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Attention: DEP Docket Number 03-24-04
Office of Legal Affairs
Department of Environmental Protection
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**RE: Proposed New Rules: N.J.A.C. 7:1E-1.12, 3.5, and 4.12
PRN 2024 – 062**

I am submitting these comments on behalf of the New Jersey Business & Industry Association. NJBIA is the state's largest association representing businesses in New Jersey. Many of our members are or will be subject to these rules.

As a general proposition, NJBIA supports laws that help prevent environmental catastrophes, such as the Discharge Prevention, Containment and Countermeasure (DPCC) law and implementing regulations, and that ensure appropriate cleanups are taken when a discharge occurs.

We appreciate the Department's longstanding implementation of the DPCC program and its interest in ensuring that major facilities subject to these regulations are operated properly and safely. At the same time, we are always cautious to ensure that the Department, or any other governmental agency, does not impose regulatory requirements that are not necessary, duplicative, or that impose undue burdens and costs on the regulated community.

It is with this lens that we offer these comments on the proposal.

Proposed Appendix A Listings are Unwarranted and Introduce Uncertainty.

The Department proposes to add 263 additional chemical substances or categories to the Appendix A list of chemicals subject to the Department's discharge prevention, containment, and countermeasure plan (DPCC) and discharge cleanup and removal plan (DCR) regulations. Appendix A already includes 1,700 substances, an extraordinarily long and comprehensive list of chemicals to cover by such a complex and detailed regulation. Of the 263 additional substances, 159 are perfluorinated alkyl substances (PFAS) and as contemplated by the rule would be defaulted to the list because they have been added to Environmental Protection Agency's list of reportable substances under Toxic Release Inventory (TRI) regulations. But the purpose and intent behind TRI regulations is not the same as New Jersey's DPCC/DCR regulations. The TRI is a publicly available database containing information characterizing possible releases of toxic substances. Data used to quantify releases reported to TRI are often speculative or inaccurate.

The Department's DPCC/DCR regulations require highly specific and detailed information about each regulated substance's chemical hazards, human toxicity, toxicity to terrestrial and aquatic organisms, environmental fate and transport, physical and chemical properties, and

other considerations. Such information simply does not exist for the vast majority of the 263 additional substances, including the 159 PFAS substances. Absent this information, the Department does not have an appropriate basis for listing these additional substances.

NJBIA recommends the Department reevaluate the list of additional substances, and list only those for which detailed chemical hazard, toxicity, physical/chemical property, and environmental fate and transport data exist and are widely available.

The Climate Resiliency Plan Requirements Are Largely Unnecessary, Are Overly Burdensome, and Will Create Confusion

It is appropriate for discharge prevention, containment and countermeasure plans to consider the potential for extreme weather events and other natural disasters. New Jersey, as a coastal state, has and will always be vulnerable to nor'easters, hurricanes, severe rainstorms, and flooding. This is nothing new.

In fact, the existing DPCC planning and construction rules already account for extreme weather events. Plans must consider flood hazard areas and ensure that the facilities are adequately protected from flood waters and washouts. Existing N.J.A.C. 7:1E-2.9 provides that hazardous substances stored within a FEMA mapped floodplain "shall be adequately protected so as to prevent such hazardous substances from being carried off by or being discharged into flood waters."

Construction and maintenance standards for tanks, pipes, spillover areas and other buildings and equipment already consider the possibility of tropical storm winds, flooding, and other extreme weather. These standards have proved more than adequate given the minor number of any major spills from these facilities since the DPCC rules have been in place. Where there have been spills, such as during Superstorm Sandy, adequate plans were in place to contain and mitigate those discharges.

We do not object if the Department, in looking at construction and other standards, were to determine that they needed to be clarified or, with justification, strengthened. We do not object to specifically requiring major facilities to be aware of sea level rise in their longer-term planning. However, what the Department proposes is using the uncertainty of potential long-term changes to weather systems to jimmy rig reference to climate change to seem responsive to a perceived problem.

In the first instance, climate or climate change does not cause extreme weather. To cite the International Panel on Climate Change (IPCCC):

In a narrow sense, climate is usually defined as the average weather, or more rigorously as the statistical description in terms of the mean and variability of relevant quantities over a period of time ranging from months to thousands or millions of years. The classical period for averaging these variables is 30 years, as defined by the World Meteorological Organization (WMO). The relevant quantities are most often surface variables such as temperature, precipitation and wind. Climate in a wider sense is the state, including a statistical description, of the climate system.

Similarly, climate change is also a reference to a statistical representation of changes to those systems. Again, the IPCC considers climate change as:

A change in the state of the climate that can be identified (*e.g.*, by using statistical tests) by changes in the mean and/or the variability of its properties and that persists for an extended period, typically decades or longer. Climate change may be due to natural internal processes or external forcings such as modulations of the solar cycles, volcanic eruptions and persistent anthropogenic changes in the composition of the atmosphere or in land use.

We raise these technical definitions from the IPCC, not to show that extreme weather is not changing or not a concern, but because it is important, especially for a governmental scientific agency such as the Department, to use correct terminology to describe its actions and intent. We should be referencing potential changes to extreme weather as a concern, not climate change which is merely the statistical documentation of any changes.

More significantly, despite the references to the Department's website and previous published documents, there is no consensus on whether extreme weather, especially the frequency or strength of hurricanes, will increase in the near future. The IPCC is not predicting an increase in either the frequency or severity of tropical cyclones. Even the STAP Report, which the Department relies on heavily in another upcoming proposed rule states: "Future changes in the frequency, intensity (wind speed), precipitation rate, and tracks of extratropical storms remain an area of active research, and the STAP concluded there is *no definitive consensus* regarding such changes at this time." (emphasis added)

The IPCC has not identified any worldwide statistical detection in tropical storm frequency or severity outside the anticipated range of natural variability. This is key because we know that the frequency and strength of hurricanes and other weather events vary widely, as they have historically. Knowing this, we should prepare accordingly. Labeling such variances "climate change" does nothing to further facilitate protection or the appreciation of risk. What it does is to confuse the matter by requiring searches in various scientific documents to address a problem for which we already have concrete data of risks and impacts.

Given the uncertainty of the world community on the future impact of hurricanes, it will be confusing to require major facilities to plan for "the effects of climate change." It would be much simpler, and more accurate, if the Department required plans to prepare for hurricanes with a certain wind speed, duration, and flooding likelihood. Such definitive statements of impacts to prepare for would avoid the expensive exercise of hiring experts to pore through the Department's documents, search the scientific literature for potential changes in extreme weather, and then propose plans to address what there is no certainty about. We know that New Jersey has suffered through major storms as evidenced by the history of such storms over the last 150 years (the Department can easily Google the history of major storms impacting New Jersey to give it an understanding of the risks these facilities face). We know, with statistical certainty, that such storms are likely to happen again. We can, and should, prepare for these types of extreme weather.

It also makes very little sense to have facilities prepare plans and detail mitigation measures for sea level rise scenarios to the year 2100 for 1, 2.5, 4, and 7 feet above sea level increases from the base year 2000. We can and will (in the PACT REAL rule comments) have a longer response on the potential and likelihood of sea level rise by the year 2100. However, no matter what is likely to happen to sea level rise, it is a slow creep. We know that New Jersey has been "sinking" for

thousands of years coming out of the last glacial era. We know that this sinking will continue for thousands of years into the future. This amounts to about 1 foot per century. It is constant, and slow. Sea level is also rising due to a warming ocean. This rise is also slow, about 2 mm per year, the equivalent of two pennies stacked together. Whether this relative sea level rise will accelerate is the subject of further discussion, but not even the Department predicts it will accelerate until after 2050.

Since DPCC plans will be renewed every five years (three years under the existing rules), what is gained from having plans predict and plan for SLR over the next 75 years? What is the benefit of using SLR levels that are not likely or even not plausible?

We do very well in measuring the actual increase in relative SLR. We have specific data going back decades, if not longer. We will be able to detect any acceleration of relative SLR decades before that rise will have any meaningful effect to the facilities covered by this rule. Having plans in place now to plan for what may or may not happen in 75 years from now, especially since those plans are continually submitted and updated, is nonsensical.. Circumstances will certainly change. Businesses will come into being, close, evolve, as will the substances they store. New protective measures may be put in place. This requirement will only make work for engineers and planners, make New Jersey an even more expensive place in which to do business, and serve absolutely no benefit to the people of this state. This requirement should be dropped upon adoption.

Absence of De Minimis Container Size and Discharge Notification Volume is Impractical, Costly, and Creates Uncertainty.

The rules should provide for a *de minimis* exemption. The proposed rule specifies there is no exemption for a *de minimis* discharge notification. This on its face will result in gratuitous and unnecessary reporting. A zero threshold is impractical and infeasible and introduces considerable regulatory uncertainty. Would a 50-milliliter spill, wherever it occurs, be an amount invoking mandatory reporting? The cost of reporting, both to the facility and to the regulatory authority, far outweighs the benefit. For the DPCC/DCR regulations to be workable, and to avoid instances of frivolous non-compliance and to be consistent with common practice, the Department needs to establish a reasonable minimum reportable quantity.

The proposed rule also requires identification of hazardous substance storage areas, including the type, size, and maximum number of containers. Unfortunately, the Department does not establish a *de minimis* container size. The rule is silent with respect to how small a container must be, and this omission creates considerable regulatory uncertainty. Does the rule extend down to a 55-gallon drum, a gallon container, a quart jar?

The Department should clarify and establish a reasonable *de minimis* given the purpose for DPCC/DCR regulations. It is unlikely the spill of a container as small as a gallon will pose a risk of the sort the DPCC/DCR regulations seek to mitigate. NJBIA suggests a 55-gallon drum is a reasonable *de minimis* container volume for this rule.

DPCC Plan Renewal Period and Tank Testing Records Retention are Appropriate and Practical.

The Department proposes to extend the DPCC plan renewal period from 3 to 5 years. NJBIA supports this practical and reasonable change, which will help mitigate preparation and review costs and administrative costs. Similarly, the Department proposes to change the tank testing records

retention period under the rule from the tank's life to either the tank's life or 10 years, whichever is shorter. NJBIA also supports this change, which will cut regulated facility and regulatory authority administrative costs.

Non-Permeable Secondary Containment Should be Better Defined.

Integrity testing is required for “non-impermeable secondary containment,” but no definition of non-impermeable secondary containment is provided. The Department should provide a definition of non-impermeable secondary containment and provide examples for illustrative purposes.

Doubling Fines for Noncompliance Should Be Justified.

To address inflation and reflect the current value of the dollar, the Department proposes to double fines for noncompliance. The latent and tacit presumption in determining a fine is that it is set at an amount that is necessary to incentivize compliance and deter negative behavior. The Department offers no evidence that the new amount will achieve those objectives, or whether similar results can be achieved through fines set at lower amounts. Moreover, it is important to note that compliance is also a function of publicity and corporate policy and standards and not solely a result of the deterrent effect of fines.

While the fine levels proposed may be appropriate, the Department should analyze if they will improve compliance or if the same compliance can be achieved at lower dollar thresholds.

Thank you for the consideration of our comments.

Sincerely,

Ray Cantor
Deputy Chief Government Affairs Officer