture (DOAg)

John Fitch Plaza

P. O. Box 330

Trenton, NJ 08625

(609) 292-8896 Main

(609) 292-3978 fax

<http://www.state.nj.us/agriculture/>

(5 Divisions within DOAg)

Division of Animal Health (609) 292-3956

Division of Agriculture and Natural

Resources (609) 292-5532

Division of Marketing and Development

(609) 292-5536

Division of Food and Nutrition

(609) 984-0672

Division of Plant Industry (609) 292-5440

Committees

State Agriculture Development Committee

(609) 984-2504

State Soil Conservation Committee

(609) 292-5540

Attorney General (AG)

25 Market Street or

P. O. Box 81

Trenton, NJ 08625-0081

(609) 292-8740

(609) 292-3508 fax

<http://www.state.nj.us/lps/oag>

(1 Section within AG)

Environmental Protection

(609) 292-1566

Department of Community Affairs (DCA)

101 South Broad Street, 6th Floor or

P. O. Box 800

Trenton, NJ 08625-0800

(609) 292-6420

(609) 984-6696 fax

<http://www.state.nj.us/dca/>

(2 Divisions within DCA)

Division of Codes & Standards

(609) 292-7899

Division of Local Government Services

(609) 292-6126

Commerce & Economic Growth Commission (CEGC)

20 West State Street or

P.O. Box 820

Trenton, NJ 08625-0820

(609) 777-0885

(609) 633-7365 fax

<http://www.state.nj.us/commerce/>

Department of Environmental Protection (DEP)

401 East State Street

P. O. Box 402

Trenton, NJ 08625

(609) 777-DEP3 (3373) General Information

(877) WARN DEP 24-hr. Hotline, All Complaints, Spills

(609) 292-2885

(609) 292-7695 fax

<http://www.state.nj.us/dep/>

(22 Areas within DEP)

Air & Environmental Enforcement

(609) 633-7288

Air Quality Management

(609) 292-6710

Air Quality Permitting Program

(609) 984-6721

Division of Environmental Safety, Health, &
Analytical Programs

(609) 633-7964

Division of Fish and Wildlife

(609) 292-2965

Division Parks and Forestry

(609) 292-2733
Division of Science and Research
(609) 984-6071
Division of Solid & Hazardous Waste
(609) 984-6880 General
(609) 984-6874 Fax
(609) 984-5950 Permitting & Technical
(609) 633-1418 Regulation
www.state.nj.us/dep/dshw/
Division of Water Quality
(609) 292-4543 General
(609) 984-7938 Fax
www.state.nj.us/dep/dwq/
Division of Watershed Management
(609) 984-0058
Endangered & Nongame Species
(609) 292-9400 or 984-1015
Environmental Regulation
(609) 292-2795
Fish, Game & Wildlife
(609) 292-2965
Forest Service
(609) 292-2531
Groundwater
(609) 633-7021
Hazardous Waste Regulation
(609) 984-7081
Land Use Management
(609) 292-1932
Natural and Historic Resources
(609) 292-3541
Pesticide Control
(609) 984-2011
Recycling & Planning
(609) 984-3438
Wildlife Management
(609) 292-6685
Well Drillers & Pump Installers
(609) 777-1013 or 984-6831

(7 Related Areas)
Above Ground Storage Tanks
(609) 633-0610
Safe Drinking Water
(609) 292-5550
Surface Water Discharge Permits
(609) 292-4543
Surface Water Quality Standards
(609) 633-7020

Underground Storage Tank Certifications
(609) 777-1013
Water Enforcement
(609) 984-5855
Wetlands
(609) 292-1235

Councils
Clean Air Council
(609) 292-1254
Clean Water Council
(609) 984-0058

Department of Health and Senior Services (DHSS)

P. O. Box 360
Trenton, NJ 08625-0360
(609) 530-2000
(609) 984-5474 fax
<http://www.state.nj.us/health/>
(2 Divisions within DHSS)
Environmental & Occupational Health
(609) 588-7463
Public Health & Environmental Lab
(609) 292-5605

Council & Board
Public Health Council
(609) 292-9382
State Health Planning Board
(609) 292-9382

Department of Labor

P. O. Box 110
Trenton, NJ 08625-0110
(609) 292-2121 General Information
(609) 292-4214 fax
<http://www.state.nj.us/labor>