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THE JOURNAL OF STATE AGENCY RULEMAKING

VOLUME 27 NUMBER 6

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(Includes adopted rules filed through February 27, 1995)

MOST RECENT UPDATE TO NEW JERSEY ADMINISTRATIVE CODE: JANUARY 17, 1995
See the Register Index for Subsequent Rulemaking Activity.

NEXT UPDATE: SUPPLEMENT FEBRUARY 21, 1995

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On occasion, a proposing agency may extend the 30-day comment period to accommodate public hearings or to elicit greater public response to a proposed new rule or amendment. An extended comment deadline will be noted in the heading of a proposal or appear in a subsequent notice in the Register.

At the close of the period for comments, the proposing agency may thereafter adopt a proposal, without change, or with changes not in violation of the rulemaking procedures at N.J.A.C. 1:30-4.3. The adoption becomes effective upon publication in the Register of a notice of adoption, unless otherwise indicated in the adoption notice. Promulgation in the New Jersey Register establishes a new or amended rule as an official part of the New Jersey Administrative Code.

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RULE PROPOSALS

AGRICULTURE

(a)

DIVISION OF MARKETS

New Jersey Sire Stakes Program Qualifying Standards

Proposed Amendment: N.J.A.C. 2:32-2.22

Authorized By: Sire Stakes Board of Trustees, Bruce A. Stearns, Executive Director and Arthur R. Brown, Jr., Secretary, Department of Agriculture.

Authority: N.J.S.A. 5:5-91.

Proposal Number: PRN 1995-159.

Submit comments by April 19, 1995 to:
Bruce A. Stearns, Executive Director
New Jersey Sire Stakes Program
Department of Agriculture
Division of Markets
CN 330
Trenton, New Jersey 08625
Telephone: (609) 292-8830

The agency proposal follows:

Summary

N.J.A.C. 2:32-2.22 contains the qualifying standards for starters in the New Jersey Sire Stakes Pari-mutuel Division. The amendment proposed is primarily technical and is merely designed to clarify the existing substantive provision. The only substantive change is to lower the qualifying time for three year old pacers by one second on each of the three sized tracks to put the times more in keeping with the existing track qualifying standards for overnight (non-stakes) races.

The New Jersey Sire Stakes conditions in N.J.A.C. 2:32-2 were based on the provisions of N.J.S.A. 5:5-91 which established the program in April of 1971. The conditions have been amended since their initial adoption to provide an administrative framework under which the program could operate. The amendment process is done by the New Jersey Sire Stakes Board of Trustees who solicit suggestions for proposed changes from various groups of horsemen who participate in the program. The Trustees consider the various suggestions including concerns of their own and adopt changes at the end of each racing season.

The conditions are necessary for the operation of the Sire Stakes Program and are widely distributed among the participants and are reproduced in several industry publications. They relate to standing of stallions, nomination of yearlings, sustaining payments and the racing of the New Jersey sired horses at New Jersey tracks. They have provided definitive guidelines for the operation of the Sire Stakes Program for the past two decades and have operated well during that period.

Social Impact

The Sire Stakes conditions have had a limited impact on the public in general during their existence. Therefore, the proposed amendments impact will be limited to the participants in the Sire Stakes Program who will number approximately 4,500.

The proposed change in qualifying standards will increase the level of competition and will provide better racing by eliminating a small number of the horses who were not competitive.

Economic Impact

The proposed amendment should cause little economic impact on the Sire Stakes participants. There will be a slightly increased level of competition with the lowering of the qualifying standard for three year old pacers by one second.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the rulemaking requirements of the New Jersey Sire Stakes, Division of Markets, New Jersey Department of Agriculture, are dictated by Sire Stakes Program Establishment Act, N.J.S.A. 5:5-91 et seq., and are not subject to any Federal requirements or standards.

Regulatory Flexibility Analysis

Many of the participants in the Sire Stakes Program are small businesses as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Therefore, a regulatory flexibility analysis is appropriate. The purpose of the Sire Stakes Program is to provide competition for New Jersey-Sired Standardbred horses that are, at once, challenging enough to improve the breed and open enough to encourage the maximum participation of Standardbred, with economic incentives of sufficient magnitude to make participation worthwhile. The number of small businesses participating in the Program has increased each year. Therefore, the Sire Stakes Board of Trustees believes the program is beneficial to such businesses.

The proposed amendments do not require any reporting or recordkeeping requirements on these small businesses. The proposed amendment includes language which assures that all participants in the Sire Stakes Program are fairly and equitably treated regardless of the size of their business. If anything, the changes clarify the intent of the condition and tighten the standards of competition by lowering the time standard which should ensure optimal participation of the small business Sire Stakes participants. Therefore the proposed amendments are not considered of such a burden to the participating small businesses as to require a separate standard based on business size. Further, in the interest of competitive fairness and to maintain the integrity of the program, no differing standards, based on business size, are offered.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

2:32-2.22 Qualifying standards

(a) All starters in the New Jersey Sire Stakes Pari-mutuel Division must meet the following qualifying standards **in their last start on a fast track** and be eligible at time of entry.

1. [Horses making a break in a qualifying race or in the next purse race following a qualifying race must requalify with the exception of those horses who were not required to qualify. All other qualifying standards in effect at the track where the race is being conducted must be adhered to.] **The New Jersey Sire Stakes qualifying times will be as follows:**

	One Mile Track	**⅝ Mile Track**	**½ Mile Track**
Two-Year-Old Trot	**2:05**	**2:06**	**2:07**
Three-Year-Old Trot	**2:03**	**2:04**	**2:05**
Two-Year-Old Pace	**2:02**	**2:03**	**2:04**
Three-Year-Old Pace	**2:00**	**2:01**	**2:02**

NOTE: These times are not always the same as track qualifying standards.

[2. The New Jersey Sire Stakes qualifying times at the Pari-mutuel tracks will be as follows:

	1 Mile Track	⅝ Mile Track	½ Mile Track
Two-Year-Old Trot	2:06	2:06	2:07
Three-Year-Old Trot	2:03	2:04	2:05
Two-Year-Old Pace	2:02	2:03	2:04
Three-Year-Old Pace	2:01	2:02	2:03

NOTE: When racing at the mile track, two seconds are allowed off the half mile, but when racing on a ½ mile track, two seconds are subtracted.]

2. Horses making a break in a qualifying race or in the next purse race following a qualifying race must requalify with the exception of those who were not required to qualify. All other qualifying standards at the track where the race is being conducted must be adhered to.

3.-4. (No change.)

(b) (No change.)

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COMMUNITY AFFAIRS

(a)

DIVISION OF CODES AND STANDARDS

Uniform Construction Code
Lead Hazard Evaluation and Abatement Code

Proposed Amendments: N.J.A.C. 5:23-1.4, 2.4, 2.7, 2.14, 2.15, 2.17A, 2.23, 4.18 and 4.20
Proposed New Rules: N.J.A.C. 5:17

Authorized By: Harriet Derman, Commissioner, Department of Community Affairs.

Authority: N.J.S.A. 52:27D-124 and 52:27D-436.

Proposal Number: PRN 1995-174.

Submit written comments by May 4, 1995 to:

Michael L. Ticktin, Esq.
Chief, Legislative Analysis
Department of Community Affairs
CN 802
Trenton, NJ 08625
FAX number (609) 633-6729

The agency proposal follows:

Summary

The Department is proposing new rules at N.J.A.C. 5:17 to implement the lead evaluation and abatement contractor certification program mandated by P.L. 1993, c.288. The statute requires that the Department promulgate rules governing the certification of businesses that perform lead evaluation or abatement services. The underlying purpose of this law is the protection of the consumers of these services from unscrupulous or untrained contractors. Additionally, the statute calls for the Department to adopt work practice standards governing the performance of these services. These standards are also proposed here.

The statute requires that contractors performing lead abatement obtain a permit to do so under the Uniform Construction Code. Accordingly, there are proposed amendments at N.J.A.C. 5:23 to the Uniform Construction Code included here to accomplish this.

The proposed new rules at N.J.A.C. 5:17 serve as a companion to the rules promulgated by the Department of Health (see: N.J.A.C. 8:62) governing the accreditation of training providers and the certification of individual inspectors, workers, supervisors and planner/project designers working in the field of lead evaluation and lead hazard abatement (see 26 N.J.R. 3575(a) and 27 N.J.R. 671(a)). Taken together, these two sets of rules fulfill the legislative mandate of P.L. 1993, c.288.

Federal law also requires the establishment of training and certification programs for those performing lead evaluation and abatement. A model has been proposed by the United States Environmental Protection Agency (USEPA), but has not yet been adopted (see 40 C.F.R. Part 745). Notice is hereby given that the State of New Jersey intends to seek USEPA authorization for its lead training and certification program. (States without an authorized program will be covered by the USEPA program, when adopted.)

The following is a section-by-section summary of the proposed amendments to the Uniform Construction Code at N.J.A.C. 5:23-1.4, 2.4, 2.7, 2.14, 2.15, 2.17A, 2.23, 4.18 and 4.20:

The amendments to the Uniform Construction Code (UCC) incorporate definitions of lead evaluation and lead abatement (N.J.A.C. 5:23-1.4), put in place a requirement for a permit to be issued under the UCC for lead abatement work (N.J.A.C. 5:23-2.14), and list the information to be required in the permit application (N.J.A.C. 5:23-2.15). These proposed amendments repeat in the UCC the statutory requirement that one must be either a certified contractor or an employer using employees certified to do this work by the Department of Health on property that the employer owns or a single-family owner-occupant in order to obtain a permit to do lead abatement work (N.J.A.C. 5:23-2.14 and 2.15).

The proposed amendments stipulate that lead abatement work shall not be considered ordinary repairs or minor work as those terms are defined in the UCC (N.J.A.C. 5:23-2.7 and 2.17A). Also included in the proposed amendments to the UCC is language to make it clear that the replacement of windows and doors for the purpose of abating lead hazards shall not trigger any UCC requirement for enlarging the openings (N.J.A.C. 5:23-2.4(a)7i).

The proposed amendments to the UCC establish a Lead Abatement Clearance Certificate to close a lead abatement job once it has been determined that the lead hazards described in the scope of work accompanying the permit application have been abated successfully (N.J.A.C. 5:23-2.23(m)). Finally, a fee of $140.00 is proposed to be established for lead hazard abatement permits and a fee of $28.00 for lead abatement clearance certificates (N.J.A.C. 5:23-4.18(h) and 4.20(c)3).

The following is a description of the proposed new rules at N.J.A.C. 5:17.

N.J.A.C. 5:17-1 contains the scope and definitions for the lead hazard evaluation and abatement rules.

N.J.A.C. 5:17-2 sets forth the statutory requirement for those in the business of either lead evaluation or abatement to become certified. It also requires contractors to disclose any relationship between those performing lead evaluation and those performing lead abatement services at the same job site. Furthermore, this section details the requirements for obtaining contractor certification, including a requirement that all employees conducting lead evaluation or abatement services be certified to do so by the Department of Health, and a requirement for contractors to obtain insurance.

As proposed, at N.J.A.C. 5:17-2.3(a) each application for contractor certification is to be accompanied by a fee of $1,500. Certifications issued will be valid for two years. The proposal at N.J.A.C. 5:17-2.4(d) includes a provision for certifications to be renewed for additional two year periods. As provided in the enabling statute, the proposal allows applications for renewal to be made during the 90 day period before or after the certification expiration date, except that business firms applying after the expiration date may not continue to perform evaluation or abatement services until the certification is renewed. The fee for renewal will also be $1,500 per certification.

Finally, the proposed new rules at N.J.A.C. 5:17-2.6 list the causes for contractors' certifications to be denied, suspended or revoked and the civil penalties that may be imposed on contractors violating the regulations. The penalties, taken from the enabling legislation, are not to exceed $1,000 for the first offense and not to exceed $5,000 for each subsequent offense (N.J.A.C. 5:17-2.6(b)).

N.J.A.C. 5:17-3 sets forth the requirements for testing and evaluation services. The subchapter contains requirements for information that must be provided to consumers of these services, including a list of what the evaluation report must contain taken from the proposed EPA requirement. Additionally, testing protocols are given. While there is no Federal standard in place for this testing, these rules rely heavily on the most recent draft of the U.S. Department of Housing and Urban Development, "Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing," (HUD Guidelines) prepared by the National Center for Lead-Safe Housing, May, 1994 edition.

N.J.A.C. 5:17-4 contains the requirements for the preabatement preparation. Abatement jobs are classified by the amount of paint to be disturbed, the duration of the job and whether the jobs are indoor or outdoor. Again, these standards are drawn largely from the most recent version of the HUD Guidelines, referenced above.

N.J.A.C. 5:17-5 sets forth the duties of the contractor, the procedure to be followed for obtaining a variation to deviate from the requirements, and procedures for protecting building occupants remaining during abatement.

N.J.A.C. 5:17-6 prescribes procedures to be followed for various lead hazard abatement methods, including: paint removal, building component replacement, enclosure and encapsulation. Again, these standards draw heavily from the HUD Guidelines. While there is no nationally-recognized standard for lead hazard abatement, and no Federal agency has promulgated requirements, the HUD Guidelines generally are acknowledged as the standard to be followed.

N.J.A.C. 5:17-7 deals with testing for lead hazards in soil.

N.J.A.C. 5:17-8 gives the requirements for post-abatement cleaning for both interior and exterior work areas.

N.J.A.C. 5:17-9 contains the requirements for final inspection and clearance testing and gives lead dust levels acceptable for clearance.

N.J.A.C. 5:17-10 requires that waste disposal comply with all applicable New Jersey Department of Enviromental Protection requirements and that the contractor keep a record of the name of the waste hauler or the site where the waste was taken.

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N.J.A.C. 5:17-11 will contain the work practice standards for abating lead hazards on steel structures and has been reserved while the Department gathers additional information and will be proposed shortly.

Social Impact

The implementation of the proposed amendments and new rules will protect consumers of lead evaluation and abatement services from unqualified contractors and unsafe work practices that might cause harm to them and to their families.

Economic Impact

The proposed amendments and new rules will require that contractors become certified and that prescribed work practices be followed. However, because a Federal law has been passed and EPA regulations have been proposed requiring contractor certification, there is no discernible additional economic burden imposed by these regulations. The proposed amendments establish the following fees to be paid by the building owner: $140.00 for a permit to perform lead hazard abatement, $28.00 for a lead abatement clearance certificate and $120.00 for a variation, if one is requested. A biannual fee of $1,500 is to be paid by the contractor for certification.

Contractors and workers will benefit from the elimination of unfair competition from unpermitted individuals performing lead activities in violation of regulatory requirements.

Executive Order No. 27 Statement

The proposed new rules do not contain any standards or requirements that exceed standards or requirements imposed by Federal law. As explained above, the USEPA requirements for contractor certification have been proposed, but have not yet been adopted. These proposed new rules do not exceed the USEPA proposal. Also, as stated above, there is no Federal law or regulation that sets forth work practice standards for lead evaluation and abatement. However, these proposed new rules rely heavily on the most recent draft of the HUD Guidelines referenced above.

Regulatory Flexibility Analysis

It is expected that most of the contractors offering lead evaluation and abatement services will be small businesses as defined in the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Compliance requirements and costs are discussed in the Summary and Economic Impact above. The use of professional services would not be required for compliance. Because the enabling legislation for the proposed amendments and new rules seeks to protect the consumers of those services, there is no basis for differential treatment of small businesses. Also, as mentioned above, contractor certification also is mandated by Federal law.

Full text of the proposal follows (additions indicated in boldface **thus**; deletion indicated in brackets [thus]):

CHAPTER 17
LEAD HAZARD EVALUATION AND ABATEMENT CODE

SUBCHAPTER 1. GENERAL PROVISIONS

5:17-1.1 Title; scope; intent

(a) This chapter, adopted pursuant to P.L. 1993, c.288, Lead-Based Paint Hazard Abatement and Lead-Based Paint Abatement Contractor Certification Act, shall be known and shall be cited throughout the rules as "N.J.A.C. 5:17" and, when referred to in this part of the rules, may be cited as "this chapter."

(b) Unless otherwise specifically provided, all references to article or section numbers or to provisions not specifically identified by number, shall be construed to refer to such article, section, or provision of this chapter.

(c) This chapter controls the abatement of lead-based paint hazards and the certification of lead-based paint hazard evaluation or abatement contractors.

(d) This chapter seeks to provide and ensure public safety, health, and welfare insofar as they are affected by the identification and abatement of lead-based paint hazards. It is not intended to, nor shall it be construed to, conflict with or limit the applicability of the lead paint hazard abatement work standards promulgated by the Occupational Safety and Health Administration (OSHA), 29 C.F.R. 1926.62.

1. Lead-based paint has been a pervasive construction material which unless disturbed or deteriorated poses no significant health risk. These standards are intended to apply to the abatement of lead-based paint hazards which may pose a serious health hazard to building occupants.

2. The removal, repair, encapsulation, or enclosure of the lead-based paint or lead-contaminated soil shall require a construction permit issued pursuant to the State Uniform Construction Code Act (N.J.S.A. 52:27D-119 et seq.). Any encapsulation or enclosure materials or methods shall conform to the construction requirements of the Uniform Construction Code (UCC) except that there shall be no requirement to increase the size of door or window openings.

5:17-1.2 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

"ASTM" means the American Society for Testing and Materials.

"Business firm" means and includes any corporation, company, association, society, firm, partnership or joint stock company, or any sole proprietor, engaged in, advertising, or holding itself out to be in the business of lead evaluation or lead abatement.

"Commissioner" means the Commissioner of the Department of Community Affairs.

"Composite sampling" means an economical, but less specific, method of sampling for lead-based paint hazards by analyzing dust from several surfaces together.

"Department" means the Department of Community Affairs.

"Encapsulant" means a coating or rigid material that relies on adhesion to a lead-based painted surface and is not mechanically fastened to the substrate.

"Encapsulation" means a process to make lead-based paint inaccessible by providing a barrier between the lead-based paint and the environment, where the primary means of attachment for the encapsulant is bonding of the product used to the surface covered either by the product itself or through the use of an adhesive.

"Enclosure" means the installation of a rigid, durable barrier that is mechanically attached to building components, with all edges and seams sealed with caulk or other sealant and having a design life of at least 20 years.

"HUD Guidelines" means the Clearance Draft of the "Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing" prepared for the United States Department of Housing and Urban Development by the National Center for Lead-Safe Housing (May 16, 1994) and available from the National Center, 10227 Wincopin Circle, Suite 205, Columbia, Maryland 21044.

"HEPA" means high efficiency particulate air.

"HEPA sander" means an electric sander equipped with a specially designed shroud or containment system where all exhaust air is passed through a HEPA filter.

"HEPA vacuum blasting" means abrasive blasting with a shroud under the vacuum that is attached to the blast head where all exhaust air is passed through a HEPA filter.

"HEPA vacuum needle gun" means a needle gun that removes paint by the force of metal needles rapidly pounding against the painted surface attached to a vacuum where all exhaust air is passed through a HEPA filter.

"Inspector/risk assessor" means a person certified by the New Jersey Department of Health as such.

"Lead abatement" means a process designed either to mitigate or to eliminate permanently lead-based paint hazards on a premises and includes, but is not limited to: the removal of lead-based paint and lead-contaminated dust; the containment or encapsulation of lead-based paint; the replacement of lead-painted surfaces or fixtures; the removal of covering of lead-contaminated soil; and all preparation, cleanup, disposal and post-abatement clearance testing activities associated with such measures.

"Lead evaluation" means a surface-by-surface investigation to determine the presence and condition of lead-based paint and the

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provision of a report explaining the results of the investigation, including, but not limited to, hazards found and recommendations for abatement.

"Lead screening" means an abbreviated lead-based paint hazard evaluation which may be appropriate for buildings constructed between 1960 and 1978.

"Lead-based paint" means paint or other surface coating material that contains lead in excess of 1.0 milligrams per centimeter squared or in excess of 0.5 percent by weight.

"Lead-based paint hazard" means any condition that causes exposure to lead from lead-contaminated dust or soil or lead-contaminated paint that is deteriorated or present in surfaces that would result in adverse human health effects.

"N.J.A.C." means the New Jersey Administrative Code.

"N.L.L.A.P." means the U.S. Environmental Protection Agency National Lead Laboratory Accreditation Program.

"Owner" means building owner or his agent.

"Patch test" means a field test procedure in which a small area of the existing lead-based paint film is prepared and the encapsulant product is applied or installed and cured in the manner intended for the large-scale job.

"Plastic sheeting" means a minimum of six mil thick polyethylene (plastic) sheeting unless the text specifies otherwise.

"Surface" means an area such as an interior or exterior wall, ceiling, floor, door, door frame, window sill, window frame, porch, stair, handrail and spindle, or other abradable surface, soil, furniture, a carpet, a radiator or a water pipe.

"UCC" means the New Jersey Uniform Construction Code, N.J.A.C. 5:23.

"ug" means micrograms of lead per.

"Window" means the entire window system, including the sash, the stop and parting beads, and the window jambs.

"Window well" means the window trough.

"XRF" means x-ray fluorescence, a radiological method of in-place testing for the presence of lead-based paint on surfaces.

SUBCHAPTER 2. CONTRACTOR CERTIFICATION

5:17-2.1 Certification required

(a) Effective January 1, 1996, no individual, partnership, corporation or other business entity shall engage in either the business of lead evaluation or the business of lead abatement, unless certified by the Department in accordance with section 15 of P.L. 1993, c.288 (N.J.S.A. 52:27D-428) and these rules.

(b) Any individual, corporation, partnership or other business entity seeking certification in accordance with these rules shall either be certified or shall employ individuals certified by the Department of Health in accordance with section 3 of P.L. 1993, c.288 (N.J.S.A. 26:2Q-3) (see N.J.A.C. 8:62) and shall designate a person, certified as a lead abatement supervisor by the Department of Health, at each job site to be responsible for ensuring compliance with the requirements of P.L. 1993, c.288 and of these rules.

(c) Contractor certification shall not be required for the following individuals or activities;

1. An owner undertaking work on his or her own premises using his or her own employees, provided that those employees are certified by the Department of Health;

2. A homeowner performing lead abatement work himself or herself on a dwelling unit that he or she owns and occupies as a primary place of residence; or

3. Any business firm engaging in painting, woodworking, structural renovation or other indoor or outdoor contracting services that may result in the disturbance of paint, provided that the firm does not hold itself out as certified by the Department or otherwise represent that it has specialized competency to perform lead evaluation or abatement work.

(d) A corporation, partnership or other business entity may be denied certification if any stockholder, director, officer, partner or other person having an economic interest in the organization shall have violated any of the provisions of these rules or been denied certification for cause. This provision shall also apply to any business organization having a parent or subsidiary relationship to any such business organization.

5:17-2.2 Conflict of interest

(a) No business firm shall be certified to offer lead evaluation or lead abatement services if any person who is a proprietor, general partner, officer, director, employee, or shareholder or limited partner in the firm is employed as an official or inspector by any agency, public or private, enforcing the State Uniform Construction Code Act, or is employed by any public health department or agency in the State of New Jersey.

1. This section shall not apply to the ownership of stock or other investment instrument in any corporation listed on any national stock exchange.

(b) Any relationship between the individuals or business firm performing lead evaluation services and the individuals or business firm performing lead abatement services at a job site shall be disclosed to the owner in writing.

(c) Nothing contained in this section shall be deemed to prevent a business firm from offering both evaluation and abatement services provided that the disclosure required in (b) above is made for any job where that firm performs both evaluation and abatement.

5:17-2.3 Application for certification

(a) Every application for certification as either a lead evaluation contractor or a lead abatement contractor, or both, shall be made on the appropriate form prescribed by the Commissioner and shall be accompanied by a non-returnable fee of $1,500. In the case of firms seeking certification to perform both evaluation and abatement work, two fees shall be paid.

(b) Every application for certification shall include the following:

1. The full name and address of the business. In the case of a corporation, the name entered on the application shall be the same as that registered with the Secretary of State. In all cases, the address entered on the application shall be the street number, street name, municipality, the post office serving the property, if different from the municipality, and the zip code, of the location of the primary office of the applicant's business organization. In no case shall the address be only the address of an agent or only a post office box. It shall, in all cases, be the address at which the proprietor, or the designated representative of the business organization who is certified by the Department of Health in accordance with section 3 of P.L. 1993, c.288 (N.J.S.A. 26:2Q-3) and is responsible for compliance with P.L. 1993, c.288 can usually be found;

2. The name and address of an agent upon whom service upon the business organization may be made within the State of New Jersey. The agent shall be either an individual who is a resident of the State of New Jersey or a corporation maintaining an office within the State of New Jersey;

3. The business organization's telephone number;

4. The business organization's Federal Taxpayer Identification Number;

5. The name, address and home telephone number of each person having at least a 10 percent ownership interest in the business organization;

6. Information concerning the experience of the applicant, and of the person certified by the Department of Health and designated as being responsible for compliance with P.L. 1993, c.288, in the State of New Jersey, including the number of years in the lead evaluation and/or lead abatement business and the municipalities in which such business has been carried on during the three years immediately preceding the date of application;

7. A list of the employees who will be involved in performing evaluation or abatement tasks, together with their New Jersey Department of Health Certification Number and the discipline(s) in which they are certified;

8. Any criminal convictions against the business or against any person having an interest in the business and the disposition thereof; and

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9. Proof of insurance as follows: a minimum of $1 million in commercial general liability coverage written on an occurrence basis by an entity admitted or otherwise approved to write policies in New Jersey by the New Jersey Department of Insurance and with an "A" or better rating from A.M. Best. Insurance coverage meeting this requirement shall be in effect during the entire time that a contractor remains certified and cannot be allowed to lapse.

i. For purposes of submitting the application for certification, a copy of the policy cover sheet showing the contactor name, the policy number, the effective dates, the amount of coverage and the name of the entity issuing the policy shall be accepted as proof of insurance.

(c) Each applicant for certification shall disclose in the application any relationship with any other business organization engaged in lead evaluation and/or lead abatement or in the supply of goods, services or materials for lead evaluation or abatement or in any other work for which a permit is required pursuant to the Uniform Construction Code, N.J.A.C. 5:23, and shall further disclose all interests of any officer, partner, director, shareholder or employee in any other business organization engaged in lead evaluation and/or lead abatement or in the supply of goods, services or materials for lead evaluation or abatement or in any other work for which a permit is required pursuant to the Uniform Construction Code, N.J.A.C. 5:23.

5:17-2.4 Issuance of certification

(a) Upon receipt of a completed application, the Department shall either issue the certification or deny it in accordance with these rules within 30 days.

(b) The certification shall remain valid, unless suspended or revoked in accordance with these rules, until the expiration date indicated thereon. If the business is transferred to another legal entity, the contractor certification issued by the Department shall not be transferable.

1. The Department shall be notified in writing when any employee who is certified by the Department of Health and is designated as having responsibility for ensuring compliance with P.L. 1993, c.288 ceases to be associated with the business organization. In any such case, the certification shall expire and become invalid unless another person certified by the Department of Health is substituted and the Department of Community Affairs is so notified in writing within 10 days of the change.

2. Any other change in the information submitted to the Department with the application for certification shall be reported to the Department in writing within 30 days of the change.

(c) The certification shall specify whether the holder is certified as a lead evaluation contractor, a lead abatement contractor, or both.

(d) A certification may be renewed for additional two year periods. Applications for renewal shall be made upon forms provided by the Commissioner, shall be accompanied by a fee of $1,500 and shall be subject to the same conditions as an original application.

1. Applications for recertification may be made during the 90 day period before the certification expiration date or the 90 day period after the certification expiration date; except that if a business firm applies after the certification expiration date, the firm shall not perform any services for which certification is required until the certification is renewed. If a certification has expired for more than 90 days, the business firm shall be required to obtain a new certification.

(e) A copy of the certification shall be conspicuously displayed for public review in the office of a firm engaged in the business of abating lead-based paint hazards or conducting lead evaluations. Additionally, the certification number shall be displayed on all business vehicles and at all lead abatement or evaluation jobs in progress.

5:17-2.5 Denial, suspension, imposition of conditions upon or revocation of certification

(a) A certification may be denied, suspended, limited or revoked, depending on the nature and severity of the offense, if the certification holder or applicant, or an officer, partner, director, shareholder or employee of the certification holder or applicant, has at any time:

1. Willfully made a misstatement or omission of material fact in an application for certification or renewal of certification, or in providing other information required by the Department or by a local enforcing agency enforcing the State Uniform Construction Code;

2. Misrepresented qualifications for certification, or fraudulently obtained certification;

3. Willfully committed fraud in the business of lead evaluation or lead abatement or in any other business involving work subject to the Uniform Construction Code, N.J.A.C. 5:23;

4. Engaged in practices during lead abatement work contrary to safe procedures established therefor, or otherwise practiced lead evaluation or lead abatement in a grossly negligent manner;

5. Engaged in the business of lead evaluation and/or lead abatement without having certification from the Department to do so, or employed persons to perform lead evaluation or lead abatement work who were not then certified pursuant to section 3 of P.L. 1993, c.288 (N.J.S.A. 26:2Q-3) to perform such work;

6. Failed to comply with applicable permit and/or certificate requirements, or otherwise violated, or abetted another to violate, or hindered or delayed the Department in the enforcement of, the State Uniform Construction Code Act, as supplemented by sections 14 through 24 of P.L. 1993, c.288, including these rules adopted pursuant thereto; or

7. Refused to make a certification available when directed to do so by the Department, or otherwise violated, or abetted another to violate, any order of the Commissioner issued pursuant to the State Uniform Construction Code Act, as supplemented by sections 14 through 24 of P.L. 1993, c.288.

(b) Whenever the Department shall find cause to deny an application for certification, or to suspend or revoke a certification, it shall notify the applicant or certification holder of the reasons therefor, in writing, and shall provide an opportunity for a hearing pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1, when a request for a hearing is filed within 15 days of the date of notice.

(c) Denial of, suspension of, imposition of conditions upon, revocation of, or refusal to renew a certification shall not limit the Department from pursuing against the applicant or certificate holder any other lawful remedy available to the Department.

(d) A business firm whose certification has been revoked shall be ineligible to apply for certification for three years from the date of revocation. This ineligibility shall extend to any other business firm having any proprietor, officer, director, general partner, or shareholder or limited partner with at least a 10 percent interest in common with the business firm whose certification was revoked.

5:17-2.6 Civil penalties

(a) No person shall, either knowingly or purposely:

1. Obstruct, hinder, delay or interfere by force or otherwise with the Department in the exercise of any power or the discharge of any function or duty pursuant to the provisions of sections 14 through 24 of P.L. 1993, c.288;

2. Prepare, utter or render any false statement, report, document, plan or specification permitted or required pursuant to sections 14 through 24 of P.L. 1993, c.288; or

3. Refuse or fail to comply with a ruling, action, order or notice of the Commissioner pursuant to sections 14 through 24 of P.L. 1993, c.288.

(b) Any person who shall violate any provision of (a) above shall be subject to a civil penalty not exceeding $1,000 for the first offense and not exceeding $5,000 for each subsequent offense. If the violation is of a continuing nature, each day that it continues shall constitute an additional and separate violation.

(c) A person shall be deemed to have violated or caused to be violated the provisions of sections 14 through 24 of P.L. 1993, c.288 if an officer, agent or employee under his or her control has violated or caused to be violated any such provision. If any such person is

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a corporation, all officers, directors and shareholders having at least a 10 percent interest shall be jointly and individually liable for any violation by the corporation.

SUBCHAPTER 3. EVALUATION AND TESTING

5:17-3.1 Contract documents—testing and evaluation

(a) Prior to testing and evaluation, an inspector/risk assessor shall enter into a contract with the owner which explains:

1. The extent of the testing and evaluation;

2. Any special responsibilities or precautions which owners or occupants need to be aware of during testing;

3. The estimated duration and cost of the testing and evaluation;

4. The extent of any recommendations to be made at the completion of the testing/evaluation, such as whether maintenance recommendations and additional testing such as water, soil or air may be recommended. It shall be made clear to the owner that additional testing is not required by Federal law or the UCC.

(b) Prior to testing and evaluation, an inspector/risk assessor shall inform the owner that all testing and evaluation can be forgone if all painted surfaces are to be abated as if they were covered with lead-based paint.

(c) An inspector/risk assessor shall first determine if a structure pre-dates 1978. For structures built after 1978, no testing/evaluation shall be performed unless the owner acknowledges in writing that he or she has been informed that structures built after 1978 are considered lead-safe and that the owner is requesting testing/evaluation as a special precaution.

(d) If an inspector/risk assessor determines that a structure was built before 1978 but no earlier than 1960, he or she shall notify the owner that while the structure may contain lead hazards, it is not deemed to be as likely to contain lead hazards as older structures, and shall offer to perform a less comprehensive lead screening prior to deciding whether to perform testing/evaluation.

1. The cost of the screenings shall be disclosed.

2. The screening shall include a determination of the exact age of the structure, and research to determine its painting history, any maintenance or renovation history, and any history of health problems or medical testing or records related to lead exposure of occupants.

3. The screening shall include a visual inspection for suspected lead hazards such as chips and dust.

4. At the owner's option, or if otherwise required by law, the screening may include a survey for proximate environmental lead sources and soil, water or air tests for lead. However, if the inspector/risk assessor undertakes these additional tests, a signed statement shall be required from the owner acknowledging that he or she has been informed that these tests, absent other evidence of contamination, are not currently required under Federal law or the UCC.

(e) At the completion of all testing and evaluation, as per this subchapter, an inspector/risk assessor shall provide an owner with a complete report of all testing performed and all results.

1. The report shall include: the date(s) of inspection; the address of the building(s) and unit numbers (if applicable); the date of construction of the building(s); the name, address and telephone number of the owner; the name and signature of each inspector/risk assessor conducting testing (including the New Jersey Department of Health certification number); the name, address and telephone number of the firm employing the inspector/risk assessor(s); the name and address of each laboratory conducting analysis of collected samples; each testing device and/or sampling procedure employed and the serial number of any XRF device used; the precise locations of all components and surfaces on components tested or sampled; all data collected using onsite testing devices; and the results of all tests performed. A copy of this report shall be made available to the Department upon request.

(f) The inspector/risk assessor, based on the results, shall outline for the owner options for the maintenance and abatement of any lead hazards or potential lead hazards if any are found.

1. For multi-family dwellings containing 10 or more units, a planner/project designer, certified by the Department of Health, shall be required to perform this task.

5:17-3.2 Testing/evaluation

(a) An inspector/risk assessor shall test and perform an evaluation of a structure built prior to 1978, and later structures for which a complete evaluation has been requested, according to this section.

(b) All paint surfaces dating from 1978 or before shall be visually examined and rated good/fair/poor as provided in (b)2 and 3 below.

1. An intact paint surface is smooth, continuous and free of surface defect which would result in the release of paint dust or chips.

2. Large surfaces such as walls, floors and ceilings shall be rated as follows:

i. Good condition shall indicate a surface where less than one-half square foot is not intact;

ii. Fair condition shall indicate a surface where one-half to two square feet of surface are not intact;

iii. Poor condition shall indicate a surface where more than two square feet of surface are not intact.

3. Components without large surfaces, such as window sills, baseboards, or other small areas, shall be rated as follows:

i. Good condition shall indicate that less than one percent of the surface is not intact;

ii. Fair condition shall indicate that one to 10 percent of the surface is not intact;

iii. Poor condition shall indicate that more than 10 percent of the surface is not intact.

(c) Where painted surfaces are not intact, the inspector/risk assessor shall record the problem, including any suspected causes such as moisture build-up, mildew, friction with other building surfaces, or structure problems, such as roof leaks, which affect the surface.

(d) Painted surfaces which show irregularities which are accessible to children because of their height or location in the structure shall also be recorded.

(e) The inspector/risk assessor shall write a sampling plan to test all or representative surfaces in fair or poor condition, using the methods specified in this chapter.

1. An inspector/risk assessor shall follow applicable Federal guidelines to write a sampling plan for Federally-funded housing.

2. A sampling plan for multiple dwellings may employ random or worst-case sampling, provided the methodology used is disclosed to the owner.

3. A sampling plan for more than 10 identical multi-family dwelling units may employ target sampling as per Table 3.1, using random or worst-case sampling.

i. Worst-case sampling requires the sampling of units cited for housing code violations within one year, units the owner identifies as in poor condition, units in which two or more children older than six months but younger than six years reside, units used for day care and vacant units to be reoccupied within three months.

4. When selecting sample sites, where random testing is not the method employed, preferred sample sites are: high traffic areas, sills of operable windows near which children are known to play, the kitchen area, the bedroom of the youngest child over six months old, and the bedroom of the next oldest child.

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TABLE 3.1

Minimum Number of Targeted Dwellings to Be Sampled Among Similar Dwellings (Random Sampling May Require Additional Units)

Number of Similar Dwellings	Number of Dwellings to Sample*
1-9	All
10-75	10
76-125	17
126-175	19
176-225	20
226-300	21
301-400	22
401-500	23
500+	24 + 1 dwelling for each additional increment of 50 dwellings or less

*Does not include dwellings with children who have elevated blood lead levels.

SOURCE: CLEARANCE DRAFT: Guidelines For The Evaluation And Control Of Lead-Based Paint Hazards in Housing, The National Center for Lead-Safe Housing, May 1994.

5. The inspector/risk assessor shall disclose sample sites to the owner and to any tenants. Owner-occupants or tenants shall be given an opportunity to show the inspector/risk assessor areas which they suspect to be lead hazards. The inspector/risk assessor shall confirm the location and use of rooms with the occupants.

5:17-3.3 Certification and standards

(a) All evaluation and testing for lead based paint hazards shall be conducted by inspector/risk assessors trained as per N.J.A.C. 8:62 and certified pursuant to these regulations.

(b) All laboratories which process or evaluate samples shall be recognized under the USEPA National Lead Laboratory Accreditation Program (NLLAP) to analyze lead in paint, dust and soil samples.

(c) The contractor shall allow the Department access to the job site at any time while evaluation is ongoing. The contractor shall also make available to the Department, upon request, any documentation relevant to the job.

(d) The following USEPA recognized procedures shall be employed for (a) and (b) above.

1. Wipe sampling for settled lead dust shall be performed as per Appendices 13.1 and 14.2 of the HUD Guidelines (draft 5-16-94), as supplemented and amended;

2. Vacuum Sampling shall be performed as per Appendix 13.2 of the HUD Guidelines (draft 12-20-93), as supplemented and amended;

3. Paint Chip sampling shall be performed as per Appendix 13.2 HUD Guidelines (draft 5-16-94), as supplemented and amended;

4. When approved analytical laboratory procedures so require, for wipe sampling and vacuum sampling, field spikes shall be prepared as per Appendix 14.3 of the HUD Guidelines (draft 5-16-94), as supplemented and amended;

5. Where applicable, NLLAP certified laboratories shall follow the laboratory analytical procedures outlined in Appendix 14.1 of the HUD Guidelines (draft 5-16-94), as supplemented and amended.

5:17-3.4 Test Methods

(a) Inspector/risk assessors may use the following test methods with the limitations noted:

1. XRF testing shall be performed in compliance with N.J.A.C. 7:28-4 using accepted calibration techniques and substrate corrections.

i. An XRF reading may be taken only on paint surfaces with intact areas measuring at least three feet by three feet.

ii. To ensure accuracy, XRF measurements shall not be obtained from severely chipped or worn surfaces.

(b) Dust wipe sampling shall be done as per the HUD Guidelines, referenced in N.J.A.C. 5:17-3.3(c). Or, as an alternative, vacuum sampling per the HUD Guidelines referenced in N.J.A.C. 5:17-3.3(c) shall be performed.

1. Wipe samples shall be submitted for laboratory analysis with field spike control samples, as per N.J.A.C. 5:17-3.3(c).

2. Before submitting wipe samples to an NLLAP laboratory, an inspector/risk assessor shall ensure that the wipes chosen are acceptable to the laboratory and that the wipes are appropriately containerized in secure rinsable containers acceptable to the laboratory.

(c) Sampling in individual residential units shall be performed as follows:

1. Single samples for one residential unit shall be taken from: an entry way/porch, the room in which children, if present, most frequently play, children's bedroom(s), kitchen and bathroom(s).

2. Samples in selected areas shall be taken at: areas on floors near friction or impact areas, on interior or exterior window sills of often opened windows and near cabinets in bathrooms or near kitchen utensils.

3. Composite samples may be used provided that the inspector/risk assessor follows the most recent HUD Guidelines and this methodology is disclosed, in writing, to the owner and to occupants. Composite samples shall be sent to an NLLAP laboratory. The laboratory shall be notified and results shall be properly recorded and identified as from composite samples. In composite sampling, each sample shall be approximately the same size. Wipes shall not be re-used. Composite samples shall not combine: interior and exterior samples, samples from carpeting and hard flooring, samples from different components, or samples from different residential units.

4. Composite samples for one residential unit shall be taken at three or four locations (as applicable), representing: interior window sills, exterior window sills, hard flooring and carpeting, if present.

(d) Sampling in multi-family dwellings shall be performed as follows:

1. In addition to the samples listed in (c) above, for multi-family residences, where there are common areas, two dust samples from high traffic floor areas and two window sill (exterior, if possible) samples from common areas shall be taken. In rooms or areas in excess of 2,000 square feet, an additional window sill sample, if possible, and an additional floor sample shall be taken. For every additional 2,000 square feet, there shall be one more window sill sample and one more floor sample.

2. In multi-family residences less than four stories, one entry area floor sample and one sample from a first floor common area and from the sill of an operable window shall be taken. If there are more than four stories, on every fourth floor, two floor dust samples, a window sill sample and samples from every fourth set of stair treads and every fourth stair landing shall be collected.

(e) Paint chip analysis shall be performed by an inspector/risk assessor according to the HUD Guidelines referenced in N.J.A.C. 5:17-3.3(c) above.

1. Because paint chip sampling can itself release dust, sampling time and location shall be specifically disclosed to the owner and to any occupants.

2. Occupants shall not be present at the site of chip sampling.

3. Samples shall consist of all layers of paint without any substrate included.

4. Paint samples should not be removed from surfaces which show fresh evidence of chewing or from surfaces which are accessible to children. An inspector/risk assessor shall devise a method to test these surfaces in a non-destructive way, either from an existing chip or from a similar inaccessible location on the surface to be tested. An XRF test may be used if there is sufficient surface area intact.

(f) An inspector/risk assessor or an owner or occupant may use chemical spot tests for initial pre-tests; however, chemical spot tests shall not form the basis of any screening, testing or evaluation or abatement activity performed under this chapter.

(g) Anodic stripping voltammetry (ASV) may be used to test surfaces in accordance with manufacturer's recommendations and any applicable Federal protocols that may be developed.

(h) Any other test methods may be used if documentation is first submitted to the Department and the Department, based on test

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data or acceptance by a Federal authority, approves the method for use.

5:17-3.5 Lead hazards

(a) The following lead dust levels indicate lead hazards for which the inspector/risk assessor shall recommend abatement and maintenance options:

1. Floors—in excess of 200 ug/square foot;

2. Interior window sills—in excess of 500 ug/square foot;

3. Exterior window sills (including the window wells)—in excess of 800 ug/square foot; and

4. Carpeting dust vacuum method results in excess of 100 ug/square foot.

(b) The following lead dust levels resulting from a lead screening shall indicate that a full evaluation shall be recommended in the report produced by the inspector/risk assessor:

1. Floor wipes in excess of 100 ug/square foot or dust vacuum method results in excess of 50 ug/square foot; or

2. Window sill wipes in excess of 400 ug/square foot or dust vacuum method results in excess of 200 ug/square foot.

(c) In addition, the inspector/risk assessor may recommend other maintenance, soil, water or air testing and remediation methods to abate soil, water, or other sources of contamination; testing, cleaning or removing furniture or other contents of structures where contamination is suspected; further or later testing and re-evaluation of certain areas. The inspector/risk assessor may certify some areas as safe from lead hazards only for a limited time or only if certain scheduled maintenance activities are timely performed.

SUBCHAPTER 4. PRE-ABATEMENT PREPARATION AND OCCUPANT PROTECTION

5:17-4.1 Specification and drawing

(a) Prior to the commencement of any lead abatement project, the owner shall consent in writing to the scope of the project and to the methods to be employed during the abatement.

(b) A sketch plan of the abatement site shall be prepared and made available to the owner and to any occupants who shall remain in the structure during abatement. The sketch plan shall clearly show:

1. Work areas, labeled to show all surfaces to be abated, which shall not be accessible to occupants;

2. Barriers, if any, which separate the work area from occupied areas;

3. Occupied areas, including bathroom facilities with a route of access to these facilities, and emergency egress route(s), if occupants are to be present during abatement;

4. Workers' changing, handwashing and/or shower, toileting and eating areas;

5. Waste disposal route;

6. Waste storage area or dumpster if abatement will require more than one day;

7. Location of any special equipment; and

8. Any other information which occupants or the contractor would need to know to ensure safe and responsible activity during the abatement.

(c) Prior to any abatement, the occupants shall be relocated, if required, and they shall be supplied with information about lead hazards and about the abatement work being performed.

1. For limited abatements, during which occupants' safe access to bathroom facilities and emergency egress routes remains uninterrupted, occupants shall be given lead hazard information.

2. For all abatements, occupants shall be instructed how to remove, wrap, and secure personal belongings including furniture, appliances, carpeting, draperies and other items which require relocation or protection during the abatement.

(d) Prior to an abatement, the owner shall correct all structural deficiencies affecting the work area.

(e) The entire work area shall be HEPA vacuumed to remove existing dust, paint chips and debris.

(f) When waste shall be left at a site overnight, a secure area such as a plastic-lined room or area or a locked dumpster shall be set aside for this purpose.

5:17-4.2 Abatement classification

(a) An abatement shall be classified as an interior or exterior worksite.

(b) Interior worksites shall be classified as Level 1, 2, 3 or 4, as described in N.J.A.C. 5:17-4.3(c), based on typical applications, time limit for the abatement, resident location, barrier system, warning signs, ventilation systems, furniture, clean up requirements and dust sampling.

(c) Exterior worksites shall be classified as Level 1, 2 or 3, as described in N.J.A.C. 5:17-4.3(c), based on typical applications, time limit for the abatement, resident location, barrier systems, playground considerations, security, signs, weather, clean up and porches.

(d) Contractors shall follow the procedures specified in N.J.A.C. 5:17-4.3(c).

5:17-4.3 Worksite levels

(a) An inspector/risk assessor shall designate each lead abatement as one or more of the following:

1. Interior worksite, preparation Level 1, 2, 3 or 4;

2. Exterior worksite, preparation Level 1, 2 or 3; or

3. Window treatment or replacement preparation.

(b) For each of the interior levels specified in subsection (a) above, worksite preparation shall be performed as follows:

1. Interior worksite, preparation Level 1:

i. Typical application: Dust removal and any abatement or interim control method disturbing no more than two square feet of painted surface per room;

ii. Time limit: One work day;

iii. Resident location: Inside dwelling, but outside work area. Residents shall have secure passage to bathroom facilities and to emergency egress route(s). Alternatively, residents can leave the dwelling during the work;

iv. Barrier system: Single layer of plastic sheeting on floor extending five feet in all directions beyond the perimeter of the surface area to be treated. A low physical barrier, such as furniture or wood planking, shall be provided to prevent inadvertent access by residents. This barrier shall not be mechanically fastened.

v. Warning signs: Required at entry to room, but not on building unless exterior work is also underway;

vi. Ventilation system: Dwelling ventilation system turned off, but vents need not be sealed with plastic sheeting if they are more than five feet away from the surface being treated. Negative pressure zones are not required, unless large supplies of fresh air must be admitted into the work area to control exposures to other hazardous substances, for example, solvent vapors; and

vii. Furniture: Left in place uncovered unless it is within five feet of working surface. If within five feet, furniture shall be sealed with plastic sheeting or moved for paint treatment. No covering is required for dust removal.

2. Interior worksite, preparation level 2:

i. Typical application: Any interim control or abatement method disturbing between two and 10 square feet of painted surface per room;

ii. Time limit: One work day;

iii. Resident location: Inside dwelling, but outside work area. Rersidents shall have secure passage to bathroom facilities and to emergency egress route(s). Alternatively, residents may leave the dwelling during the work;

iv. Barrier system: Two layers of plastic sheeting on entire floor. Plastic sheeting forming a primitive airlock flap shall be placed on all doorways. The primitive air lock shall be constructed using two sheets of plastic. The first one shall be taped to the floor and the two sides of the doorway. A slit approximately six feet in length shall be cut down the middle of the plastic sheeting. Do not begin the slit at the top and do not cut the slit all the way down to the floor. The second sheet of plastic sheeting shall be taped across

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the top of the doorway so that it acts as a flap. The flap shall open into the work area. Doors secured from inside the work area need not be sealed;

v. Warning signs: Required at entry to room, but not on building unless exterior work is also underway;

vi. Ventilation system: Turned off and all vents in room sealed with plastic sheeting. Negative pressure zones are not required, unless large supplies of fresh air must be admitted into the work area to control exposure to other hazardous substances, for example, solvent vapors; and

vii. Furniture: Removed from work area. Large items can be sealed with taped plastic sheeting and left in work area.

3. Interior worksite, preparation Level 3:

i. Typical application: Any interim control or abatement method disturbing between two and 10 square feet of painted surface per room;

ii. Time limit: Five days;

iii. Resident location: Outside the dwelling, but can return in evening after day's work and cleanup are completed. Residents shall have secure passage to bathroom facilities and to emergency egress route(s). Alternatively, residents can leave until all work is completed;

iv. Barrier system: Two layers of plastic sheeting on floors. Plastic sheeting with primitive airlock flap, as described in (b)2iv above, shall be provided on all doorways to work areas. Doors secured from inside the work area need not be sealed. Overnight barrier shall be locked or firmly secured;

v. Warning signs: Posted at main and secondary entryway;

vi. Ventilation system: Turned off and all vents in room sealed with plastic sheeting. Negative pressure zones are not required, unless large supplies of fresh air must be admitted into the work area to control exposure to other hazardous substances, for example, solvent vapors; and

vii. Furniture: Removed from work area. Large items can be sealed with taped plastic sheeting and left in work area.

4. Interior worksite, preparation Level 4:

i. Typical application: Any interim control or abatement method disturbing more than 10 square feet per room (not including windows);

ii. Time limit: None;

iii. Resident location: Outside the dwelling for duration of project; cannot return until clearance has been achieved;

iv. Barrier system: Two layers of plastic sheeting on floors. If entire unit is being treated, cleaned, and cleared, individual room doorways need not be sealed. If only a few rooms are being treated, all doorways shall be sealed with a primitive airlock flap, described in (b)2iv above, to avoid cleaning entire dwelling. Doors secured from inside the work area need not be sealed;

v. Warning signs: Posted at building exterior near main and secondary entryways;

vi. Ventilation system: Turned off and all vents in room sealed with plastic sheeting. Negative pressure zones are not required, unless large supplies of fresh air must be admitted into the work area to control exposure to other hazardous substances, for example, solvent vapors; and

vii. Furniture: Removed from work area. Large items can be sealed with taped plastic sheeting and left in work area.

(c) For each of the exterior levels specified in (a) above, worksite preparation shall be performed as follows:

1. Exterior Worksite, preparation Level 1:

i. Typical applications: Any interim control or abatement method disturbing less than 10 square feet of exterior painted surface/dwelling. Not appropriate for window treatment;

ii. Time limit: One day;

iii. Resident location: Inside dwelling for duration of project until cleanup has been completed. Alternatively, can leave until all work has been completed;

iv. Barrier system: For first story, one layer of plastic sheeting on ground shall extend 10 feet out in all directions from all working surfaces. For each additional story to be abated, plastic sheeting shall extend an extra three feet. When the plastic sheeting is punctured to anchor ladders, the plastic sheeting at the feet of the ladder shall be taped so that debris does not fall below the plastic sheeting. When the ladder is moved, any punctures in the plastic sheeting shall be sealed with tape. For all other exterior plastic surfaces, protect plastic sheeting with boards to prevent puncture from falling debris, nails, etc., if necessary. The plastic sheeting shall be secured to the side of the building with tape or other anchoring system so that there are no gaps between the plastic sheeting and the building. The edges of the plastic sheeting shall be anchored in place. All windows in the dwelling shall be kept closed. The contractor shall advise the occupants of all neighboring buildings that windows within 20 feet and that face the work area should be kept closed;

v. Security: Erect temporary fencing or barrier tape at a 20 foot perimeter around entryway of building or less if distance to next building or sidewalk is less than 20 feet. Use a locked dumpster, covered truck, or locked room to store debris before disposal; and

vi. Signs: Post warning signs on the building and at a 20 foot perimeter around building or less if distance to next building or sidewalk is less.

2. Exterior worksite, preparation Level 2:

i. Typical applications: Any interim control or abatement method disturbing between 10 and 50 square feet of exterior painted surface/dwelling;

ii. Time limit: None;

iii. Resident location: Relocated from dwelling during workday, but return after daily cleanup has been completed;

iv. Barrier system: For first story, one layer of plastic sheeting on ground shall extend 10 feet out in all directions from all working surfaces. For each additional story to be abated, plastic sheeting shall extend an extra three feet. When the plastic sheeting is punctured to anchor ladders, the plastic sheeting at the feet of the ladder shall be taped so that debris does not fall below the plastic sheeting. When the ladder is moved, any punctures in the plastic sheeting shall be sealed with tape. For all other exterior plastic surfaces, protect plastic sheeting with boards to prevent puncture from falling debris, nails, etc. if necessary. The plastic sheeting shall be secured to the side of the building with tape or other anchoring system so that there are no gaps between the plastic sheeting and the building. The edges of the plastic sheeting shall be anchored in place. All windows in the dwelling shall be kept closed. The contractor shall advise the occupants of all neighboring buildings that windows within 20 feet and that face the work area should be kept closed;

v. Security: Erect temporary fencing or barrier tape at a 20 foot perimeter around entryway of building or less if distance to next building or sidewalk is less than 20 feet. Use a locked dumpster, covered truck, or locked room to store debris before disposal; and

vi. Signs: Post warning signs on the building and at a 20 foot perimeter around building or less if distance to next building or sidewalk is less.

3. Exterior worksite, preparation Level 3:

i. Typical applications: Any interim control or abatement method disturbing more than 50 square feet of exterior painted surface per dwelling;

ii. Time limit: None;

iii. Resident location: Relocated from dwelling for duration of project until final clearance is achieved;

iv. Barrier system: For first story, one layer of plastic sheeting on ground shall extend 10 feet out in all directions from all working surfaces. For each additional story to be abated, plastic sheeting shall extend an extra three feet. When the plastic sheeting is punctured to anchor ladders, the plastic sheeting at the feet of the ladder shall be taped so that debris does not fall below the plastic sheeting. When the ladder is moved, any punctures in the plastic sheeting shall be sealed with tape. For all other exterior plastic surfaces, protect plastic sheeting with boards to prevent puncture from falling debris, nails, etc. if necessary. The plastic sheeting shall be secured to the side of the building with tape or other anchoring system so that there are no gaps between the plastic sheeting and the building. The edges of the plastic sheeting shall be anchored

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in place. All windows in the dwelling shall be kept closed. The contractor shall advise the occupants of all neighboring buildings that windows within 20 feet and that face the work area should be kept closed;

v. Security: Erect temporary fencing or barrier tape at a 20 foot perimeter around entryway of building or less if distance to next building or sidewalk is less than 20 feet. Use a locked dumpster, covered truck, or locked room to store debris before disposal; and

vi. Signs: Post warning signs on the building and at a 20 foot perimeter around building or less if distance to next building or sidewalk is less.

(d) Preparation for window treatment or replacement shall be performed as follows:

1. Window replacement from the interior of the building:

i. Appropriate application: Any window treatment or replacement;

ii. Time limit: None;

iii. Resident location: Inside dwelling, but outside work area. Residents shall have secure passage to bathroom facilities and to emergency egress route(s). Alternatively, residents may leave the dwelling during the work;

iv. Barrier system: One layer of plastic sheeting on floor extending five feet out in all directions from window being treated/replaced. Two layers of plastic sheeting shall be taped to the outside wall covering the window opening. Plastic sheeting forming a primitive airlock flap shall be placed on all doorways. The primitive air lock shall be constructed using two sheets of plastic. The first one shall be taped to the floor and the two sides of the doorway. A slit, approximately six feet in length, shall be cut down the middle of the plastic sheeting. The slit shall not extend all the way to the top or all the way to the floor. The second sheet of plastic shall be taped across the top of the doorway so that it acts as a flap. The flap shall open into the work area. Doors secured from inside the work area need not be sealed;

v. Warning signs: Required at entry to room, but not on building unless exterior work is also underway;

vi. Ventilation system: Turned off and all vents in room sealed with plastic sheeting. Negative pressure zones are not required, unless large supplies of fresh air must be admitted into the work area to control exposure to other hazardous substances, for example, solvent vapors; and

vii. Furniture: Removed from work area. Large items can be sealed with taped plastic sheeting and left in work area.

2. Window replacement from the exterior of the building:

i. Appropriate application: Any window treatment or replacement;

ii. Time limit: None;

iii. Resident location: Remain inside dwelling until project has been completed. Alternatively, residents may leave until all work has been completed;

iv. Barrier system: For windows on the first story, one layer of plastic sheeting on ground extending five feet out in all directions from window being treated/replaced. For windows on upper stories, the plastic sheeting shall be extended an additional three feet per story. Two layers of plastic sheeting shall be taped to the interior wall covering the window opening. When the plastic sheeting is punctured to anchor ladders, the plastic sheeting at the feet of the ladder shall be taped so that debris does not fall below the plastic sheeting. When the ladder is moved, any punctures in the plastic sheeting shall be sealed with tape. For all other exterior plastic surfaces, protect plastic sheeting with boards to prevent puncture from falling debris, nails, etc. if necessary. The plastic sheeting shall be secured to the side of the building with tape or other anchoring system so that there are no gaps between the plastic sheeting and the building. The edges of the plastic sheeting shall be anchored in place. All windows in the dwelling shall be kept closed. The contractor shall advise the occupants of all neighboring buildings that windows within 20 feet and facing the work area should be kept closed;

v. Security: Erect temporary fencing or barrier tape at a 20 foot perimeter around the building or less if distance to next building or sidewalk is less than 20 feet. Use a locked dumpster, covered truck, or locked room to store debris before disposal; and

vi. Signs: Post warning signs on the building and at a 20 foot perimeter around building or less if distance to next building or sidewalk is less.

(e) For all worksites, damaged or torn plastic sheeting or other barriers shall be promptly repaired or replaced.

(f) For all exterior worksites, preabatement composite soil samples, consisting of at least four sub-samples, shall be taken next to the foundation or from the dripline below any exterior surface to be abated, unless this information is available from a current risk assessment.

(g) Porches and other building elements that project into the space between the work area and the ground shall be covered with plastic sheeting.

(h) Exterior abatement shall not be conducted if wind speeds are greater than 20 miles per hour. Work shall stop and clean up shall occur before rain begins.

(i) Where exterior abatement is to be performed, playground equipment shall be removed from the work area and adjacent areas. Large items may be sealed with taped plastic sheeting. All movable items shall be moved to a 20 foot distance from the work area.

5:17-4.4 Air equipment

(a) Negative air, at a rate of 10 air exchanges per hour, shall be required only when dry sanding or abrasive blasting are used. Dry sanding or abrasive blasting shall be allowed only by variation granted pursuant to N.J.A.C. 5:17-5.3.

(b) Windows, doors, chimneys and other vents or openings shall be closed during abatement. If ventilation is required because of the needs of occupants, or because of chemical fumes, HEPA equipment to filter exhaust and supply clean outside air shall be used.

SUBCHAPTER 5. LEAD HAZARD ABATEMENT—GENERAL

5:17-5.1 Duties of the contractor

(a) The certified contractor shall be responsible for ensuring compliance with all applicable provisions of this chapter.

(b) Prior to beginning an abatement job, the contractor shall apply for a permit under the UCC and shall provide the owner and the occupants with a description of the scope of work and information about lead-based paint hazards.

1. Additionally, the contractor shall notify the Department of Community Affairs 10 working days prior to the anticipated start of work. This notification shall include the name and certification number of the contractor, the location where the work is to be performed, and a brief description of the scope of work. The notification shall be sent to the following address: Department of Community Affairs, Bureau of Code Services, CN 816, Trenton, NJ 08625.

(c) Following completion of the abatement job, the contractor shall certify to the owner, in writing, that all lead-based paint hazards that were part of the scope of work have been abated in accordance with the requirements of this chapter. Where the scope of work included encapsulation or enclosure, the contractor shall provide the owner with information regarding ongoing inspection and maintenance requirements and any other precautions necessary to maintain the integrity of the enclosure.

1. A copy of this certification shall be filed with the local enforcing agency having jurisdiction under the UCC prior to the issuance of a certificate of approval. The local enforcing agency shall also receive a copy of any information provided to the owner regarding enclosure or encapsulation performed and the location(s) of enclosures or encapsulants within the building.

2. In addition to the written certification to the owner, described above, the contractor shall retain a final report on each job which shall include: the start and completion dates of the abatement, the names and addresses of any other abatement firms working at the site including the names of the supervisors, the name, address and signature of each inspector/risk assessor conducting clearance testing, the date(s) and results of clearance testing, the name of each laboratory that conducted the analyses, a detailed written description of the abatement (the scope of work required in (b) above may be used to meet the requirement for a written description of the

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abatement provided that any deviations from the scope of work are described in the final report). A copy of this report shall be made available to the Department upon request.

(d) The contractor certification number shall be displayed at the job site. All employees involved in lead abatement at the job site shall be certified by the Department of Health and shall carry evidence of such certification.

(e) The contractor shall allow the Department access to the job site at any time while evaluation or abatement are ongoing, including preparation, clean-up, and testing. The contractor shall also make available to the Department, upon request, any documentation relevant to the job.

(f) The contractor shall ensure that a supervisor certified by the New Jersey Department of Health is on the job site at all times that abatement work is being performed and that all evaluation or abatement tasks are performed only by individuals certified by the Department of Health to perform those tasks.

5:17-5.2 Permits required

(a) Effective January 1, 1996, a permit under the UCC shall be obtained for any work intended to abate lead hazards. Additionally, a permit under the UCC shall be obtained for any related construction work requiring a permit.

5:17-5.3 Variations

(a) Any variation from the requirements of this chapter shall be requested in writing only from the Department and shall be accompanied by a nonrefundable fee of $120.00 paid by check or money order, payable to the "Treasurer, State of New Jersey."

(b) The request for variation shall include:

1. A statement of the requirements of the chapter from which a variation is sought;

2. A statement of the manner by which strict compliance with these provisions would result in practical difficulties; and

3. A statement of the alternative proposed which adequately protects the health, safety and welfare of the occupants or intended occupants and the public generally and which adequately prevents contamination of the environment.

(c) The Department shall grant or deny variations in writing within 20 working days of a complete request for variation. When a variation is approved, the owner shall provide a copy of the approval to the local enforcing agency having jurisdiction under the UCC.

5:17-5.4 Occupancy during abatement

(a) Occupancy during abatement shall be allowed only as described in this chapter. Where abatement work will be ongoing for more than one day, and the occupants will be returning at night, cleaning shall be performed as follows at the end of the workday:

1. For interior abatement jobs, HEPA vacuum, wet wash, and HEPA vacuum again treated surfaces and floors extending five feet in all directions from the treated surface. If occupants are to have access to the work area, the top layer of plastic shall be removed from the floor and discarded. For dust removal work alone, a HEPA vacuum and wet wash cycle is adequate. Floors in adjacent area(s) used as a pathway to the work area shall also be HEPA vacuumed and wet washed.

2. For exterior abatement jobs, the entrance to be used by occupants shall be made clear and free of any potential lead hazards or sources of contamination.

3. Lead-contaminated debris shall be stored outside the dwelling unit in a secure, locked area.

SUBCHAPTER 6. PAINT REMOVAL; COMPONENT REPLACEMENT; ENCLOSURE; ENCAPSULATION

5:17-6.1 Lead-based paint removal

(a) The following paint removal methods are prohibited:

1. Open flame burning or torching:

i. Using cutting torches to remove fire escapes, railings or other metal components coated with lead-based paint is also prohibited unless the paint is removed first.

2. The use of heat guns operating above 1,100 degrees Fahrenheit;

3. Machine sanding or grinding without a HEPA-equipped exhaust tool;

4. Uncontained hydroblasting or high pressure washing;

5. Abrasive blasting or sandblasting without a HEPA vacuum-equipped exhaust tool;

6. The use of methylene chloride chemical paint removers; and

7. The use of dry scraping.

i. Exception to (a)7 above: Dry scraping is permitted if the surfaces are near electrical outlets or for scraping accompanying heat gun use. In either case, the area to be dry scraped shall not exceed two square feet.

(b) Heat guns shall not be used for areas exceeding two square feet. In addition to the other worksite preparation requirements of this chapter, the following shall be done prior to heat gun use:

1. A fully-charged ABC 20 pound (minimum) fire extinguisher shall be provided within 100 feet of each work area; and

2. It shall be verified that the existing electrical supply is adequate for the heat gun(s) or provide portable generators to power the heat gun(s).

(c) The applicable steps listed in (c)1 through 7 below shall be followed for the mechanical paint removal method chosen to abate lead hazards:

1. For use of HEPA sanding with a shroud, the shroud shall be in contact with the surface at all times;

2. For use of a HEPA vacuum power sander, the sandpaper shall be flat on the surface at all times;

3. For HEPA vacuum blasting, the blast head shall remain in contact with the surface at all times. HEPA vacuum blasting shall be used for metal, brick, concrete or other masonry surfaces only;

4. For HEPA vacuum needle gun, the shroud shall remain in contact with the surface at all times. HEPA vacuum needle guns shall be used for metal surfaces only.

5. For wet scraping, all loose and flaking paint shall be removed by working a few square feet at a time. The surface shall be lightly misted, then a paint scraper shall be used to remove loose material which shall be deposited on the plastic sheeting. Scrapers shall be kept razor sharp to minimize abrasion and gouging;

6. For offsite paint removal, building components shall be misted with water prior to removal. Treated components shall remain offsite or wrapped in plastic until any onsite dust-generating activities are concluded and clean up has taken place. Before reinstallation, treated components shall be cleaned utilizing the standard HEPA vacuum/wet wash/HEPA vacuum cycle to remove any residues. Components shall be completely dry and the pH shall be checked prior to repainting; and

7. For on-site paint removal, the chemical paint remover shall be applied following manufacturer's instructions:

i. Softened paint shall be removed using a scraper or putty knife and the material removed shall be deposited in a water-tight and corrosion-proof container.

ii. Alkali neutralization and residue removal shall be performed following manufacturer's instructions or accepted practice;

iii. Following neutralization, all surfaces shall be scrubbed with a high phosphate detergent or its functional equivalent to remove visible residues. An original detergent container and/or the data sheet with information on the use of the product shall be available for inspection at the worksite; and

iv. For wood surfaces or components, the entire neutralization and cleaning process shall take place without allowing the surface to dry.

5:17-6.2 Building component replacement

(a) The following steps shall be followed for all building component replacement intended to abate lead hazards:

1. Turn off and disconnect all electrical circuits present inside or near the component to be removed;

2. Lightly mist the component to be removed. Do not apply water to components containing electrical circuits;

3. Using a utility knife or other sharp instrument, carefully score all affected painted seams;

4. Remove any screws or other fasteners;

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5. Using a flat pry instrument and a hammer, carefully pry the affected building component away from the surface to which it is attached. The pry bar should be inserted into the seam at the nail or other fastening device at one end of the component and prying pressure applied. This process should be repeated at each subsequent fastening location until the end of the component is reached and the component is freed;

i. Use a pry point pad or softener, if necessary, to minimize damage to adjoining substrates;

6. Carefully remove or bend back all nails (or other fastening devices) and wrap removed components and nails in plastic sheeting and seal with duct tape;

i. Exception to (a)6 above: Wrapping components in plastic is not required if the dwelling is vacant and the pathway to the truck or other waste containment site is lined with plastic;

7. HEPA vacuum any dust that may have accumulated behind the component removed;

8. New lead-free components shall not be brought into the work area until all dust-generating activity is complete and the dust has been cleaned up by at least one HEPA vacuuming;

9. If new lead-free components are to be applied to lead painted walls, ceilings, floors or any other lead-painted surface, regardless of whether it has been enclosed, caulk shall be applied to the perimeter of the back side of the replacement component to seal it before installation;

10. Replacement components shall be installed using standard carpentry practices; and

11. In the case of windows and doors, no friction surfaces coated with lead-based paint shall remain unless these components have been enclosed in accordance with the requirements of this chapter or unless all lead-based paint has been removed from these components in accordance with the requirements of this chapter.

i. Exception to 11(a) above: If it can be determined clearly that hazardous levels of lead on metal doors and frames reside only in the primers, and that the primers were factory-applied and are in sound condition, then the primers themselves need not be abated or removed. Doors shall be operating properly, free from impact or abrasion between moving parts that will damage any surfaces. Any damage to the primer resulting from sample collection shall be repaired immediately in a manner that restores the integrity of the primer coat.

(b) All replacement components installed shall comply with all applicable provisions of the Uniform Construction Code (N.J.A.C. 5:23) except that the size of window and door openings shall not be required to be increased.

5:17-6.3 Enclosure methods

(a) All materials used for enclosure shall comply with all applicable provisions of the Uniform Construction Code (N.J.A.C. 5:23).

(b) Drywall, fiberboard or its functional equivalent may be used for interior wall enclosure. Moisture-resistant greenboard shall be used in damp areas. The following steps shall be followed for interior wall enclosure intended to abate lead hazards.

1. Turn off and disconnect all electrical circuits present in the area to be enclosed;

2. Prior to enclosure, repair all structurally unsound substrates and water leaks that will affect the integrity of the enclosure;

3. Use construction adhesive to glue the drywall in place;

4. Screw the drywall to the studs behind the existing wall. Screws shall be long enough to go through the drywall, the plaster, the wire mesh or lath, and bite an inch into the stud or structure;

5. Use extension rings to bring out electrical devices flush with the new drywall and retrofit any HVAC registers;

6. Wherever the drywall meets wood framing or any other component, including electrical devices, pipes and HVAC registers, the seams shall be sealed with a silicon caulk or other sealant that has at least a 10 year warranty;

7. Tape and finish the drywall;

8. Enclosures installed shall not protrude beyond the depth of door or window frames or other trim pieces; and

9. If paneling is used to enclose surfaces painted with lead-based paint, all joints and edges shall be fully supported to prevent flexing that might compromise the seal of the seams.

(c) The following steps shall be followed for interior ceiling enclosure intended to abate lead hazards:

1. Turn off and disconnect all electrical circuits present in the area to be enclosed;

2. Repair all structurally unsound substrates and water leaks prior to enclosure;

3. Screw a metal hat channel or furring channel to the plaster. Screws shall be long enough to penetrate the hat channel, plaster or other substrate and wire mesh holding the plaster and to bite firmly into the joist;

4. Affix the drywall to the hat channel;

5. Use extension rings to bring out electrical devices flush with the new drywall and retrofit any HVAC registers;

6. Wherever the drywall meets wood framing or any other component, including electrical devices, pipes and HVAC registers, the seams shall be sealed with a silicon caulk or other sealant that has at least a 10 year warranty;

7. Tape and finish the drywall;

8. Where there is a cast-in-place concrete ceiling, the certification of an architect or engineer as to whether the existing ceiling will hold the additional weight of the enclosure shall be required; and

9. Acoustical lay-in panels (drop ceilings) shall not be used for lead-based paint enclosures.

(d) The following steps shall be followed for the enclosure of floors intended to abate lead hazards:

1. Remove dirt and loose paint in accordance with the requirements of this chapter;

2. Remove shoe molding, if any, along the baseboard;

3. Cover old flooring using one-half inch or thicker plywood or other equivalent underlayment. All plywood sheets shall be installed flush with each other. Gaps shall be filled with flash patching cement. All nails shall be hammered flush and all dirt HEPA vacuumed thoroughly;

i. When the plywood is to be covered by vinyl floor covering, a row of nails or screws shall be run through the old flooring a few inches apart in a straight line over each joist prior to putting down the plywood.

ii. When the plywood is to be covered by carpeting, a bead of caulk shall be run at the edge of every sheet of plywood before it is set in place and all gaps shall be filled with flash patching cement.

iii. When the floor to be enclosed is poured slab or cast-in-place concrete, the surface shall be predrilled to accept each screw that anchors the plywood enclosure. A structural engineer shall be consulted for situations other than slab on grade construction; and

4. Joints at vertical surfaces shall be covered by quarter-round or equivalent molding. Metal thresholds shall be placed at all doorways after the vinyl flooring or carpeting is installed.

(e) The following steps shall be followed for the enclosure of stairs intended to abate lead hazards:

1. Remove dirt and loose paint in accordance with the requirements of this chapter; and

2. Completely cover steps with vinyl treads and risers. The vinyl shall be stapled and glued with floor adhesive. Long staples shall be used to reinforce the tread cover and at the end of the vinyl that butts up tight to the wood riser of the next step.

i. Metal bull nosing may be used in place of vinyl at wear points.

ii. Plywood may be used to cover step risers and squared off treads. Plywood may also be used for additional protection, supplementing the vinyl covers.

iii. If the steps to be enclosed are pre-cast concrete, the surface shall be pre-drilled to accept each screw that anchors the enclosure.

(f) The following steps shall be followed for miscellaneous interior building component enclosure intended to abate lead hazards:

1. Turn off and disconnect all electrical circuits present in the area to be enclosed;

2. Pipes shall be enclosed with casting tape which shall be applied so that it overlaps itself or they shall be enclosed with a drywall box following the procedure described in (a) above;

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3. Interior or exterior door frames shall be enclosed using preformed metal door buck covers or their equivalent. All seams shall be caulked;

4. Knee walls, painted structural supports and trim such as baseboards and other items shall be enclosed with plywood or its equivalent. All plywood shall be cut to fit tightly, sealed with adhesive and nailed. All seams shall be caulked; and

5. Windows shall be enclosed using snap-in aluminum or vinyl tracks. Track covers shall be pressed into a bead of caulk at each seam.

i. Painted sashes may be planed to remove lead-based paint and reinstalled.

ii. Friction surfaces on windows shall not be painted.

iii. Exterior window sills shall be covered with metal cut to fit and screwed into place. Metal shall be pressed into a bead of caulk at the seams.

(g) The following steps shall be followed for exterior wall enclosure intended to abate lead hazards:

1. Turn off and disconnect all electrical circuits present in the area to be enclosed;

2. Repair all structurally unsound substrates and water leaks prior to enclosure;

3. Cover all exterior painted surfaces with rigid or cloth dust barriers.

i. Do not cover vents with cloth or other covering; and

4. Install vinyl or aluminum siding, any board product intended for exterior use, natural or synthetic brick or stone veneers or stucco. All seams shall be caulked and back caulked.

i. Aluminum coil stock may be used on soffits, facia, barge board, decorative crown moldings, door and window frames, parapets and other moldings. All seams shall be caulked and back caulked.

5:17-6.4 Encapsulation

(a) Encapsulation products or systems to be used for lead-based paint hazard abatement shall be warranted by the manufacturer to perform for at least 20 years.

1. Encapsulants shall meet all applicable fire, health and environmental regulations.

2. The material safety data sheet (MSDS) shall be obtained from the manufacturer for all encapsulants tested or applied.

3. Residential paints and canvas-backed vinyl wallpaper shall not be used for encapsulation of lead-based paint unless they meet the performance requirements of this chapter.

(b) Prior to the application of any encapsulant, a determination shall be made as to whether the surface or component is suitable for encapsulation. Encapsulants shall not be applied to friction or impact surfaces, deteriorated components or severely deteriorated paint films.

1. Exception to (b) above: Interior floor and stair surfaces may be encapsulated with a rigid floor covering (for example, vinyl tile) that is adhesively bonded to the surface.

2. The condition of existing paint films shall be assessed by performing a visual evaluation, checking for surface deterioration and determining interfacial and other film integrity properties. Wherever possible, standard ASTM procedures shall be used to rate the degree of these conditions.

(c) Patch tests shall be performed for each surface preparation procedure and encapsulant. A successful patch test of the surface preparation and the encapsulant on the surface to which it will be applied shall be made before an encapsulant is applied to a surface.

1. For liquid-applied systems, the patch size shall be six inches by six inches. The area prepared for the patch test shall be at least two inches larger in each direction than the area to be encapsulated.

i. Three inch by three inch patches may be used for fiber-reinforced wall covering and for areas where the shape of the component makes use of a larger test patch impossible.

2. At least one test patch shall be applied to each type of component in each room where the encapsulant is to be used.

3. A logbook shall be kept documenting the location, application method, wet film thickness, if appropriate, and environmental conditions (temperature and relative humidity) for each patch test.

4. A visual evaluation of each patch test shall be performed and the results recorded in the logbook. The encapsulant coating shall be inspected for wrinkling, blistering, cracking, cratering, or bubbling.

5. An adhesive evaluation of each patch test shall be performed using one of the following three methods and the results recorded in the logbook.

i. "X"-Cut Method:

(1) Using a sharp cutting tool, an "X" shall be inscribed in the center of the patch after the encapsulant system has cured according to the manufacturer's recommendations. Each cut line shall be one and one-half inches to two inches long and shall be made through all layers down to the substrate.

(2) If the cut does not go through the patch to the base substrate, a second "X" cut shall be made in a different location.

(3) The point of the cutting tool shall be placed at the intersection of the two cut lines and used to attempt to peel or lift the patch from the existing topcoat. If more than a one-half inch square portion or section of the patch can be removed from the existing topcoat, then the encapsulant fails the patch test.

ii. Patch edge method:

(1) A cut shall be made adjacent to the edge of the patch, through as thick a layer of the encapsulant as possible, to the base substrate.

(2) If the cut does not go through the patch to the base substrate, a second cut shall be made in a different location.

(3) The point of the knife shall be placed under the encapsulant at the cut, attempting to peel or lift the patch. If more than a one-half inch square portion or section of the patch can be removed from the existing topcoat, then the encapsulant fails the patch test.

iii. Soundness method

(1) A three-eighths inch by three inch bead of construction adhesive shall be applied to the central portion of the face of an eight inch square piece of gypsum wallboard. The wallboard shall then be pressed onto the six inch by six inch patch. The curing time recommended by the adhesive manufacturer shall be observed.

(2) An attempt shall be made to pull the wallboard square away from the painted surface. If the paper backing of the wallboard remains on the adhesive on the painted surface, the patch passes the test.

(d) In addition to the other worksite preparation requirements of this chapter, surface preparation shall be performed as follows and shall replicate the surface preparation used for the successful patch test:

1. Surfaces to be encapsulated shall be cleaned with non-sudsy degreasers or other appropriate cleaning products. The surface shall be rinsed thoroughly;

2. Smooth, glossy surfaces shall be roughened to improve adhesion as recommended by the encapsulant manufacturer;

3. Loose paint shall be removed by wet scraping;

4. Exposed base substrates shall be cleaned or prepared for encapsulation as needed; and

5. Any leaks or sources of moisture shall be eliminated. Where nonreinforced coatings are to be used, cracks shall be filled with a caulking, patching, or sealing compound compatible with the encapsulant and the substrate to which it is applied.

(e) Coatings shall be applied following the manufacturer's instructions. Encapsulant application shall be performed as it was for the successful patch test.

1. Environmental conditions shall be as specified in the manufacturer's instructions and shall be as close as possible to the conditions that existed during the successful patch test.

2. Mixing and/or thinning of liquid encapsulants shall be performed in accordance with the manufacturer's directions.

3. Wet film thickness gauges shall be used to ensure that liquid encapsulants are applied according to the manufacturer's recommended thicknesses.

4. The manufacturer's instructions shall be followed for the application of fabric if required with the use of reinforced liquid encapsulants.

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(f) Adhesively bonded coverings shall be applied following the manufacturer's instructions. Encapsulant application shall be performed as it was for the successful patch test.

1. Environmental conditions shall be as specified in the manufacturer's instructions and shall be as close as possible to the conditions that existed during the successful patch test.

2. Wherever possible, permanent, clay-based adhesive shall be used.

3. Adhesively bonded floor tile shall be installed according to the manufacturer's instructions.

(g) Following encapsulation and the curing time specified by the manufacturer, all encapsulated surfaces and components shall be visually inspected for signs that the encapsulant is not adhering. If problems are noted, then appropriate corrective measures shall be taken.

(h) In addition to the logbook of patch test results described in (c) above, the following documentation shall be maintained by the contractor and shall be supplied to the building owner and to the occupant if other than the owner. This information shall be made available at the job site upon request of the Department:

1. The type of encapsulant used and product name;

2. The exact location(s) to which encapsulants were applied;

3. The product label and/or a copy of the manufacturer's technical product information;

4. The MSDS for all products used;

5. A description of the procedures followed, including surface preparation, environmental conditions and wet and dry film thickness for liquid encapsulants.

6. The name, address and certification number of the contractor;

7. The date of application; and

8. A recommended schedule for inspection of the encapsulated surfaces for signs of failure.

SUBCHAPTER 7. SOIL

5:17-7 Soil interim controls or abatement

(a) An inspector/risk assessor shall fulfill the requirements as described in (b) and (c) below if any of these conditions exist:

1. A site to be remediated contains bare play areas which are designated play areas or which contain children's play equipment or which areas are commonly used and known to be used by children as play areas;

2. Lead based paint is known or suspected to be on a building exterior and is known or suspected to be a health hazard or source of interior contamination;

3. Soil is known or suspected from prior usage to be contaminated with lead; or

4. The owner requests soil testing.

(b) The inspector/risk assessor shall recommend a soil sampling strategy of at least the following:

1. For a residential yard or playground, a composite sample of no more than 10 sub-samples of bare play areas if there are such areas;

2. A composite sample of no more than 10 sub-samples for a residential, daycare or school building along the building drip line;

3. A sample method to collect the top one inch of soil from areas to be sampled, and to include, but not oversample, paint chips or other contaminated debris in the soil; and

4. For sites other than residential, daycare or school uses, the inspector/risk asessor shall work with the owner to recommend an appropriate strategy.

(c) After receiving results of the sampling in (b) above from a qualified NLLAP certified laboratory, the inspector/risk accessor shall recommend at least the following interim controls or permanent abatement strategy:

1. Any areas testing more than or equal to 5,000ug/g lead shall be permanently abated by a method such as soil removal; however, this requirement shall not supercede any Federal or State regulation which applies to any designated waste site or industrial area;

2. Any area testing between 2,000ug/g and 5,000ug/g shall be permanently abated by a method such as paving over or soil removal; and

3. Any area testing between 400ug/g and 2,000ug/g shall be permanently abated as noted in (c)1 or 2 above, or may be subjected to interim controls such as a change in usage pattern by moving play equipment, walkways or the like and planting thorny bushes or other ground cover, or installing fencing or other barriers to prevent use of contaminated areas. A plan for interim controls shall include a maintenance schedule to monitor use and to ensure that plantings and installations remain in place.

SUBCHAPTER 8. ABATEMENT CLEANING (INTERIOR AND EXTERIOR)

5:17-8.1 Post abatement cleaning—interior work areas

(a) To allow the lead dust to settle, post abatement cleaning shall begin no sooner than one hour after the lead hazard abatement project has been completed.

(b) Cleaning shall take place when the abatement project has been completed and before abated surfaces are painted or sealed.

1. Removal of plastic sheeting shall be done as follows:

i. Plastic sheeting used in the abatement area shall be removed first. Plastic sheeting used to isolate the abatement area shall be removed only when all other plastic sheeting has been removed;

ii. Immediately prior to removal, plastic sheeting shall be misted with water to hold down dust. If necessary, to prevent debris from falling on unprotected floors, moistened debris on plastic sheeting covering floors shall be swept toward the middle of the plastic sheeting prior to folding;

iii. Plastic sheeting shall be removed by folding the ends toward the middle to trap any dust residue;

iv. The plastic sheeting shall be placed in double four mil or single six mil plastic bag(s) that are then sealed with duct tape and removed from the project area for disposal; and

v. The plastic sheeting shall be removed in the following order:

(1) Upper level plastic sheeting, such as that on cabinets and counters;

(2) The top layer of the floor plastic sheeting;

(3) Vent cover and doorway plastic sheeting;

(4) Bottom layer of floor plastic sheeting; and

(5) Plastic used to isolate the abatement project.

2. Work clothing and equipment shall be decontaminated as follows:

i. Work clothing shall be placed in a bag. The bag shall be labeled and sealed for transport to a laundry facility equipped to clean lead contaminated clothing or shall be discarded with other project waste;

ii. All tools shall be wiped down with rags or sponges using trisodium phosphate or other detergent solution formulated to bind lead. An original, marked container showing the nature of the formula and any necessary precautions shall be available at the work site. The name of the product used and its manufacturer shall be included in the records retained by the contractor;

iii. Disposable supplies such as mop heads, sponges, and rags shall be sealed and shall be disposed of as allowed by the New Jersey Department of Environmental Protection; and

iv. Durable equipment such as power and hand tools, generators, and vehicles shall be HEPA vacuumed and then washed with a detergent solution as required in (b)2ii above prior to removal from the work site.

3. The abatement area(s) shall be vacuumed with a HEPA vacuum cleaner as follows:

i. HEPA vacuuming shall be sequenced to avoid passing through rooms already cleaned. The entryway shall be vacuumed last; and

ii. In each room, vacuuming shall begin with the ceiling and shall proceed down the walls. Every surface shall be vacuumed including, but not limited to, ceiling, walls, windows, window sills, exterior sills, window wells, doors, heating and air conditioning equipment, fixtures, such as light fixtures, and built-in appliances. Floors shall be the final surface vacuumed.

4. The abatement area(s) shall be wet washed with a detergent solution as required in (b)2ii above prepared in accordance with manufacturer's instructions.

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i. In each room, the wet wash process shall begin with the ceiling and work down to the floor following the sequence in (b)3i and ii above.

ii. String mops and mop buckets with wringers are required for wet washing floors. Sponge mops shall not be used.

5. When dry, the abated area(s) shall be HEPA vacuumed again, following the sequence in (b)3i and ii above.

(c) A preliminary visual inspection shall be conducted to ensure that all surfaces described in the scope of work have been abated and that there is no visible lead dust or residue.

1. If the visual inspection is unsatisfactory, the HEPA vacuum, wet wash, HEPA vacuum cycle described in (b)3 through 5 above shall be repeated.

2. If the visual inspection is satisfactory, any other construction work that will disturb lead-based paint surfaces shall be completed.

(e) All abated surfaces, such as walls, ceilings, and woodwork, shall be primed with an appropriate primer. Those areas shall then be painted or stained and sealed. Surfaces subjected to repeated friction, such as window sashes, jambs, sills, and wells, shall be painted with a final coat of high gloss enamel or clear sealer.

1. Surfaces enclosed with vinyl, aluminum coil stock, or other materials that are traditionally not painted, and new replacement components are exempt from this provision.

(f) After the painting or sealing has been completed, a final cleaning of the area is required. The final cleaning shall follow the HEPA vacuum, wet wash, HEPA vacuum cycle described at (b)3 through 5 above.

1. Surfaces newly painted with latex paint are exempt from the final wet wash. However, those surfaces must be HEPA vacuumed.

5:17-8.2 Post abatement cleaning—exterior work areas

(a) To allow the lead dust to settle, post abatement cleaning shall begin no sooner than one hour after the lead hazard abatement project has been completed.

(b) Cleaning shall take place when the abatement project has been completed and before abated surfaces are painted or sealed.

1. Removal of plastic sheeting shall be done as follows:

i. Immediately prior to removal, plastic sheeting shall be misted with water to hold down dust. If necessary to prevent debris from falling on unprotected ground, moistened debris on plastic sheeting covering floors shall be swept toward the middle of the plastic sheeting prior to folding;

ii. Plastic sheeting shall be removed by folding the ends toward the middle to trap any dust residue; and

iii. The plastic sheeting shall be placed in double four mil or single six mil bag(s) that are then sealed with duct tape and removed from the project area for disposal.

2. Work clothing and equipment shall be decontaminated as follows:

i. Work clothing shall be placed in a bag. The bag shall be labeled and sealed for transport to a laundry facility equipped to clean lead contaminated clothing or shall be discarded with other project waste;

ii. All tools shall be wiped down with rags or sponges using trisodium phosphate or other detergent solution formulated to bind lead. An original, marked container showing the nature of the formula and any necessary precautions shall be available at the work site. The name of the product used and its manufacturer shall be included in the records retained by the contractor;

iii. Disposable supplies shall be sealed and shall be disposed of as allowed by the New Jersey Department of Environmental Protection; and

iv. Durable equipment such as power and hand tools, generators, and vehicles shall be HEPA vacuumed and then washed with a detergent solution as required in (b)2ii above prior to removal from the work site.

(c) A preliminary visual inspection shall be conducted to ensure that all surfaces described in the scope of work have been abated and that there is no visible lead dust or residue.

SUBCHAPTER 9. FINAL INSPECTION AND CLEARANCE TESTING

5:17-9.1 Final inspection and clearance testing

(a) To allow lead dust to settle, the final inspection and clearance testing shall begin no sooner than one hour after the final cleaning is completed.

(b) The final inspection shall consist of a visual inspection to verify that all abated surfaces have been replaced, painted, or sealed, and the collection of environmental samples to ensure that the work area has been effectively cleaned.

1. Wipe samples shall be taken from the abated area, one sample from within 10 feet outside the containment area and one sample from any nearby high traffic area.

2. When an abatement project involves exterior abatement work, soil samples shall be collected around the foundation of the structure and in any play areas that could have been affected by the work. All soil samples shall be composite samples as described in (d) below.

(c) Single surface samples, which shall consist of one sample in a single, hard, rinsable container, shall be required for all abatement projects.

1. Single surface sampling shall follow the methodology at N.J.A.C. 5:17-3.3(c) of this chapter.

2. Single surface sampling shall comply in number and location with Table 9.1 below.

(d) Composite clearance samples, which shall consist of no more than four subsamples in a single container, are allowed for abatement projects where similar lead hazard control treatments were used in multiple rooms of the same dwelling. Composite sampling shall be performed in accordance with N.J.A.C. 5:17-3.4(c).

(e) The following lead dust levels are acceptable for clearance:

1. Floors—200 ug/square foot;

2. Interior window sills—500 ug/square foot; and

3. Window wells, exterior concrete, rough surfaces—800 ug/square foot.

(f) For clearance of exterior abatement projects, soil samples shall be compared with samples taken prior to the abatement project. A statistical analysis, such as, but not limited to, a paired student T-test, shall be used to determine if the post abatement soil lead level has increased at a statistically significant level (significant at the 95 percent confidence limit) from the preabatement soil lead level.

1. For soil abatement projects, lead in soil shall not exceed 400 ug/g.

2. Random soil sampling is permitted in a multi-family complex of 10 or more buildings with similar lead control activity.

(g) Random sampling is permitted in multifamily buildings with 10 or more dwelling units where the units are similarly configured and have had comparable lead control activity, performed at the same time and using the same abatement contractor. The units to be tested shall not be selected until all abatement activity and cleaning have been completed.

(h) Field spiked samples shall be submitted and analyzed in accordance with the requirements of N.J.A.C. 5:17-3.3(c).

(i) All clearance samples shall be analyzed at a laboratory participating in the NLLAP program.

SUBCHAPTER 10. WASTE DISPOSAL

5:17-10.1 Waste Disposal

Waste disposal shall comply with regulations promulgated by the New Jersey Department of Environmental Protection. The contractor shall record the name of the waste hauler or the site(s) where the waste was taken if the contractor did not use a waste hauler.

SUBCHAPTER 11. STEEL STRUCTURES (RESERVED)

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TABLE 9.1
Recommended Minimum Number and Location of Single-Surface Clearance Dust Samples for All Abatement and Interim Control Work

Clearance Category	Category Description	Number and Location of Wipe Samples in Each Area*
1	Interior treatments	Two dust samples from every room in dwelling (whether treated or untreated). > One interior window sill or window trough, alternating between rooms, > One floor, and one floor sample for every 2,000 square feet of a common area room (if present).
	No containment within dwelling	
2	Interior treatment with plastic sheeting containment within dwelling (airlock on doors between treated and untreatd areas)	Two dust samples from every room in dwelling (whether treated or untreated). > One interior window sill or window trough, alternating between areas. > One floor, and one floor sample for every 2,000 square feet of a common area room (if present). One floor sample outside the containment area but within 10 feet of the airlock. (This extra sample is recommended in 20 percent of the treated dwellings in multifamily housing and all single-family homes.)
3	Exterior treatments (including soil)	Two dust samples as follows: At least one dust sample on a horizontal surface in part of the outdoor living area (e.g., a porch floor), and One window trough samle.

*A room includes a hallway or a stairway. If no window is present, collect just one floor sample. When a closet is treated, the room to which it is attached should be tested. A closet is not considered to be a separate room.

SOURCE: CLEARANCE DRAFT: Guidelines For The Evaluation And Control of Lead-Based Paint Hazards in Housing, The National Center for Lead-Safe Housing, May 1994.

5:23-1.4 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

. . .

"Lead abatement" means a process designed either to mitigate or to eliminate permanently lead-based paint hazards on a premises and includes, but is not limited to: the removal of lead-based paint and lead-contaminated dust; the containment or encapsulation of lead-based paint; the replacement of lead-painted surfaces or fixtures; the removal or covering of lead-contaminated soil; and all preparation, cleanup, disposal and post-abatement clearance testing activities associated with such measures. "Lead abatement" shall not include painting, woodworking, structural renovation or other indoor or outdoor contracting services that may result in the disturbance of paint, unless it is evident from the statements and/or actions of a person or persons authorizing or performing such services that an objective of the work is the mitigation or permanent elimination of a lead-based paint hazard.

"Lead evaluation" means a surface-by-surface investigation to determine the presence and condition of lead-based paint and the provision of a report explaining the results of the investigation, including, but not limited to, hazards and recommendations for abatement.

. . .

5:23-2.4 Alterations, replacements and damages

(a) Except as provided in N.J.A.C. 5:23-2.5, existing structures when altered or repaired shall conform to the following requirements:

1.-6. (No change.)

7. Alterations mandated by any property or fire safety maintenance code, or minimum housing standard or regulation, adopted pursuant to law, shall be made to conform only to the requirements of that code, standard or regulation and shall not be required to conform to the subcodes adopted pursuant to this chapter unless the code requiring the alterations so provides.

i. If alterations are undertaken to abate lead hazards pursuant to N.J.A.C. 5:17, windows and doors used for replacement shall comply with all applicable provisions of this chapter except that the size of the opening in which components are replaced shall not be required to be enlarged.

(b) (No change.)

5:23-2.7 Ordinary repairs

(a) (No change.)

(b) Such repairs shall not include any of the following:

1.-5. (No change.)

6. Addition to, or alteration, replacement or relocation of:

i.-iii. (No change.)

iv. Mechanical or other work affecting public health or general safety[.]; **or**

7. Any work undertaken for the purpose of lead abatement.

5:23-2.14 Construction permits when required

(a) It shall be unlawful to construct, enlarge, alter or demolish a structure, or change the occupancy of a building or structure requiring greater strength, exitway or sanitary provisions, or to change to a different use group, or to install or alter any equipment for which provision is made or the installation of which is regulated by [the regulations] **this chapter, or to undertake a project involving lead abatement in accordance with N.J.A.C. 5:17**, without first filing an application with the construction official, or the appropriate subcode official where the construction involves only one trade or subcode, in writing and obtaining the required permit therefor.

(b) The following are exceptions from (a) above:

1.-2. (No change.)

3. Emergency work **not involving lead abatement**, except that a permit shall be applied for or notice given as soon thereafter as is practicable, but not later than 72 hours thereafter.

4.-5. (No change.)

(c) An annual construction permit may be issued by the construction official to educational, industrial, institutional, mercantile, business and government facilities based upon submission of the following in duplicate:

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1.-4. (No change.)

5. A statement[,] from the management of the facility attesting that the maintenance staff performing work under the annual permit are under the direct supervision of a qualified individual, as set forth under N.J.A.C. 5:23-2.14(e)1, or are individually qualified in their respective trades.

i. Evidence of qualification shall be journeyman status, civil service status, trade experience, trade school certification, college degree, State licensure pursuant to law or other appropriate evidence of competence.

ii. No person employed on the maintenance staff of a facility shall be deemed to be qualified to engage in lead abatement unless he or she has been certified by the New Jersey Department of Health pursuant to section 3 of P.L. 1993, c.288 (N.J.S.A. 26:20-3) (see N.J.A.C. 8:62).

6.-8. (No change.)

(d)-(f) (No change.)

5:23-2.15 Construction permits—application

(a) The application for a permit shall be submitted [in such form as the enforcing agency may prescribe] **on the standard Construction Permit Application form prescribed by the Commissioner at N.J.A.C. 5:23-4.5(b)2** and shall be accompanied by the required fee as provided for in this subchapter and N.J.A.C. 5:23-4. The application shall contain a general description of the proposed work, its location, the use and occupancy of all parts of the building or structure and of all portions of the site or lot not covered by the building or structure, and such additional information as may be required by the construction official, which shall include, but not be limited to, the following:

1.-4. (No change.)

5. A statement that all required State, county and local prior approvals have been given, including such certification as the construction official may require; [and]

6. For Class I structures, a list of all materials and work requiring special inspections, and a list of agencies, qualified licensed professionals or firms intended to be retained for conducting those inspections in accordance with the requirements of the building subcode[.]; **and**

7. If the work involves lead abatement, the applicant shall provide the following:

i. A copy of the scope of work which shall describe precisely the location and extent of the work;

ii. A sketch plan showing the locations where abatement work is to be performed and showing emergency egress routes for any occupants to be in the building during abatement;

iii. A record of all materials to be used for all phases of the job, including encapsulants, enclosures, containment materials and replacement components, as appropriate;

iv. A copy of the lead evaluation report, if any has been done, prepared by a business firm certified by the Department pursuant to N.J.A.C. 5:17 to do lead evaluation; and

v. The degree to which any lead hazards identified in any report prepared by a lead evaluation firm certified by the Department will be abated.

(b) In addition, the following information shall be required on any application for a construction permit when such information is available, but not later than the commencement of work.

1.-3. (No change.)

4. If the work involves lead abatement, one of the following shall be supplied:

i. The name and Department certification number issued pursuant to N.J.A.C. 5:17 of any business firm undertaking the lead abatement; or

ii. If the work is to be done by employees of the owner of the property, the name and New Jersey Department of Health certification number issued pursuant to N.J.A.C. 8:62 of each such employee; or

iii. If the work is to be done on an owner-occupied single family dwelling, a certification by the owner stating that he or she owns and occupies the property as a principal place of residence, will be performing the abatement work, and has received the written information for homeowners prepared by the Department explaining the danger of improper lead abatement, procedures for conducting safe lead abatement, and the availability of certified lead abatement contractors or of any available training for homeowners.

[4.]**5.** In the event of any change of contractor or person in charge of work under (b)1, 2, [and] 3 **and 4** above, such change shall be filed as an amendment to the application.

(c)-(e) (No change.)

5:23-2.17A Minor work

(a) The issuance of a permit shall not be required before minor work may proceed. The owner, or an architect or contractor acting on [his] behalf **of the owner,** shall, however, provide notice of the work to the enforcing agency before work begins.

(b) (No change.)

(c) Minor work:

1.-3. (No change.)

4. Minor work shall also mean and include the installation of any fire detection or suppression device in any one- or two-family dwelling; installation of a radon mitigation system in an existing detached one or two-family dwelling; the installation of a burglar alarm or security system in any structure and the installation of a low voltage communication system in any structure other than a one- or two-family dwelling[.];

5. Minor work shall not include lead abatement.

(d) (No change.)

5:23-2.23 Certificate [of Occupancy] requirements

(a)-(l) (No change.)

(m) Lead Abatement Clearance Certificate: Following a lead hazard abatement job performed by a business firm or by an employee or employees of the owner of a property, a written application for a lead abatement clearance certificate shall be filed with the enforcing agency by the owner or the owner's agent. The application shall include a certification by the firm or person performing the work that all applicable provisions of N.J.A.C. 5:17 have been met, including the clearance requirements, and that the components or areas in the scope of work submitted in the permit application are lead safe.

1. When the lead hazard abatement work includes encapsulation or enclosure, the certification by the firm or person performing the work shall include any recommendations for on-going maintenance or precautions to be taken to maintain the integrity of the encapsulation or enclosure.

2. When all lead hazards identified in an evaluation report prepared by a firm licensed by the Department pursuant to N.J.A.C. 5:17 have been totally and permanently abated, the certification shall so state.

3. When an owner-occupant of a single-family house is performing the work, a lead abatement clearance certificate may be requested by the owner. The application for a lead abatement clearance certificate shall include a statement signed by a lead evaluation contractor certified by the Department pursuant to N.J.A.C. 5:17, or signed by an individual inspector/risk assessor certified by the New Jersey Department of Health pursuant to N.J.A.C. 8:62 indicating that the clearance standards contained in N.J.A.C. 5:17 have been met and that all components or areas in the scope of work submitted in the permit application have been rendered lead-safe.

5:23-4.18 Standards for municipal fees

(a)-(g) (No change.)

(h) No special fee shall be established for any class or type of work which is undertaken as a part of work authorized by a construction permit, except elevator and sign permits as herein provided. Other special fees may be established for work regulated by the code but not undertaken as a part of the new construction project. Such special fees shall be flat fees.

1. The fee for a permit for lead hazard abatement shall be $140.00. The fee for a lead abatement clearance certificate shall be $28.00.

(i)-(k) (No change.)

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5:23-4.20 Departmental fees

(a)-(b) (No change.)

(c) Departmental (enforcing agency) fees shall be as follows:

1.-2. (No change.)

3. Fees for certificates and other permits are as follows:

i.-ix. (No change.)

x. The fee for a permit for lead hazard abatement work shall be $140.00. The fee for a lead abatement clearance certificate shall be $28.00.

4.-9. (No change.)

(d) (No change.)

(a)

NEW JERSEY HOUSING AND MORTGAGE FINANCE AGENCY

Low Income Housing Tax Credit Qualified Allocation Plan

Proposed New Rules: N.J.A.C. 5:80-33

Authorized By: Board of Directors of the New Jersey Housing and Mortgage Finance Agency, Ira Oskowsky, Acting Executive Director.

Authority: N.J.S.A. 55:14K-5g.

Proposal Number: PRN 1995-181.

Submit comments by April 19, 1995 to:

Anthony W. Tozzi
New Jersey Housing and Mortgage Finance Agency
3625 Quakerbridge Road
CN 18550
Trenton, NJ 08650-2085

The agency proposal follows:

Summary

The Low Income Tax Credit ("LITC") Program is one of a variety of resources used to stimulate the development of affordable housing. Like most State and Federal resources, the LITC program is a limited resource with a finite dollar amount allocated to it each year. With the State's affordable housing needs continually growing, the question is often asked of how to best allocate these resources to get the greatest results. The State of New Jersey is making a concerted effort to target resources to key areas in our state, in order to increase the positive impact to those areas. In order to allocate tax credits, the New Jersey Housing and Mortgage Finance Agency (Agency) must adopt a Qualified Allocation Plan. The Qualified Allocation Plan, proposed herein as N.J.A.C. 5:80-33, establishes cycles for applications and set-asides which prioritize how credits will be allocated.

There will be three cycles for tax credit applications: an Urban Cycle; a Suburban Cycle; and a Final Cycle. Projects located in urban aid municipalities will compete in the Urban Cycle. Non Urban Aid-eligible projects will compete in the Suburban Cycle. All projects may apply during the Final Cycle where urban and suburban projects compete against each other. The Final Cycle includes credits received from the National Pool, and any credits not utilized from the earlier cycles and from the Reserve.

The Qualified Allocation Plan also establishes set-asides for the allocation of tax credits as follows:

1. Nonprofit Set-Aside: 20 percent of the credits available in the Urban and Suburban Cycles will be reserved for qualified nonprofit organizations. The Internal Revenue Code of 1986, as amended, requires that a minimum of 10 percent of the tax credit ceiling be set aside for nonprofits.

2. Senior Set-Aside: 20 percent of the credits available in the Urban and Suburban Cycles will be reserved for senior projects. A project will qualify for both the senior and nonprofit set-asides when a senior project is sponsored by a nonprofit.

3. Two-Reserve Set-Asides:

(a) Nine percent of the total allocation: Projects that did not receive a full allocation in the prior allocation year will compete and be ranked under the point system set forth in the final cycle. If there are funds remaining in this cycle, they will be made available for the set aside in (b) below.

(b) One percent of the total allocation (with the potential of more as projects have or may have returned unused credits): Projects that did receive their full allocation in the prior allocation year but now need additional credits to cover construction overruns. This reserve is also available for projects where there may have been a technical error made or for de minmis awards of up to $100,000 for the Urban/Suburban Cycle. This would be in a case where there were not sufficient credits in the cycle to fully fund the last of the set aside ranking projects. There is no application deadline for this portion of the Reserve. $100,000 of this Reserve will be set aside for technical errors, etc., until allocations are ready to be made in the final cycle. Any credits remaining in this fund will be used in the final cycle.

The Plan identifies the requirements an applicant has to meet in order to be eligible for tax credits. The applicant must demonstrate that the project will be rented to persons of low income for a minimum 15-year compliance period with a 15-year extended use period. In addition, the applicant must be able to demonstrate that the project is feasible by providing evidence such as site control, local and environmental approvals, finacing commitments and identification of the development team.

The NJHMFA will review applications and award tax credits on a point system. The point system provides applicants with points for various categories such as offering family housing, locating the project in a targeted city or neighborhood, offering special services, exceeding the required number of low income housing units, increasing the low income housing time restriction, projects which involve substantial rehabilitation/adaptive use, projects which employ minority and women-owned business and projects which fall under HUD's troubled project list.

Recipients of tax credits can be any individual, partnership, corporation or entity which is producing rental residential housing which will meet the requirements of these rules. As the low income housing tax credit program is established pursuant to the Internal Revenue Code, the rules shall be construed and administered in a manner consistent with the Code.

Compliance with the requirements of the Code is the sole responsibility of the owner of the building for which the credit is allowable. NJHMFA makes no representations to the owner or anyone else as to compliance with the Code, Treasury regulations, or any other laws or regulations governing Low-Income Housing Tax Credits, or as to the financial viability of any project. All applicants should consult their tax accountant, attorney or advisor as to the specific requirements of Section 42 of the Code governing the Federal Low Income Housing Tax Credit Program.

Social Impact

The tax credit program requires recipients of the tax credits to restrict a portion of the units in the housing project to low or moderate income tenants. Recipients must elect to restrict at least 20 percent of the units to families earning 50 percent or less of median income or 40 percent of the units to families earning 60 percent or less of median income. The program, therefore, not only supplies much needed rental housing for New Jersey, but also the availability of housing affordable to low and moderate income families. The program also establishes a point system for allocating how credits will be allocated. Projects located in urban areas and projects meeting special needs population or social services gain points which will assist in such projects gathering sufficient points to receive an allocation. The social impact of the point system will likely result in more projects being developed in urban areas and for projects meeting social services or special needs population.

Economic Impact

The tax credit program provides credits for recipients on their Federal income tax. Recipients typically will sell the tax credits to investors. The sale produces funds which are invested by the recipients for construction or rehabilitation of the housing project. In addition to the funds derived from the sale of tax credits, the monies used to construct or rehabilitate a project creates jobs in the construction industry. The economic impact on applicants for tax credits lies with the $1,000 application fee. Applicants that are awarded tax credits are also required to pay a reservation fee of one percent (for profits) or one-half percent (nonprofit) of the allocation amount over the 10-year credit period, less the $1,000 application fee. Tax credit recipients are also likely to absorb costs associated with professionals such as attorneys and accountants. Finally, tax credit recipients will incur costs imposed by the Agency for monitoring compliance with the tax credit program. These costs amount to $100.00 per unit per year or a one time cost of $750.00 per unit.

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Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the rules are either the same as those imposed by Federal law or not subject to any Federal standards or requirements.

Regulatory Flexibility Analysis

The rules within this subchapter will apply to developers of housing. Developers can be individuals, corporations or partnerships and in some cases will qualify as a small business as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The rules impose certain compliance aspects as well as recordkeeping and reporting requirements. The compliance aspects deal with the maintenance of the housing for occupancy of low and moderate income housing. Recipients of tax credits must rent a portion of the units to such families for at least 15 years (the compliance period). As to recordkeeping and reporting requirements, recipients must keep records for the compliance period in order to demonstrate they are in compliance (for example, the number of low/moderate income units, the rent charged, certifications of income for the low income tenants). Recipients must also submit reports to the Agency certifying that they are meeting the compliance aspects. It is likely that recipients will employ professionals, such as attorneys and accountants, to assist them with the compliance, recordkeeping and reporting requirements. The compliance, recordkeeping and reporting requirements of the rules have all been mandated under the Tax Credit regulations promulgated under the Internal Revenue Code. Such requirements are imposed as a condition for developers to receive the tax credits. As the requirements are imposed by Federal regulations, no differentiation in the reporting, recordkeeping or compliance requirements based on business size is imposed.

Full text of the proposed new rules follows:

SUBCHAPTER 33. LOW INCOME HOUSING TAX CREDIT QUALIFIED ALLOCATION PLAN

5:80-33.1 Introduction

(a) The Low Income Tax Credit ("LITC") Program is one of a variety of resources used to stimulate the development of affordable housing. Like most State and Federal resources, the LITC program is a limited resource with a finite dollar amount allocated to it each year. With the State's affordable housing needs continually growing, the question is often asked of how to best allocate these resources to get the greatest results. The State of New Jersey is making a concerted effort to target resources to key areas in the State, in order to increase the positive impact to those areas.

(b) In keeping with this philosophy, the New Jersey Housing and Mortgage Finance Agency (NJHMFA) in its Tax Credit Allocation Plan has prioritized tax credit allocations to projects that are located in targeted areas. The NJHMFA may consider expanding the targeting strategy to include:

1. Designated Empowerment Zones and Enterprise Communities;
2. Municipalities in which the Office of State Planning has approved a Strategic Revitalization Plan;
3. Neighborhood designated by the Commissioner of the Department of Community Affairs as part of a neighborhood-based strategy.

(c) At the conclusion of the allocation year, NJHMFA will evaluate the viability of any expansion under (b) above and make a determination as to whether they will be included in promulgated amendments to this Plan.

(d) In order to provide for the effective coordination of the New Jersey Low Income Tax Credit Program and the Internal Revenue Code (the "Code"), the rules within this subchapter shall be construed and administered in a manner consistent with the Code and regulations promulgated thereunder.

(e) Compliance with the requirements of the Code is the sole responsibility of the owner of the building for which the credit is allowable. NJHMFA makes no representations to the owner or anyone else as to compliance with the Code, Treasury regulations, or any other laws or regulations governing Low-Income Housing Tax Credits, or as to the financial viability of any project. All applicants should consult their tax accountant, attorney or advisor as to the specific requirements of Section 42 of the Code governing the Federal Low Income Housing Tax Credit Program.

5:80-33.2 Definitions

The following words and terms, as used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

"Adaptive reuse" means the substantial rehabilitation and conversion of any existing non-residential building, (for example, school or factory) to a residential use.

"COAH obligation" means a low/moderate income rental project that is in a Council on Affordable Housing (COAH) certified plan or in a plan that is currrently under COAH's jurisdiction as the result of a petition for substantive certification.

"Court-ordered obligation" means a low/moderate income rental project that is part of a judgment of repose, a pending judgment of repose and/or court settlement that is the result of an exclusionary zoning lawsuit.

"Complete application" means an application including the application fee, completed application forms and certifications, and all eligibility requirements.

"De minimis award" means an award of credits from the Reserve in order to fully fund the last of the highest ranking projects in a cycle up to a maximum of $100,000. An example of a de minimis award follows:

There are 10 projects in the suburban cycle. They are ranked highest to lowest. There are enough credits to fully fund the first five projects. The sixth project needs $100,000 but there is only $10,000 left in the cycle. NJHMFA may take $90,000 from the Reserve and award it to the project. If the last highest ranking projects is not able to be fully funded by using the amount left in the cycle plus a de minimis award, the project may not be able to be funded and may have to reapply.

"Family project" means any non-age-restricted project.

"Geographic distribution" means in order to promote equitable distribution of tax credits across the State, NJHMFA takes into consideration geographic distribution when awarding reservations of tax credits. In a tie-breaker situation, credits will be awarded to the project situated in the area that has not yet received low income housing tax credits.

"Minimum rehab project" means any project undertaking rehabilitation, where the construction costs total less than 50 percent of the acquisition cost where construction cost equals the costs of demolition, off-site improvements, residential and other structures, environmental clearances, surety, sales tax, building permits and other costs of construction and acquisition cost equals the costs of land, building acquisition appraisal, relocation and other acquisition costs. Minimum rehab projects ar eligible to apply only in the Final Cycle. They will be funded in the third round only if there are no other projects left to fund.

"Qualified nonprofit organization" means, pursuant to Section 42(h)(5)(B) of the Code, an entity that owns an interest in the project (directly or through a partnership) and materially participates (within the meaning of Section 469(h)) in the development and operation of the project throughout the compliance period and is not affiliated with or controlled by a for-profit organization. Section 42(h)(5)(C) defines a qualified nonprofit organization as follows:

1. Such organization is described in paragaraph (3) of (4) of Section 501(c) and is exempt from tax under Section 501(a);
2. Such organization is determined by the State housing credit agency not to be affiliated with or controlled by a for-profit organization; and
3. One of the exempt purposes of such organization includes the fostering of low-income housing.

Section 42(h)(5)(D) describes how certain subsidiaries meet the definition of a qualified nonprofit organization as follows:

1. In general: For purposes of this paragraph, a qualified non profit organization shall be treated as satisfying the ownership and material participation test of Section 42(h)(5)(B) if any qualified corporation in which such organziation holds stock satisfies such test.
2. Qualified corporation: For purposes of paragraph 1 immediately above, the term 'qualified corporation' means any corporation if

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100 percent of the stock of such corporation is held by one or more qualified nonprofit organizations at all times during the period such corporation is in existence.

"Senior project" means a project dedicated to households whose head, spouse or sole member is 62 years of age or older.

"Social services model" means any project which submits evidence such as an executed agreement between a housing and social service provider or otherwise demonstrates to the satisfaction of NJHMFA that one or more of the following types of services will be provided to improve the quality of life of the residents of the project. The services include, but are not limited to:

1. Hiring a full-time social service coordinator. If a social service coordinator is being provided through a third party, then a signed agreement between the two parties is required, and the coordinator must be dedicated to the tax credit project for at least 20 hours a week;
2. Providing child care services either on site or linked to outside child care centers;
3. Providing health care services either on site or linked with a local health care provider;
4. Providing job training programs on site or linked with a local training center;
5. Providing personal care and/or housekeeping services on site;
6. Providing at least one congregate meal on site;
7. Providing adult day-care services; or
8. Providing transportation services for the residents.

A project cannot be classified as having both a special needs component and a social services model. In a tie-breaker situation where a special needs project is tied with a project offering a social services model, the tie cannot be broken on the social services model tie-breaker. Instead, both projects go to the next rung of the tie-breaker system which is geographic distribution.

"Special needs project" means a project serving populations including individuals and families who are in need of certain types of home and/or community-based supportive services, usually on an ongoing basis, in order to remain capable of independent living in communities. Supportive services range across a wide continuum of care and will vary from person to person depending on their particular physical, psycho-social, and/or mental limitations, and may vary for one person over time. Each special needs tenant does not have to utilize all of the services provided by the project; however, the services must be available. If tenants are not utilizing the services that are available, NJHMFA may call into question whether or not the project is serving a special needs population. In order to be classified as a Special Needs Project, applicants must propose a project which will reserve a minimum of 20 percent of the total affordable units in the project for occupancy by one (or more) of the targeted populations referred to below, and must make available a minimum of three daily services addressing the needs of the identified group, one of which must be a social services coordinator. If a social services coordinator is being provided through a third party, then a signed agreement between the two parties is required, and the coordinator must be dedicated to the tax credit project for at least 20 hours a week. Project sponsors may reserve more than 20 percent of their affordable units for occupancy by one or more of these targeted populations. For certain types of special needs projects, no more than 30 percent of the units should be set aside for persons with special needs in order to avoid saturation or an institution-type atmosphere. In order to be classified as a Special Needs Project, applicants must also demonstrate evidence of appropriate linkages—such as an executed agreement between a housing and social service provider and commitments from applicable State and/or local agencies. In addition, applicants must demonstrate that the market for the targeted population exists in the project's service area and market the units to persons with special needs. In a tie-breaker situation where a special needs project is tied with a project offering a social services model, the tie cannot be broken on the social services model tie-breaker. Instead, both projects go to the the next rung of the tie-breaker system which is geographic distribution. Examples of target populations are:

1. Persons with AIDS/HIV-related illness;
2. Homeless;
3. Mentally ill;
4. Frail elderly;
5. Alcohol/substance abusers;
6. Persons with physical disabilities;
7. Mentally retarded/developmentally disabled;
8. Pregnant/parenting teens; or
9. Victims of domestic violence.

Examples of supportive services include, but are not limited to, the following:

1. Case management;
2. Counseling and crisis intervention;
3. Health care advocacy and linkages;
4. Assistance with activities of daily living and/or instrumental activities of daily living;
5. Recreational activities;
6. Entitlement counseling and advocacy;
7. Employment counseling and training;
8. Support groups;
9. Home-based personal or medical assistance;
10. Skilled nursing;
11. Meals preparation;
12. Housekeeping;
13. Substance abuse and mental health supports; or
14. Child care.

Linkages, Service Commitments and Market Analysis—Applicants who propose a special needs project must also demonstrate evidence of appropriate linkages—such as an executed agreement between a housing and social service provider and commitments from applicable state and/or local agencies. In addition, applicants must demonstrate that the market for the targeted population exists in the project's service area and affirmatively market the units to persons with special needs.

"Targeted city" means any city designated by the Governor's Urban Coordinating Council.

"Targeted neighborhood" means any neighborhood which has been selected for implementation of a specific revitalization plan within a city designated by the Governor's Urban Coordinating Council. If the targeted neighborhoods are not announced at least one month prior to the application deadline, only targeted cities shall apply and the full 20 points awarded.

5:80-33.3 Reservation cycles

(a) Each year there will be up to three cycles and a reserve set-aside. They will be advertised in The Atlantic City Press, The Record, Newark Star Ledger, The Courier News, The Asbury Park Press, The Camden Courier Post, Bridgeton Evening News and The Times. NJHMFA will set the eligibility cut-off dates in each year for receipt of completed applications. The application filing deadlines and the credits available in each cycle will be announced as early in the year as possible. Reservations will be announced approximately 90 days (or the next business day if the 90th day is a weekend or holiday) after the deadline for the cycle. NJHMFA may adjust the number of cycles or adjust the dates if required by the time of passage of Federal legislation or adoption of IRS rules and regulations or for other compelling circumstances.

(b) For the Urban Cycle, only projects located in municipalities listed on the urban area list (see Appendix Exhibit 1 incorporated here by reference) may apply in this cycle. Fifty-four percent of the State's population credits are available in this cycle. Minimum rehab projects are not eligible to apply in this cycle.

(c) For the Suburban Cycle, all projects not located in municipalities listed on the urban area list may apply in this cycle. Thirty-six percent of the State's population credits are available in this cycle. Minimum rehab projects are not eligible to apply in this cycle.

(d) The Final Cycle will take place only in the event there are unused credits from the Reserve or the Urban and Suburban Cycles or if New Jersey is awarded an allocation from the National Pool. All projects may apply to this cycle. If all credits are not reserved in the Suburban and Urban Cycles, the remaining amount will be made available in this cycle. Any National Pool as well as any

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remaining credits in the Reserve set-aside will also be made available in this cycle. Minimum rehab projects are eligible to apply in this cycle.

(e) Should NJHMFA receive any returned credits after the Final Cycle awards have been made, NJHMFA will, to the extent possible, try to reallocate them before December 31st. They will be allocated to the next-highest ranking project(s) from the Final Cycle.

(f) Projects that were admitted to a cycle but did not receive a reservation of credits may re-apply in the Final Cycle by simply submitting a Reapplication Certification in which the applicant certifies that there are no changes whatsoever to the previously submitted application or documents any and all changes to the previously submitted application. If there are changes, a reapplication fee is required.

5:80-33.4 Application fees

(a) An application fee of $1,000 is required with each application. The application fee is nonrefundable and will be credited toward the reservation fee. A nonrefundable reapplication fee of $100.00 is required only if there are changes to the application.

(b) Projects that applied but did not receive a reservation of credits can reapply in a later cycle or the following year by submitting a reapplication certification and reapplication fee. Projects that are in essence new projects, for example, changes in the project composition, sites or sponsor or developer entities, must submit a new application and application fee.

5:80-33.5 Set-asides

(a) The NJHMFA shall establish a Reserve Set-Aside by setting aside 10 percent of the State's population credits, any returned credits and any carryforward credits, as a reserve for projects that did not receive a full allocation in the previous year because there were not enough credits to meet the demand and for projects that did receive a full allocation but need additional credits due to technical errors, de minimis awards and for projects that need additional credits due to construction costs overruns, etc. The Reserve Set-Aside is not included within the Urban or Suburban Cycle. The dual purpose of the Reserve Set-Aside is intended to address the following.

1. NJHMFA has been experiencing unprecedented demand for the low-income housing tax credit and as a result was able to only partially fund some projects in the prior allocation year. Those projects that did not receive their full eligible allocation based on NJHMFA's credit evaluation are eligible to compete for up to their full allocation in this portion of the Reserve. The developer fee and eligible basis will be frozen at the level of the last carryover certification. Projects such as these must follow the application requirements listed under N.J.A.C. 5:80-33.9. The deadline date for receipt of these applications is the same as the Urban and Suburban Cycles' deadline. These projects will be ranked in accordance with the criteria set forth in the Final Cycle. Awards will be announced at the same time as awards from the Urban and Suburban Cycles and any credits left will be made available under paragraph 2 below. The amount of credits available in this portion of the Reserve is nine percent of the State's population credits.

2. This portion of the Reserve Set-Aside is for hardship requests for projects that have received a full allocation but need additional credits due to technical errors, de minimis awards and for projects that need additional credits due to construction cost overruns, etc. Applicants cannot apply for additional credits from this portion of the reserve until the year in which the project places in service. Any hardship request must be documented to the satisfaction of NJHMFA. There is no application deadline for this portion of the Reserve; however, credits from the Reserve are subject to availability. This portion of the Reserve is funded by carryforward and returned credits and the remaining one percent of the State's population credits. $100,000 of this portion of the Reserve will be set aside for technical errors, etc. until allocations are ready to be made in the Final Cycle.

(b) The NJHMFA shall establish a Senior Set-Aside by setting aside 20 percent of the credits available in the Urban and Suburban Cycles for senior citizen projects. Senior citizen projects are eligible for credits beyond the set-aside. In each cycle, reservations will first be awarded to the highest scoring senior projects until the senior set-aside has been met. Once the senior set-aside has been fully reserved to senior projects, reservations will be awarded to the highest scoring nonprofit-sponsored projects until the nonprofit set-aside has been fully reserved. Then, reservations will be awarded to the applications with the highest scores. If, because of lack of demand, the senior set-aside is not fully utilized, remaining credits in the senior set-aside will be released into that cycle for use by other projects.

(c) The NJHMFA shall establish a Nonprofit Set-Aside in order to encourage the participation of local and/or State tax-exempt organizations in the tax credit program. Twenty percent of the credits available in the Urban and Suburban Cycles will be set aside for qualified nonprofit organizations. Nonprofits are eligible for credits beyond the set-aside. If, however, there is not enough nonprofit demand, credits remaining in the nonprofit set-aside shall be made available to other projects so long as no more than 90 percent of the total State housing credit ceiling, as per Internal Revenue Code 42(h)(5)(A), is allocated to for-profit sponsored projects. In order to qualify for credits from the nonprofit set-aside and for the nonprofit reservation fee, organizations must certify that they are a qualified nonprofit organization under the meaning of the Code.

(d) Nonprofit senior projects will count toward both set-asides. For example, if a senior project sponsored by a qualified nonprofit organization receives an allocation of tax credits, that project is helping to meet the Statewide goal of awarding 20 percent of the population credits to nonprofits; it is also helping to meet the Statewide goal of awarding 20 percent of the population credits to senior projects.

(e) The following is an example of the estimated breakdown of credits in cycles and set-asides:

Population Credits (estimate)	$9,900,000
Less 10 percent Reserve Set-Aside	$990,000
Available for Urban & Suburban Cycles	$8,910,000

Urban Cycle—$5,346,000		Suburban Cycle—$3,564,000	
20 percent Senior Set-Aside	$1,069,200	20 percent Senior Set-Aside	$712,800
20 percent Nonprofit Set-Aside	$1,069,200	20 percent Nonprofit Set-Aside	$712,800
Other	$3,207,600	Other	$2,138,400

5:80-33.6 Application process

(a) Applications will be accepted beginning one month prior to the deadline date. Late and incomplete applications will not be admitted into a cycle. After the application deadline, telephone calls or other verbal communications on behalf of tax credit application from a project's development team, elected representatives, etc., will not be accepted. Written communication altering the application so as to cure a prior incompleteness or ineligibility or increase its competitiveness will not be considered. NJHMFA reserves the right to contact the applicant if the need arises.

(b) Projects must meet all of the following eligibility requirements in order to be admitted into a cycle.

1. The minimum term of the low income occupancy commitment is 30 years: a 15-year compliance period plus the 15-year extended use period required by the Internal Revenue Code. At the time the project is placed in service, the project owner must enter into an "extended low-income housing commitment agreement" as required in Section 42(h)(6) of the Code. To comply with this requirement, NJHMFA will file a Deed of Easement and Restrictive Covenant pursuant to State law.

2. The applicant must select one of the following low-income set asides: 20 percent of the units to be occupied by persons earning 50 percent or less of median income; 40 percent of the units to be occupied by persons earning 50 percent or less of median income; or 40 percent of the units to be occupied by persons earning 50 percent or less of median income (for HOME targeting projects, if applicable).

i. All rents and utility allowances shall be correctly calculated. Applicants choosing to restrict at least 50 percent of the units to

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households earning 50 percent or less of the area median income in order to score points under the point system established by these rules, shall be bound by such choice for the period of restriction selected as it will be reflected on the Deed of Easement and Restrictive Covenant.

3. The type of housing proposed and all amenities and services shall be described in a narrative format. It must include an explanation of how the services will be paid for as well as the need and demand for the project and its impact upon the neighborhood. Commercial space, if any, must be disclosed.

4. At the time the application is filed, the applicant shall be either the owner or developer of the project and shall demonstrate that it has site control of the property via any one of the following:

i. Fee simple title;

ii. Long-term leasehold interest;

iii. Option to purchase or lease, including evidence that options are renewable until at least the start of construction;

iv. Executed land sales contract or other enforceable agreement for acquisition of the property;

v. An executed disposition and development agreement with a public agency. Title ownership is not required for carryover allocations; or

vi. A site being developed pursuant to the NJHMFA's Camden housing initiative, under which the NJHMFA has developed a program to stimulate the construction, rehabilitation and improvement of housing in the city of Camden.

5. All local and environmental approvals shall have been obtained and must be provided. Applicants shall submit a copy of the preliminary or final site plan resolution as well as all other approvals. For substantial rehabilitation projects that are not required by the municipality to obtain site plan approval, a letter from the planning board (or appropriate municipal official) stating that the project is not subject to site plan approval shall be provided. It is the applicant's responsibility to demonstrate that the project complies with all applicable local land use and zoning ordinances and that nothing at the local level interferes with the project obtaining all necessary permits. The Code requires that the chief executive officer of the municipality in which the project is to be located be given the opportunity to comment on the project. NJHMFA will notify the chief executive officer of the municipality and allow him or her a reasonable opportunity to comment on the project. Final environmental approvals shall not be required by the application date for projects being developed pursuant to the NJHMFA's Camden housing initiative, under which the NJHMFA has developed a program to stimulate the construction, rehabilitation and improvement of housing in the City of Camden.

6. All financing information shall be disclosed in the application package. The total of all funding sources (excluding bridge financing) must equal the total project cost. Commitment letters from lending institutions for construction and permanent financing must indicate the interest rate (or the basis on which the interest rate will be set), term of the loan and all conditions. Projects requesting Balanced Housing or State HOME funds from the Department of Community Affairs (DCA) shall submit a letter from DCA evidencing that the application has been received and is complete. DCA will inform NJHMFA of the projects it intends to fund and the subsidy amounts if those projects are sufficiently competitive to receive tax credits. DCA will announce the Balanced Housing and HOME commitments at the same time NJHMFA awards the reservations of tax credits.

i. Commitment letters for grants (that is, Federal Home Loan Bank) should be firm or contain only conditions that are under the control of the sponsor, that is, grant commitments cannot be conditioned on the availability of funds. All grants whether private, Federal, State or local must be deducted from basis (unless the grantee is taking the grant into income and paying income tax on it or the grantee is making a loan to the partnership). For local government grants or loans, for example, CDBG, RCA, a copy of the county's or municipality's resolution approving the funds for the project shall be submitted with the application. For projects receiving HOME funds the applicant shall submit a copy of the participating jurisdiction's resolution approving the funds for the project or a copy of HUD form 7015.15, "Request for Release of Funds Certification" along with a copy of the participating jurisdiction's transmittal letter to HUD.

ii. Applicants of projects over 25 units representing that they will be contributing equity beyond that generated by the tax credit shall disclose the amount, the source, for example, developer fee, savings account, pledged assets, and all terms. Applicants coming out-of-pocket to fill the equity gap shall provide a letter from a certified public accountant who certifies that the applicant has the amount of cash that is needed to fill the gap. Applicants are discouraged from representing in their application that they will be using their own financial resources, when in fact, they anticipate applying for other Federal, State or local subsidies.

iii. Applicants do not need to have a syndicator at the time of application. For projects that do not have an investor at the time of application, NJHMFA shall assume a net pricing of $0.50 per tax credit dollar. However, if the applicant wants the project underwritten at a higher price, then the applicant shall include a commitment letter from an investor evidencing the net pricing and total anticipated net proceeds.

iv. For projects relying solely on equity funding from syndicators, that is, no mortgage, grants, etc., applicants shall submit evidence that the syndication equity shown in the application is attainable. Acceptable evidence is a fully executed commitment letter from the syndicator, indicating the actual pricing and the total anticipated net proceeds (which should equal the total equity funding shown in the application). The actual net price shall be used in NJHMFA's initial credit evaluation. This evaluation shall assume a mortgage will be obtained. In determining the maximum mortgage supportable by the rent roll, NJHMFA will assume the operating costs of the 15-year proforma and the general NJHMFA mortgage underwriting guidelines in N.J.A.C. 5:80-33.17.

7. In accordance with the Code, NJHMFA will examine the reasonableness of the operational costs of the project. Applicants shall demonstrate that their project is financially feasible and viable as a qualified low-income housing project throughout the tax credit compliance period. Applicants shall submit a 15-year cash flow proforma. Applicants with less than 15-year fixed rate permanent financing shall show how the project will remain feasible throughout the compliance period when, for example, the rate adjusts or a balloon payment comes due. A project that applied for balanced housing funds should be using the same rent structure in the tax credit application as in the application for balanced housing.

8. Resumes of the development team (to the extent they have been selected at the time of application for tax credits) shall be submitted. This includes the project owner (general partner and limited partner or syndicator if selected), developer, architect, consultant, general contractor, and management company. All team members shall disclose prior or current defaults or foreclosures or, if none, provide a statement that affirms no involvement in such actions. Misrepresentation of any information about the experience, financial capacity or defaults or foreclosures of any team member will be grounds for denial or loss of the credits and may affect the person's future participation in the program.

9. Projects over 25 units must complete the identity of interest disclosure certification as set forth in Appendix, Exhibit 2, incorporated herein by reference.

10. Applicants requesting acquisition credits shall include an attorney opinion regarding each building's eligibility for acquisition credits unless the deed(s) conveying title to the previous owner clearly shows that the building has not changed ownership in the past 10 years. As long as the sale is an arms-length transaction, the sale price listed on the deed or purchase contract will be used in determining acquisition basis. If the sale is not an arms-length transaction, the applicant shall submit an appraisal not older than six months. The acquisition basis will be limited to the lesser of the purchase price or appraised value.

11. In order to qualify for credits from the nonprofit set-aside and for the nonprofit reservation fee, applicants shall certify that they are a qualified nonprofit organization under the meaning of the Code.

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12. For projects over 25 units that are claiming a prior owner's expenditures in basis, a Certified Public Accountant shall certify the amount of the eligible costs incurred by a prior owner pursuant to the Code at 42(d)(7)(B)(i) which permits a subsequent owner to claim a credit on a qualified low income building, provided the credit was allowed to the prior owner. The CPA must certify that the amount of such costs shown in the application has been spent and is accurately reflected in eligible basis.

13. All projects funded by the United States Department of Rural Economic and Community Development (formerly known as Farmer's Home Administration) must provide a letter from the State Director approving the loan and stating that the funds have been obligated.

14. All applicants anticipating receiving Section 8 Project Based Rental Assistance or any other type of rental subsidy from a government or private source shall submit with the tax credit application evidence of receipt of such assistance. Evidence of Section 8 shall include, at a minimum, a letter from the Public Housing Authority (PHA) firmly approving the project for Section 8 Project Based Assistance subject to the completion of the subsidy layering review. For projects involved in the A.F.L.-C.I.O. Pension Fund Program, a preliminary commitment from the A.F.L.-C.I.O. shall suffice. For other types of rental assistance, evidence shall include a fully executed rental assistance contract that specifies the source and term of the subsidy, as well as any timing concerns. Projects underwritten at fair market rents (FMRs) must include the Section 8 evidence described above in this paragraph; however, applicants that underwrite their project at the tax credit rents and can show their project is feasible at the tax credit rents do not have to submit evidence of Section 8 assistance.

15. Projects occupied by special needs populations are particularly hard to develop because of the risk typically associated with them. This risk emanates largely from their reliance on year-to-year operating subsidies from such sources as state and local departments of human services. Consequently, funding levels may vary depending on the governmental budget. Because this Plan awards points to these types of projects, applicants shall support their claim to serve special needs populations by providing, at a minimum, operating subsidy sources and their contact persons and the social service providers' track records (evidencing fulfillment of governmental contracts, etc.) and references. Firm operating subsidy commitments for the 30-year extended use period are not required. The applicant or general partner does not have to be the social service provider. However, the applicant shall also include with the application a copy of the executed contract or letter of agreement signed by both the owner and the social service provider that specifies the scope and frequency of the support services to be provided, the number of units to be serviced and the length of time (term) of the services contract. A special needs marketing analysis and plan shall be submitted.

16. NJHMFA encourages all owners/developers to affirmatively market their projects. For projects over 25 units, applicants shall submit an Affirmative Fair Housing Marketing Plan, which, in short, documents how the project will be marketed to those people who are least likely to apply. For instance, if the proposed development is located in an area predominantly occupied by Caucasians, outreach should be directed to non-Caucasians. Conversely, if the population is predominantly African-American, outreach should be directed to non-African-American groups. At the time the units are placed in service, the developer and rental agent shall certify that the project was affirmatively marketed.

5:80-33.7 Review process

(a) After successfully fulfilling the eligibility requirements at N.J.A.C. 5:80-33.6(b), applications will be admitted into the cycle. NJHMFA will undertake an initial credit evaluation (or needs analysis) by reviewing the application and the cost and basis breakdown for compliance with cost benchmarks and underwriting standards (see N.J.A.C. 5:80-33.17). NJHMFA will perform the first of the needs evaluations pursuant to the Code's mandate to housing credit agencies to allocate credits to a project in an amount not to exceed that necessary for its financial feasibility and its viability as a qualified low-income housing project throughout the compliance period. NJHMFA also performs these needs evaluations at the time the allocation is made and at the time the project is placed in service.

(b) Applications will receive points based on the point system for the particular cycle in which they compete. In the event of a tie score, projects will be ranked according to the tie-breaker system for the particular cycle in which they are competing. Set-asides will be filled within each cycle by first making reservations to the highest scoring senior projects until the senior set-aside is met and next making reservations to the highest scoring nonprofit-sponsored projects until the nonprofit set-aside is met. Then, reservations will be awarded to the applications with the highest scores and to the applications that win the tie-breakers.

(c) The point system for the Urban Cycle shall be as follows:

1. Family projects—20 points.

2. Targeted cities and targeted neighborhoods—20 points maximum broken down as follows: targeted city—10 points; or targeted neighborhood—an additional 10 points if project is located in a targeted neighborhood within the targeted city.

i. Targeted cities and targeted neighborhoods are designed to target resources to key areas in the State, in order to increase the positive impact to those areas. If the targeted neighborhoods are not announced at least one month prior to the application deadline, only targeted city shall apply and the full 20 points shall be awarded.

3. Special needs projects—10 points:

i. This category is designed to encourage development and preservation of housing for special needs populations.

4. Increasing the low income set-aside—20 points:

i. This category is designed to encourage projects with set-asides exceeding the minimum required by Code, namely the 40-60 and 20-50 set-asides, by setting aside at least 50 percent of the units at 50 percent of the area median income. The project's set-aside selected in the application will be reflected in the deed restriction.

5. Period of restriction—20 points:

i. This category is designed to encourage projects to remain low income beyond the 30 years required. Projects that extend the extended use period by five years or more will receive the 20 points. The period of restriction stated in the application will be the number of years that the property will be deed restricted.

6. Substantial rehabilitation/adaptive reuse—10 points:

i. This category is designed to encourage projects undertaking substantial rehabilitation and adaptive reuse.

7. Minority and women business enterprises—10 points:

i. This category is designed to encourage the utilization of certified minority business enterprises (MBE) and women business enterprises (WBE) as subcontractors and on the development team. MBEs and WBEs are certified by the New Jersey Department of Commerce and Economic Development. Developers who are committed to using MBEs and WBEs should submit a MBE/WBE Certification. This states that 15 percent of the construction cost will be let to MBEs and WBEs in the development of the project. MBEs and WBEs can be a part of the development team as well as subcontractors. As part of the placed in service certification, the developer and accountant must certify that at least 15 percent of the construction cost was expended on MBEs/WBEs. If the project did not utilize 15 percent MBE/WBE, and a MBE/WBE Certification was submitted, NJHMFA shall recapture the allocation.

8. Existing HUD-held or HUD-insured projects undergoing substantial rehab—10 points:

i. This category is designed to enable substantial rehabilitation of projects that are on HUD's Troubled Project list. Applicants shall show that they have exhausted all other HUD resources.

(d) In the event of a tie score under the point system for the Urban cycle, reservations will be made in the following priority order:

1. Targeted Cities—if still a tie:

i. First, to projects offering a social services model; if still a tie:

ii. Second, on the basis of geographic distribution; if still a tie:

iii. Third, to the project with the most percentage points below the maximum developer fee; and if still a tie:

iv. Fourth, to the project utilizing public housing waiting lists.

2. Family Projects—if still a tie:

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i. First, to projects offering a social services model; if still a tie:
ii. Second, on the basis of geographic distribution; if still a tie:
iii. Third, to the project with the most percentage points below the maximum developer fee; and if still a tie:
iv. Fourth to the project utilizating public housing waiting lists.
3. Senior Projects—if still a tie:
i. First, to projects offering a social services model; if still a tie:
ii. Second, on the basis of geographic distribution; if still a tie:
iii. Third, to the project with the most percentage points below the maximum developer fee; and if still a tie:
iv. Fourth, to the project utilizing public housing waiting lists.
(e) The point system for Suburban Cycle shall be as follows:
1. Family projects which:
i. Meet a COAH or Court-ordered fair share obligation—20 points; or
ii. Do not meet a COAH or Court-ordered fair share obligation—10 points.
2. Senior projects that help a municipality meet a COAH or Court-ordered fair share obligation—10 points.
3. Special needs projects—10 points:
i. This category is designed to encourage development and preservation of housing for special needs populations.
4. Increasing the low income set-aside—20 points:
i. This category is designed to encourage projects with set-asides exceeding the minimum required by Code, namely, the 40-60 and 20-50 set-asides, by setting aside at least 50 percent of the units at 50 percent of the area median income. The project's set-aside selected in the application will be reflected in the deed restriction.
5. Period of restriction—20 points:
i. This category is designed to encourage projects to remain low income beyond the 30 years required. Projects that extend the extended use period by five years or more will receive the 20 points. The period of restriction stated in the application will be the number of years that the property will be deed restricted.
6. Substantial rehabilitation/adaptive reuse—10 points:
i. This category is designed to encourage projects undertaking substantial rehabilitation and adaptive reuse.
7. Minority and women business enterprises—10 points:
i. This category is designed to encourage the utilization of certified minority business enterprises (MBE) and women business enterprises (WBE) as subcontractors and on the development team. MBEs and WBEs are certified by the New Jersey Department of Commerce and Economic Development. Developers who are committed to using MBEs and WBEs should submit a MBE/WBE Certification. This states that 15 percent of the construction cost will be let to MBEs and WBEs in the development of the project. MBEs and WBEs can be a part of the development team as well as subcontractors. As part of the placed in service certification, the developer and accountant must certify that at least 15 percent of the construction cost was expended on MBEs/WBEs. If the project did not utilize 15 percent MBE/WBE, and a MBE/WBE Certification was submitted, NJHMFA shall recapture the allocation.
8. Existing HUD-held or HUD-insured projects undergoing substantial rehab—10 points:
i. This category is designed to enable substantial rehabilitation of projects that are on HUD's Troubled Project list. Applicants must show that they have exhausted all other HUD resources.
(f) In the event of a tie score under the point system for the Suburban Cycle, reservations will be made in the following priority order:
1. COAH Obligation—if still a tie:
i. First, to projects offering a social services model; if still a tie:
ii. Second, on the basis of geographic distribution; if still a tie:
iii. Third, to the project with the most percentage points below the maximum developer fee; and if still a tie:
iv. Fourth, to the project utilizing public housing waiting lists.
2. Family Projects—if still a tie:
i. First, to projects offering a social services model; if still a tie:
ii. Second, on the basis of geographic distribution; if still a tie:
iii. Third, to the project with the most percentage points below the maximum developer fee; and if still a tie:
iv. Fourth, to the project utilizing public housing waiting lists.
3. Senior Projects—if still a tie:
i. First, to projects offering a social services model; if still a tie:
ii. Second, on the basis of geographic distribution; if still a tie:
iii. Third, to the project with the most percentage points below the maximum developer fee; and if still a tie:
iv. Fourth, to the project utilizing public housing waiting lists.
(g) The point system for Final Cycle shall be as follows:
1. Family projects located in urban areas—20 points:
i. This category is designed to encourage family projects that are located in urban areas.
2. Suburban projects meeting a COAH obligation: family projects—20 points; and senior projects—10 points.
i. This category is designed to encourage projects that are helping a suburban municipality meet a COAH or court-ordered fair share obligation.
3. Targeted cities and targeted neighborhoods: This category is designed to target resources to key areas in the State, in order to increase the positive impact to those areas: targeted city—10 points; and targeted neighborhood—an additional 10 points if project is located in a targeted neighborhood within the targeted city.
i. Targeted cities and targeted neighborhoods are designed to target resources to key areas in the State, in order to increase the positive impact to those areas. If the targeted neighborhoods are not announced at least one month prior to the application deadline, only targeted city shall apply and the full 20 points shall be awarded.
4. Special needs projects—10 points:
i. This category is designed to encourage development and preservation of housing for special needs populations.
5. Increasing the low income set-aside—20 points:
i. This category is designed to encourage projects with set-asides exceeding the minimum required by Code, namely, the 40-60 and 20-50 set-asides, by setting aside at least 50 percent of the units at 50 percent of the area median income. The project's set-asides selected in the application will be reflected in the deed restriction.
6. Period of restriction—20 points:
i. This category is designed to encourage projects to remain low income beyond the 30 years required. Projects that extend the extended use period by five years or more will receive the 20 points. The period of restriction stated in the application will be the number of years that the property will be deed restricted.
7. Substantial rehabilitation/adaptive reuse—10 points:
i. This category is designed to encourage projects undertaking substantial rehabilitation and adaptive reuse.
8. Minority and women business enterprises—10 points:
i. This category is designed to encourage the utilization of certified minority business enterprises (MBE) and women business enterprises (WBE) as subcontractors and on the development team. MBEs and WBEs are certified by the New Jersey Department of Commerce and Economic Development. Developers who are committed to using MBEs and WBEs should submit a MBE/WBE Certification. This states that 15 percent of the construction cost will be let to MBEs and WBEs in the development of the project. MBEs and WBEs can be a part of the development team as well as subcontractors. As part of the placed in service certification, the developer and accountant must certify that at least 15 percent of the construction cost was expended on MBEs/WBEs. If the project did not utilize 15 percent MBE/WBE, and a MBE/WBE Certification was submitted, NJHMFA shall recapture the allocation.
9. Existing HUD-held or HUD-insured projects undergoing substantial rehabilitation—10 points:
i. This category is designed to enable substantial rehabilitation of projects that are on HUD's Troubled Project list. Applicants shall show that they have exhausted all other HUD resources.
(h) In the event of a tie score under the point system for the Final cycle, reservations will be made in the following priority order:
1. Targeted cities—if still a tie:
i. First, to projects offering a social services model; if still a tie:
ii. Second, on the basis of geographic distribution; if still a tie:
iii. Third, to the project with the most percentage points below the maximum developer fee, and if still a tie:

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iv. Fourth, to the project utilizing public housing waiting lists.

2. COAH obligation—if still a tie:

i. First, to projects offering a social services model; if still a tie:

ii. Second, on the basis of geographic distribution; if still a tie:

iii. Third, to the project with the most percentage points below the maximum developer fee, and if still a tie:

iv. Fourth, to the project utilizing public housing waiting lists.

3. Urban family projects—if still a tie:

i. First, to projects offering a social services model; if still a tie:

ii. Second, on the basis of geographic distribution; if still a tie:

iii. Third, to the project with the most percentage points below the maximum developer fee, and if still a tie:

iv. Fourth, to the project utilizing public housing waiting lists.

4. Suburban family projects—if still a tie:

i. First, to projects offering a social services model; if still a tie:

ii. Second, on the basis of geographic distribution; if still a tie:

iii. Third, to the project with the most percentage points below the maximum developer fee, and if still a tie:

iv. Fourth, to the project utilizing public housing waiting lists.

5. Urban senior projects—if still a tie:

i. First, to projects offering a social services model; if still a tie:

ii. Second, on the basis of geographic distribution; if still a tie:

iii. Third, to the project with the most percentage points below the maximum developer fee, and if still a tie:

iv. Fourth, to the project utilizing public housing waiting lists.

6. Suburban senior projects—if still a tie:

i. First, to projects offering a social services model; if still a tie:

ii. Second, on the basis of geographic distribution; if still a tie:

iii. Third, to the project with the most percentage points below the maximum developer fee; and if still a tie:

iv. Fourth, to the project utilizing public housing waiting lists.

5:80-33.8 Reservation process

(a) On the basis of the point and tiebreaker systems, staff will make reservation award recommendations to the Tax Credit Committee. The Tax Credit Committee will consist of the Commissioner of the Department of Community Affairs, or his or her designee, the Executive Director of NJHMFA and three members of the NJHMFA executive staff. The Committee will review the rankings and tie-breaker decisions as well as requests for reservations from the Reserve Set-Aside. Committee decisions are final. All applicants will be notified in writing whether their projects received a reservation or not and the basis for the decision. A reservation commitment letter will be mailed to all reservation recipients. Recipients have 30 days from the date of the reservation letter to pay the reservation fee. A reservation is not complete until the reservation fee is paid. The Reservation Fee Schedule is as follows:

1. Forprofit-sponsored Projects: One percent of the allocation amount over the 10-year credit period

2. Nonprofit-sponsored Projects: One-half of one percent of the allocation amount over the 10-year credit period

5:80-33.9 Requests for additional credits

(a) Should additional credits be awarded to a project, a reservation fee for the additional credit amount must be provided. All projects seeking additional credits shall have the developer fee that is shown in basis "frozen" at the amount shown on the most recent Sponsor Certification.

(b) Applicants seeking an allocation of additional credits are divided into three categories:

1. Projects from the previous calendar year. These projects shall apply to the Reserve set-aside. These are projects that received allocations in the previous calendar year that, because demand for credits exceeded the supply, were not allocated the full credit amount supportable by the project's eligible basis. Eligible basis cannot exceed that shown on their previous Carryover Certification. Applicants must submit a new application and application fee by the Urban/Suburban Cycle deadline date. Projects will be scored and ranked according to the Final Cycle's point system and tie-breaker system.

2. Hardship Requests of $100,000 or less—Apply to the Reserve Set-Aside. Only hardship requests for additional tax credits of $100,000 or less are eligible to apply for credits from the Reserve Set-Aside. There are no application deadlines to apply to the Reserve. NJHMFA will award additional credits out of the Reserve Set-Aside on a first-come-first-served basis subject to NJHMFA's evaluation of the request and availability of credits. The developer fee shown in eligible basis cannot exceed that shown on the previous Sponsor Certification. Applicants shall submit all of the following before NJHMFA will consider the request:

i. Reapplication fee. The reapplication fee is not required when a project reapplies in the Final Cycle after failing to secure credits in the Urban or Suburban Cycle and only then if there are no changes to the application. In applying for a hardship request for additional credits, it is a given that changes have occurred since the initial application;

ii. Reapplication Certification;

iii. Explanation why additional credits are being sought plus supporting documentation;

iv. Letter from the investor (if known) which addresses the eligibility and specific need for the additional credits. If the applicant is still incurring costs and is using a projection of costs and basis in his or her application for additional credits, the investor must verify the projection; and

v. Release of the previously reserved credits effective upon the NJHMFA approval of an increased reservation. This is required only for projects that seek an increase in the reservation amount that they received that same year, for example, received reservation in urban cycle and applied to Reserve later in year for an incrase in the reservation.

3. Hardship Requests of over $100,000—Apply during a cycle. Hardship requests for additional credits exceeding $100,000 will be handled in a scheduled cycle. The developer fee shown in eligible basis cannot exceed that shown on the previous Sponsor Certification. Applicants shall complete an application and the following in order to be deemed a complete application:

i. Reapplication fee. The reapplication fee is not required when a project reapplies in the final cycle after failing to secure credits in the urban or suburban cycle and only then if there are no changes to the application. In applying for a hardship request for additional credits, it it is a given that changes have occurred since the initial application;

ii. Reapplication Certification;

iii. Explanation why additional credits are being sought plus supporting documentation;

iv. Sponsor Certification with an audited breakdown of costs and basis. An independent C.P.A. shall have audited the project and certified the Breakdown of Costs and Basis (which includes disclosure of all funding sources and amounts). For projects still incurring eligible costs, for example, security system, landscaping, NJHMFA will consider awarding additional credits based on the audited Breakdown of Costs and Basis incurred to date and the applicant's projection of costs and basis incurred through the end of the first year of the credit period;

v. Letter from the investor (if known) which addresses the eligibility and specific need for the additional credits. (If the applicant is still incurring costs and is using a projection of costs and basis in his or her application for additional credits, the investor must verify the projection.); and

vi. Release of the previously reserved credits effective upon the NJHMFA approval of an increased reservation. Required only for projects that seek an increase in the reservation amount that they received that same year, for example, received reservation in urban cycle and applied in final cycle for an increase in the reservation.

5:80-33.10 Binding commitments

There are no binding commitments from the tax credit authority of future years allowable under this Qualified Allocation Plan.

5:80-33.11 Returning credits

(a) Projects unable to utilize their allocation should return their allocation to the NJHMFA as soon as possible via letter. NJHMFA will send a letter acknowledging receipt of the return. Returned credits are deposited into the Reserve.

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(b) As an incentive to turn in unused credits early, projects that return credits by November 15 will have their previously paid reservation fee credited toward their next reservation fee. Projects returning credits after November 15 that receive a reservation the next year will have to pay a new reservation fee.

5:80-33.12 Credit evaluation (needs analysis)

(a) In accordance with Section 42(m)(2), NJHMFA evaluates the need for the tax credit at the application stage, at carryover, if applicable, and before completing the IRS Form 8609, that is, when the building is placed in service. During each evaluation, if the amount of the tax credit request is not needed for the financial feasibility of the project and its viability as a qualified low-income housing project throughout the tax credit compliance period, the amount of the tax credit will be reduced to the needed amount. The determination of whether the amount requested is needed for financial feasibility and continued viability of the project will include an examination as to whether there have been increases or decreases in project costs, other funding sources or rental subsidies which would result in a higher allocation than needed. For each evaluation, a Sponsor Certification in the format supplied in the application must be submitted. On a case-by-case basis, NJHMFA may extend its filing deadline if the sponsor can show good cause.

(b) At carryover, the Carryover Sponsor Certification form must include an independent C.P.A. certification on the Breakdown of Costs and Basis page that the 10 percent test has been met; that all sources and uses shown are accurate; and that the costs shown in basis are allowable under the Code. The filing deadline is November 15.

(c) As soon as possible after the building has placed in service, the owner must submit a Placed in Service Sponsor Certification showing all sources (including net syndication proceeds), uses and basis as well as the pricing from the limited partner investor. The developer fee shown in eligible basis cannot exceed that shown on the Reservation or Carryover Certification. The filing deadline is November 15.

(d) In performing the final evaluation of the project's need for the tax credits, NJHMFA will use the actual net pricing achieved with the investor. Any substantive changes to the project's financing plan or costs must be explained in detail and may cause the project to be reconsidered by the NJHMFA.

(e) For projects over 25 units, an independent C.P.A. must audit the project and certify to the costs and basis on Attachment A of the Placed in Service Sponsor Certification set forth in Appendix, Exhibit 3, incorporated herein by reference. The C.P.A. must also verify the actual pricing achieved with the investor. The developer fee shown in eligible basis cannot exceed that shown on the Reservation or Carryover Certification set forth in Appendix, Exhibit 3. To make sure that the placed in service paperwork is submitted to NJHMFA by the November 15th deadline, sponsors must ensure that the cost certification process begins immediately upon construction completion. In fact, if a project is already placed in service the same year in which it receives a reservation, the cost certification process should begin before construction completion in order to avoid jeopardizing the reservation. For projects still incurring eligible costs, NJHMFA, when performing its placed in service needs analysis, will consider the owner's reasonable projection of costs and basis incurred through the end of the first year of the credit period in addition to the audited Breakdown of Costs and Basis.

(f) The Code requires that NJHMFA reduce the credit amount based upon need; however, this does not mean that NJHMFA will jeopardize the long-term financial feasibility and viability of the project by "arbitrarily" taking back credits. For example, if the equity market improved so that projects were able to get better pricing from investors, NJHMFA will not necessarily reduce the credit on those projects that use the excess credits to cover cost overruns, provide betterments in the project such as upgrading the security system, landscaping, provision of appliances such as washers and the like. NJHMFA will not allow these additional funds to be used to increase the developer fee eligible basis amount over that shown on the previous carryover.

5:80-33.13 Extended use agreement

Section 42(h)(6) of the Internal Revenue Code requires the project owner to enter into an extended low-income housing commitment agreement that adds an additional 15 year low-income occupancy requirement to the initial 15 year compliance period. It must be recorded in order to claim the tax credits when filing Federal tax returns. Owners shall complete the NJHMFA's Deed of Easement and Restrictive Covenant. Upon receipt of a complete and fully executed agreement, NJHMFA will file the restrictive covenant pursuant to State law.

5:80-33.14 Obtaining the 8609

Upon completion of the final needs evaluation, filing of the extended use agreement and payment of the monitoring fee, the NJHMFA will complete Part I of the IRS Form 8609 and will forward a copy, as filed with the IRS, to the project owner. An 8609 is issued for each building in the project. (Owners should be sure to make copies of the signed IRS Form 8609 as a copy must be filed each year with Federal tax returns.)

5:80-33.15 Additional documentation

NJHMFA reserves the right to ask for any documentation necessary throughout the application, reservation, carryover and placed in service processes. NJHMFA will also require all syndication documents.

5:80-33.16 Compliance monitoring

(a) Owners/agents are required to keep records for each qualified low income building in the project which will show for each year of the compliance period the following information:

1. The total number of residential rental units in the building, including the number of bedrooms and the size in square feet of each residential rental unit;

2. The percentage of residential rental units in the building that are low income;

3. The rent charged on each residential rental unit in the building, including any utility allowances;

4. The number of occupants in each low income unit, but only if rent is determined by the number of occupants in each unit under Section 42(g)(2) (as in effect before the Revenue Reconciliation Act of 1989);

5. The low income unit vacancies in the building and information that shows when and to whom the next available units were rented;

6. The annual income certification of each low income tenant per unit. For an exception to this requirement, see Section 42(g)(8)(B) which provides a special rule for a 100 percent low-income building;

7. Documentation to support each low income tenant's income certification, that is, a copy of the tenant's Federal income tax return, W-2 form or income verification from third parties such as employers or agencies paying unemployment compensation. Tenant income is calculated in a manner consistent with the determination of annual income under Section 8 of the United States Housing Act of 1937, not in accordance with the determination of gross income for Federal income tax liability. In the case of a tenant receiving housing assistance payments under Section 8, the documentation requirement is satisfied if the public housing authority provides a statement to the building owner declaring that the tenant's income does not exceed the applicable income limit under Section 42(g). For an exception to this requirement, see Section 42(g)(8)(B) which provides a special rule for a 100 percent low-income building;

8. The eligible basis and qualified basis of the building at the end of the first year of the credit period; and

9. The character and use of the non-residential portion of the building included in the building's eligible basis under Section 42(d), that is, tenant facilities that are available on a comparable basis to all tenants and for which no separate fee is charged for use of the facilities, or facilities reasonably required by the project.

(b) Owners/agents are required to retain the records described above for at least six years after the due date (with extensions) for filing the Federal income tax return for that year. The records for the first year of the credit period, however, must be retained for the entire compliance period plus six years beyond the due date (with extensions) for filing the Federal income tax return for the last year

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of the compliance period of the building (21 years total). Therefore, records for the first year of the compliance period must be retained for 21 years. Records for each year thereafter must be retained for six years after filing the Federal income tax return for that particular year.

(c) The owner/agent of a low income housing project shall certify, under penalty of perjury, annually to the Agency for each year of the compliance period that for the preceding 12 month period:

1. The project met the requirements of the 20-50 test under Section 42(g)(1)(A) or the 40-60 test under Section 41(g)(1)(B) or the 40-50 test under Section 42(i)(2)(E)(i); whichever minimum set aside test was applicable to the project; and if applicable to the project, the 15-40 test under Sections 42(g)(4) and 142(d)(4)(B) for "deep rent skewed" projects;

2. There was no change in the applicable fraction of any building in the project (as defined by Section 42(c)(1)(B)), or that there was a change and a description of the change;

3. The Owner received an annual income certification on each low income tenant, and documentation to support that certification; or in the case of a tenant receiving Section 8 Housing Assistance Payments, the statement from a public housing authority declaring that the tenant's income does not exceed the applicable limit under Section 42(g). For an exception to this requirement, see Section 42(g)(8)(B) which provides a special rule for a 100 percent low-income building;

4. Each low income unit in the project was rent restricted under Section 42(g)(2);

5. All units in the project were for use by the general public and used on a non-transient basis (except for transitional housing for the homeless provided under Section 42(i)(3)(B)(iii));

6. Each building in the project was suitable for occupancy, taking into account local health, safety and building codes;

7. There was no change in the eligible basis of any building in the project, or if there was a change, the nature of the change, (that is, a common area has become commercial space, or a fee is now charged for a tenant facility formerly provided without charge);

8. All tenant facilities included in the eligible basis under Section 42(d) of any building in the project such as swimming pools, other recreational facilities, and parking areas, were provided on a comparable basis without charge to all tenants in the building;

9. If a low income unit in the project became vacant during the year, that reasonable attempts were or are being made to rent that unit or the next available unit of comparable or smaller size to tenants having a qualifying income before any units in the project were or will be rented to tenants not having a qualifying income;

10. If the income of a tenant of a low income unit who has previously been verified, increases to above 140 percent of the applicable limited allowed in Section 42(g)(2)(D)(ii), that unit may continue to be counted as a low income unit as long as the next available unit of comparable or smaller size in the project was or will be rented to tenants having a qualifying income; and

11. An extended low income housing commitment as described in Section 42(h)(6) was in effect for buildings subject to Section 7108-(c)(1) of the Revenue Reconciliation Act of 1989.

(d) The Agency requires the owners of all low income housing projects to submit annually to the Agency for review the Annual Project Certification and the Occupancy Status Report which requires information on tenant income and rent for each low income unit. In addition, throughout the year, owners of at least 20 percent of all tax credit projects will be required to submit to the Agency for compliance review the following information for a minimum of 20 percent of all low income units (units will be identified by the Agency):

1. A copy of the annual income certification for the household;

2. The documentation the owner has received to support the certification; and

3. The rent record.

(e) The Agency will select which projects will undergo Agency review and give owners reasonable notice that their project has been chosen as well as identify which documents will need to be submitted. Reviews may occur more frequently than on a 12 month basis, provided that all months within each 12 month period are subject to certification. NJHMFA charges a fee for these services in the amount of $100.00/unit per year for the 15-year compliance period or a one-time up-front fee of $750.00 per unit.

(f) The Agency reserves the right to perform an on-site inspection of any low-income housing project at least through the end of the compliance period and have access to all books and records which would document compliance.

(g) Upon determination by the Agency of noncompliance with Section 42 of the Internal Revenue Code or other relevant rules and regulations, the Agency will give prompt notice to the owner of the violation. The owner will then be given sufficient notice to correct the violation. The Agency is required to notify the IRS, within 45 days after the end of the correction period, of the noncompliance and whether the owner has or has not corrected the violation.

5:80-33.17 Underwriting standards

(a) No project will be allocated more than $2,000,000 in credits in any one calendar year.

(b) The amount of developer fee allowed in eligible basis is limited to 15 percent of total development cost excluding land, working capital, marketing expenses, escrows, operating deficit reserves, costs associated with syndication and step-in-the-shoes costs exceeding the acquisition price.

1. However, a developer fee of up to 20 percent (of total development cost excluding land, working capital, marketing expenses, escrows, operating deficit reserves, costs associated with syndication and step-in-the-shoes costs exceeding the acquisition price) is allowed for the following types of housing:

i. Scattered site single-family or duplex housing;

ii. Projects of 25 units or less; and

iii. Housing for special needs projects.

2. Professional fees not included in the developer fee are the fees for the architect, engineer, lawyer, accountant, surveyor, appraiser, professional planner, historical consultant and environmental consultant. All other consultant fees shall be included in the developer fee and are not allowed to be shown as separate line items on the tax credit application.

3. The developer fee contained in the application will be the maximum fee recognized by the Agency at the time of cost certification. During the scoring and ranking process, if there is a tie score, one of the tie-breaker criteria is a lower developer fee. However, the developer fee should not go below a "floor" of eight percent.

(c) For projects over 25 units in size, where there is an identity of interest between the developer and contractor, applicants are limited in the amount of developer fees and contractor profit allowed in basis. The combined developer fee/general contractor profit may not exceed 18 percent of total cost minus land, working capital, marketing, escrows, operating deficit reserves, costs associated with syndication and step-in-the-shoes costs exceeding the acquisition price.

1. An identity of interest exists between the owner (or developer) and the general contractor if any of the following conditions exist:

i. When there is any financial interest between the developer and the general contractor;

ii. When one or more of the officers, directors, stockholders or partners of the developer is also an officer, director, stockholder or partner of the general contractor; or

iii. When any officer, director or stockholder of the developer has any interest whatsoever in the general contractor.

(d) The credit amount is determined by multiplying the qualified basis by the applicable percentage rate. It is the intention of this Plan to use nine percent as the applicable percentage rate for new construction and rehabilitation and four percent as the rate for acquisition and federally funded projects. NJHMFA reserves the right, as permitted by the tax credit regulations, to use an applicable rate below the maximum nine percent and four percent and to issue less than the maximum credit allocation otherwise supportable by the project's eligible basis. The applicable Federal rate of the month in which the building is placed in service or applicable Federal rate of the lock-in agreement will still appear on the building's 8609;

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however, the credit amount cannot exceed the amount NJHMFA allocated to the project. The issuance of tax credits or the determination of any allocation amount in no way represents or purports to warrant the feasibility or viability of the project by the NJHMFA.

(e) Financing arrangements will be evaluated to ensure that projects are not structured to artificially increase basis. Examples:

1. Drawing down entire bridge or secondary loans at construction closing instead of using such financing on an as needed basis.
2. Including accrued construction period interest from soft second loans in basis even though payment of the interest is deferred indefinitely as long as the building remains low income or until sale.
3. Assuming an interest rate far in excess of the market. (Secondary or bridge financing between corporate affiliates should not exceed prime plus two points). The excess interest charges in such cases will not be considered in eligible basis.

(f) While the tax law does not require allocating agencies to place restrictions on the development cost of any project, it does require them to consider the reasonableness of the developmental and operational costs of the project. The NJHMFA will examine building construction and land costs in comparison to the certified cost data on existing tax credit projects and other non-luxury multifamily housing in the same geographic areas. Consideration will be given to "high costs" projects provided that the costs are justifiable and reasonable under the circumstances and can be attributed to unique project characteristics (such as location in difficult-to-develop area, limited commercial space, or tenant services or common areas essential to the character of the project) which are consistent with the housing needs and priorities of the allocation plan.

(g) The amount of contingency in eligible basis cannot exceed 10 percent of the total depreciable basis.

(h) Intermediary costs include, but are not limited to, developer fees (which include organizational costs and loan consultant fees), legal, planning, accounting, architectural and engineering fees, syndication costs and fees charged by negotiating agents (for example, realtors, etc). They do not include those costs properly allocated to and payable by the syndicator (such as SEC registration and sales commissions). Pursuant to Internal Revenue Code 42(m)(2)(B)(iii), NJHMFA shall consider the percentage of the housing credit dollar amount used for project cost other than the cost of intermediaries but the intermediary cost standard shall not be applied so as to impede the development of projects in hard-to-develop areas.

EXHIBIT 1
LIST OF URBAN AREAS FOR LOW-INCOME HOUSING TAX CREDITS

Asbury Park City
Bayonne City
Belleville Township
Bloomfield Township
Bridgeton City
Camden City
Carteret Borough
East Orange City
Elizabeth City
Garfield City
Glassboro Borough
Gloucester City
Gloucester Township
Hillside Township
Hoboken City
Irvington Township
Jersey City
Keansburg Borough
Kearny Town
Lakewood Township
Lindenwold Borough
Lodi Borough
Long Branch City
Millville City
Monroe Township (Gloucester)
Mount Holly Township
Neptune Township
New Brunswick City
Newark City
North Bergen Township
Old Bridge Township
Orange City Township
Passaic City
Paterson City
Paulsboro Borough
Pemberton Township
Penns Grove Borough
Pennsauken Township
Perth Amboy City
Phillipsburg Town
Plainfield City
Pleasantville City
Rahway City
Roselle Borough
Salem City
Trenton City
Union City
Vineland City
West New York Town
Willingboro Township
Winslow Township
Woodbridge Township
Woodbury City

EXHIBIT 2
IDENTITY OF INTEREST CERTIFICATION

☐ Application
☐ Placed in Service

An identity of interest exists between developer and general contractor, if any of the following conditions exist:

1. When there is any financial interest between the developer and the general contractor;
2. When one or more of the officers, directors, stockholders or partners of the developer is also an officer, director, stockholder or partner of the general contractor;
3. When any officer, director or stockholder of the developer has any interest whatsoever in the general contractor;
4. When the general contractor advances any funds to the developer.

The undersigned, as duly authorized representative of _____ _____, the developer and/or applicant for an allocation by the New Jersey Housing and Mortgage Finance Agency ("Agency") of Low Income Housing tax Credit pursuant to Section 42 of the Internal Revenue Code of 1986, as amended, for the project known as _____ certifies as follows:

☐ There is no Identity of Interest as described above between developer and the general contractor.

☐ There is an Identity of Interest as described above between developer and the general contractor.

Any applicant or recipient of tax credits which certifies to an identity of interest will be limited to a combined developer fee general contractor profit of 18% of total project cost less expenditures on land, working capital, marketing, escrows, operating deficit reserves, syndication, and costs associated with step-in the shoes basis exceeding acquisition price.

CERTIFICATION

I, _____, hereby represent and state that the foregoing information and any attachments thereto, to the best of my knowledge, are true and complete. I acknowledge that the New Jersey Housing and Mortgage Finance Agency is relying on the information contained herein and thereby acknowledge that the undersigned entity is under a continuing obligation, from the date of this Certification through the completion of the Project, to notify the Agency in writing of any changes to the answers or information contained herein. I acknowledge that I am aware that it is a criminal offense to make a false statement or misrepresentation in this certification, and if I do so, I recognize that I am and/or the undersigned entity is subject to criminal prosecution under the law.

Sworn and subscribed to before
the undersigned Notary Public
on the date appearing below

_____ _____(L.S.)
Witness [Secretary of Corporation (Seal)]

_____
Print Name

_____
Print Title

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(INDIVIDUAL OR PARTNERSHIP FORM)

BE IT REMEMBERED, that on _____, 199__, before me, the subscriber, personally appeared _____, who, I am satisfied, the person named in and who executed the within Instrument, and thereupon he/she acknowledged that he/she signed, sealed and delivered the same as his/her act and deed, for the purposes therein expressed.

_____
Notary Public

(CORPORATE FORM)

BE IT REMEMBERED, that on _____, 199__, before me, the subscriber, personally appeared _____, who, being duly sworn on his/her oath, deposes and makes proof to my satisfaction, that he/she is the Secretary of _____, Corporation named in the within Instrument; that _____ is the President of said Corporation; that the execution, as well as the making of this Instrument, has been duly authorized by a proper resolution of the Board of Directors of the said Corporation; that deponent well knows the corporate seal of said Corporation; and that the seal affixed to said Instrument is the proper corporate seal and was thereto affixed and said Instrument signed and delivered by said President as and for the voluntary act and deed of said Corporation, in the presence of deponent, who thereupon subscribed his/her name thereto as attesting witness.

_____
Notary Public

EXHIBIT 3
SPONSOR'S CERTIFICATION

☐ Application
☐ Re-Application
☐ Carryover
☐ Placed in Service/Allocation

State of _____
SS.
County of_____

The undersigned, as the duly authorized representative of _____, the developer/applicant and/or the recipient of an allocation by the New Jersey Housing and Mortgage Finance Agency ("Agency") of a Low-Income Housing Tax Credit pursuant to Section 42 of the Internal Revenue Code of 1986 ("Code"), as amended, for the project known as _____ acknowledges and certifies as follows:

1. ***You must check and complete one of the following:***
   ☐ It is anticipated that the project will be placed in service on, or prior to, December 31, _____
   -OR-
   ☐ The project was placed in service on _____ .

2. The developer/applicant/recipient fully intends to abide by all applicable federal laws and regulations relating to the Low-Income Housing Tax Credit.

3. The developer/applicant/recipient is not relying on any Agency statements or representations as to the value of the allocation of the low-income housing tax credit, including, but not limited to, representations or statements concerning the initial and continuing project eligibility under applicable federal law, calculation of qualified basis and eligible basis, determination of whether federal subsidy is involved, term of the tax credit, term of the compliance, potential impact of future changes in federal law and applicability of recapture requirements and penalties.

4. The developer/applicant/recipient must enter into an extended low-income housing commitment with the Agency pursuant to Section 42(h)(6) of the Code in which the taxpayer and his/her successors agree to meet the elected set aside and the applicable fraction of low-income occupancy for an extended use period of at least fifteen years beyond the fifteen-year compliance period (subject to possible termination of the extended use period under circumstances described in the Code). The agreement incorporates a Deed of Easement and Restrictive Covenant to be executed by the tax credit recipient and recorded by the Agency. The Deed of Easement and Restrictive Covenant must be executed in the form required by the Agency and delivered to the Agency prior to the time of allocation (IRS Form 8609). It is further acknowledged that the terms of the Deed of Easement and Restrictive Covenant will be enforceable by the Agency or by qualified prospective, present or former low-income occupants of the Project in the state courts during the extended use period. The Deed of Easement and Restrictive Covenant may have a negative effect on the future value of the Project.

The undersigned further acknowledges that the developer/applicant/recipient will need the consent of any present mortgage holders on the subject property to record the restrictive covenant since any foreclosing taxpayer may neither evict without cause nor increase the gross rent on low-income units until three years after he/she forecloses on the project and terminates the extended use period.

5. The development costs of the project (as of this time) as detailed in the attached breakdown of costs and basis were prepared by the developer/applicant/recipient or his/her agents and are accurate to best of his/her knowledge. All funding commitments recited in the Agency Low-Income Tax Credit Application are firm commitments.

6. Section 42(m)(2) of the Code dictates that the housing credit agency shall not allocate tax credits exceeding the amount needed for project feasibility. Consequently, the developer/applicant/recipient consents with this certification to a possible reduction of credits subsequent to needs analyses conducted by HMFA at carryover and placed in service dates.

7. If this is a reapplication, ***you must check one of the following:***
   ☐ Project did not receive full credit amount supportable by the project's eligible basis in a prior year
   ☐ Project did not receive allocation in a previous cycle
   ☐ Project is seeking additional credits

8. If this is a reapplication, ***you must check one of the following:***
   ☐ NO changes to the previously submitted application have been made.
   ☐ Changes have been made in this reapplication. Documentation substantiating these changes are included with this reapplication as specified by the Qualified Allocation Plan.

I understand that it is a criminal offense to make a false statement or a purposely misleading statement on this Certification and that if I do, I and the entity which I represent, will be subject to criminal prosecution, possible loss of tax credit allocation, and disqualification from future participation in the Low Income Housing Tax Credit Program in New Jersey.

Sworn and subscribed to
before the undersigned
Notary Public on the date
appearing below:

_____ _____(L.S.)
Witness (Secretary of Corporation)

_____
(Print Name and Title)

ACKNOWLEDGEMENT

(INDIVIDUAL OR PARTNERSHIP FORM)

BE IT REMEMBERED, that on _____, 199__, before me, the subscriber, personally appeared _____, who, I am satisfied, is the person named in and who executed the within Instrument, and thereupon he/she acknowledged that he/she signed, sealed and delivered the same as his/her act and deed, for the uses and purposes therein expressed.

_____
Notary Public

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(CORPORATE FORM)

BE IT REMEMBERED, that on _____, 199___, before me, the subscriber, personally appeared _____, who, being by me duly sworn on his/her oath, deposes and makes proof to my satisfaction, that he/she is the Secretary of _____ the Corporation named in the within Instrument; that _____ is the President of said Corporation; that the execution, as well as the making of this Instrument, has been duly authorized by a proper resolution of the Board of Directors of the said Corporation; that deponent well knows the corporate seal of said Corporation; and that the seal affixed to said Instrument is the proper corporate seal and was thereto affixed and said Instrument signed and delivered by said President as and for the voluntary act and deed of said Corporation, in the presence of deponent, who thereupon subscribed his/her name thereto as attesting witness.

_____
Notary Public

ENVIRONMENTAL PROTECTION

(a)

ENVIRONMENTAL REGULATION

Ninety-day Construction Permits

Proposed Readoption with Amendments: N.J.A.C. 7:1C

Proposed Amendments: N.J.A.C. 7:7-4.2 and 4.10, 7:13-1.2 and 4.1, 7:14A-22.6 and 22.8

Authorized By: Robert C. Shinn, Jr., Commissioner, Department of Environmental Protection.

Authority: N.J.S.A. 13:1D-9, 13:1D-29 et seq., specifically 13:1D-33.

DEP Docket Number: 10-95-02/145.

Proposal Number: PRN 1995-189.

A **public hearing** concerning this proposal will be held:

Monday, April 10, 1995 at 9:30 A.M.
New Jersey Department of Environmental Protection
Public Hearing Room
401 East State Street (1st floor)
Trenton, NJ 08625

Submit written comments, identified by the Docket Number given above, by April 19, 1995 to:

Janis Hoagland, Esq.
Office of Legal Affairs
New Jersey Department of Environmental Protection
CN 402
Trenton, New Jersey 08625

The agency proposal follows:

Summary

Pursuant to the requirements and criteria of Executive Order No. 66(1978), the Ninety-Day Construction Permits rules, N.J.A.C. 7:1C, are scheduled to expire on June 15, 1995. As required by Executive Order No. 66, the Department of Environmental Protection (Department) has reviewed these rules and has determined them to be necessary, reasonable, and proper for the purpose for which they were originally promulgated. The Department therefore proposes to readopt this chapter, with amendments as described below.

The Ninety-Day Construction Permits rules have been in effect since 1975. These rules implement the Construction Permit Law, N.J.S.A. 13:1D-29 et seq., which was enacted in 1975 to secure timely decisions from the Department regarding its administration of five permit programs and to ensure adequate public notice of those decisions. The readoption of N.J.A.C. 7:1C will enable the Department to continue to use unified procedures and timeframes in reviewing and issuing construction permits pursuant to the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 et seq.; the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq.; the Waterfront Development Law, N.J.S.A. 12:5-3; the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq.; and the Water Pollution Control Act, N.J.S.A. 58:10A-1 (specifically, treatment works approvals for construction or changes to sanitary sewage collection, treatment and discharge systems). Within the Department, the Land Use Regulation Program administers the first four programs and the Division of Water Quality administers the treatment works approval program.

Section Summary

Following is a summary of the substantive provisions of N.J.A.C. 7:1C proposed for readoption, subject to the proposed amendments described in the discussion of the proposed amendments below.

N.J.A.C. 7:1C-1.1 explains the purpose of these rules. N.J.A.C. 7:1C-1.2, the definition section, defines the terms that are essential to the understanding of these rules.

N.J.A.C. 7:1C-1.3 describes the pre-application procedure and requirements. N.J.A.C. 7:1C-1.4 outlines the general procedural requirements for a construction permit application. N.J.A.C. 7:1C-1.5 contains the fee schedules for permit applications, extension of time requests, and permit modifications.

N.J.A.C. 7:1C-1.6 describes the use of the DEP Bulletin. N.J.A.C. 7:1C-1.7 outlines the procedures for review of applications. N.J.A.C. 7:1C-1.8 sets forth the time limits in which the Department must make a decision on a permit application.

N.J.A.C. 7:1C-1.9 sets forth the procedures for appealing permit decisions issued by the Department. N.J.A.C. 7:1C-1.10, 1.11 and 1.12 set forth the limitations and applicability of these rules.

N.J.A.C. 7:1C-1.13 outlines the procedure and requirements for over-the-counter processing of minor stream encroachment permits and minor treatment works approvals.

N.J.A.C. 7:1C-1.14 clarifies that all permit applications subject to these rules will also be subject to the specific programmatic rules of the appropriate agency, and identifies those specific rules which either supersede or are in addition to this chapter.

Proposed Amendments

At N.J.A.C. 7:1C-1.2, the definitions section, the Department is proposing to delete the definition of "application," which is currently defined as "application form CP-1 and the appropriate agency supplement" and substitute a definition for "application form," as the application form required and provided by the appropriate agency. For example, an applicant for a permit issued by the Land Use Regulation Program would complete the Land Use Regulation Program permit application form. The CP-1 form requires only general information of use to all the permitting programs, that is, name and address of the applicant, and exact location of the work site (county, municipality, block and lot). Each of the permitting programs requires an agency supplement to be completed in addition to the CP-1 form. The use of the generic CP-1 form was intended to streamline the permit application process for the regulated community. However, in order to obtain the site/facility-specific information needed to issue the applied for permits, the various permitting programs have each developed addenda to the CP-1 form, which has reduced the CP-1 form to essentially a title page containing the site/facility name and address. The Department therefore proposes to integrate the general information gathered through the use of the CP-1 form into the program-specific addenda currently used and discontinue use of the CP-1 form. This proposed amendment will consolidate the information and reduce the paperwork needed from the regulated community.

The Department is also proposing to amend those sections of the Coastal Permit Program Rules, N.J.A.C. 7:7-4.2 and 4.10, and the newly adopted (see notice of adoption published elsewhere in this issue of the New Jersey Register) Flood Hazard Area Control Rules, N.J.A.C. 7:13-1.2, 4.1 and 4.2, to delete references to the CP-1 form and substitute the Land Use Regulation Program application form. The Department is also proposing to amend the rules concerning applications for Treatment Works Approvals at N.J.A.C. 7:14A-22.6 and 22.8 to reference the Treatment Works Approval application form.

The Department is proposing to amend N.J.A.C. 7:1C-1.3(b)5 to reference the correct provision of the newly adopted (see Notice of Adoption elsewhere in this issue of the New Jersey Register) Flood Hazard Area Control Rules, N.J.A.C. 7:13. The Department is also proposing to amend N.J.A.C. 7:1C-1.3(c) and (d), and add a new subsection (e), to specify that applicants shall follow the specific programmatic rules for the type of permit they are seeking.

At N.J.A.C. 7:1C-1.5 the Department is proposing amendments to the fee schedule for Treatment Works Approvals (TWAs). The Department

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proposes to amend the minimum fee charged for TWAs from $150.00 to $450.00. The current fee structure was adopted in 1989. Changes to the rules for the TWA program, which became effective on June 6, 1994, reduced the scope of the industrial TWA program and created a procedure for obtaining General Industrial TWAs. In addition, these changes to the rules for the TWA program changed the regulatory threshold for TWAs to exempt from the approval process projects with a design flow of less than 8,000 gallons per day with a lateral connection and other similar small projects. This proposal contains, at N.J.A.C. 7:1C-1.5(a)5iv, a proposed amendment to the minimum TWA fee. An applicant for a General Industrial TWA will be required to pay this new fee, which is, on average, substantially less than fees charged for industrial TWAs prior to June 6, 1994. The basis for the proposed fee is described below.

The Department staff position titles necessary for the TWA program are listed in Table I, below, and include clerical staff, management information system technicians, engineers, supervisors, and a bureau chief. The total hours necessary for each staff level involved in the processing of an average TWA application was estimated based upon past experience within the program. The appropriate hourly rate for each position was then taken into account and, along with the established fringe benefit and indirect cost rates, a fee was determined. The fringe rate is established by the Department of Treasury and the indirect cost rate is set by Department and U.S. Environmental Protection Agency agreement. Title I summarizes the calculation which results in the proposed minimum application fee of $450.00 for TWAs.

TABLE I

Treatment Works Approvals Minimum Fee Calculation
(based on average work hours required to process a TWA)

Bureau of Construction and Connection

Staff	Time (Hours)	Hourly Rate	Total
Clerical	3.5	$12.32	$ 43.12
Tech MIS	3.0	22.35	67.05
Engineer	5.0	24.53	122.65
Supervisor	1.0	28.71	28.71
Bureau Chief	0.5	33.38	16.69
			$278.22

Fringe benefit rate (.2425) = $278.22 × .2425 = $67.47
Indirect cost rate (.3118) = ($278.22 + $67.47) × .3118 = $107.79
Minimum Fee: $278.22 + $67.47 + $107.79 = $453.48
Therefore, set minimum fee at $450.00.

The services provided by the staff listed in Table I above include the following, listed by each staff level. Clerical staff process incoming correspondence and application packages, answer telephone calls, coordinate pre-application and technical review meetings, process outgoing correspondence and decision letters, and file the correspondence and decision packages. Management Information System Technicians, listed as Tech MIS in the table, hold pre-application meetings, respond to general and specific inquiries concerning administrative requirements, conduct the administrative review of the application and prepare acknowledgement letters which describe any deficiencies, process application fees, and prepare the information for the DEP Bulletin. Engineering staff hold both pre-application and technical meetings, respond to inquiries on administrative and technical requirements, review the application for conformance with the regulations at N.J.A.C. 7:14A-22 and 23, resolve deficiencies with the applicant/consulting engineer, and prepare an application decision letter. The Supervisor intervenes on issues which cannot be resolved at the staff level and reviews the Engineering staff's recommendations for approval/denial of each application. The Bureau Chief is responsible for the final review and signing of the permit decision recommendation. Following the Bureau Chief's review, the application package and decision is either returned to staff for revisions or returned to the clerical staff for processing and mailing to the applicant.

This proposed fee amendment will result in a decrease in incoming revenue to the Department in comparison to Fiscal Year 1994 revenue in the TWA program. In Fiscal Year 1994, the Industrial TWA fee revenue equalled $132,616 and the minimum fee TWA fee revenue equalled $37,650, totalling $170,266. The projected yearly incoming revenue based on the proposed new minimum fee equals approximately $85,050. The projected overall reduction in revenue based on a minimum TWA fee of $450.00 equals $85,216.

The Department proposes to amend N.J.A.C. 7:1C-1.5(a)4i(2) and (3) to be consistent with the revised Flood Hazard Area Control regulations, N.J.A.C. 7:13, proposed in February 1994 (see 26 N.J.R. 1009(a)), which the Department is adopting (see adoption notice published elsewhere in this issue of the New Jersey Register). Specifically, the Department proposes to amend the definitions of "minor stream encroachment project" and "major stream encroachment project." The Department also proposes to add to the definition of "minor stream encroachment project," at N.J.A.C. 7:1C-1.5(a)4i(2), the review of an encroachment project for a zero percent or 20 percent "net fill" limitation associated with a single family dwelling. Under the current rules, this review is considered a "major stream encroachment project."

In addition, the list of major project elements, currently found at N.J.A.C. 7:1C-1.5(a)4iv, is proposed to be deleted, and proposed for addition at N.J.A.C. 7:1C-1.5(a)4i(3). The Department also proposes to delete a portion of N.J.A.C. 7:1C-1.5(a)4ii to be consistent with the revised Flood Hazard Area Control regulations, N.J.A.C. 7:13, proposed in February 1994 (see 26 N.J.R. 1009(a)), which the Department is adopting (see adoption notice published elsewhere in this issue of the New Jersey Register). The Department proposes to amend N.J.A.C. 7:1C-1.5(a)4vi by adding the words "in the floodplain" to clarify that it is fill in the floodplain that is regulated.

The Department proposes to amend N.J.A.C. 7:1C-1.5(b) concerning the extension of issued CAFRA, Waterfront Development and Coastal Wetlands permits. The Department, on June 24, 1994 (see 26 N.J.R. 2934(a), July 18, 1994) adopted amendments to the Coastal Permit Program Rules at N.J.A.C. 7:7-1.5(d)1 concerning the duration of permits. The Department is proposing to amend N.J.A.C. 7:1C-1.5(b) to simply refer to the procedures found at N.J.A.C. 7:7-1.5(d). The provision for the $50.00 base fee for these extension requests remains unchanged.

In addition, the Department proposes to amend N.J.A.C. 7:1C-1.5(b)1, concerning extension of time requests for stream encroachment permits. The Department is proposing to delete the provision charging a fee for extension of an issued stream encroachment permit. Stream encroachment permits are issued for a fixed period of time, five years. A new permit application must be submitted in order for a permit to be extended beyond this five year period. The fee for the extension of time for stream encroachment permits applied when stream encroachment permits were issued for an initial period of two years and then were extended for one year periods following an applicant's request and submittal of a fee.

At N.J.A.C. 7:1C-1.5(d), concerning modifications of issued permits, the Department proposes to add that a change in the hydraulics of a stream also constitutes a significant change.

At N.J.A.C. 7:1C-1.6, the Department proposes to amend the regulations concerning distribution of the DEP Bulletin. Currently, the Department distributes the DEP Bulletin free of charge to all municipalities, counties, and interested persons. The Department is proposing to continue the practice of providing an annual subscription to the publication free of charge to each municipality, county planning board, and the New Jersey public depositories; however, all other interested persons will be charged an annual subscription fee of $50.00 to cover the State's costs associated with printing and mailing. References to the "DEPE Bulletin" are also amended to "DEP Bulletin" to reflect the 1994 reorganization and redesignation of the Department (see Reorganization Plan No. 001-1994, 26 N.J.R. 2171).

The Department proposes to consolidate, clarify and recodify the chapter, specifically N.J.A.C. 7:1C-1.7 through 1.9 and 1.14. Currently, N.J.A.C. 7:1C-1.14, concerning related regulations states that the subchapter does not supersede or preempt specific regulations establishing procedures for the individual construction permit programs. N.J.A.C. 7:1C-1.14 sets forth the provisions in the programmatic rules which are in addition to or supersede this subchapter. The Department proposes to delete those subsections of N.J.A.C. 7:1C-1.7 and 1.8 which are superseded by specific programmatic regulations at N.J.A.C. 7:7, the Coastal Permit Program Rules, and N.J.A.C. 7:13, the Flood Hazard Area Control (Stream Encroachment) regulations (as revised and adopted as new rules published elsewhere in this issue of the New Jersey Register). The Coastal Permit Program Rules at N.J.A.C. 7:7 establish the procedures by which the Department reviews permit applications and appeals from permit decisions under the Coastal Area Facility Review

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Act (CAFRA) (N.J.S.A. 13:19-1 et seq.), the Wetlands Act of 1970 (N.J.S.A. 13:9A-1 et seq.), and the Waterfront Development Act (N.J.S.A. 12:5-3). The Flood Hazard Area Control Regulations, N.J.A.C. 7:13, govern the review of applications for stream encroachment permits.

At N.J.A.C. 7:1C-1.7, Review of application, the Department proposes to delete subsections (b) and (c), which are superseded by N.J.A.C. 7:7-4, and to add subsections to reference the procedures established at N.J.A.C. 7:7 and 7:13. A subsection is also proposed to reference the review procedure for treatment works approvals at N.J.A.C. 7:14A-22 and 23. The Department proposes to amend N.J.A.C. 7:1C-1.8, Decision on permit application, to make it consistent with the 1993 legislative amendments to CAFRA which provide the Department with the ability to waive the requirement for a public hearing on an individual CAFRA application and hold a 30 day public comment period in its place. In order to consolidate these regulations, the Department proposes to delete N.J.A.C. 7:1C-1.14(b) and 1.14(c)3, and recodify the section. At N.J.A.C. 7:1C-1.8(e), the Department proposes to delete the requirement that an extension request needs to be made at least 15 days prior to the expiration date for review. In addition, the Department proposes to amend N.J.A.C. 7:1C-1.8(f), concerning the effect of a disapproval of an application, to provide that the resubmitted application is to be for a revised project of the same or reduced scope, rather than the same project that previously was reviewed and denied. Also, the Department proposes to add language to N.J.A.C. 7:1C-1.8(f), consistent with that found in the Coastal Permit Program Rules at N.J.A.C. 7:7, to state that a resubmitted application will be treated as a new application, although reference may be made to the previously reviewed application.

The Department is proposing a new N.J.A.C. 7:1C-1.9(b), concerning appeals of stream encroachment permits, to reference the appeals procedures found in the Flood Hazard Area Control regulations (as revised and adopted as new rules elsewhere in this issue of the New Jersey Register). As a result of this amendment, the Department is recodifying the remainder of the section. The Department is proposing a new subsection N.J.A.C. 7:1C-1.9(f) to reflect the enactment, in December 1993, of P.L. 1993, c.359 (N.J.S.A. 52:14B-3.1 through 3.3), which prohibits State agencies from promulgating rules that allow third party appeals of permit decisions unless specifically authorized by Federal or State law.

The Department proposes to repeal N.J.A.C. 7:1C-1.12 as it is outdated and unnecessary.

The Department is proposing to repeal N.J.A.C. 7:1C-1.13, the section providing for over-the-counter processing of applications for stream encroachment and treatment works approval permits. Due to staffing limitations, the Department does not have the resources to provide this service. In addition, the regulated commuity has rarely utilized this provision. The Department will continue to try to accommodate all requests for an expedited review process and feels that it is not necessary to have a separate review process to handle these requests. The Department will continue to review applications for stream encroachment and treatment works approval permits in an expedited fashion to the extent possible, reasonable, and practical, and unless emergencies dictate otherwise. As a result of this proposed amendment, the Department proposes to recodify N.J.A.C. 7:1C-1.14 as N.J.A.C. 7:1C-1.12. In addition, the Department is proposing to amend the section proposed to be recodified as N.J.A.C. 7:1C-1.12(b) to correctly cross-reference the citations of the newly adopted Flood Hazard Area Control Rules, N.J.A.C. 7:13 (see notice of adoption published elsewhere in this issue of the New Jersey Register).

Social Impact

The Department expects the proposed readoption with amendments will have a positive social impact to the extent that the citizens of New Jersey are concerned about impacts to the environment. The proposed readoption with amendments will have a positive social impact on the people of the State by continuing to implement a permitting system that is clear and understandable to the general public and regulated community. By readopting these rules, the Department will be able to maintain the efficiency and uniformity of the current permit review system, which is designed to secure timely decisions and adequate public notice of permit applications. These rules will have a positive social impact as the environment will benefit from the efficient and effective administration of programs permitting projects that meet the applicable regulatory criteria.

Economic Impact

The proposed readoption with amendments of the 90-Day Construction Permits Rules will continue to impose economic burdens, in the form of application fees, on individual applicants seeking permits. On a larger scale these rules will have a positive economic impact on the regulated community and the general public. The fees collected pursuant to these rules enable the administering agencies to fund staff to review and process these applications. These rules ensure the issuance of timely decisions from the Department.

The Department expects the proposed amendment at N.J.A.C. 7:1C-1.2 to have a positive economic impact. To the extent that this amendment consolidates information and reduces the amount of paperwork required to complete an application for a permit governed under these regulations, less time and effort should be required to complete an application form.

The increased minimum TWA fee is not expected to be a hardship to homeowners and small businesses since the new TWA rules, effective June 6, 1994, exempt projects with a design flow of less than 8,000 gallons per day with a lateral connection and other similar small projects. The proposed minimum TWA fee results in a reduction to the fee charged for Industrial TWAs prior to June 6, 1994, and will not have an economic impact on homeowners or small businesses since they are not required to obtain this type of approval.

The proposed annual subscription fee for the DEP Bulletin will have an economic impact as interested persons who wish to receive a subscription will need to pay the annual fee. However, the DEP Bulletin will be available in municipal offices and at New Jersey public depositories for review for those who do not wish to pay the subscription fee.

The various proposed amendments designed to consolidate these rules and appropriately cross-reference the specific permit programs' rules elsewhere in the Administrative Code will not have any economic impacts.

Environmental Impact

The proposed readoption with amendments reflects the Department's intention to manage these permit programs as effectively and efficiently as possible. The programs steer development away from naturally hazardous and sensitive areas, protect estuarine and marine environments from adverse impacts, and promote resource conservation and designs sensitive to the environment. Through the five permit programs governed by these rules, the Department regulates the growth and development of the coastal area, the uses of the tidal wetlands, the uses and developments in the flood plains, and the changes to sanitary sewage collection treatment and discharge systems. The readoption of these rules will enable the Department to continue to streamline its permit review process and concentrate its effort on the actual review of applications for consistency with the goals and objectives of each of the programs, for example, protection of the natural and cultural resources of the coastal area, the promotion of public safety, health and welfare, and the protection and maintenance of surface and ground water quality. The environment will indirectly benefit from the efficient and effective administration of programs permitting projects that meet the applicable regulatory criteria. Thus, to the extent that the fees collected and permits reviewed pursuant to these rules and amendments improve the efficiency and maintain the capabilities of the Department, the environment will benefit.

Executive Order No. 27 Statement

This readoption and the amendments are not proposed under the authority of or in order to implement, comply with or participate in any program established under Federal law. The readoption and amendments are not under the authority of a State statute that incorporates or refers to Federal law, Federal standards or Federal requirements. Accordingly, Executive Order No. 27(1994) does not require a comparison with Federal law.

Regulatory Flexibility Analysis

In accordance with the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has determined that a significant portion of builders and property owners affected by the proposed readoption and amendments will be "small businesses" as defined in the Act. The amendments to the minimum TWA fee are not expected to impact small businesses as many are exempt from the requirement to obtain a TWA from the Department based on the rule changes effective June 6, 1994. In an attempt to balance the need to protect the environment against the economic impact, the Department has determined that to

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exempt small businesses from the requirements would not provide sufficient revenue to administer these programs and would, therefore, endanger the environment, public health and public safety.

To comply with these rules, small businesses may have to submit permit applications, which may require engineering support work, assistance in evaluating the environmental impact of the projects, and an application fee. The extent of information required in an application and the amount of the application fee depend on the scope and location of the proposed project. Application fees are calculated as a percentage of construction costs or the number of dwelling units proposed in the development. To the extent that small business builders are likely to propose smaller-scale projects, application fees will be less for small businesses than for large builders.

In developing the existing rules, the Department has balanced the need to protect the public and the environment from the adverse impacts of unregulated development against the economic impact of the rules. The Department has determined that there is no authority to exempt small businesses from regulation in the various implementing permit statutes and that to minimize the impact of the rules on small businesses beyond what is proposed would endanger public health, public safety and the environment by undermining the coordination of development to such a degree as to make the policy goals impossible to meet. Therefore, no exemption from coverage was provided in the existing rules, and there is no basis for exempting small businesses in the proposed readoption.

Full text of the proposed readoption may be found in the New Jersey Administrative Code at N.J.A.C. 7:1C.

Full text of the proposed amendments follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

7:1C-1.2 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise:

. . .

["Application" means DEPE Application Form CP-1 and the appropriate agency supplement.]

"Application form" means the permit application form required and provided by the appropriate agency.

"Appropriate agency" means:

1. The Land Use Regulation Program, CN 401, Trenton, NJ 08625 for:

i. Approval of plans for the development of any waterfront upon any tidal or navigable waterway pursuant to N.J.S.A. 12:5-3 (Waterfront Development Permit);

ii. Permits for a regulated activity under the Wetlands Act of 1970, P.L. 1970, c.272 (N.J.S.A. 13:9A-1 et seq.); [and]

iii. Permits issued pursuant to the Coastal Area Facility Review Act, [P.L. 1973, c.185] **P.L. 1993, c.190** (N.J.S.A. 13:19-1 et seq.)[.]**; and**

iv. Stream encroachment permits under N.J.S.A. 58:16A-[55 or 55.2]**50 et seq.**

2. The Division of Water Quality, CN 029, Trenton, NJ 08625 for:

i. A treatment works approval for the construction, change, improvement, alteration or extension of sanitary sewage collection [system] **and treatment systems issued** pursuant to N.J.S.A. 58:10A-1 et seq. and N.J.A.C. 7:14A-[12] **22.**

. . .

"Construction permit" means:

1.-2. (No change.)

3. A permit issued pursuant to the Coastal Area Facility Review Act, [P.L. 1973, c.185] **P.L. 1993, c.190** (N.J.S.A. 13:19-1 et seq.);

4. A permit issued pursuant to the "Flood Hazard Area Control Act," N.J.S.A. 58:16A-[55 or 55.2] **50 et seq.** and the "Flood Hazard Area **Control** Regulations," N.J.A.C. 7:13 [et seq.; or 55.2]; **and**

5. A treatment works approval for the construction, change, improvement, alteration or extension of sanitary sewage collection [system] **and treatment systems** issued pursuant to N.J.S.A. 58:10A-1 et seq. and N.J.A.C. 7:14A-[12] **22.**

Note: "Construction permit" does not include any approval of or a permit for an electric generating facility or for a petroleum processing or storage facility, including a liquefied natural gas facility, with a storage capacity of over 50,000 barrels.

. . .

"Treatment works approval" means an approval issued pursuant to N.J.S.A. 58:10A-6 or N.J.A.C. 7:14A-[12] **22.**

7:1C-1.3 Pre-application procedure and requirements

(a) (No change.)

(b) Prior to submitting an application to the Department, the applicant shall, if required by the appropriate agency, notify the following local agencies of intent to file an application by mailing them [a] **the** completed [DEP Application Form CP-1] **application form**, and shall obtain an acknowledgement of receipt of notification by certified mail return receipt requested:

1.-4. (No change.)

5. If applicable, those agencies which are required to be notified in accordance with the provisions of N.J.A.C. 7:13-[2.2(a)] **4.2.**

(c) Applicants for [minor] stream encroachment permits [are exempt from the provisions of (b) above (unless they are projects of special concern (see N.J.A.C. 7:13-5.2))] **shall follow the procedures set forth in the Flood Hazard Area Control Rules at N.J.A.C. 7:13.**

(d) Applicants for a treatment works approval shall obtain the [endorsement] **consent** of the affected sewarage authority and/or municipality [(see] **in accordance with the procedures at** N.J.A.C. 7:14A-[12] **22.8**[)].

(e) Applicants for CAFRA, Waterfront Development and coastal wetland permits shall follow the procedures set forth in the Coastal Permit Program Rules at N.J.A.C. 7:7.

7:1C-1.4 Application for construction permit

(a) To apply for a permit, the applicant shall prepare and submit a formal application to the appropriate agency.

1. The application shall consist of a complete [and acknowledged DEP Application Form CP-1] **application form**, the fee required by N.J.A.C. 7:1C-1.5, and other materials of a format and content as specified by rules or [otherwise] **checklist** for individual permit programs.

2. (No change.)

7:1C-1.5 Fees

(a) Fees shall be charged for the review of any application for a construction permit in accordance with the following schedule:

1.-3. (No change.)

4. Stream encroachment permits:

i. As used in this paragraph, the following terms shall have the following meanings:

(1) (No change.)

(2) "Minor stream encroachment project" means an encroachment project that does not require hydrologic and/or hydraulic review to determine the impact on flood carrying capacity; does not require review of any stormwater detention basin for compliance with Stormwater Management Regulations, N.J.A.C. 7:8; does not increase potential for erosion or sedimentation in stream and does not require substantial channel modification or relocation; and does not need to be reviewed for [20 percent] **the zero percent or 20 percent** "net fill" [limitation as specified under N.J.A.C. 7:13-4.7(d)] **limitations other than that associated with a single family dwelling**. These shall include, but are not limited to, **the following activities in a floodplain:** major desnagging and stream clearing, minor dredging projects, dug ponds without structure, **stormwater** outfall structures, minor water intake facilities, minor regrading, utilities in the flood plain, each channel crossing of utility, bank stabilization at grade, minor bank reestablishment and/or protection projects, **less than 100 linear feet of channel modification, less than 100 linear feet of a retaining wall four foot high or less,** footbridges, bridge deck replacements, recreation and habitat management structures of the Division of Fish, Game and Wildlife, farming practices (including ditches) approved by the Soil Conservation Service, and projects whose major purpose is mosquito control pursuant to N.J.S.A. 26:9-1 et seq. Governmental agencies may combine their [minor] **stream cleaning** projects for a calendar year and submit them as one project which will be considered a minor project.

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(3) "Major stream encroachment project" means a project that requires hydrologic and/or hydraulic review to determine the impact on flood carrying capacity of the stream or [stormwater detention basin(s) for compliance with Stormwater Management Regulations, N.J.A.C. 7:8,] **the review of stormwater detention basin(s) located in the floodplain,** or involves fill or structures necessitating review for compliance with the **zero percent or** 20 percent "net fill" limitation specified in N.J.A.C. 7:13. In addition, [developments involving more than one acre in a flood plain for commercial use and subdivision of more than 10 acres for residential development shall also be classified as major projects.] **the following shall be classified as a major project: development where the applicant owns or controls more than one acre in a floodplain for commercial use or a subdivision of more than 10 acres for residential use. Major project elements shall include, but not be limited to, the following activities within a floodplain: bridges, culverts, small dams, greater than 100 linear feet of channel modifications, and greater than 100 linear feet of a retaining wall more than four feet high.**

ii. For each project element of minor stream encroachment projects, the fee shall be $300.00 for each project element that is to be reviewed[, except that no fee shall be charged for such projects in a drainage area of less than 320 acres which has been approved by the appropriate municipal or county engineer, or a professional engineer for State agency projects, and the certification of such approval has been submitted to and acknowledged by the Department. Each individual stream encroachment shall constitute a project element].

iii. (No change.)

iv. For each project element of major projects, the fee shall be $2,000 for each project element that is to be reviewed. [These project elements shall include, but not be limited to, the following: bridges, culverts, small dams, channel modifications, stream enclosures, stormwater detention bassin, fill, structures and retaining walls more than four feet high, channel realignment and channel relocation.] The fee for major stream encroachment projects shall include channel work for a distance of 300 feet upstream and downstream except as provided below at (a)4vi.

v. For major stream encroachment projects [outside the channel but within the 100 year flood plain and requiring the establishment of an encroachment line] **requiring the establishment of an encroachment line or the modification to a stream,** the fee shall be $2,000 for each 1,000-foot reach of the channel or portion thereof.

vi. For major stream encroachment projects that consist of an individual driveway culvert and fill **in the floodplain** for one single family residence, the fee shall be $1,000 for the culvert and $400.00 for the fill.

vii. (No change.)

5. Treatment works approval fees shall be calculated as follows:

i.-iii. (No change.)

iv. An applicant for a treatment works approval shall pay a minimum fee of [$150.00] **$450.00.**

v.-vii. (No change.)

viii. The annual fee schedule report may be obtained, at any time after public notice is published in accordance with (a)5vi or vii above, by submitting a request and self addressed 10 inch by 13 inch (minimum size) envelope to:

New Jersey Department of Environmental
Protection
[Division of Water Resources
Wastewater Facilities Management Element]
Environmental Regulation
Division of Water Quality
Bureau of Construction and Connection Permits
Annual Report Request
CN-029, [4th] **3rd** floor
Trenton, New Jersey 08625

(b) **Extensions of time for issued CAFRA, Waterfront Development and Coastal Wetlands permits will be granted in accordance with the Coastal Permit Program Rules, N.J.A.C. 7:7-1.5(d).** Each extension of time requested must be accompanied by a $50.00 nonrefundable base fee. [Each extension, if granted, will be for a maximum period of one year. No permit will be extended beyond a total of five years from the original date of the permit, except for projects of unusual size or scope or for projects which are delayed due to circumstances beyond the permittee's control (such as a delay in the funding of a public works project), in which case the appropriate agency may, upon request of the applicant prior to the expiration of the original permit, extend the permit for a total of 10 years from its original effective date. This exception shall not apply to Stream Encroachment Permits or treatment works approvals.]

1. Besides the base fee, an additional $50.00 shall be charged for each extension of time requested for a [minor stream encroachment project, and for a] Category 3 treatment works approval, and $150.00 for each extension of time requested [for a major stream encroachment project and] for a Category 1 or 2 treatment works approval.

(c) (No change.)

(d) For the purposes of this section, a modification to an issued permit will be processed for modified projects which will not result in a signficant change in the scale, use, or impact of the project as approved. The determination as to what constitutes a significant change is within the sole discretion of the Department and will be based on a review of the original application file and the new information submitted by the applicant. A change that will cause less environmental impact than the original project will not constitute a "significant change." Significant changes generally include, but are not limited to, increased clearing, grading, filling or impervious coverage, reduction in buffers, [and] change in foot print location**, and a change in the hydraulics of a stream.**

1. (No change.)

(e)-(j) (No change.)

7:1C-1.6 [DEPE] **DEP** Bulletin

(a) The Department shall publish in the "[DEPE] **DEP** Bulletin", a report of the receipt of each new application and each agency action on applications currently before it. [This publication] **An annual subscription for the DEP Bulletin** will be distributed free of charge to [all] **each of the** municipalities, [counties] **each of the county planning boards,** and [other interested persons] **each New Jersey public depository. All other interested persons shall pay an annual subscription fee of $50.00 per subscription requested to cover printing and mailing costs.** Publication in the "[DEPE] **DEP** Bulletin", constitutes constructive notice to all interested persons of Department actions on construction permits.

(b) (No change.)

7:1C-1.7 Review of application

(a) Within a maximum of 20 working days followng the date of receipt of the application, the appropriate agency shall:

1. (No change.)

2. Assign an agency project number, accept the application for filing, but request in writing that the applicant submit within a specific period of time, additional information to assist in its review. In such cases, the application will not be considered complete **for final review or public hearing** until all the additional information has been received and deemed acceptable for review; or[,]

3.-4. (No change.)

5. The Department shall consider written initial comments from public agencies and other interested persons, received [within five working days of publication of the initial project status report in the DEP Bulletin.] **at or within 15 days after the public hearing, if one is held, or during the public comment period. Additional comments received after this date will also be included in the application file and may be considered by the Department in the application review process if relevant to the application.**

[(b) The appropriate agency shall hold the public hearing required by the "Coastal Area Facility Review Act," N.J.S.A. 13:19-1 et seq., within 60 days after the date the application is declared complete for public hearing and may schedule public hearings for other construction permit programs within the time limits prescribed by these regulations.

(c) An application for waterfront development permit is not complete unless and until the applicant has in his possession a legal

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document setting forth the person's rights to use or occupy the riparian land, including but not limited to grants, leases or licenses.]

[(d)]**(b)** (No change in text.)

(c) Notwithstanding the requirements of (a) above, applications for CAFRA, waterfront development, and coastal wetlands permits shall be reviewed in accordance with the procedure set forth in the Coastal Permit Program Rules at N.J.A.C. 7:7-4.

(d) Notwithstanding the requirements of (a) above, applications for stream encroachment permits shall be reviewed in accordance with the procedures set forth in the Flood Hazard Area Control Rules at N.J.A.C. 7:13.

(e) Applications for treatment works approvals shall be reviewed in accordance with the procedure set forth in the treatment works approval rules, N.J.A.C. 7:14A-22 and 23.

7:1C-1.8 Decision on permit application

(a) (No change.)

(b) [In the case of permit application under N.J.A.C. 13:19-1 et seq., the Department shall act on the application within 60 days of the hearing held pursuant to N.J.S.A. 13:19-9, unless additional information was required at the hearing, in which case the Department shall act on the application within 90 days of receipt of the additional information.] **Applications for CAFRA permits shall be reviewed in accordance with the procedures set forth in the Coastal Permit Program Rules at N.J.A.C. 7:7.**

(c)-(d) (No change.)

(e) This time period may be extended for a one time only 30 day period by the mutual consent of the applicant and the appropriate agency, provided that the applicant or the appropriate agency, request from the other such an extension [at least 15 days] prior to the expiration date for the approval, conditioning, or disapproval of such an application.

(f) The effect of disapproval is as follows:

1. A disapproval without prejudice is a disapproval of the application. However, a subsequent application by the same applicant for [the same project] **a revised project of the same or reduced scope** on the same site may be submitted within one year of the date of disapproval without additional fees (limited to one resubmittal, without additional fee). **The resubmitted application will be treated as a new application, although references may be made to the previously reviewed application.**

2. (No change.)

7:1C-1.9 Appeals

(a) An appeal from an action of the [Division of Coastal Resources] **Land Use Regulation Program on a coastal permit** pursuant to N.J.S.A. 12:5-3, N.J.S.A. 13:19-1 et seq. or N.J.S.A. 13:9A-1 et seq. shall be to the Commissioner in accordance with the procedures of N.J.A.C. 7:7-5.

(b) An appeal of an approval or denial of a stream encroachment permit shall be to the Commissioner in accordance with the procedures of N.J.A.C. 7:13-4.10.

[(b)]**(c)** Any interested person who considers himself or herself aggrieved by the approval or denial of a stream encroachment permit or a treatment works approval for the construction, change, improvement, alteration or extension of sanitary sewage collection systems may, within 10 days of publication of notice of the decision in the DEP Bulletin, or within 10 days of publication of notice of the decision by the permittee pursuant to (c) below, whichever occurs first, request a hearing by addressing a written request for such hearing to the Office of Legal Affairs, ATTENTION: Adjudicatory Hearing Requests, Department of Environmental Protection [and Energy], CN 402, Trenton, New Jersey 08625-0402.

1.-2. (No change.)

[(c)-(e)]**(d)-(f)** (No change in text.)

(g) Nothing in this section shall be construed to provide a right to an adjudicatory hearing in contravention of N.J.S.A. 52:14B-3.1 through 3.3 (P.L. 1993, c.359).

[7:1C-1.12 Implementation of these rules and regulations

This Chapter shall apply to all construction permit applications submitted to the Department on or after December 22, 1975.

7:1C-1.13 Over-the-counter processing

(a) As a means of expediting permit review for certain minor projects, the Department will fast process, to the extent possible, reasonable, and practical, and unless emergencies dictate otherwise, minor stream encroachment and treatment works approvals.

(b) Stream encroachment rules are as follows:

1. The Department will provide, workload and staff permitting, a 24-hour processing service for certain "minor" stream encroachment permits (listed below). Projects must be in-house by 9:30 a.m., and may be picked up at 4:30 p.m., otherwise the permit will be mailed, or can be picked up the next day. Pre-application conferences are recommended to ensure that all necessary material will be submitted. An appointment must be made for the over-the-counter submittal, review and permit issuance. Over-the-counter processing will be limited to one project per day per applicant. Projects may not be divided in order to qualify for over-the-counter processing.

2. The construction permit DEP Application Form CP-1 must be properly completed, but it does not need to be forwarded to any county or municipal agency. An Engineering Data Sheet (DWR-086) must be completed for all stream encroachment projects.

3. Minor stream encroachment projects are defined in N.J.A.C. 7:1C-1.5(a)4v(2).

i. Minor stream encroachment projects which may be processed on an over-the-counter basis include, but are not limited to:

(1) Outlet structures along one stream;

(2) One sewer outlet diffuser;

(3) One minor water intake;

(4) Minor regrading, outside of the channel but within the 100 year flood area;

(5) Utilities that are constructed within the 100 year flood area—limited to total length of 500 linear feet along the channel;

(6) One utility crossing of the channel;

(7) Minor bank reestablishment and or protection projects, limited to 100 linear feet. (See (b)3 above);

(8) Bridge deck replacements (See paragraph (b)3 above);

(9) Farming practices (including ditches) approved by the Soil Conservation Service;

(10) Projects whose major purpose is mosquito control pursuant to N.J.S.A 26:9-1 et seq.:

(11) "Over-stream" utility crossings "attached" to an existing bridge or culvert above the underclearance or within the superstructure.

ii. Minor stream encroachment projects which will not be processed on an over-the-counter basis shall include:

(1) Desnagging and stream cleaning;

(2) Minor dredging projects;

(3) Dug ponds without structures;

(4) Residential footbridges;

(5) Recreation and habitat management structures of the Division of Fish, Game and Wildlife;

(6) Combined projects of government agencies submitted as one minor project for a calendar year will not be considered as a minor project for over-the-counter permit purposes; and

(7) Projects of special concern.

(c) Rules for treatment works approvals are as follows:

1. The Department of Environmental Protection has a 24 hour processing service for "minor" projects requiring treatment works approvals. "Minor" treatment works approvals must be:

i. A length of 1,200 linear feet or less:

ii. At a cost of $50,000 or less;

iii. Of a sewage flow per day of 12,000 gallons or less.

2. No projects with pump stations, force mains, siphons, gallonage transfers or holding tanks will be processed over-the-counter. Projects cannot be located in areas under sewer ban or administrative order, or subject to litigation. Projects may not be divided in order to qualify for over-the counter processing.

3. Projects must be in-house by 9:30 a.m., and all administrative documents must be in proper order. Pre-application conferences are strongly recommended. Over-the-counter projects will be processed by appointment only.

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4. Applicants must include in the application package proof of a prior approval, endorsement, or a letter of no objection from all required local agencies prior to filing application with the State.

5. An "engineer's report" form, available from the Construction and Connection Permits of the Division of Water Resources, must be completed and certified by a New Jersey licensed professional engineer and submitted with the application.]

7:1C-[1.14] **1.12** Related regulations

(a) (No change.)

[(b) For waterfront development permits, wetlands permits and CAFRA permits, reference should be made to the following:

1. For pre-application procedures, N.J.A.C. 7:7-3 supersedes this subchapter;

2. For permit review procedures, N.J.A.C. 7:7-4 supersedes this subchapter; and

3. For appeals, N.J.A.C. 7:7-5 supersedes this subchapter.]

[(c)](**b**) For a stream encroachment permit, reference should be made to the following:

1. For the pre-application conferences, the requirements of N.J.A.C. 7:13-[2.2] **4.3** are in addition to 7:1C-1.3; **and**

[2. For the pre-application conferences, the requirements of N.J.A.C. 7:13-2.2 are in addition to 7:1C-1.3;

3. For permit application review procedures, N.J.A.C. 7:13-2.8 supersedes this subchapter;

4. For appeals, the requirements of N.J.A.C. 7:13-2.11 are in addition to N.J.A.C. 7:1C-1.9, except that the applicant or the person making the hearing request shall comply with N.J.A.C. 7:13-2.11(b); and]

[5.]**2.** For application information, the requirements of N.J.A.C. 7:13-[2.1] **4.1** are in addition to N.J.A.C. 7:1C-1.4.

(c) The requirements of this subchapter concerning appeals from the Department's decisions on treatment works approvals for the construction, change, improvement, alteration or extension of sanitary sewage collection **and treatment** systems supersedes N.J.A.C. 7:14A.

7:7-4.2 Application contents

(a) Applications shall contain the following:

1. [A] **The** completed [DEPE Standard Construction Permit (CP-1)] **Land Use Regulation Program (LURP) permit application** form.

2.-3. (No change.)

4. Verification that a certified mail notice with return receipt requested (white receipt or green card is acceptable) and a copy of the site plan and [CP-1] **Land Use Regulation Program (LURP permit application** form have been forwarded to the planning board and environmental commission of the county in which the proposed development would occur and to all landowners within 200 feet of the property or properties on which the proposed development would occur, along with a certified list of all landowners within 200 feet. The site plan referred to in this subsection need not include a full set of plans, but must depict the proposed development in relationship to existing site conditions. This plan may be on an 8½ by 11 inch sheet of paper provided it generally depicts the proposed development and the general and site specific location.

i. An application for linear development shall include verification that a certified mail notice with return receipt requested (white receipt or green card is acceptable) and a copy of the site plan and [CP-1] **Land Use Regulation Program (LURP) permit application** form have been forwarded to the planning board and environmental commission of the county in which the proposed development would occur and to all landowners within 200 feet of the proposed development rather than to all landowners within 200 feet of the property or properties on which the proposed development would occur. If the 200 foot area falls within the right-of-way, the applicant must notify those landowners within 200 feet of the outer edges of the right-of-way, along with a certified list of all landowners within this 200 feet. The site plan referred to in this subsection need not include a full set of plans, but must depict the proposed development in relationship to existing site conditions. This plan may be on an 8½ by 11 inch sheet of paper provided it generally depicts the proposed development and the general and site specific location. For the purposes of this subsection, "linear development" means land uses such as roads, railroads, sewerage and stormwater management pipes, gas and water pipelines, electric, telephone and other transmission lines and the rights-of-way therefor, which have a basic function of connecting two points. Linear development shall not mean residential, commercial, office or industrial buildings, improvements within a development such as utility lines or pipes or internal circulation roads.

5.-11. (No change.)

(b)-(f) (No change.)

7:7-4.10 Requests for modifications

(a) (No change.)

(b) Modifications shall require an application to amend the issued permit, including a new [CP-1 form] **Land Use Regulation Program (LURP) permit application form**, notice requirements pursuant to N.J.A.C. 7:7-4.2, a copy of the original permit, summary report, and approved plans, and any additional information necessary to review the proposed modification.

(c)-(d) (No change.)

7:13-1.2 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

. . .

"Application" means [a completed CP-1] **the completed Land Use Regulation Program (LURP) permit application** form, **as defined at N.J.A.C. 7:7-1.3,** along with the appropriate fee, plans supporting calculations and reports as required by this chapter.

. . .

7:13-4.1 Required information for all applications submitted to the Department

(a) The [standard] **Land Use Regulation Program (LURP) permit** application form[, CP-1,] shall be completed by the applicant or the applicant's authorized agent including all signatures and seals. Notarization is not necessary.

(b)-(l) (No change.)

7:13-4.2 Notice

(a) The applicant shall provide notice to those persons described in (a)1 to 5 below, of the filing of an application for a permit under this chapter for projects considered a major project under the 90-Day Construction Permit Rules (N.J.A.C. 7:1C), for projects along trout associated watercourses, for projects exposing acid-producing soils, for projects requesting a hardship exemption and for an appeal of the Department's decision on an application deemed complete for review. The notice shall include a description of the nature and location of the proposed project, data on the application, (a copy of the [CP-1] **completed Land Use Regulation Program (LURP) permit application** form will be acceptable to fulfill these requirements) and a request that written comments be sent to the Department at the address stipulated at N.J.A.C. 7:13-1.5. The notice shall be sent to the following agencies and individuals:

1.-5. (No change.)

(b) (No change.)

7:14A-22.6 Information and submission requirements for general industrial treatment works approvals

(a) Industrial treatment works not exempt pursuant to N.J.A.C. 7:14A-22.4 shall submit the following information as an application for a General Industrial Treatment Works Approval:

1. The Departments' [standard application form CP-1] **Treatment Works Approval application form** (original) signed, dated and imprinted with a seal where applicable;

i. The application form shall require information regarding name and address of applicant, applicant's agent and design engineer; project site location; project description; the status of related permit applications; property owner's certification; professional engineer's certification; and proper construction and operation clause.

2.-8. (No change.)

(b)-(d) (No change.)

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7:14A-22.8 Requirements for construction, installation, or modification of treatment works—stage II

(a) Persons who propose to build, install or modify treatment works that require the Department's approval pursuant to this subchapter, shall submit the following information and documents in the manner prescribed in this subchapter:

1. The Department's [standard application form CP-1] **Treatment Works Approval application form, as defined at N.J.A.C. 7:14A-22.6(a)1,** (original) signed, dated and imprinted with a seal where applicable; and

2.-13. (No change.)

(b)-(c) (No change.)

(a)

ENVIRONMENTAL REGULATION

Coastal Permit Program Rules

Proposed Amendments: N.J.A.C. 7:7-1.3, 2.1, 2.2, 2.3, 4.2, 4.4, 4.5, 4.6, 4.7, 4.10, 5.1, 7.1, 7.2, 7.3, 7.4 and 7:7 Appendix

Proposed New Rules: N.J.A.C. 7:7 Appendix B, C and D

Authorized By: Robert C. Shinn, Jr., Commissioner Department of Environmental Protection.

Authority: N.J.S.A. 13:1D-9, 13:1D-29 et seq. (specifically 13:1D-33), 12:5-1 et seq, 13:9A-1 et seq. and 13:19-16.

DEP Docket Number: 12-95-02/473.

Proposal Number: PRN 1995-190.

Public hearings concerning these amendments will be held on:

Monday, April 10, 1995 at 7:00 P.M.
Dover Municipal Building
33 Washington Street
Toms River, New Jersey

Wednesday, April 12, 1995 at 11:00 A.M.
Ocean City Music Pier
Ocean City, New Jersey

Thursday, April 13, 1995 at 8:30 A.M.
Department of Environmental Protection
Public Hearing Room
401 East State Street
Trenton, New Jersey

Submit written comments identified by the DEP docket number above by May 19, 1995 to:

Kimberly A. Hunter, Esq.
Attention: DEP Docket No. 12-95-02/473
Office of Legal Affairs
Department of Environmental Protection
401 East State Street
CN 402
Trenton, New Jersey 08625-402

The agency proposal follows:

Summary

The Coastal Area Facility Review Act, N.J.S.A. 13:19-1 et seq. (CAFRA), provides for the adoption and implementation of a framework of a comprehensive environmental design strategy in the coastal area. The coastal area regulated under CAFRA includes land along the Raritan Bay, Atlantic Ocean, and Delaware Bay, along the southern portion of the Delaware River, and along many other tidal waterways south of Raritan Bay. Under the authority of CAFRA, the Department of Environmental Protection (Department) reviews certain proposed developments in the coastal area to evaluate their potential effect on the environment of that area.

In July 1993, substantial legislative amendments to CAFRA were signed into law (P.L. 1993, c.190), to be effective July 1994. To implement those statutory amendments, in February 1994 the Department proposed amendments to its Coastal Permit Program Rules at N.J.A.C. 7:7. 26 N.J.R. 918(a) (February 22, 1994). These regulatory amendments were then adopted (with changes in response to public comments) on July 18, 1994 in order to coincide with the effective date of the legislative amendments to CAFRA see 26 N.J.R. 2934(a).

In public hearings, written comments and other forums to discuss the regulatory amendments proposed and adopted in 1994, members of the public and legislators commented that the Department should use every possible means to minimize the regulatory burden on persons proposing to build small projects and single-family dwellings. In adopting the existing rules in July 1994, the Department made several changes to address this concern while still complying with the requirements of the CAFRA legislative amendments of 1993. Specifically, the Legislature had mandated in those amendments that a CAFRA permit be required for a single-family home or other small project if it was the "first use" inland from the water's edge and within 150 feet of the mean high water line or the most landward limit of a beach or dune.

However, based upon discussions with legislators and members of the public, the Department has concluded that the permit procedure under CAFRA as amended, as well as under the Waterfront Development Law and the Wetlands Act of 1970 can and should be simplified still further for persons proposing to build new single-family dwellings and duplexes and other construction which would have a relatively low impact on environmental resources. The Department is therefore proposing to make those changes in these proposed amendments, and to provide an additional opportunity for public comment.

A discussion of the proposed changes follows.

Subchapter 1. General Provisions

N.J.A.C. 7:7-1.3 contain various definitions pertinent to the implementation of CAFRA. The Department proposes to amend the definitions of "intervening development," "man-made lagoon," "public development" and "reconstruction" now contained in this rule for clarification purposes. Specifically, the proposed revised definitions state how to determine whether a development constitutes an "intervening development" and specify those bath houses and cabanas which constitute "intervening development." The revised definitions also clarify that stormwater conveyance pipes are considered "public development" and clarify that the "reconstruction" of docks and piers means the repair or replacement of these structures in the same location and size. In addition, the Department proposes to amend the definition of "development" to exclude debris removal or cleanup provided such activities do not include excavation, filling or grading.

The Department also proposes to add definitions for the following terms: linear development, LURP (Land Use Regulation Program) application form, man-made lagoon, porch, and waterward side of development. These changes are proposed to make the application process smoother and more predictable.

Subchapter 2. Activities for Which a Permit Is Required

N.J.A.C. 7:7-2.1(b) clarifies which activities are regulated under CAFRA and which are not. The Department proposes to amend N.J.A.C. 7:7-2.1(b) to clarify that the repair and maintenance of utilities in rights-of-way on beaches and dunes are not regulated development as defined at N.J.A.C. 7:7-1.3. The Department proposes to amend N.J.A.C. 7:7-2.1(b)1 and (b)2 to include "upgrade" when describing the maintenance, repair or replacement of certain utilities. These activities are not regulated under CAFRA. In addition, revisions to N.J.A.C. 7:7-2.1(b)4 and 5 are being proposed to clarify that for the purposes of determining if development is regulated, both paved and unpaved areas are used in calculating equivalent parking area and that the addition of parking spaces by restriping is not a regulated activity. The Department proposes to delete N.J.A.C. 7:7-2.1(b)5iv, which lists the mooring of 25 or more floating homes as a type of CAFRA development. The moorings are not subject to CAFRA, but to the Waterfront Development Law. The Department also proposes to add N.J.A.C. 7:7-2.1(b)7 to clarify that a CAFRA permit is not required for a commercial or public development which is not located on a beach, dune or within 150 feet of the mean high water line, provided the proposed development will not cause the number of parking spaces either solely or in conjunction with the existing development to exceed the regulatory threshold of the appropriate zone, or provided the proposed construction does not include any new parking spaces.

N.J.A.C. 7:7-2.1(c) contains exemptions to CAFRA. The Department proposes to amend N.J.A.C. 7:7-2.1(c)1iv to clarify that CAFRA exemptions may remain valid in certain instances when a new or renewed building permit is issued by the local authorities, provided that the newly authorized construction would not result in added adverse impacts to

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Special Areas (as defined in the Rules on Coastal Zone Management, N.J.A.C. 7:7E-3) beyond those impacts associated with the formerly exempt construction authorized before July 19, 1994.

In addition, the Department proposes to amend N.J.A.C. 7:7-2.1(c)2i to clarify the exemption for residential subdivisions which received preliminary subdivision approval or minor subdivision approval pursuant to the Municipal Land Use Law prior to July 19, 1994. Under the proposed amendment, this exemption will apply to the specific project that was approved, namely development of the subdivision which is consistent with the lot coverage, use and density restrictions of the zoning ordinance in effect at the time of the subdivision approval and as memorialized in the accompanying resolution. The Department also proposes to clarify that the exemption for reconstruction of a damaged development codified at N.J.A.C. 7:7-2.1(c)3 applies to any development which was legally existing on, and damaged subsequent to, July 19, 1994. The proposed revision of this rule also clarifies that a permit shall not be required for elevating a residential dwelling on pilings, provided the number of dwelling units does not increase and the elevation of a commercial development on pilings provided there is no increase in the number of parking spaces excluding the area underneath the elevated structure.

N.J.A.C. 7:7-2.1(c)5ii describes other activities that can be conducted without a CAFRA permit. The Department proposes to amend N.J.A.C. 7:7-2.1(c)5ii to include a wetland as an area on which an open fence, open carport, flower box, garden, gazebo, satellite dish, shed, boardwalk, walkway or shower cannot be built without a CAFRA permit. This proposed amendment is intended to provide the degree of protection for wetlands envisioned by the Coastal Wetlands Act (N.J.S.A. 13:9A-1 et seq.) and the Freshwater Wetlands Impact Protection Act (N.J.S.A. 13:9B-1 et seq.) as well as by CAFRA. In addition, the Department proposes to define "sheds" under this section as having a footprint of 120 square feet or less. Properly anchored propane tanks, and above ground swimming pools (not exceeding 410 square feet in surface area) which do not discharge to surface waters or wetlands, are also proposed to be included as structures not requiring a CAFRA permit unless they are located on a beach, dune or wetland. The Department also proposes to include a landscape wall no more than one foot in height (or a series of walls not to exceed a cumulative total of one foot in height) as a "similar structure."

The Department proposes to add N.J.A.C. 7:7-2.1(e) to clarify that a development may no longer be exempt from CAFRA if significant changes are made to the development which would void the subdivision, site plan or building approvals listed at N.J.A.C. 7:7-2.1(c)1 and 2, or which would result in additional impacts to Special Areas, as defined in the Rules on Coastal Zone Management, N.J.A.C. 7:7E-3. This amendment is needed to clarify that this CAFRA exemption pertains to specific projects approved before July 19, 1994 and to assure that exempt projects are not subsequently revised to increase environmental impacts. To the current N.J.A.C. 7:7-2.1(e) (recodified as (f)) concerning exemption determinations, the requirement to submit a completed LURP application form is added.

N.J.A.C. 7:7-2.3 lists those activities which require a Waterfront Development permit under the Waterfront Development Law. The Department is proposing to amend N.J.A.C. 7:7-2.3(d)3 to not require a waterfront development permit for the construction of a minor addition to or changes in existing structures or manufacturing operations which do not result in adverse environmental impacts to Special Areas defined at N.J.A.C. 7:7E-3, and provided the addition is located in an existing cleared portion of the site, and is set back a minimum of 15 feet from the mean high water line. The Department is proposing to amend N.J.A.C. 7:7-2.3(d)4 and 5 to include "reconstruction" in the list of activities which do not require a Waterfront Development permit. As previously stated, the definition of "reconstruction" is proposed to be amended to clarify that reconstruction of docks and piers means the repair or replacement in the same location and size of the preexisting structure. In addition, the Department proposes to delete the requirement that the repaired, replaced, or renovated structure have no additional permanent adverse effects on any natural resources on-site. The Department proposes to rely on the 1977/1978 base map photography of the Tidelands Maps adopted by the Tidelands Resource Council or a Waterfront Development Permit issued after 1977/1978 to determine the size and location of the structure to be repaired, replaced, renovated or reconstructed. This aerial photography is the most reliable source available at a scale easily used by Department staff, property owners and potential buyers. It is easily accessible to the public at the appropriate County Clerk's office and provides coverage of all tidal waters of the State which are subject to the Waterfront Development Law. The Department proposes to amend N.J.A.C. 7:7-2.3(d) to include the redecking and replacement of bridge surfaces, provided there is no change in width, length or height, as an activity which would not require a permit pursuant to that law. Subsection (e) is added to clarify that those portions of a deck or pier proposed to be constructed above the mean high water line and in the coastal zone may be subject to the permit-by-rule at N.J.A.C. 7:7-7.4(a)5 and 6.

Subchapter 4. Permit Review Procedures

The Department is proposing to amend the application submission requirements for a permit pursuant to the Coastal Area Facility Review Act, N.J.S.A. 13:19-1 et seq., the Waterfront Development Law, N.J.S.A. 12:5-1 et seq., and the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq., in order to simplify the application process. N.J.A.C. 7:7-4.2(a) is proposed to be amended to require verification in the form of white mailing receipts or other written receipts for all applications, instead of the green mailing receipts. In addition, under the proposed amendments, notice to all owners of real property (including easements) within 200 feet of the property or properties on which the proposed development would occur will not be required at the time of application for individual CAFRA permits, or for Waterfront Development or Wetlands applications for which a public hearing is required, but would instead be provided at the time of notice of the public comment period or public hearing. In addition, applicants will be required to submit photographs of the specific location of the proposed development taken from a minimum of four different locations and labeled as to orientation. The Department also proposes to require applicants to submit plans for Waterfront Development applications which depict the depths of mean low water outshore of the dock for a distance of at least 100 feet, except for lagoons. Also proposed is a new provision, N.J.A.C. 7:7-4.2(a)4iv, which will allow the Department to reduce notice requirements if additional development is proposed within certain existing industrial or park facilities.

The Department proposes to divide N.J.A.C. 7:7-4.4, Initial Review of Applications, into two subsections, one for CAFRA applications and one for Waterfront Development or Coastal Wetlands applications. As proposed, each section clarifies the actions the Department shall take within 20 working days of receipt of the application, within 15 days of receipt of any additional information, and after the application has been declared complete for final review.

N.J.A.C. 7:7-4.5 contains rules applicable to public hearings and public comment periods. The Department proposes a number of amendments described below to more accurately reflect the timeframes contained in the 1993 amendments to CAFRA. N.J.A.C. 7:7-4.5(a) is proposed to be amended to include a list of specific developments for which a public hearing would be held. These developments include 150 or more residential dwelling units, 300 or more parking spaces or equivalent parking area, new roads, solid waste facilities, new wastewater treatment plants, airports, manufacturing or industrial processing facilities, power production plants, and mining activities. Under the proposed amendment, the Department can at its discretion hold a public hearing for other types of developments when it determines that additional information is necessary to assist in the review of the application, and that the information can only be obtained through a public hearing. In the event that a public hearing is not held, the Department will hold a 30 day public comment period. The Department proposes to clarify the procedure for a public comment period through proposed amendments to N.J.A.C. 7:7-4.5(e).

The Department proposes to amend N.J.A.C. 7:7-4.5(g)2 to allow the applicant to provide newspaper notice of a public hearing for linear developments of one-half mile or more in length. The proposed amendment to N.J.A.C. 7:7-4.5(g)2i provides the applicant with the specific language for the newspaper advertisement. Under the proposed amendments, proof of notice to owners of real property, including easements, and public agencies shall consist of certified mail receipts or other written receipts. Proof of publication in the newspaper shall consist of the date and newspaper in which the notice was published and a copy of the newspaper advertisement.

The Department also proposes to add a new subsection, N.J.A.C. 7:7-4.5(h), which will describe the notice requirements for a public comment period.

The Department proposes to recodify the language which clarifies that no application for a Waterfront Development or a Coastal Wetland

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permit shall be declared complete for final review unless and until the applicant has possession of all tidelands conveyances required for the riparian land from N.J.A.C. 7:7-4.4(a)2ii (Initial review of applications) to N.J.A.C. 7:7-4.6(c) (Final review of application) because it relates to the final rather than initial review stage of an application. However, in an effort to facilitate coastal permit processing, the Department may at its discretion continue to issue a permit decision prior to receipt of the conveyance, provided that a complete application for the conveyance has been received by the DEP, Bureau of Tidelands Management.

The Department proposes to amend N.J.A.C. 7:7-4.7 to provide that the Department shall act on CAFRA applications within 60 days of the public hearing, or within 60 days of the close of the public comment period, unless additional information is required.

N.J.A.C. 7:7-4.10 contains the procedures for modifying permits. The Department proposes to amend N.J.A.C. 7:7-4.10(b) to allow the Department at its discretion to eliminate, reduce or modify notice requirements for modifications to permits if the proposed modification is contained within the footprint of an existing structure and there is no proposed change in use or expansion and if no off-site impacts beyond those associated with the previously approved project are anticipated.

Subchapter 5. Appeals

N.J.A.C. 7:7-5.1(a) is amended to redesignate the current chapter Appendix as Appendix A, in light of the addition of three new appendices through this proposal.

Subchapter 7. General Permit and Permits-By-Rule

The Department proposes to amend subchapter 7, General Permits and Permit-by-Rule to allow General Permit and Permits-by-Rule not only for applications made under CAFRA, but also for applications made under the Waterfront Development Law, N.J.S.A. 12:5-1 et seq., and Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq. The Department proposes to amend N.J.A.C. 7:7-7.2(a) to establish 12 additional general permits for the following types of projects, which shall be subject to the conditions of the specific General Permit. These proposed General Permits include:

- Construction of a single-family home or duplex (including, but not limited to, all accessory structures including garages, sheds, pools, and driveways but excluding shore protection structures) on lots adjacent to natural waterways provided the project complies with the rules at N.J.A.C. 7:7E for dunes, beaches, wetlands, wetland buffers, coastal bluffs and threatened and endangered wildlife and vegetation species habitats;
- Expansion of a single-family home or duplex (including, but not limited to, all accessory structures including garages, sheds, pools, and driveways but excluding shore protection structures) on the waterward side of the dwelling, or by more than 400 square feet on the non-waterward side of the dwelling, on lots adjacent to natural waterways, provided the expansion complies with the Rules at N.J.A.C. 7:7E for dunes, beaches, wetlands, wetland buffers, coastal bluffs and threatened and endangered wildlife and vegetation species habitats;
- Bulkhead construction and placement of associated fill on a lot located on a substantially developed man-made lagoon;
- Revetment construction at a single family/duplex lot on a natural waterway excluding the Atlantic Ocean, Delaware, Raritan, and Sandy Hook Bays;
- Construction of marina support facilities at legally existing and operating commercial marinas including boat rack systems, marina support buildings, restrooms, pumpout facilities, construction of a sewer line to connect restrooms and pumpouts into existing sewer lines, gasoline pumps and associated tanks on the upland, boat handling facilities and construction of water lines;
- Reconstruction of a legally existing functioning bulkhead;
- Hazardous waste clean-up;
- Construction of recreational facilities at parks which are publicly owned or controlled for the purposes of public access;
- Landfall of utilities;
- Bulkhead construction and placement of associated fill at a single family/duplex lot on a natural waterbody;
- Construction of piers, docks, pilings and boatlifts in man-made lagoons; and
- Maintenance dredging of no more than 100 cubic yards of material in a man-made lagoon.

N.J.A.C. 7:7-7.2(a)4 currently contains a general permit for the voluntary reconstruction of non-damaged development. The Department proposes to amend N.J.A.C. 7:7-7.2(a)4ii to clarify that to qualify for this general permit, reconstruction cannot result in an increase in the number of dwelling units for residential developments and cannot result in an increase in the number of parking spaces or the equivalent parking area for commercial development. This clarification will codify existing policy.

The proposed General Permits will further clarify and simplify the permit process in two principal ways: first, a Compliance Statement may be submitted as part of the permit application in lieu of an Environmental Impact Statement; second, no public hearing under N.J.A.C. 7:7-4.5 will be required. Though there will be no public hearing under the proposed amendments, the Department will consider written comments regarding pending applications for the General Permits.

The proposed General Permits include specific conditions which must be satisfied in order to qualify for the General Permits. The requirements are located at N.J.A.C. 7:7-7.2.

Under N.J.A.C. 7:7-7.1(c), the Department may adopt a General Permit by rule only after providing public notice and an opportunity for a public hearing, and after determining that the type of development authorized by the General Permit:

- Will cause only minimal adverse environmental impacts when performed separately;
- Will have only minimal cumulative adverse impacts on the environment; and
- Is in keeping with the legislative intent to protect and preserve the coastal area from inappropriate development, and will be in conformance with the purposes of CAFRA.

The proposed General Permits satisfy these requirements.

First, the General Permits will not authorize the construction of a development if the project will have more than minimal adverse impacts on the environment, either separately or cumulatively (when considered in combination with other projects). As discussed above, the proposed General Permits allowing construction or expansion of single family homes or duplex projects cannot be authorized under the General Permit unless they comply with the applicable Coastal Rules at N.J.A.C. 7:7E regarding dunes, beaches, wetlands, wetland buffers, coastal bluffs and threatened and endangered wildlife and vegetation species habitats. Through the use of that criterion and the other proposed criteria applicable to each General Permit, the Department will ensure that the projects authorized under the General Permits meet the standard of causing minimal adverse impacts. In addition, the remaining activities proposed to be authorized by General Permit (bulkhead construction, revetment construction, marina support facilities, hazardous waste cleanup, construction at existing parks, landfall of utilities, construction of docks and piers on developed man-made lagoons, and minor maintenance dredging) will also be subject to criteria minimizing their environmental impacts.

Second, authorizing development under a General Permit is consistent with the intent and purposes of the CAFRA legislative amendments of 1993, which specifically authorize the Department to adopt General Permits. Using a General Permit rather than an individual permit will not compromise the Department's efforts to protect and preserve the coastal area from inappropriate development, because the proposed general permits will only apply to single family homes or duplexes, or to other smaller developments, and will contain specific criteria intended to minimize their environmental impacts.

Finally, the publication of the proposed amendments in the New Jersey Register satisfies the public notice requirement, and a public hearing on the proposed amendments has been scheduled to satisfy the hearing requirement.

N.J.A.C. 7:7-7.3 sets forth the procedure to apply for authorization under a General Permit. Under this rule, a person applying for a general permit must submit a completed LURP application form, photographs of the site, and verification (in the form of the white certified mail receipt or other written receipt) that a completed copy of the application has been forwarded to the environmental commission, municipal planning board, county planning board and municipal construction official. The Department proposes to amend this section to require the applicant to submit a complete copy of the application to all owners of real property surrounding and sharing a property boundary at any point on the perimeter of the proposed development instead of to all property owners within 200 feet. For beach and dune maintenance applications which involve more than one single family lot, the Department is proposing to require the applicant to provide public notice in the official newspaper of the municipality or in a newspaper of general circulation in the municipality if there is no official newspaper and to all owners of real property within 200 feet of an above ground structure, rather than to

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all property owners within 200 feet of the beach and dune maintenance activities. Proposed N.J.A.C. 7:7-7.3(f) through (r) list the additional application requirements specific to each General Permit. Proposed N.J.A.C. 7:7-7.3(s) and (t) contain the procedures that will be used to review General Permit applications.

The Department proposes to adopt four additional Permits-by-Rule for the following types of developments:

- Construction or expansion of a single-family home or duplex on a bulkheaded man-made lagoon lot;
- Placement of public safety or beach/dune ordinance signs on beaches and dunes provided no footings are required, and placement of signs at public parks;
- Construction of those portions of non-residential docks and piers located landward of the mean high water line; and
- Construction of those portions of residential docks and piers located landward of the mean high water line.

Under N.J.A.C. 7:7-7.4(b), a person wishing to engage in an activity covered by a Permit-by-Rule must now submit notification to the Department 30 days prior to commencement of the proposed work. It has been the Department's experience since the adoption of the permits-by-rule on July 18, 1994, that 30 days is an insufficient amount of time to review these submittals and to respond to the applicant, since the Department staff must review each individual notification. Thus, the Department proposes to amend this rule to require notification by certified mail 45 days before commencement of the proposed work. The notification requirements are also proposed to be amended to include the applicant's name, mailing address, telephone number, lot and block of the project site, municipality, county and street address of the project site, and a description of the proposed activity. These requirements are also proposed for amendment to delete the requirement for the submission of a local building permit.

Social Impact

The proposed amendments will have a positive social impact. The proposed amendments will make the CAFRA permit process less intimidating and more user-friendly for people considering building or expanding a single-family home or duplex. Establishing the new General Permits and Permits-by-Rule will streamline the CAFRA permit process for persons seeking to construct minor development which the Department has determined will cause only minimal environmental impacts, provided that the development is constructed in accordance with the conditions of the specific permits. As a result, the proposed amendments will minimize the resources that permit applicants will need to expend on the permit process, without affecting the positive environmental impact of N.J.A.C. 7:7 (as discussed in the Environmental Impact statement below).

Economic Impact

The proposed amendments will have a positive economic impact on persons seeking to construct minor developments which would otherwise have required an individual permit under CAFRA, the Waterfront Development Law or the Wetlands Act of 1970. As is the case under the current rules, those persons may incur costs for engineering, consulting and legal services. However, for projects covered under the proposed General Permits and Permits-by-Rule, those costs should be reduced, because there will be no public hearing associated with the CAFRA General Permit process and the Department may be able to issue permit decisions more quickly. In addition, the Department charges a smaller fee to review an application for a General Permit, and no fee for a Permit-by-Rule review. For projects covered under the Permits-by Rule, there is no formal permit application and no fee associated with compliance with the Coastal Area Facility Review Act, Waterfront Development Law and Wetlands Act of 1970. The Department has not determined the precise dollar amount of the cost savings, because the cost associated with a public hearing varies depending upon the circumstances and public reaction to each project, and the cost associated with a permit application varies depending upon the nature and complexity of the project and the circumstances associated with it.

The Department expects these proposed amendments to have an adverse economic impact on the operation of the DEP, Land Use Regulation Program. Applications for the proposed General Permits and Permits-by-Rule will continue to require review by DEP staff; however, the reduction in permit fees generated by these proposed General Permits and Permits-by-Rule will continue to force the Land Use Regulation Program to operate with insufficient financial resources.

Environmental Impact

The Department expects the new General Permits and Permits-by-Rule to have no environmental impact. As discussed above, the projects covered by proposed General Permits and Permits-by-Rule will not be authorized unless they comply with the applicable Coastal Rules at N.J.A.C. 7:7E. Accordingly, the Department does not expect projects that would have been ineligible for an individual permit to become eligible for a General Permit or a Permit-by-Rule. In addition, specific conditions must be met for projects to qualify for General Permits. Those conditions and the information upon which the Department will base permit decisions are intended to ensure that any projects authorized under the newly proposed General Permits and Permits-by-Rule will have no more than a minimal adverse environmental impact, both singly and collectively.

Executive Order No. 27 Analysis

Governor Whitman's Executive Order No. 27(1994) requires that all State rulemaking notices include a statement as to whether the rule in question contains any standards or requirements which exceed the standards or requirements imposed by Federal law. The following is an analysis of the Federal and State Coastal Zone Management Acts.

The Coastal Zone Management Act (P.L. 92-583) was passed by Congress and signed into law on October 27, 1972. The Act authorized a Federal grant-in aid program to be administered by the Secretary of Commerce, who in turn delegated this responsibility to the National Oceanic and Atmospheric Administration's (NOAA) Office of Coastal Zone Management (OCZM).

The Federal Coastal Zone Management Act sets no specific regulatory standards for development in the coastal zone, but merely provides broad guidelines and basic requirements for States developing coastal management programs. These guidelines and requirements for Program development and approval are contained in 15 CFR Part 923 as revised and published in the Federal Register. In summary, the requirements for Program approval are that the State develop a coastal management program that:

(1) Identifies the boundaries of the coastal zone subject to the management program;

(2) Defines those land and water uses within the coastal zone which have a direct and significant impact on coastal waters;

(3) Identifies and designates areas of particular concern within the coastal zone;

(4) Identifies the means by which the State proposes to exert control over the land uses and water uses referred to in (2) above, including a list of State constitutional provisions, laws, regulations and judicial decisions;

(5) Contains broad guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority;

(6) Contains a description of the organizational structure proposed to implement the coastal management program, including the responsibilities and interrelationships of local, areawide, State, regional and interstate agencies in the management process;

(7) Contains a procedure for assessing public beaches and a planning process for the protection of and access to, public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value;

(8) Contains a planning process for energy facilities likely to be located in or which may significantly affect, the coastal zone including a process for anticipating the management of the impacts resulting from such facilities; and

(9) Contains a planning process for assessing the effects, and studying and evaluating ways to control or lessen the impact of, shoreline erosion and to restore areas adversely affected by such erosion.

In 1978 the State of New Jersey's Coastal Zone Management Program was first approved by NOAA. The Program contains statements of policy which will be followed by the Department in making coastal decisions and which will guide other public and private actions affecting the coast. The State's Coastal Management Program has been designed to enable New Jersey to meet the requirements of the Federal Coastal Zone Management Act.

The Department was given responsibility to prepare and administer the State's coastal management program by the Governor. The Department's enabling legislation, the Coastal Area Facility Review Act, Wetlands Act, Waterfront Development Law and tidelands and shore protection statutes provide a strong mandate and basis for direct State agency involvement in key decisions involving the coastal region. The Department of Energy Act and Hackensack Meadowlands Reclamation and

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Development Act give some coastal responsibilities to other State agencies, and these are also included in the State's Coastal Management Program.

The State's Coastal Management Program meets the guidelines established under the Federal Coastal Zone Management Program, and the State of New Jersey has obtained approval from NOAA to implement its program under the Federal Coastal Zone Management Act. That Act does not contain specific regulatory standards for development in the coastal zone but identifies basic components that must be included in a State's coastal zone management plan. The Federal Coastal Zone Management Act does not set forth procedures by which individual activities within a State's coastal zone are to be regulated. The Department has identified activities which will have minor environmental impacts and are in conformance with the basic components of the State's coastal zone management program. Therefore the Department has proposed additional general permits and permits-by-rule to simplify the State's processing of coastal permits. The new series of general permits and permits-by-rule will have a tremendous economic benefit to the regulated public. The general permits and permits-by-rule will not require, in most cases, the services of professional consultants or engineers. Also, the timeframe in which the Department must issue a permit decision is greatly reduced as is the permit application fee.

The Department believes that the Coastal Permit Program Rules, which establish the procedures by which the Department reviews coastal permit applications under the State's coastal management program, do not exceed the Federal standards of the Federal Coastal Zone Management Act.

Regulatory Flexibility Analysis

In accordance with the New Jersey Regulatory Flexibility Act, N.J.S.A 52:14B-16 et seq., the Department has determined that the category of builders and property owners affected by the proposed amendments will be "small businesses" as defined in the Act. Therefore, affected small businesses will need to apply for authorization under a coastal permit. In doing so, they may incur costs for engineering, consulting and legal services. However, the proposed amendments will reduce those costs from those likely to be incurred under the existing rules, because there will be an expanded category of General Permits and Permits-by-Rule, none of which will require a public hearing. In addition, lesser fees will be required to review these applications, and in most instances a reduced application package will be needed.

The Department has not established different requirements for small businesses in the proposed amendments. The CAFRA statute does not authorize the Department to exempt small businesses from regulation or to establish reduced requirements for small business compliance. In addition, establishing such reduced requirements would undermine the coordination of coastal development contemplated by CAFRA and other relevant laws. However, to the extent that small business owners qualify for the proposed General Permits and Permits-by-Rule, those owners will be subject to a simplified application process.

Full text of the proposed amendments follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

7:7-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

. . .

"Development" means any activity for which a Wetlands Act of 1970 or Waterfront Development Permit is required, including site preparation and clearing. Development, for an application under the Coastal Area Facility Review Act, means the construction, relocation, or enlargement of any building or structure and all site preparation therefor, the grading, excavation or filling on beaches and dunes, and shall include residential development, commercial development, industrial development, and public development. Development does not include repairs or maintenance such as replacing siding, windows or roofs, unless such repairs or maintenance are associated with [expansions] **enlargements which are not exempt pursuant to N.J.A.C. 7:7-2.1(c)4. Development does not include debris removal or cleanup provided such activities do not involve excavation, grading or filling on beaches and dunes.**

. . .

"Intervening development" means a development with an above ground structure, excluding any shore protection structure or sand fencing, and includes houses, garages, **cabanas or bath houses which are fully enclosed and serviced by a municipal sewer system,** commercial, industrial or public buildings that are either completed or under active construction as of July 19, 1994 and that have received all necessary Federal, State, and local approvals **on or** prior to July 19, 1994 **or are otherwise exempt from CAFRA, and all development that has been approved and constructed under CAFRA.** "Intervening development" does not include seawalls, bulkheads, retaining walls, revetments, fences, boardwalks, promenades, patios, decks, carports, prefabricated sheds, docks piers, lifeguard stands, [bath houses,] gazebos, swimming pools, utility lines, culverts, railroads, roadways, sewage pump stations, or [cabanas] **seasonal or temporary structures as defined at N.J.A.C. 7:7-1.3.** An "intervening development" will be determined by looking at the [vertical plane of the exterior walls of the structure extended] **widest point of the footprint of the existing development and extending a line** landward and perpendicular to the mean high water line [or landward limit of a beach or dune] **from each point (See Appendix B, incorporated herein by reference). If the proposed development does not fall entirely within these lines, it shall be regulated.**

. . .

"Linear development" means land uses such as roads, railroads, sewerage and stormwater management pipes, gas and water pipelines, electric, telephone and other transmission lines and the rights-of-way which have a basic function of connecting two points, and beach and dune maintenance activities. Linear development shall not mean residential, commercial, office or industrial buildings, or improvements within a development such as utility lines or pipes or internal circulation roads that are proposed at the same time as the original development.

"LURP (Land Use Regulation Program) application form" means an application form used when applying for a permit or exemption pursuant to the Coastal Area Facility Review Act, Waterfront Development Law, Wetlands Act of 1970, Flood Hazard Area Control Act, or Freshwater Wetlands Protection Act, or when applying for Water Quality Certification and Federal Consistency Determinations. This form includes blocks for information regarding the permit application type, project description, project site location, property owner certification and names and addresses of the applicant and the applicant's agent.

. . .

"Man-made lagoon" means an artificially created linear waterway sometimes branched, ending in a dead end with no significant upland drainage. Lagoons have been created through dredging and filling of wetlands, bay bottom and other estuarine water areas for the purpose of creating waterfront lots for residential development adjacent to the lagoon. A natural waterway which is altered by activities including, but not limited to, filling, channelizing, or bulkheading shall not be considered a man-made lagoon, nor shall a bulkheaded boatslip be considered a lagoon.

. . .

"Porch" means a covered or uncovered entrance, directly connected to a residential dwelling.

. . .

"Public development" means a solid waste facility, including incinerators and landfills, wastewater treatment plant, public highway, airport including single or multi-air strips, an above or underground pipeline designed to transport petroleum, natural gas, **stormwater** or sanitary sewage, and a public facility, and shall not mean a seasonal or temporary structure related to the tourism industry, an educational facility or power lines. "Public development" does not have to be publicly funded or operated.

. . .

"Reconstruction" means the repair or replacement of a building, structure, or other parts of a development, provided that such repair or replacement does not increase or change the location of the footprint of the preexisting development, does not increase the area of impervious coverage associated with the development, and does not result in a change in the use of the development. **Reconstruction**

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of docks and piers means repair or replacement in the same location and size of the preexisting structure. Reconstruction does not include repairs or maintenance, such as replacing siding, windows, roofs, unless such repairs or maintenance are associated with [expansions] **enlargements which are not exempt pursuant to N.J.A.C. 7:7-2.1(c)4.**

. . .

"Waterward side of development" means the area of the site located between a tidal waterbody and a line(s) drawn through the point(s) of the footprint of the building closest to the water, and parallel to the waterbody, which line extends to the property boundaries. (see Appendices C and D, herein incorporated by reference).

. . .

7:7-2.1 CAFRA

(a) (No change.)

(b) The Department interprets its obligation and responsibility to regulate development as defined by CAFRA to include review of the potential impacts of any development, if at least part of that development is located within the area in which a CAFRA permit is required. Therefore, if any development requires a CAFRA permit, the Department will review all of the components of the development, not just those that triggered the regulatory thresholds of CAFRA. In addition, the Department will review all the components of a development that spans the zones in (a) above if the total development exceeds a regulatory threshold. The Department interprets the statutory intent as excluding developments with relatively minor impacts. **In addition, the repair and maintenance of utilities within rights-of-way on beaches and dunes are not regulated development as defined at N.J.A.C. 7:7-1.3.** To that end, the following statutory terms are interpreted to mean the following, for the purposes of this section.

1. Public development, for purposes of (a)3, 4 and 5 above only, does not include:

i. (No change.)

ii. The maintenance, repair or replacement **(including upgrade)** of existing water, petroleum, sewage or natural gas pipelines, and associated pump stations and connection junctions, and electrical substations, located completely within paved roadways or paved, gravel, or cleared and maintained rights-of way, provided that the replacement of sewage pipelines and associated pump stations does not result in an increase in the associated sewer service area;

iii. The repair, modification, or replacement of sanitary system components, including upgrading of systems from primary to secondary treatment, provided that an increase in [design effluent flow] **capacity** will not result;

iv. The construction, maintenance, repair or replacement **(including upgrade)** of water lines, telecommunication lines and cable television lines; or

v. (No change.)

2. Public development, for the purposes of N.J.A.C. 7:7-2.1(a)2 above does not include:

i. The maintenance, repair or replacement **(including upgrade)** of existing water petroleum, sewage or natural gas pipelines, and associated pump stations and connection junctions, and electrical substations, located completely within paved roadways or paved, gravel, or cleared and maintained rights-of-way, provided that the replacement of sewage pipelines and associated pump stations does not result in an increase in the associated sewer service area;

ii. The **maintenance,** repair, modification, or replacement of sanitary system components, including upgrading of systems from primary to secondary treatment, provided that an increase in [design effluent flow] **capacity** will not result;

iii. The **placement or connection of telecommunication lines and cable television lines, or the** maintenance, repair, replacement, or connection of telecommunication lines and cable television lines; [or]

iv. The maintenance, repair or replacement of existing and functional methods and related structures located completely within cleared and maintained rights-of-way[.]**; or**

v. Maintenance and repair (excluding replacement, reconstruction or modification) of existing stormwater management facilities which receive, store, convey or discharge stormwater runoff. These facilities may include retention and detention basins and infiltration structures; grassed swales, filter fabric, rip-rap channels and/or stormwater outfalls.

3. (No change.)

4. Equivalent parking areas will be calculated at 270 square feet per parking space, including one half of the associated aisle area, excluding access drives. **This calculation shall apply to both paved and unpaved parking areas.**

5. For the purposes of (a)2 through 5 above, development or expansion of existing developments "either solely or in conjunction with a previous developments" means:

i.-iii. (No change.)

[iv. The mooring of 25 or more floating homes in a marina. For the purposes of this subparagraph, a floating home is defined as a waterborne structure designed and intended primarily as a permanent or seasonal dwelling, not for use as a recreational vessel, and which will remain stationary for more than 10 consecutive days;]

[v.]**iv.** The addition of one or more parking spaces or dwelling units or equivalent to any existing dwelling units or parking spaces or equivalent parking area for which construction had commenced subsequent to September 19, 1973 where such addition, when combined with the existing dwelling units or parking area, results in a total exceeding the regulatory threshold. Any dwelling units or parking areas in existence on or before September 19, 1973 which have been determined by the Department to be exempt from the requirements of this subchapter due to on-site construction on or before September 19, 1973 will not be counted when determining if a new or expanded development exceeds the regulatory threshold.

(1) The addition of parking spaces by restriping is not regulated.

Recodify existing vi. and vii. as **v. and vi.**(No change in text.)

[5.]**6.** (No change in text.)

7. For the purposes of (a)2iii, iv 3, 4 and 5 above (developments not located on a beach or a dune and not located within 150 feet of beach, dune or mean high water line unless there is an intervening development), commercial and public development described in (b)3 above does not include development which:

i. Does not cause the number of parking spaces (either solely or in conjunction with the existing development) to exceed the regulatory threshold of the appropriate zone; or

ii. Does not propose development of any new parking spaces, regardless of whether the total number of existing parking spaces exceeds the regulatory threshold of the appropriate zone.

(c) This subchapter shall not apply to developments which meet one of the following criteria **for exemption under CAFRA** specified at N.J.S.A.13:19-5:

1. A development which has received preliminary site plan approval pursuant to the "Municipal Land Use Law," P.L. 1975, c.291 (N.J.S.A. 40:55D-1 et seq.) or a final municipal building or construction permit on or before July 19, 1994, provided that construction begins by July 19, 1997, and continues to completion with no lapses in construction activity for more than one year;

i.-iii. (No change.)

iv. In the event the final municipal building or construction permit expires and the permit is renewed or a new permit is obtained for the same project, the development will remain exempt provided construction begins by July 19, 1997. In cases where the municipal approval expires and is renewed or that a new permit is issued, the Department will require documentation that the new **or renewed** permit authorizes [exactly] the same construction as the original permit, **and that the currently authorized construction would not result in additional adverse impacts to any Special Areas as defined at N.J.A.C. 7:7E-3 that are greater than any adverse impacts associated with the development authorized before July 19, 1994, and the proposed construction is either 15 feet inshore of a bulkhead or no closer to the water than the original approval.**

2. A residential development which has received preliminary subdivision approval or minor subdivision approval pursuant to the "Municipal Land Use Law," P.L. 1975, c.291 (N.J.S.A. 40:55D-1 et seq.) on or before July 19, 1994 where no subsequent site plan

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approval is required, provided that construction begins by July 19, 1997, and continues to completion with no lapses in construction activity of more than one year;

i. An exemption under this section is granted only for the specific project [depicted on approved plans or described in the approving resolution or construction permit] **that was the subject of the subdivision approval, namely development of the subdivision which is consistent with the lot coverage, use and density restrictions of the zoning ordinances that were in effect at the time of the subdivision approval or that were authorized by the subdivision approval.**

ii.-iii. (No change.)

3. The reconstruction of any development **which was legally existing on and damaged subsequent to July 19, 1994** that is damaged or destroyed, in whole or in part, by fire, storm, natural hazard or act of God, provided that such reconstruction is in compliance with existing requirements or codes of municipal, State and Federal law; and further provided that such reconstruction does not result in:

i.-ii. (No change.)

iii. A relocation landward or laterally may [be exempt from] **qualify for the exemption at** [(c)3i] **(c)3** above if the Department determines, in writing, that such a relocation would result in less environmental impact than the **in place reconstruction of** damaged or destroyed development.

iv. Any person requesting a determination concerning relocation landward shall follow the procedures for an exemption determination at [(e)2] **(f)2** below.

v. A permit is not required for elevating a residential development on pilings, provided the number of dwelling units does not increase.

vi. Commercial development provided there is no increase in the number of parking spaces excluding the area located underneath the elevated structure.

4. (No change.)

5. The construction of a patio, deck or similar structure at a residential development.

i. For the purposes of this subsection, "similar structure" includes porches, balconies and verandas. The exemption for the construction of a patio, deck, porch, balcony or veranda only remains in effect as long as the patio, deck, porch, balcony or veranda remains [unused] **used** for the purpose that it was originally constructed. The conversion of such a structure into a new room or additional dwelling unit will require [Department review] **a CAFRA Permit.**

ii. For the purposes of this subsection, the following will also be allowed at a residential development, provided that such construction does not include the placement of pilings or placement of a structure on a beach, [or] dune, **or wetland:** open fences, open carports, flower boxes, gardens, **a landscape wall (for example, railroad ties) no more than one foot in height (or a series of walls not to exceeding a cumulative total of one foot in height),** gazebos, satellite dishes and antennas, sheds **(with a footprint of 120 square feet or less)**, wooden boardwalks and gravel or brick/paver block walkways, **propane tanks properly anchored, and** showers/spa/hot tubs **and above ground swimming pools (not exceeding 400 square feet of surface area)** which do not discharge to surface waters or wetlands.

iii.-iv. (No change.)

6. Services provided, within the existing public right-of-way, by any governmental entity which involve:

i. (No change.)

ii. Public highway lane widening, intersection and shoulder improvement projects **(including new paving or repaving)** which do not increase the number of travel lanes;

iii.-iv. (No change.)

7.-8. (No change.)

(d) (No change.)

(e) A development shall no longer be exempt from the requirement of obtaining a CAFRA permit if significant changes are made to the development which would void the approvals listed at (c)1 and 2 above, or which would result in additional impacts to Special Areas, as defined at N.J.A.C. 7:7E-3, which additional impacts are greater than the impacts associated with the originally exempt development.

[(e)]**(f)** Development that is exempt from CAFRA requires no certification or approval from the Department, except as may be required by other programs administered by the Department. Any person who wishes may request from the Department a written determination of a development's exemption from the requirements of this subchapter.

1. For an exemption pursuant to (c)1 and 2 above, the following shall be submitted:

i. A folded copy **(8½ inch by 14 inch)** of the [preliminary local approval of the site plan or subdivision, including a copy of the] approved site **plan or subdivision** plan [or subdivision itself], a copy of the resolution approving the site plan or subdivision, or a copy of the building permit [with] **and** approved plan and soil conservation district approval where required;

ii. In the event that the final municipal building or construction permit expires and the permit is renewed or a new permit is obtained for the same project, the development will remain exempt provided construction begins by July 19, 1997. To make such a determination, the Department will require documentation that the new permit authorizes exactly the same construction as the original permit, such as a copy of the original building permit with approved plan and soil conservation district approval where required and a copy of the new building permit with approved plan depicting the exact development as the original; [and]

iii. The fee specified at N.J.A.C. 7:1C-1.5(a)3v; **and**

iv. A completed LURP application form.

2. For an exemption pursuant to (c)3, 4, and 5 above the following shall be submitted:

i. Plans showing the existing structures and site conditions with locations and dimensions, and all proposed structures, filling, grading, excavation and clearing;

(1) For exemptions based on fire, storm, natural hazard or Act of God, the site plans submitted shall also indicate all preexisting structures to be rebuilt.

ii. Photographs of the site; [and]

iii. The fee specified at N.J.A.C. 7:1C-1.5(a)3v; **and**

iv. A completed LURP application form.

3. For an exemption pursuant to (c)8 above, the following shall be submitted:

i.-iii. (No change.)

iv. Photographs of the site; [and]

v. The fee specified at N.J.A.C. 7:1C-1.5(a)3v; **and**

vi. A completed LURP application form.

7:7-2.2 Wetlands

(a) Wetlands permits are required for all activities in coastal wetlands delineated and mapped pursuant to the Wetlands Act of 1970 including, but not limited to:

1.-2. (No change.)

3. The maintenance or repair of bridges, roads, highways, railroad beds or the facilities of any utility or municipality. This provision shall not apply to emergency repairs necessitated by a natural disaster or a sudden and unexpected mechanical, electrical or structural failure. Written notification of such repairs shall be provided to the [Division] **Program** within seven days after their initiation;

4.-12. (No change.)

(b)-(c) (No change.)

7:7-2.3 Waterfront development

(a)-(c) (No change.)

(d) A permit shall be required for the construction, reconstruction, alteration, expansion of enlargement of any structure, or for the excavation or filling of any area, any portion of which is in the waterfront area as defined in (a) above, with the exceptions listed below:

1.-2. (No change.)

3. In the waterfront area defined in (a)3 above, minor additions to or changes in existing structures or manufacturing operations that do not [increase the amount of impervious cover,] **result in adverse environmental impacts to Special Areas defined at N.J.A.C. 7:7E-3, provided the addition is located in an existing cleared area of the**

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site, and is set back a minimum of 15 feet from the mean high water line, where such changes or additions do not result in a change in the present land use of the site;

4. The repair, replacement, [or] renovation**, or reconstruction (as defined at N.J.A.C. 7:7-1.3)** of any legally existing dock, wharf, pier, bulkhead or building **that appears on the applicable Tidelands Map adopted by the Tidelands Resource Council (base map photography dated 1977/1978) or received a Waterfront Development permit subsequent to the date of the photograph** provided that the repair, replacement, [or] renovation**, or reconstruction (as defined at N.J.A.C. 7:7-1.3)** [will not have any additional permanent adverse effects on any natural resources on-site, including, but not limited to, wetlands, shallow water habitat, submerged vegetation, and natural shoreline configuration, and provided the repair, replacement or renovation] does not increase the size of the structure and the structure is used solely for residential purposes or the docking or servicing of pleasure vessels;

5. The repair, replacement, [or] renovation**, or reconstruction (as defined at N.J.A.C. 7:7-1.3)** of any legally existing floating dock, mooring raft or similar temporary or seasonal improvement or structure **that appears on the applicable Tidelands Map adopted by the Tidelands Resource Council (base map photography dated 1977/1978) or received a Waterfront Development permit subsequent to the date of the photograph** provided that the repair, replacement, [or] renovation**, or reconstruction (as defined at N.J.A.C. 7:7-1.3)** [will not have any additional permanent adverse effects on any additional permanent adverse effects on any natural resources on-site, including but limited to, wetlands, shallow water habitat, submerged vegetation, and natural shoreline configuration, and provided the improvement or structure] does not exceed in length the waterfront frontage of the parcel of real property to which it is attached and is used solely for the docking or servicing of pleasure vessels[.]**; and**

6. The redecking and replacement of bridge surfaces provided there is no change in width, length or height.

(e) Those portions of a dock or pier proposed to be constructed above the mean high water line and in the coastal zone may be subject to the permit-by-rule at N.J.A.C. 7:7-7.4(a)5 and 6.

Recodify existing (e)-(g) as **(f)-(h)** (No change in text.)

7:7-4.2 Application contents

(a) Applications shall contain the following:

1. A completed [DEP Standard Construction Permit (CP-1)] **LURP application form for the type of permit being applied for;**

2. (No change.)

3. Verification ([green card] **white certified mailing receipt or other written receipt** is required) that a complete copy of the application package has been submitted to the clerk of the municipality in which the proposed velopment will occur, and to the planning board**, construction official** and environmental commission of the municipality in which the proposed development would occur. Applications for CAFRA permits within the Pinelands Preservation Area or Protection Area must also contain verification that a complete copy of the application package has been submitted to the Pinelands Commission;

4. Verification that a certified mail notice [with return receipt requested] (white **mailing** receipt or [green card] **other written receipt** is acceptable) and a copy of the site plan and [CP-1] completed [DEP] **LURP** application form have been forwarded to the planning board and environmental commission of the county in which the proposed development would occur and to all [landowners] **owners of real property, including easements,** within 200 feet of the property or properties on which the proposed development would occur, along with a certified list of all [landowners] **owners of real property, including easements,** within 200 feet**, except as described at (a)4i through iv below**. The site plan referred to in this subsection need not include a full set of plans, but must depict the proposed development in relationship to existing site conditions. This plan may be on an 8½ by 11 inch sheet of paper provided it generally depicts the proposed development and the general and site specific location. **The public notice shall read as follows and a copy shall be included in the application to the Department:**

"This letter is to provide you with legal notification that an application will be submitted to the New Jersey Department of Environmental Protection, Land Use Regulation Program for a permit for the development shown on the enclosed plan.

The complete permit application package can be reviewed at either the municipal clerk's office or by appointment at the DEP's Trenton office. The Department of Environmental Protection welcomes comments and any information that you may provide concerning the proposed development and site. Please submit your written comments within 15 days of receiving this letter to:

New Jersey Department of Environmental Protection
Land Use Regulation Program
CN 401
501 East State Street
Trenton, New Jersey 08625
attn: (County in which property is located) Section Chief";

i. Notice to all owners of real property, including easements, within 200 feet of the property or properties on which the proposed development would occur is not required for individual CAFRA applications at the time the application is submitted. Instead notice shall be provided in accordance with the notice requirements for a public hearing or for a public comment period, whichever is applicable. The notice requirements for a public hearing are set forth at N.J.A.C. 7:7-4.5(g). The notice requirements for a public comment period are set forth at N.J.A.C. 7:7-4.5(h) (for general permit application requirements see N.J.A.C. 7:7-7.3).

ii. Notice to all owners of real property, including easements, within 200 feet of the property or properties on which the proposed development would occur is not required at the time an application is first submitted for a Waterfront Development or Wetlands permit, if a public hearing is required pursuant to N.J.A.C. 7:7-4.5(a). Notice shall instead be provided in accordance with the requirements for notice of a public hearing set forth at N.J.A.C. 7:7-4.5(g).

[i.]**iii.** [An] **A waterfront development or wetlands permit** application for a linear development **of one-half mile or more in length** shall **be subject to public notice in the official newspaper of the municipality or in a newspaper of general circulation in the municipality if there is no official newspaper(s). Such an application shall also** include verification that a certified mail notice [with return receipt requested] (white **mailing** receipt or [green card] **other written receipt** is acceptable) and a copy of the site plan and [CP-1] completed **LURP application** form have been forwarded to [the planning board and environmental commission of the county in which the proposed development would occur and to] all [landowners] **owners of real property, including easements,** within 200 feet of [the proposed development] **an above ground structure related to the linear development such as a pump station or treatment plant,** rather than to all [landowners] **owners of real property, including easements,** within 200 feet of the property or properties on which the proposed development would occur. [If the 200 foot area falls within the right-of-way, the applicant must notify those landowners within 200 feet of the outer edges of the right-of-way, along with a certified list of all landowners within this 200 feet.] The site plan referred to in this subsection need not include a full set of plans, but must depict the proposed development in relationship to existing site conditions. This plan may be on an 8½ by 11 inch sheet of paper provided it generally depicts the proposed development and the general and site specific location. [For the purposes of this subsection, "linear development" means land uses such as roads, railroads, sewerage and stormwater management pipes, gas and water pipelines, electric, telephone and other transmission lines and the rights-of-way therfor, which have a basic function of connecting two points. Linear development shall not mean residential, commercial, office or industrial buildings, improvements within a development such as utility lies or pipes, or internal circulation roads];

iv. For additional development proposed on the site of an existing industrial or park facility of at least 100 acres in size, the Department may at its discretion eliminate, modify or reduce the requirement for individual notice to owners of real property, including

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easements, depending on the scope, location and anticipated impacts of the proposed development. For example, an applicant proposing to construct a salt dome or guard shack at an industrial facility located greater than 500 feet from adjacent properties would be required to provide notice in a newspaper instead of notifying all owner's of real property, including easements property owners within 200 feet. Similarly, an applicant proposing to construct tennis courts located on one side of a 200 acre park facility would be required to notice only those property owners within the vicinity of the proposed tennis court.

[5. A copy of a the public notice shall be included in the application to the Department. The notice shall read as follows:

"This letter is to provide you with legal notification that an application will be submitted to the New Jersey Department of Environmental Protection, Land Use Regulation Program for a permit for the development shown on the enclosed plan.

The complete permit application package can be reviewed at either the municipal clerk's office or by appointment at the DEP's Trenton office. The Department of Environmental Protection welcomes comments and any information that you may provide concerning the proposed development and site. Please submit your written comments within 15 days of receiving this letter. In your letter, you may request a hearing if you believe one is necessary. Requests for a public hearing should state the specific nature of the issues proposed to be raised at the hearing. Both comments and hearing requests should be sent along with a copy of this letter to:

New Jersey Department of Environmental Protection
Land Use Regulation Program
CN 401
5 Station Plaza
Trenton, New Jersey 08625
attn: (County in which property is located) Section Chief";

6. Proof that notification of filing of an application for a CAFRA permit was published in the DEP Bulletin. The application shall be submitted to the Department within two weeks of publication of the notice of filing in the DEP Bulletin;]

[7.]**5.** Photographs showing the [project site;] **specific location of the proposed development taken from a minimum of four different locations and labeled as to orientation.**

[8.]**6.** Fifteen copies of development plans. (Plans must be folded [if] **to no** larger than 8½ inches by 11 inches in size.)

i. (No change.)

ii. For Waterfront Development applications for activities occurring below the mean high water line and for Wetlands applications for catwalks, docks or piers:

(1)-(2) (No change.)

(3) Dock plans must show channel location, **depths at mean low water outshore of the dock for a distance of at least 100 feet (excluding lagoons),** location and orientation of proposed mooring areas, mooring area depths at mean low water, including the method, time and date of soundings, cross sections of the dock including height and width of any wetland crossing(s).

(4) Development plans for activities in an area subject to a Tidelands conveyance (grant, lease or license) shall be prepared **and sealed** by a professional engineer or land surveyor, and must depict the limits of the conveyance. All activities in areas except man-made lagoons are subject to this requirement. Development plans for activities in man-made lagoons do not have to be prepared by a professional engineer, unless required by N.J.S.A. 45:8-27 et seq.

Recodify existing 9.-11. as **7. to 9.** (No change in text.)

(b)-(f) (No change.)

7:7-4.4 Initial review of applications

(a) [Within 20 working days of receipt of the application, the Department shall take one of the following actions] **For all CAFRA applications**:

1. [Declare the application complete for final review, assign an agency project number, and proceed to review on the merits.] **Within 20 working days of receipt of the application, the Department shall take one of the following actions:**

i. Assign an agency project number, accept the application, and issue notification to the applicant that the application is complete for public hearing or for a public comment period and a public hearing or public comment period shall be scheduled within 15 days;

ii. Assign an agency project number, accept the application and issue notification to the applicant that additional information is required to correct deficiencies; or

iii. Return the application, explaining why it is unacceptable for filing, and return the filing fee upon notification that the applicant does not intend to reapply.

[2. Assign an agency project number and accept the application, but request in writing that the applicant submit additional information within a specific period of time to assist in its review. In such cases, the application will not be considered complete for final review filing or complete for public hearing until all the additional information has been received and deemed acceptable for review.

i. In the case of all CAFRA permit applications and those other coastal permit applications or CAFRA permit modification applications for which the Department has determined that additional information is necessary to assist in its review and that this information can only be obtained by public hearing, the application shall be declared complete for public hearing.

ii. No application shall be declared complete for final review unless and until the applicant has possession of all tidelands conveyances required for the riparian land. The Department may in its discretion issue a permit decision prior to receipt of the conveyance.

3. Return the application, explaining why it is unacceptable for filing, and return the filing fee upon notification that the applicant does not intend to reapply.]

[(b)]**2.** Within 15 days of the receipt of any additional information submitted pursuant to [(a)2] **(a)1ii** above, the Department shall issue notification to the applicant [regarding] **stating** whether the amended application is considered complete.

[1.]**i.** Such notification shall either:

[i.]**(1)** Specify which deficiencies still remain;

[ii.]**(2)** If no public hearing is to be held, declare the application complete for [final review] **public comment**; or

[iii.]**(3)** If a public hearing is to be held, declare the application complete for the public hearing.

[2.]**ii.** Copies of information submitted in response to deficiency letters shall be submitted to the municipal clerk and at the discretion of the Department, be distributed by the applicant to the same persons to whom copies of the initial application were distributed.

[(c) Applications for which a public hearing will be held shall go on to the public hearing phase of the permit review process. Wetland and Waterfront Development applications which do not require a public hearing and which are complete for final review shall begin the 90 day review period established pursuant to the 90 Day Construction Permit Law on the date of receipt of the additional information which completed the application.]

[(d)]**3.** If an application is not complete for [final review] **public comment** or for the public hearing within 90 days of a request for additional information, the Department may, 30 days after providing written notice by certified mail to the applicant, cancel and return the application, unless the applicant can demonstrate good cause for the delay in completing the application. In such cases, a 90 day extension in which to submit the information will be granted.

Recodify existing 1.-3. as **i.-iii.** (No change in text.)

[(e)]**4.** Once an application is declared complete for final review **in accordance with N.J.A.C. 7:7-4.6,** [or for the public hearing, whichever occurs later,] the Rules on Coastal Zone Management, N.J.A.C. 7:7E [et seq.], in effect at that time will govern the staff review of the permit application [pursuant to the 90 Day Law, N.J.S.A. 13:1D-29 et. seq].

[(f)]**5.** Once an application for which a public hearing is required has been declared complete for public hearing, the Department shall prepare a preliminary analysis of the project, based upon the staff analysis and recommendations, as well as upon comments from other agencies to whom copies of the application were distributed and comments from interested persons.

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Recodify existing 1.-2. as **i.-ii.** (No change in text.)

(b) For all Waterfront Development and Coastal Wetland applications:

1. Within 20 working days of receipt of the application, the Department shall take one of the following actions:

i. Assign an agency project number, accept the application, and issue notification that the application is complete for final review effective the date of receipt of the application;

ii. Assign an agency project number, accept the application, and issue notification to the applicant that the application is complete for public hearing and a public hearing shall be scheduled within 15 days;

iii. Assign an agency project number and accept the application but request in writing that the applicant submit additional information within a specific period of time to assist in its review. In such cases, the application will not be considered complete for final review until all additional information has been received and the application deemed complete;

iv. Assign an agency project number and accept the application but request in writing that the applicant submit additional information within a specific period of time to assist in its review and inform the applicant that the Department has determined that additional information which can only be obtained by public hearing is also necessary to assist in its review; or

v. Return the application, explaining why it is unacceptable for filing, and return the filing fee upon notification that the applicant does not intend to reapply.

2. Within 15 days of receipt of any additional information submitted pursuant to b(iii) or (iv) above, the Department shall issue notification to the applicant stating whether the amended application is considered complete for public hearing or final review.

i. Such notification shall either:

(1) Specify which deficiencies still remain;

(2) If no public hearing is to be held, declare the application complete for final review; or

(3) If a public hearing is to be held, declare the application complete for the public hearing.

ii. Copies of information submitted in response to deficiency letters shall be submitted to the municipal clerk and at the discretion of the Department, be distributed by the applicant to the same persons to whom copies of the initial application were distributed.

3. Applications for which a public hearing will be held shall go on to the public hearing phase of the permit review process. Wetland and Waterfront Development applications which do not require a public hearing and which are complete for final review shall begin the 90 day review period established pursuant to the 90 Day Construction Permit Law, N.J.S.A. 13:1D-29 et seq., on the date of receipt of the additional information which completed the application.

4. If an application is not complete for final review or for the public hearing within 90 days of a request for additional information, the Department may, 30 days after providing written notice by certified mail to the applicant, cancel and return the application, unless the applicant can demonstrate good cause for the delay in completing the application. In such cases, a 90 day extension in which to submit the information will be granted.

i. All fees submitted with an application that is cancelled shall be non-refundable but will be applied toward resubmission of the application provided that such resubmission is within one year of the date of cancellation.

ii. A re-submission of a previously cancelled application more than one year after the date of cancellation shall be accompanied by the appropriate fee pursuant to N.J.A.C. 7:1C-1.5.

iii. A re-submission of an application shall be required to meet the application requirements specified at N.J.A.C. 7:7-4.2.

5. Once an application is declared complete for final review in accordance with N.J.A.C. 7:7-4.6 or for the public hearing, whichever occurs later, the Rules on Coastal Zone Management, N.J.A.C. 7:7E et seq., in effect at that time will govern the staff review of the permit application.

6. Once an application for which a public hearing is required has been declared complete for public hearing, the Department shall prepare a preliminary analysis of the project, based upon the staff analysis and recommendations, as well as upon comments from other agencies to whom copies of the application were distributed and comments from interested persons.

i. To be assured of incorporation in the preliminary analysis, such comments must be received within 20 days after the applicant has been notified of completeness for public hearing.

ii. The Department will provide copies of the preliminary analysis to the applicant and to any person requesting a copy.

7:7-4.5 Public hearings and public comment periods

(a) [Public hearings shall be convened in accordance with the following:] **A fact-findings public hearing will be held for the following types of developments:**

[1. Within 15 days of declaring an application complete for filing, the Department shall decide whether it will hold a public hearing or public comment period on a CAFRA application. The Department may, in its discretion, hold a non-adversarial public hearing for a CAFRA permit when the Department determines that additional information is necessary to assist in its review and that this information can be best obtained by providing an opportunity for a public hearing. The Department may initiate public hearings on its own or in response to public requests identifying specific issues which the Department believes warrant a public hearing.]

1. 150 or more residential dwelling units;

2. 300 or more parking spaces or equivalent paved areas;

3. New roads;

4. Solid waste facilities;

5. New wastewater treatment plants;

6. Airports;

7. Manufacturing or industrial processing facilities;

8. Power production plants; and

9. Mining activities.

[i. The Department may issue or deny a permit without a public hearing, unless there is a significant degree of public interest in the application and the Department receives written request(s) for a hearing. Requests for a public hearing must be received within 20 days of the date of publication of the notice of filing of an application for a CAFRA permit in the DEP Bulletin.]

(b) In addition, the Department may, in its discretion, hold a fact-finding public hearing for other types of development when the Department determines that, based on public comment or a review of the project, its scope and environmental impact, additional information is necessary to assist in its review or evaluate potential impacts and that this information can only be obtained by providing an opportunity for a public hearing.

(c) If a hearing is to take place, the Department shall, within 15 days of declaring the application complete for public hearing, set a date, place, and time for the public hearing and shall so notify the applicant.

1. The date for the hearing shall be not later than 60 days after the application has been declared complete for public hearing.

2. The hearing shall, if possible, be held in the municipality in which the development is proposed.

[ii.]**(d)** In the event that the Department does not hold a public hearing on a CAFRA permit application, the Department will provide for a 30-day public comment period [which begins on the date of publication of the notice of filing of an application for a CAFRA permit in the DEP Bulletin. Public comments must be submitted within 30 days of the date of publication of the notice of filing of an application for a CAFRA permit in the DEP Bulletin] **in accordance with (e) below.**

[2. The Department may, in its discretion, hold a non-adversarial public hearing for Wetlands and Waterfront Development permit applicants and for coastal permit modification applications when it determines that additional information is necessary to assist in its review and that this information can be obtained only by providing an opportunity for a public hearing. Such a determination can be

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obtained only by providing an opportunity for a public hearing. Such a determination will be made within 20 working days of the filing of the application.]

[(b) If a hearing is to take place, the Department shall, within 15 days of declaring the application complete for public hearing, set a date, place, and time for the public hearing and shall so notify the applicant.

1. The date for the hearing shall be not later than 60 days after the application has been declared complete for public hearing.

2. The hearing shall, if possible, be held in the municipality in which the development is proposed.]

(e) If a public comment period is to occur, the Department shall within 15 days of declaring the application complete for public comment, set a date for the commencement of the 30 day public comment period and shall so notify the applicant.

1. The date for the start of the public comment period shall be no later than 60 days after the application has been declared complete for public comment.

[(c)]**(f)** The Department shall publish a notice announcing the date, place, and time of the public hearing **or the date of commencement of the public comment** period in the [DEPE] **DEP** Bulletin.

[(d)]**(g)** The applicant shall give public notice of the public hearing, pursuant to section 7.1 of the Municipal Land Use Law (N.J.S.A. 40:55D-12). The newspaper display advertisement shall be a minimum of four inches in width.

1. Such notice shall describe the proposed development, identify its agency number, announce the date, place, and time of the public hearing on the application, and indicate that the comments on the application may be made to the Land Use Regulation Program, New Jersey Department of Environmental Protection, CN 401, Trenton, New Jersey 08625 at or within 15 days after the public hearing, or until the application is declared complete for **final review** (see N.J.A.C. 7:7-4.6), whichever occurs last.

2. If the development is a linear development **(as defined at N.J.A.C. 7:7-1.3) of one-half mile or more in length** [such as a pipeline or road], the applicant shall give public notice **containing the information described in (g)1 above** in the official newspaper of the municipality or in a newspaper of general circulation in the municipality if there is no official [newspapers] **newspaper**, and to owners of **all** real property, **including easements,** within 200 feet of an above ground structure related to [a] **the** linear development, such as a pumping station, [or] treatment plant, **or dune walkover,** rather than to **all** owners of real property, **including easements,** within 200 feet of the entire linear development.

3. (No change.)

4. Proof of notice shall be submitted to the Department at least three days prior to the public hearing. **Proof of notice to owners of real property, including easements, and public agencies shall consist of white certified mail receipts or other written receipts. Proof of publication in the newspaper shall specify the date and newspaper in which notice was published, and shall include a copy of the newspaper advertisement.** In cases where proof of publication is unavailable [3] **three** days prior to the hearing, the applicant may submit a notarized affidavit stating that notice of the hearing has been published, and specifying the date and newspaper in which the notice was published.

(h) The applicant shall give public notice of the public comment period pursuant to Section 7.1 of the Municipal Land Use Law (N.J.S.A. 49:55D-12). The newspaper display advertisement shall be a minimum of four inches in width.

1. The notice shall consist of a site plan, letter, and copy of the completed LURP application form.

i. The site plan referred to in h(1) above need not include a full set of plans, but must depict the proposed development in relationship to existing site conditions. This plan may be on an 8½ by 11 inch sheet of paper provided it generally depicts the proposed development and the general and site specific location.

ii. The letter shall read as follows:

"This letter is to provide you with legal notification that an application has been submitted to the New Jersey Department of Environmental Protection, Land Use Regulation Program for a permit for the development shown on the enclosed plan and that a 30 day public comment period will commence on <DATE.

The complete permit application package can be reviewed at either the municipal clerk's office or by appointment at the DEP's Trenton office. The Department of Environmental Protection welcomes comments and any information that you may provide concerning the proposed development and site. Your written comments must be submitted to the Department by the end of the 30 day comment period. Comments should be sent to:

New Jersey Department of Environmental Protection
Land Use Regulation Program
CN 401
501 East State Street
Trenton, New Jersey 08625
attn: (County in which property is located) Section Chief";

2. If the development is a linear development (as defined at N.J.A.C. 7:7-1.3) of one-half mile or more in length which does not qualify for a general permit, the applicant shall give public notice in the official newspaper of the municipality or in a newspaper of general circulation in the municipality if there is no official newspaper, and to owners of all real property, including easements within 200 feet of an above ground structure related to the proposed linear development, such as a pumping station, treatment plant, or dune walkover, rather than to all owners of real property, including easements within 200 feet of the entire linear development.

3. For additional development proposed on the site of an existing industrial or park facility of at least 100 acres in size, the Department may at its discretion eliminate, modify or reduce the requirement for individual notice to owners of real property, including easements depending on the scope, location and anticipated impacts of the proposed development. For example, an applicant proposing to construct a salt dome or guard shack at an industrial facility located greater than 500 feet from adjacent properties would be required to provide notice in a newspaper instead of notifying all owners of real property, including easements, within 200 feet. Similarly, an applicant proposing to construct tennis courts located on one side of a 200 acre park facility would be required only to notice owners of real property, including easements within the vicinity of the proposed tennis courts.

4. Notice of the public comment period shall also be given to the clerk of the municipality in which the proposed development will occur, the environmental commission and planning board of the municipality in which the proposed development will occur, and the environmental commission and planning board of the county in which the proposed development will occur.

Recodify existing (e)-(h) as **(i)-(l)** (No change in text.)

7:7-4.6 Final review of the application

(a) In the case of CAFRA applications, the Department shall, within 15 days after the public hearing, if one is held, or 15 days after the close of the public comment period if no hearing is held, either declare the application complete for final review or issue notification to the applicant that additional information is required for the complete review of the application. The request for additional information shall be made in writing, or if made at the hearing, confirmed in writing.

i. If a public hearing was held and no additional information is required, the date of the public hearing shall be the date the application was considered complete for **final** review.

ii. (No change.)

(b) (No change.)

(c) In the case of [non-CAFRA] **Waterfront Development and Coastal Wetland** applications for which a public hearing was held, the application shall be declared complete for final review on the date of the public hearing.

(d) (No change.)

(e) Notwithstanding any other provision of these rules, no application shall be declared complete for final review unless and until the applicant has possession of all tidelands conveyances required for the riparian land. The Department may at its discretion issue

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a permit decision prior to receipt of the conveyance, provided that a complete application for the conveyance has been received by the DEP, Bureau of Tidelands Management.

7:7-4.7 Timetable for final decisions

(a) The Department shall act on CAFRA applications within 60 days of the public hearing, or within 60 days of the [date the application was declared complete for final review, if no hearing is held] **close of the public comment period,** unless additional information was required, in which case the Department shall act on the application within 90 days of the date it was declared complete for final review.

(b)-(c) (No change.)

7:7-4.10 Requests for modifications

(a) (No change.)

(b) Modifications shall require an [application] **applicant** to amend the issued permit, including a new [CP-1] **LURP application** form, notice requirements pursuant to N.J.A.C. 7:7-4.2, a copy of the original permit, summary report, and approved plans, and any additional information necessary to review the proposed modification. **At the Department's discretion, notice requirements may be eliminated, reduced or modified if the proposed modification is contained within the footprint of the existing structure or paved areas, and there is no proposed change in land use, and no offsite impacts beyond those associated with the formerly approved project are anticipated. For example, the Department may not require public notice for permit modification in cases where a minor expansion is proposed in an area previously approved for structures or paving.**

(c)-(d) (No change.)

7:7-5.1 Request for review on appeal

(a) Any interested persons who consider themselves aggrieved by a final decision of the Land Use Regulation Program may, within 10 days of publication of notice of the final decision in the DEP Bulletin or within 10 days of publication of notice by the permittee pursuant to N.J.A.C. 7:7-4.8(b), whichever occurs first, appeal to the DEP Commissioner by requesting a hearing by addressing a written request to the Office of Legal Affairs, Attention: Adjudicatory Hearing Requests, Department of Environmental Protection, 401 East State Street, CN 402, Trenton, New Jersey 08625-0402 and including a completed "Administrative Hearing Request Checklist and Tracking Form for Permits" incorporated herein by reference as [an] Appendix **A.**

1.-2. (No change.)

(b)-(c) (No change.)

7:7-7.1 General standards for issuing coastal General Permits and Permits-By-Rule

(a) This section contains the procedures and substantive standards governing the issuance of new General Permits in accordance with **CAFRA,** N.J.S.A. [13:14 et seq.] **13:19-1, the Waterfront Development Law, N.J.S.A 12:5-1 et seq., and the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq.,** and contains the procedures and substantive standards for the issuance of [permits-by-rule] **Permits-By-Rule.** N.J.A.C. 7:7-7.2 and 7.3 contain the procedures and substantive standards for authorizing various developments under the issued General Permits. N.J.A.C. 7:7-7.4 describes the activities authorized by Permit-by-Rule.

(b) (No change.)

(c) The Department may issue General Permits or Permits-By-Rule only if all of the following conditions are met:

1. (No change.)

2. The Department determines that the development will be in conformance with the purposes of [CAFRA] **applicable statutes**; and

3. (No change.)

(d)-(e) (No change.)

(f) The Department may, by proposing and adopting regulations, rescind a category of [general permits] **General Permits** or [permits-by-rule] **Permits-By-Rule,** and thereafter require individual [CAFRA] permits for development previously covered by the [general permit] **General Permit** or [permits-by-rule] **Permit-By-Rule** , if it finds that the [general permit] **General Permit** or [permit-by-rule] **Permit-By-Rule** no longer meets the purposes of [N.J.S.A. 13:19-1 et seq.] **applicable statutes and of this chapter.**

(g)-(h) (No change.)

7:7-7.2 General Permit authorization

(a) The following development [in the CAFRA area] is authorized under the following General Permits, provided that the activity is in compliance with the specific conditions contained in the General Permit:

1. [Single Family Home or Duplex: The construction of a single family home or duplex on a bulkheaded lagoon lot, provided that the proposed project complies with all of the following:

i. The site is located on a man-made lagoon;

ii. All waterfront portions of the site are protected by a currently serviceable legal bulkhead;

iii. There are no wetlands on site upland of the bulkhead;

iv. The project consists solely of the construction of a single family home or duplex and associated improvements and is not part of a larger development being conducted by the property owner;

v. The dwelling and all other permanent structures, exclusive of a deck, are set back a minimum of 15 feet from the waterward face of the bulkhead;

vi. A silt fence is erected upland of the bulkhead with a 10 foot return on each end prior to construction. This fence must remain in place until all construction and landscaping activities are completed;

vii. The use of plastic under landscaped or gravel areas is prohibited. All sub-gravel liners must be made of filter cloth or other permeable material;

viii. The driveway is covered with a permeable material or is pitched to drain all runoff onto permeable areas of the site;

ix. The lowest habitable floor of the proposed structure is at or above the base flood elevation for the site as established by the Federal Emergency Management Agency and designated on the Flood Insurance Rate Map; and

x. The proposed dwelling will be serviced by an existing municipal sewer system.] **(Reserved)**

2.-3. (No change.)

4. Voluntary Reconstruction: The voluntary reconstruction of a non-damaged legally constructed, currently habitable residential or commercial development within the same footprint, provided that such reconstruction is in compliance with existing requirements or codes of municipal, State and Federal law and provided:

i. (No change.)

ii. The reconstruction does not result in an increase in the number of dwelling units **in the case of residential reconstruction, and does not result in an increase in the number of** [or] parking spaces or equivalent parking area within the development **in the case of commercial or other reconstruction.**

iii. (No change.)

iv. This General Permit authorization is not required for repairs or maintenance, such as replacing siding, windows or roofs, unless such repair or maintenance is associated with an expansion **of the footprint of development.**

5. Single Family Home or Duplex: The construction of a single family home or duplex including but not limited to all accessory structures (such as garages, sheds, pools, and driveways, excluding shore protection structures) landward of spring high tide, other than construction authorized under N.J.A.C. 7:7-7.4(a)3, provided that:

i. The project consists solely of the construction of a single family home or duplex and associated improvements (excluding any shore protection structures as well as filling outshore of the spring high tide line), and is not part of a larger development that is owned, controlled or being constructed by the property owner;

ii. The project complies with N.J.A.C. 7:7E-3.16 Dunes, 7:7E-3.22 Beaches, 7:7E-3.27 Wetlands, 7:7E-3.28 Wetland Buffers, 7:7E-3.31 Coastal Bluffs, and 7:7E-3.38 Endangered or Threatened Wildlife or Vegetation Species Habitats;

iii. The project complies with N.J.A.C. 7:7E-3.18 Coastal High Hazard Areas and N.J.A.C. 7:7E-3.19 Erosion Hazard Areas of the

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Rules on Coastal Zone Management, except as excluded under (a)5xii below;

iv. The use of plastic under landscaped or gravel areas is prohibited. All sub-gravel liners must be made of filter cloth or other permeable material;

v. The driveway is covered with a permeable material or is pitched to drain all runoff onto permeable areas of the site;

vi. On oceanfront sites with existing or proposed shore protection structures, the dwelling and all other permanent structures (except decks) are set back at least 25 feet from existing or proposed oceanfront shore protection structures. This distance shall be measured from the waterward face of a bulkhead or seawall and from the top of slope on the waterward face of the revetment;

vii. On non-oceanfront sites with existing or proposed shore protection structures, the dwelling and all other permanent structures (except decks) are set back at least 15 feet from existing or proposed shore protection structures. If there is no alternative to locating the proposed development at least 15 feet landward of the shore protection structure, the Department shall reduce the required set back if an engineering certification is provided demonstrating that, after the proposed development has been constructed, the shore protection structure can be replaced within 18 inches of the existing shore protection structure and a deed restriction is recorded for the property which states that any reconstruction of a shore protection structure shall be within 18 inches of the existing shore protection structure;

viii. For wooded sites, site clearing shall be limited to an area no more than 20 feet from the footprint of the dwelling and the area necessary for driveway, septic and utility line installations;

ix. In non-tidal areas, the lowest structural member is at or above the base flood elevation;

x. In tidal areas:

(1) The lowest floor (including the basement, if any) is elevated to or above the base flood elevation within designated zones A1 through A30 on the community's Flood Insurance Rate Maps;

(2) The building is elevated on pilings so that the bottom of the lowest horizontal structural member of the lowest floor (excluding the pilings) is elevated to or above the base flood level within designated zones V1 through V30 on the community's Flood Insurance Rate Maps;

(3) The dwelling is constructed as close as possible to the landward site boundary, and is not constructed waterward of the adjacent developments;

xi. For sites adjacent to or including surface water bodies or wetlands, a silt fence with a 10-foot landward return is erected at the limit of disturbance along the waterward and wetland sides of the development before construction begins. This fence must be maintained and remain in place until all construction and landscaping is completed; and

xii. Construction of a single family home or duplex that meets the other requirements of this rule and is located on a site partially or completely within the erosion hazard area or coastal high hazard area need not comply with the Erosion Hazard Area or Coastal High Hazard Area rules if the site meets the following criteria;

(1) It was shown as a subdivided lot prior to July 19, 1993;

(2) The lot is served by a municipal sewer system; and

(3) A house or commercial building is located on each lot abutting the lot lines perpendicular to the shoreline and the existing house or commercial building is located within 100 feet of said lot lines.

6. Single Family or Duplex Expansion: The expansion of a legally constructed, habitable single family or duplex dwelling including, but not limited to, all accessory structures (that is garages, sheds, pools, and driveways, but excluding shore protection structures), landward of the spring high water line which does not qualify for permits listed in this subchapter provided that:

i. The project consists solely of the expansion of a single family home or duplex and associated improvements landward of the spring high water line (excluding any shore protection structures as well as filling outshore of spring high water), and is not part of a larger development that is owned, controlled, or being constructed by the property owner;

ii. The expansion complies with N.J.A.C. 7:7E-3.16 Dunes, 7:7E-3.22 Beaches, 7:7E-3.27 Wetlands, 7:7E-3.28 Wetland Buffers, 7:7E-3.31 Coastal Bluffs, and 7:7E-3.38 Endangered or Threatened Wildlife or Vegetation Species Habitats;

iii. The project complies with N.J.A.C. 7:7E-3.18 Coastal High Hazard Areas and N.J.A.C. 7:7E-3.19 Erosion Hazard Areas of the Rules on Coastal Zone Management, except as excluded under (xii) below;

iv. The expansion does not include the placement of plastic under landscaped or gravel areas; any sub-gravel liners placed in connection with the expansion are made of filter cloth or other permeable material;

v. If the project includes the construction of a driveway, any newly constructed portion of the driveway shall be covered with a permeable material or is pitched to drain all runoff into permeable areas of the site;

vi. On oceanfront sites with existing or proposed shore protection structures, the dwelling and all other permanent structures (except decks) are set back at least 25 feet from existing or proposed oceanfront shore protection structures. This distance shall be measured from the waterward face of a bulkhead or seawall and from the top of slope on the waterward face of the revetment;

vii. On non-oceanfront sites with existing or proposed shore protection structures, the dwelling and all other permanent structures (except decks) are set back at least 15 feet from existing or proposed shore protection structures. If there is no alternative to locating the proposed development at least 15 feet landward of the shore protection structure, the Department shall reduce the required set back if an engineering certification is provided demonstrating that, after the proposed development has been constructed, the shore protection structure can be replaced within 18 inches of the existing shore protection structure and a deed restriction is recorded for the property which states that any reconstruction of a shore protection structure shall be within 18 inches of the existing shore protection structure.

viii. For wooded sites, the expansion will not result in the clearing of a site beyond an area more than 20 feet from the footprint of the dwelling and beyond the area necessary for driveway, septic system and utility line installations;

ix. In non-tidal areas, the lowest structural member added by the expansion is at or above the base flood elevation;

x. In tidal areas:

(1) The lowest floor (including the basement, if any) added by the expansion is elevated to or above the base flood elevation within designated zones A1 through A30 on the community's Flood Insurance Rate Maps; or

(2) The expanded portion of the building is elevated on pilings so that the bottom of the lowest horizontal structural member of the lowest floor (excluding the pilings) is elevated to or above the base flood level within designated zones V1 through V30 on the community's Flood Insurance Rate Maps;

xi. For sites adjacent to or including surface water bodies or wetlands, a silt fence with a 10-foot landward return is erected at the limit of disturbance along the waterward and wetland sides of the development before construction begins. This fence must be maintained and remain in place until all construction and landscaping is completed; and

xii. A single family home or duplex that meets all other conditions of this rule and is located on a site partially or completely within the erosion hazard area or coastal high hazard area need not comply with the Erosion Hazard Area or Coastal High Hazard Area rules if the site meets the following criteria;

(1) It was a subdivided lot prior to July 19, 1993;

(2) The lot is served by a municipal sewer system; and

(3) A house or commercial building is located on each lot abutting the lot lines perpendicular to the shoreline and said house or commercial building is located within 100 feet of said lot lines.

7. Bulkhead Construction and Placement of Associated Fill: The construction of a bulkhead or revetment on a lot located on a substantially developed manmade lagoon, provided that the proposed bulkhead complies with all of the following:

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i. The site is located on a substantially developed manmade lagoon as defined at N.J.A.C. 7:7-1.3;

ii. The bulkhead is located at or above the spring high water line unless it is between two existing lawful bulkheads not more than 75 feet apart. In such cases, the connecting bulkhead may not extend seaward of a straight line connecting the ends of the existing bulkheads;

iii. There shall be no disturbance to wetlands during construction;

iv. The bulkhead is located inshore of any wetlands;

v. A minimum 10 foot return shall be constructed at each end of the bulkhead unless it is tied into an existing adjacent bulkhead; and

vi. Clean fill from an upland source shall be used for backfill.

8. Revetment Construction at a Single Family/Duplex Lot: For the purpose of this section a revetment is defined as a sloped structure composed of rip rap or gabions which is installed along a shoreline, excluding the Atlantic Ocean, Delaware Bay, Raritan Bay and Sandy Hook Bay, to protect against erosion by waves or currents. The construction of a revetment on a waterbody is acceptable provided that the proposed revetment complies with all of the following:

i. The site of the proposed revetment shall be stabilized with a maximum slope not to exceed one vertical to two horizontal (1:2);

ii. The placement of rip rap or gabions in the waterway shall be limited to that necessary to protect the shoreline;

iii. Fill material shall be minimized and added only where needed to achieve uniform slope, shall be free of large stones and shall be firmly compacted before revetment construction begins;

iv. Filter fabric (or graded stone filter) shall be installed to prevent loss of slope materials through voids in the revetment material;

v. Revetment stones shall be angular and blocky, not rounded;

vi. The toe of the revetment shall be located at least three feet below existing grade to prevent undercutting;

vii. Weight of individual stone shall be determined by a design engineer based on wave height range for the site;

viii. Placement of a revetment in wetlands is prohibited;

ix. The revetment will not cause erosion of adjacent properties;

x. The gabion baskets shall be tightly packed with four inch to eight inch diameter stone (to minimize movement of the interior stone and consequent damage to the wire) and the edges shall be laced together with steel wire;

xi. Individual baskets shall be wired together; and

xii. The size and number of gabion baskets shall be determined by a design engineer based on wave height range for the site.

9. Support Facilities at Legally Existing and Operating Commercial Marinas: The construction of the support facilities listed in (a)9i through ix below is acceptable provided they comply with the specific conditions listed for each facility and with the conditions listed at (a)9ix below:

i. Boat rack systems/marina support buildings including, but not limited to, showroom, maintenance/repair, marine supplies, bait/tackle, boat sales, dock masters office buildings, sheds, excluding residential development.

(1) The building is to be set back a minimum of 100 feet from the mean high water line;

(2) The building or rack system shall be set back a minimum of 50 feet from the inland limit of any wetlands;

(3) The building and rack system shall be located in an existing cleared and maintained area of the site;

(4) The marina must provide or maintain rest rooms and at least one portable toilet emptying receptacle in accordance with N.J.A.C. 7:7E-7.3(d); and

(5) Marinas with dockage for 25 or more vessels or any one vessel with live aboard arrangement must provide for adequate and conveniently located pumpout stations.

ii. Restrooms.

(1) The restroom facilities shall:

(A) Discharge to a municipal or regional treatment plant where practicable; or

(B) Discharge to a subsurface sewage disposal system;

(2) Restrooms shall provide both hot and cold water and shall be maintained in a sanitary, warm, dry, brightly-lit and well ventilated condition;

(3) The restroom building shall be set back a minimum of 100 feet from the mean high water line unless the Department determines that there is no alternate location; and

(4) The restroom building shall be set back a minimum of 50 feet from the inland limit of any wetlands, unless the Department determines that there is no alternate location.

iii. Pumpout Facilities (Marine Sanitation Devices).

(1) The pumpout facilities shall:

(A) Discharge to a municipal or regional treatment plant where practicable;

(B) Discharge to a subsurface sewerage disposal system; or

(C) Discharge to a holding tank with waste being removed by a licensed septage hauler. A marina employing this method shall maintain a record of waste removal.

iv. Construction of a sewer line to connect restrooms and pumpouts to existing sewer lines.

(1) The new sewer line shall:

(A) Obtain a Treatment Works Approval from the Department's Bureau of Connection and Construction Permits;

(B) Be consistent with the 208 Water Quality Management Plan;

(C) Not result in adverse secondary impacts;

(D) Connect to an existing sewer line located immediately adjacent to the site;

(E) Have no prudent or feasible alternative alignment which would have less impact to Special Areas as defined at N.J.A.C. 7:7E-3;

(F) Not result in permanent or long term loss of Special Areas as defined at N.J.A.C. 7:7E-3; and

(G) Appropriate measures shall be used to mitigate adverse environmental impacts to the maximum extent feasible, such as restoration of disturbed vegetation, habitats, and land and water features;

v. Gasoline pump and associated pipes and tanks on the upland portion of the marina.

(1) The gasoline pump and associated pipes and tanks shall be located on the upland portion of the site;

(2) The marina must have available adequate floating containment booms and absorbent materials in the event of hydrocarbon spills;

(3) Fuel pumps shall include back pressure cutoff valves. Main cut-off valves shall be available both at the dock and in the upland area of the marina; and

(4) Obtain any other required approvals for the construction of underground or above ground storage tanks.

vi. Boat handling facilities including, but not limited to: winches, gantries, railways, platforms and lifts, hoists, cranes and fork lifts.

(1) The boat handling facility (excluding boat ramp and railways) shall be located landward of the mean high water line; and

(2) The boat handling facility shall not be located in a wetlands area.

vii. A single marina support building not exceeding a footprint of 120 square feet.

(1) The marina building shall not be located in wetlands.

viii. Construction of a water line provided that:

(1) It has no prudent or feasible alternative alignment which would have less impact on Special Areas as defined at N.J.A.C 7:7E-3;

(2) It will not result in permanent or long term loss of Special Areas as defined at N.J.A.C. 7:7E-3; and

(3) Appropriate measures shall be used to mitigate adverse environmental impacts to the maximum extent feasible, such as restoration of disturbed vegetation, habitats, and land and water features;

ix. The construction of the items listed at (a)9i through viii above shall also comply with the following:

(1) Public access shall be provided in accordance with the Public Access to the Waterfront rule (N.J.A.C. 7:7E-8.11); and

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(2) Trash receptacles along with adequate fish cleaning areas, including separately marked dispensers for organic refuse, shall be provided.

10. Reconstruction of a legally existing functioning bulkhead is acceptable provided that:

i. The reconstructed bulkhead is in-place, upland or within 18 inches outshore (as measured from the waterward face of the existing bulkhead to the waterward face of the proposed bulkhead) of the existing bulkhead;

ii. The replacement bulkhead is located upland of any wetlands;

iii. With the exception of individual single family/duplex properties, public access shall be maintained or provided in accordance with the Public Access to the Waterfront rule (N.J.A.C. 7:7E-8.11);

iv. The construction of bulkheads subject to wave run up forces (V-zones) shall be designed and certified by a professional engineer to withstand the forces of wave runup, and shall include a splash pad on the landward side. The splash pad must have a minimum width of 10 feet, and shall be constructed of concrete, asphalt or other erosion resistant material. If a cobblestone or similar splash pad is utilized, appropriate sub-base and filter cloth shall be incorporated into the design;

v. The placement of rip-rap along the seaward toe of the replacement bulkhead structure may qualify for this general permit if the Department determines that such rip rap is required to limit scour potential and the areas and volume of rip rap are minimized;

vi. The structure will not create net adverse shoreline movement downdrift, including erosion or shoaling;

vii. The construction shall have no adverse impact to any Special Areas defined at N.J.A.C. 7:7E-3; and

viii. Clean fill from an upland source shall be used for backfill.

11. Hazardous Waste Clean Up: All regulated activities above the mean high water line that are undertaken, authorized or otherwise expressly approved in writing by the Department for the investigation, cleanup or removal of hazardous substances as defined by or pursuant to the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., or pollutants, as defined by the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., provided the following conditions are met:

i. If the proposed cleanup activity is to take place in Special Areas as defined at N.J.A.C. 7:7E-3, the general permit authorization shall be issued only if the Department finds that there are no practicable alternatives to the investigation, cleanup and removal of the hazardous substances or pollutants that would involve less or no disturbance or destruction of Special Areas as defined at N.J.A.C. 7:7E-3;

ii. If the proposed activities are to take place in a wetland or transition area regulated pursuant to the Freshwater Wetlands Protection Act, the appropriate Freshwater Wetlands Protection Act authorization shall be obtained;

iii. For coastal wetlands, mitigation shall be performed according to the procedures for mitigation at N.J.A.C. 7:7E-3.27 and 7:7E-3B. The mitigation plan may be incorporated as part of the document by which the Department approves the cleanup or it may be submitted as part of the general permit application. The general permit will not be issued until the mitigation plan is submitted and approved by the Program according to the standards at N.J.A.C. 7:7E-3.27 and 7:7E-3B; and

iv. Mitigation may be required in accordance with the Rules on Coastal Zone Management, N.J.A.C. 7:7E, for disturbance to Special Areas as defined at N.J.A.C. 7:7E-3.

12. Landfall of Utilities, including cable (that is electric, television and fiber optics), telecommunication, petroleum, natural gas, water and sanitary sewer lines constructed in tidal waterbodies authorized pursuant to the Waterfront Development Law provided that:

i. The location of existing facilities prior to excavation shall be performed pursuant to the Underground Facility Protection Act, P.L.1994, c.118 (N.J.S.A. 48:2-73 et seq.);

ii. The width of the area disturbed within the right-of-way of the project is no more than 20 feet;

iii. Excavated areas for the placement of the utility landfall shall be returned to the pre-existing elevation using the original soil, if feasible or other suitable material to backfill from a depth of 18 inches to the original grade and revegetated;

iv. The utility landfall area shall have no adverse impacts to Special Areas as defined in the Rules on Coastal Zone Management N.J.A.C. 7:7E;

v. A silt fence and/or other soil erosion controls shall be installed prior to excavation and shall remain in place until final restoration is complete;

vi. The staging area and construction equipment shall not be placed directly into the tidal water. Construction equipment shall be land based or based on barges; and

vii. All underground cutting agents/lubricants shall be contained and properly disposed. Use of a vacuum trucks may be required for large drilling operations.

13. Construction of Recreational Facilities at Existing Public Parks: The construction of the following recreational facilities at parks which are publicly owned or controlled for the purposes of public access is acceptable provided that the construction complies with (a)13viii below and that the facilities are not located on dunes or in wetlands, except as noted at (a)13vii below:

i. Construction of playground equipment including, but not limited to, swings, slides, and jungle gyms;

ii. Construction of picnic tables, benches and grills which are not seasonal;

iii. Construction of gazebos, rain shelters and sheds provided they do not exceed a footprint 200 square feet;

iv. Construction of pathways, jogging trails and associated fitness equipment;

v. Construction of restrooms provided they:

(1) Discharge to a municipal or regional treatment plant where practicable; or

(2) Discharge to a subsurface sewerage disposal system;

(3) The restroom building shall be set back a minimum of 100 feet from the mean high water line unless the Department determines that there is no alternate location; and

(4) The restroom building shall be set back a minimum of 50 feet from the inland limit of any wetlands, unless the Department determines there is no alternate location;

vi. Construction of fences which do not require permanent footings.

vii. Trail or boardwalk construction in wetlands is acceptable provided that:

(1) The width of the trail or boardwalk does not exceed six feet, except for barrier free trails or boardwalks designed in accordance with the Barrier Free Subcode of the Standard Uniform Construction Code, N.J.A.C. 5:23-7. This general permit does not authorize construction of restrooms, gazebos, rain shelters, or any covered or enclosed structure;

(2) The height of the structure over wetlands shall be a minimum of four feet regardless of width;

(3) The project does not interfere with the natural hydrology of the area;

(4) The project does not encroach upon or adversely affect the habitat of any threatened or endangered species; and

viii. The construction of the recreational facilities shall have no adverse impact on any Special Areas defined at N.J.A.C. 7:7E-3.

14. Bulkhead Construction and Placement of Associated Fill: The construction of a bulkhead at a single family/duplex lot on a natural waterbody, provided that the proposed bulkhead complies with the following:

i. Legally existing functional bulkheads are located on the lots adjacent to the proposed bulkhead and are no more than 75 feet apart;

ii. The bulkhead will be located at or above the spring high water line;

iii. There shall be no disturbance to wetlands during construction;

iv. Clean fill from an upland source shall be used for backfill;

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v. The bulkhead shall not be located further waterward than the bulkheads on the adjacent properties;

vi. In the event that the bulkhead will be located landward of the adjacent bulkheads, the new bulkhead shall connect to the bulkhead on either side;

vii. The construction of bulkheads subject to wave run up forces (V-zones) shall be designed and certified by a professional engineer to withstand the forces of wave runup, and shall include a splash pad on the landward side. The splash pad must have a minimum width of 10 feet, and shall be constructed of concrete, asphalt or other erosion resistant material. If a cobblestone or similar splash pad is utilized, appropriate sub-base and filter cloth shall be incorporated into the design;

viii. The placement of rip-rap along the seaward toe of the bulkhead structure may qualify for this general permit if the Department determines that such rip rap is required to limit scour potential and the areas and volume of rip rap are minimized; and

ix. The bulkhead is located a minimum of five feet inshore of any wetlands.

15. Construction of piers, docks including jet ski ramps, pilings and boatlifts in man-made lagoons shall be acceptable provided that:

i. The structures shall be located on individual single family or duplex lots and shall be for recreational/non-commercial use;

ii. The structures shall not extend beyond a distance of 20 percent of the width of a man-made lagoon;

iii. The width of the dock or pier shall not exceed twice the clearance between the structure and the surface of the ground below or the water surface at mean high tide, except for floating docks. For example, an eight foot wide dock must be elevated a minimum of four feet above the water surface at mean high tide;

iv. The maximum width of the structure shall be eight feet, except where crossing wetlands, mudflats, where the proposed structure shall be constructed perpendicular to the shoreline to access sufficient water depth and shall not exceed six feet in width. In any case, the height of the structure over wetlands shall be a minimum of four feet;

v. Any wetlands disturbed during construction shall be restored to pre-project conditions;

vi. The proposed structure does not hinder navigation or access to adjacent docks, piers, moorings or water areas;

vii. A minimum of eight feet of open water shall be provided between any docks if the combined width of any existing or proposed docks over the water exceeds eight feet;

viii. For docks which are perpendicular to the adjacent bulkhead or shoreline construction and placement of the dock shall be a minimum of four feet from all property lines;

ix. The space between horizontal planking is maximized and the width or horizontal planking is minimized to the maximum extent practicable. Under normal circumstances, a minimum of ⅜ inch, ½ inch, ¾ inch or one inch space is to be provided for four inch, six inch, eight to 10 inch, or 12 inch plus wide planks respectively;

x. Jet ski ramps are inclined floating docks which are typically attached to existing docks for the purpose of docking jet skis. Jet ski ramps shall not exceed eight feet in width; and

xi. For sites which have existing dock structures exceeding eight feet in width over water areas and/or wetlands, which were constructed prior to September 1978 and for which the applicant proposes to increase the coverage over the water area or wetland by increasing the number or size of boat slips, docks or piers, the existing oversized structures must be reduced to a maximum of eight feet in width.

16. Minor maintenance dredging in man-made lagoons is acceptable provided that:

i. The volume of the material to be dredged shall not exceed 100 cubic yards;

ii. The proposed depth shall not exceed four feet below mean low water;

iii. Dredged material shall be placed on an upland site and shall be stabilized; and

iv. A 3:1 slope shall be maintained from the waterward edge of any wetlands to the nearest edge of the dredged area.

(b) The Department may require an application for an individual [CAFRA] permit instead of a General Permit if the Department finds that additional permit conditions would not be sufficient, or that special circumstances make this action necessary to ensure compliance with statutory requirements. The Department retains discretionary authority to require, on a case-by-case basis, submission of an individual [CAFRA] permit application for any proposed activity when it is determined that such a review would be in the public interest and that the proposed activity has the potential to cause significant impacts on environmental resources. In addition, when a project in its entirety does not qualify for a general permit, then the entire project shall require an individual [CAFRA] permit application. [The Department will require an individual CAFRA permit application for a development that has already received a General Permit.]

(c) All General Permits shall be valid for a term not to exceed five years from the date of receipt from the Department. If the term of a General Permit applicable to a specific development exceeds the expiration date of the General Permit issued by rule, and the General Permit upon which the authorization was based is modified by rule to include more stringent standards or conditions, the permittee must comply with the requirements of the new regulations by applying for a new General Permit authorization unless construction is already underway. If the General Permit is not reissued, the applicant must apply for an individual [CAFRA] permit unless construction pursuant to the prior General Permit is already underway.

1. For the purposes of this section, "construction" means having completed the foundations for buildings or structures, the subsurface improvements for roadways, or the necessary excavation and installation of bedding materials for utility lines. To determine if construction of a development or part of a development has begun by [July 19, 1997] **the date of expiration of the General Permit,** the Department shall evaluate such proofs as may be provided by the applicant, including, but not limited to, the following: documentation that the local construction official has completed the inspection at N.J.A.C. 5:23-2.18(b)1i(2) or 2.18(b)1i(3) for foundations of structures; reports from the municipal engineer documenting inspections of road bed construction; or billing receipts documenting the completion of the above construction activities. "Construction" does not include clearing vegetation, bringing construction materials to the site, site grading or other earth work associated with preparing a site for construction.

7:7-7.3 Application **and review** procedure for a General Permit authorization

(a) A person proposing to engage in an activity covered by a General Permit shall submit the following to the Department:

1. A completed [DEP Standard Construction Permit (CP-1) form] **LURP application form;**

2. Photographs of the site for which authorization is being requested;

3. Verification that a complete copy of the application has been forwarded to the clerk of the municipality ([green card] **white certified mail receipt or written receipt** is required) and that a certified mail notice with return receipt requested (white receipts or green cards are acceptable) has been forwarded to the environmental commission, or any public body with similar responsibilities, as well as to municipal planning board, county planning board, municipal construction official, and to all [landowners within 200 feet of the property or properties on which the proposed activity will occur] **owners of real property surrounding and sharing a property boundary at any point on the perimeter of the proposed development**. [The applicant shall also provide a certified list of all landowners within 200 feet as part of the application.] The notice shall read as follows:

"This letter is to provide you with legal notification that an application will be submitted to the New Jersey Department of

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Environmental Protection, Land Use Regulation Program for a General Permit [authorization] for (describe the proposed development).

The complete permit application package can be reviewed at either the municipal clerk's office or by appointment at the DEP's Trenton office. The Department of Environmental Protection welcomes comments and any information that you may provide concerning the proposed development and site. Please submit your written comments within 15 days of receiving this letter. Your comments should be sent along with a copy of this letter to:

New Jersey Department of Environmental Protection
Land Use Regulation Program
CN 401
5 Station Plaza
Trenton, New Jersey 08625
attn: (County in which property is located) Section Chief"

i. For beach and dune maintenance permit applications which involve more than one single family lot, the applicant shall provide public notice in the official newspaper of the municipality or in a newspaper of general circulation in the municipality if there is no official newspaper, and to all owners of real property, including easements within 200 feet of an above ground structure (such as a boardwalk or dune walkover structure), rather than to the all owners of real property, including easements within 200 feet of the beach and dune maintenance activities.

4. (No change.)

5. Any additional information as outlined in (b) through [(e)] **(r)** below.

(b)[A person applying for a General Permit to construct a single family home or duplex on a bulkheaded lagoon lot pursuant to N.J.A.C. 7:7-7.2(a)1 shall also submit:

1. Three copies of site plans demonstrating that the proposed development complies with the criteria listed above at N.J.A.C.7:7-7.2(a)1; and

2. A copy of the local construction permit approval obtained for the proposed single family home or duplex.] **(Reserved)**

(c) (No change.)

(d) A person applying for a General Permit for beach and dune maintenance activities pursuant to N.J.A.C. 7:7-7.2(a)3 shall also submit:

1.-3. (No change.)

[4. A statement from the applicant which details how the proposed activities will be conducted in compliance with the standards set forth in the Department's Rules on Coastal Zone Management.]

Recodify existing 5.-6. as **4.-5.** (No change in text.)

(e) A person applying for a General Permit for voluntary reconstruction of an undamaged, legally constructed, serviceable structure or habitable residential or commercial development pursuant to N.J.A.C. 7:7-7.2(a)4 shall also submit:

1. (No change.)

2. [Documentation] **For residential reconstruction, documentation** that there will not be an increase in the number of dwelling units **shall be provided. For commercial or other reconstruction, documentation that there will not be an increase in the number of** [or] parking spaces or equivalent parking area associated with the proposed reconstruction **shall be provided.**

3. (No change.)

(f) A person applying for a General Permit pursuant to N.J.A.C. 7:7-7.2(a)5, to construct a single family home or duplex not on a bulkheaded lagoon lot, shall also submit:

1. Three copies of a site plan showing the following:

i. The mean and spring high water lines of the tidal waters in proximity to the site;

ii. Existing features at the site including topography and structures, and the limits of wetlands, dune areas, beach areas, flood hazard areas and vegetation;

iii. Existing roads and utilities immediately adjacent to the site; and

iv. All proposed development, including all structures, grading and clearing; and

2. A Compliance Statement pursuant to N.J.A.C. 7:7-6, demonstrating how the proposed development complies with the criteria listed in N.J.A.C. 7:7-7.2(a)5, including supplemental documents in the form of maps, surveys, etc.

(g) A person applying for a General Permit pursuant to N.J.A.C. 7:7-7.2(a)6 to expand a single family home or duplex shall also submit:

1. Three copies of a site plan showing the following:

i. The mean and spring high water lines of the tidal waters in proximity to the site;

ii. Existing features at the site including topography and structures, roads, and utilities, and the limits of wetlands, dune areas, beach areas, flood hazard areas and vegetation;

iii. Existing roads and utilities immediately adjacent to the site; and

iv. All proposed development, including all structures, grading and clearing; and

2. A Compliance Statement pursuant to N.J.A.C.. 7:7-6, demonstrating how the proposed development complies with the criteria listed in N.J.A.C. 7:7-7.2(a)6, including supplemental documents in the form of maps, surveys, etc.

(i) A person applying for a General Permit pursuant to N.J.A.C. 7:7-7.2(a)7 for the construction of a bulkhead and associated fill on a lot located on a substantially developed manmade lagoon shall also submit:

1. Three copies of a site plan showing the following:

i. The mean and spring high water lines of the tidal waters at the site;

ii. Existing features at the site, including structures and the upper and lower limits of wetlands and beach areas;

iii. Bulkheads or other retaining structures on adjacent properties;

iv. All proposed structures including deadmen, tie backs and returns; and

2. A Compliance Statement pursuant to N.J.A.C. 7:7-6, demonstrating how the proposed project complies with the criteria listed in N.J.A.C. 7:7-7.2(a)7, including supplemental documents in the form of maps, surveys, etc.

(j) A person applying for a General Permit pursuant to N.J.A.C. 7:7-7.2(a)8 for the construction of a revetment at a single family/duplex lot on a waterbody shall also submit:

1. Three copies of a site plan showing the following:

i. The mean high, mean low and spring high water lines of the tidal waters at the site;

ii. Existing features at the site including topography and structures;

iii. The upper and lower limits of wetlands, beach areas and dune areas at the site and on adjacent waterfront properties;

iv. Bulkheads or other retaining structures on adjacent properties;

v. The location and cross sections of the proposed revetment in relationship to mean high and mean low water; and

2. A Compliance Statement pursuant to N.J.A.C. 7:7-6, demonstrating how the proposed project complies with the criteria listed in N.J.A.C. 7:7-7.2(a)8, including supplemental documents in the form of maps, surveys, etc.

(k) A person applying for a General Permit pursuant to N.J.A.C. 7:7-7.2(a)9 to construct marina support facilities shall submit:

1. Three copies of a site plan showing the following:

i. The mean high, mean low and spring high water lines of the tidal waters at the site;

ii. Existing features at the site including, topography, structures, utilities, beach areas and dune areas;

iii. The upper and lower limits of wetlands within 150 feet of the proposed limit of disturbance;

iii. The proposed development including all structures, grading and clearing; and

iv. The location of all existing and proposed public access areas;

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2. A Compliance Statement pursuant to N.J.A.C. 7:7-6, demonstrating how the proposed project complies with the criteria listed in N.J.A.C. 7:7-7.2(a)9, including supplemental documents in the form of maps, surveys, etc; and

3. A copy of any previous coastal permit for the site.

(l) A person applying for a General Permit pursuant to N.J.A.C. 7:7-7.2(a)10 for the reconstruction of a legally existing bulkhead waterward of the mean high water line shall also submit:

1. Three copies of a site plan showing the following:

i. The mean and spring high water lines of the tidal waters at the site;

ii. Existing features at the site including, all waterfront structures, existing bulkhead, and the upper and lower limits of wetlands, beach areas and dune areas;

iii. Bulkheads or other retaining structures on adjacent properties;

iii. The proposed new bulkhead including returns and tie backs and splash pad if located within the V-zone; and

iv. The location of all existing and proposed public access areas; and

2. A Compliance Statement pursuant to N.J.A.C. 7:7-6, demonstrating how the proposed project complies with the criteria listed in N.J.A.C. 7:7-7.2(a)10, including supplemental documents in the form of maps, surveys, etc.

(m) A person applying for a General Permit pursuant to N.J.A.C. 7:7-7.2(a)11 for hazardous waste clean up shall also submit:

1. Three copies of a site plan showing the following:

i. The mean and spring high water lines of the tidal waters at the site;

ii. The limits of all Special Areas as defined at N.J.A.C. 7:7E-3 within 150 feet of the proposed limits of disturbance on site and at the material disposal site;

iii. The proposed area of disturbance and method of clean up; and

iv. The restoration plan; and

2. A Compliance Statement pursuant to N.J.A.C. 7:7-6, demonstrating how the proposed project complies with the criteria listed in N.J.A.C. 7:7-7.2(a)11, including supplemental documents in the form of maps, surveys, etc.

(n) A person applying for a General Permit pursuant to N.J.A.C. 7:7-7.2(a)12 for the landfall of utilities in tidal waterbodies shall also submit:

1. Three copies of a site plan showing the following:

i. The mean and spring high water lines of the tidal waters at the site;

ii. The upper and lower limits of wetlands, beach areas, coastal bluffs, endangered or threatened wildlife or vegetation habitats and dune areas within 150 feet of the proposed limit of disturbance;

iii. The proposed area of disturbance;

iv. The restoration plan;

v. The location of the existing and proposed utility;

vi. The location and type of soil erosion and sediment control measures to be used during construction; and

2. A Compliance Statement pursuant to N.J.A.C. 7:7-6, demonstrating how the proposed project complies with the criteria listed in N.J.A.C. 7:7-7.2(a)12, including supplemental documents in the form of maps, surveys, etc.

(o) A person applying for a General Permit pursuant to N.J.A.C. 7:7-7.2(a)13 for the construction of recreational facilities at existing public parks shall also submit:

1. Three copies of a site plan showing the following:

i. The mean and spring high water lines of the tidal waters at the site; and

ii. The proposed development including all structures, grading and clearing; and

2. A Compliance Statement pursuant to N.J.A.C. 7:7-6, demonstrating how the proposed project complies with the criteria listed in N.J.A.C. 7:7-7.2(a)13, including supplemental documents in the form of maps, surveys, etc.

(p) A person applying for a General Permit pursuant to N.J.A.C. 7:7-7.2(a)14 for the construction of a bulkhead and associated fill at a single family/duplex lot on a natural waterbody shall also submit:

1. Three copies of a site plan showing the following:

i. The mean high, mean low and spring high tide lines of the tidal waters at the site;

ii. Existing features both at the site and on adjacent waterfront sites including all waterfront structures, existing bulkhead, and the upper and lower limits of wetlands, beach areas and dune areas;

iii. The proposed new bulkhead including returns and tie backs and splash pad if located within the V-Zone; and

iv. Bulkheads or other retaining structures on adjacent properties; and

2. A Compliance Statement pursuant to N.J.A.C. 7:7-6, demonstrating how the proposed project complies with the criteria listed in N.J.A.C. 7:7-7.2(a)14, including supplemental documents in the form of maps, surveys, etc.

(q) A person applying for a General Permit pursuant to N.J.A.C. 7:7-7.2(a)15 for the construction of piers, docks, pilings and boatlifts in man-made lagoons shall also submit:

1. Three copies of a site plan showing the following:

i. The mean high and mean low water lines of the tidal waters at the site;

ii. The upper and lower limits of wetlands within 150 feet of the proposed limits of disturbance;

iii. Existing structures including all waterfront structures (docks, pilings and bulkheads) on the project site and adjacent waterfront properties;

iv. The opposite side of the lagoon; and

v. The proposed dock, pier, piling and bulkhead; and

2. A Compliance Statement pursuant to N.J.A.C. 7:7-6, demonstrating how the proposed project complies with the criteria listed in N.J.A.C. 7:7-7.2(a)15, including supplemental documents in the form of maps, surveys, etc.;

(r) A person applying for a General Permit pursuant to N.J.A.C. 7:7-7.2(a)16 for maintenance dredging of no greater than 100 cubic yards in a man-made lagoon shall also submit:

1. Three copies of a site plan showing the following:

i. The mean high and mean low water lines of the tidal waters at the site;

ii. The upper and lower limits of wetlands on site and on adjacent lagoonfront properties;

iii. The existing and proposed water depths in the area to be dredged;

iv. Proposed cross sections of area to be dredged;

v. The location of dredge material disposal site;

vi.Method of dredging; and

vii. The method of stabilization of dredging material;

2. A Compliance Statement pursuant to N.J.A.C. 7:7-6, demonstrating how the proposed project complies with the criteria listed in N.J.A.C. 7:7-7.2(a)16, including supplemental documents in the form of maps, surveys, etc.

(s) Within 20 working days of receipt of the application, the Department shall take one of the following actions:

1. Declare the application complete for final review effective the date of receipt by the Department;

2. Assign an agency project number and accept the application, but request in writing that the applicant submit additional information within a specific period of time to assist in the Department's review.

i. Notwithstanding any other provision of these rules, no application shall be declared complete for final review unless and until the applicant has possession of all tidelands conveyances required for the riparian land. The Department may in its discretion issue a permit decision prior to receipt of the conveyance, provided that a complete application for the conveyance has been received by the DEP, Bureau of Tidelands Management; or

3. Return the application, explaining why it is unacceptable for filing, and return the filing fee upon notification that the applicant does not intend to reapply.

(t) Within 15 days of the receipt of any additional information submitted pursuant to (s)2 above, the Department shall issue

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notification to the applicant regarding whether the amended application is considered complete.

1. Such notification shall either:

i. Specify which deficiencies still remain; or

ii. Declare the application complete for final review effective the date of receipt of the additional information.

2. Copies of information submitted in response to deficiency letters shall be submitted to the municipal clerk and at the discretion of the Department, be distributed by the applicant to the same persons to whom copies of the initial application were distributed.

(u) The Department shall make a decision within 90 days of the application being declared complete for review.

(v) If an application is not complete for final review within 90 days of a request for additional information, the Department may, 30 days after providing written notice by certified mail to the applicant, cancel and return the application, unless the applicant can demonstrate good cause for the delay in completing the application. In such cases, a 90 day extension in which to submit the information will be granted.

1. All fees submitted with an application that is cancelled shall be non-refundable but will be applied toward re-submission of the application provided that such re-submission is within one year of the date of cancellation.

2. A re-submission of a previously cancelled application more than one year after the date of cancellation shall be accompanied by the appropriate fee pursuant to N.J.A.C. 7:1C-1.5.

3. A re-submission of an application shall be required to meet the application requirements specified at N.J.A.C. 7:7-4.2.

(w) If the Department fails to render a decision on the General Permit within 90 days of the date it was declared complete for review, the application shall be deemed to have been approved, subject to the standard conditions set forth in N.J.A.C. 7:7-1.5, with the exception of any application for a permit where the applicant has not received all required riparian conveyances setting forth the person's right to use or occupy the riparian land.

[(f) Except as otherwise provided in this section, an appropriation for a General Permit authorization will be reviewed following the procedures set for it in N.J.A.C. 7:7-4.4 and 4.7 through 4.11.]

(x) An application for a General Permit authorization will also be reviewed following the procedures set forth at N.J.A.C. 7:7-4.8 through 4.11.

7:7-7.4 Permits-By-Rule

(a) This section details the activities authorized by Permit-by-Rule.

1. (No change.)

2. [Expansion of a Single Family Home or Duplex on a bulkheaded lagoon lot: The expansion of a legally constructed, habitable single family or duplex dwelling on a bulkheaded lagoon lot, provided that the expansion does not exceed a cumulative surface area of 400 square feet, such expansion is not proposed on a wetland, and provided that such expansion is set back a minimum of 15 feet from the waterward face of the bulkhead.] **(Reserved)**

3. The expansion or construction of a single family home or duplex (including, but not limited to, all accessory structures including garages. sheds, pools and driveways, but excluding shore protection structures) on a bulkheaded lagoon lot, provided that the proposed project complies with all of the following:

i. The site is located on a man-made lagoon lot, with an existing bulkhead along the entire waterfront portion of the site;

ii. All waterfront portions of the site are protected by a currently serviceable bulkhead;

iii. There are no wetlands on site upland of the bulkhead;

iv. The construction or expansion is not part of a larger development owned, controlled or being conducted by the property owner;

v. The proposed development and all other proposed permanent structures (excluding decks) are set back a minimum of 15 feet from the waterward face of the bulkhead. If there is no alternative to locating the proposed development at least 15 feet landward of the bulkhead, the Department shall reduce the required set back if an engineering certification is provided demonstrating that, after the proposed development has been constructed, the shore protection structure can be replaced within 18 inches of the existing bulkhead and a deed restriction is recorded for the property which states that any reconstruction of a bulkhead shall be within 18 inches of the existing bulkhead;

vi. A silt fence is erected upland of the bulkhead with a 10 foot landward return on each end prior to construction. This fence shall be maintained and remain in place until all construction and landscaping activities are completed;

vii. If the project includes the construction of a driveway, any newly constructed portion of the driveway shall be covered with a permeable material or is pitched to drain all runoff onto permeable areas of the site;

viii. The lowest habitable floor (including the basement) of the proposed dwelling or expansion is at or above the base flood elevation for the site as established by the Federal Emergency Management Agency and designated on the Flood Insurance Rate Map;

ix. If the proposed development is a sewage generating development, it shall be serviced by an existing municipal sewer system; and

x. If the development involves the construction of a new single family or duplex dwelling, the use of plastic under landscaped or gravel areas is prohibited. All sub-gravel liners must be made of filter cloth or other permeable material.

4. Placement of public safety or beach/dune ordinance signs on beaches and dunes provided no footings are required, and placement of signs at public parks.

5. The construction of non-residential docks and piers located landward of the mean high water line, provided that the construction waterward of the mean high water line has received a Waterfront Development permit. The width of the structure landward of the mean high water line shall not exceed the width of the structure waterward of the mean high water line. The width of the structure over wetlands shall not exceed six feet and the height shall be a minimum of four feet over the wetlands. This permit-by-rule also includes the construction of non-residential decks provided they are not located on a beach, dune or wetland, provided the construction does not require clearing of forest vegetation and provided the size does not exceed a footprint area of 400 square feet. The Waterfront Development permit may include additional conditions (including but not limited to public access to the waterfront) on the upland construction to insure compliance with the Rules on Coastal Zone Management, N.J.A.C. 7:7E.

6. The construction of the portion of a recreational dock or pier landward of the mean high water line at a residential development, provided that construction waterward of the mean high water line is authorized through the issuance of a Waterfront Development permit. The width of the structure landward of the mean high water line shall not exceed the width of the structure waterward of the mean high water line. The width of the structure over wetlands shall not exceed six feet and the height shall be a minimum of four feet over the wetlands. The Waterfront Development permit may include additional conditions on the upland construction to insure compliance with the Rules on Coastal Zone Management (N.J.A.C. 7:7E). For example, the Waterfront Development permit may be conditioned to require the dock to cross the wetlands at the narrowest point on the property or to allow continued access along the shoreline.

(b) A person wishing to engage in an activity covered by a Permit-By-Rule shall submit notification to the Department **to be received by certified mail** [at least 30] **45** days prior to commencement of the proposed work. **For persons wishing to engage in the activities listed at (a)5 and 6 above, the Waterfront Development Permit application shall be considered notification, and the Department shall issue the Permit-By-Rule in conjunction with the Waterfront Development Permit.** Such notification shall be sent to: Administrator, DEP—Land Use Regulation Program, CN 401, Trenton, New Jersey 08625, and shall include:

1. A [description of the location of the proposed activity including county, municipality, lot(s) and block(s)] **completed LURP application form.**

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2. [A description of the proposed expansion including its dimension and location] **A plan showing existing development and the proposed expansion including its dimensions and location;** [and]

3. **A site location map; and**

[3.]**4.** [A copy of the issued building permit for the proposed development.] **Photographs showing the area of the proposed development.**

(c) If the Department determines that the proposed development does not qualify for the Permit-By-Rule, the Department will provide a Notice of Ineligibility for the Permit-By-Rule within 45 days of receipt of the notification by the Department. The Notice of Ineligibility will specify which conditions of the Permit-By-Rule are not met. If the Department determines the application to be ineligible for the Permit-By-Rule, no construction shall proceed until the applicant:

1. Modifies the proposed development to meet the conditions of the Permit-By-Rule and submits new notice of the Permit-By-Rule to the Department, showing revised development. The Department shall issue its decision within 45 days of receipt of the new notice; or

2. Receives a General Permit or Individual Permit from the Department for the proposed development.

APPENDIX A

Administrative Hearing Request Checklist
and Trucking Farm for Permits

(No change in text.)

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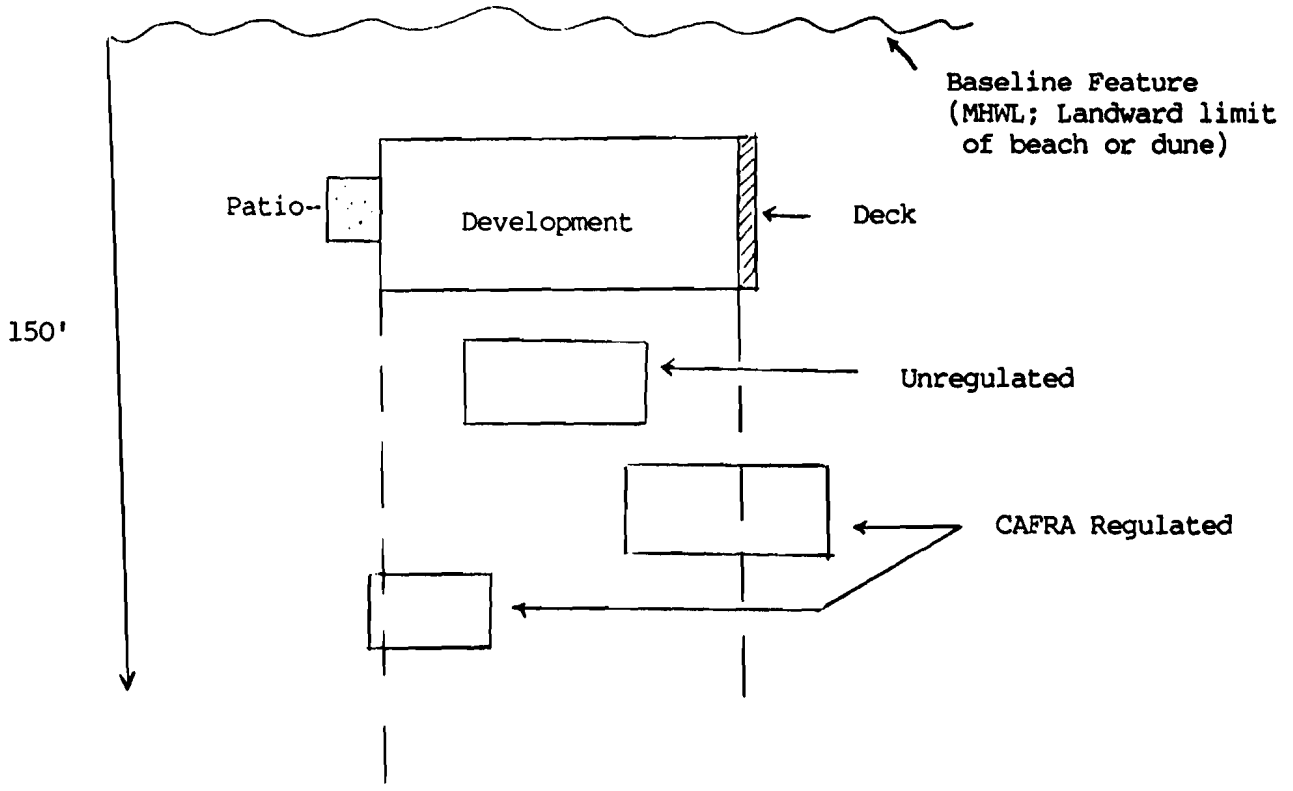
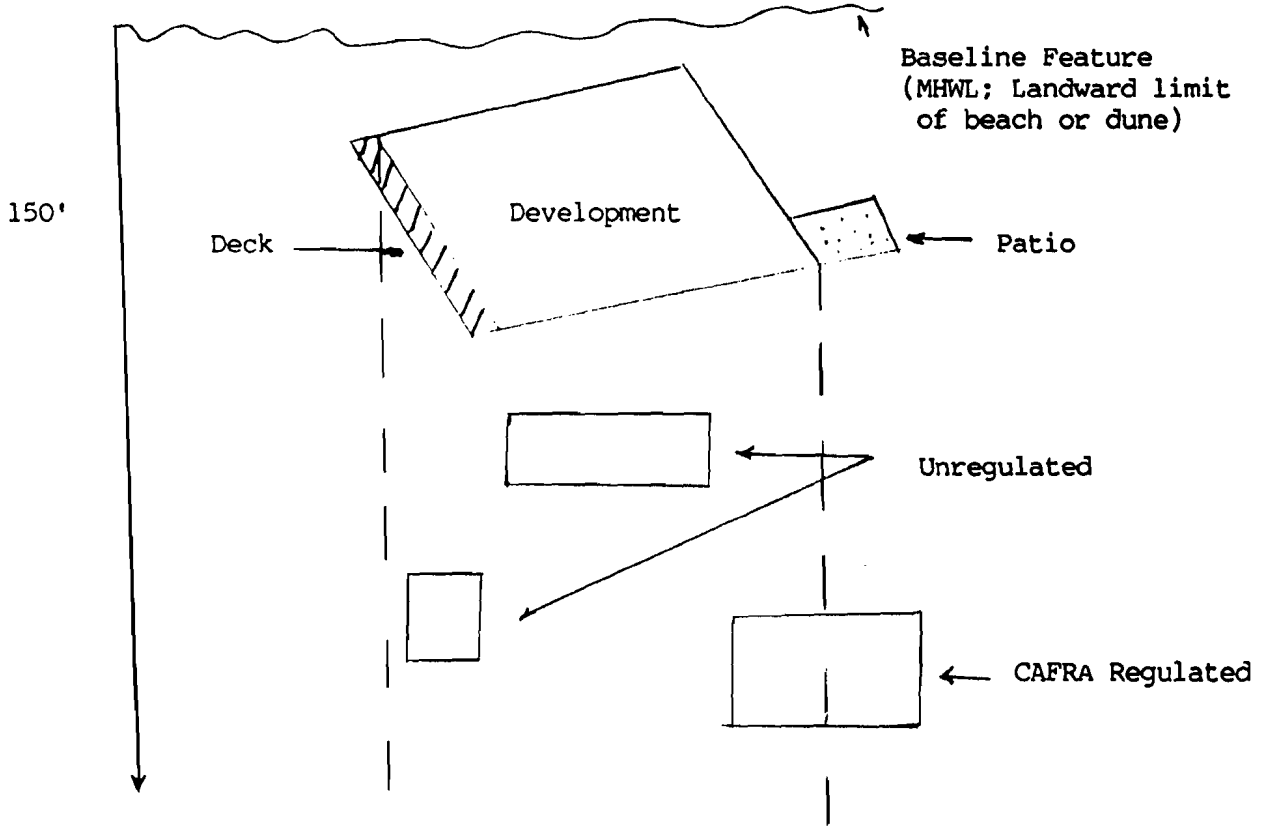
APPENDIX B

A.



B.



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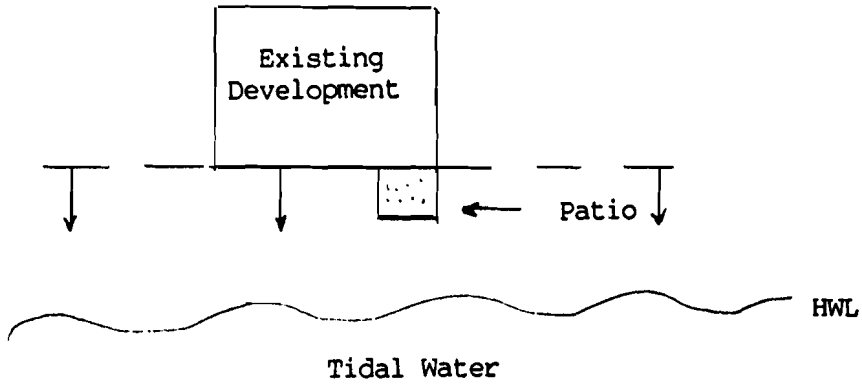
APPENDIX C

A.



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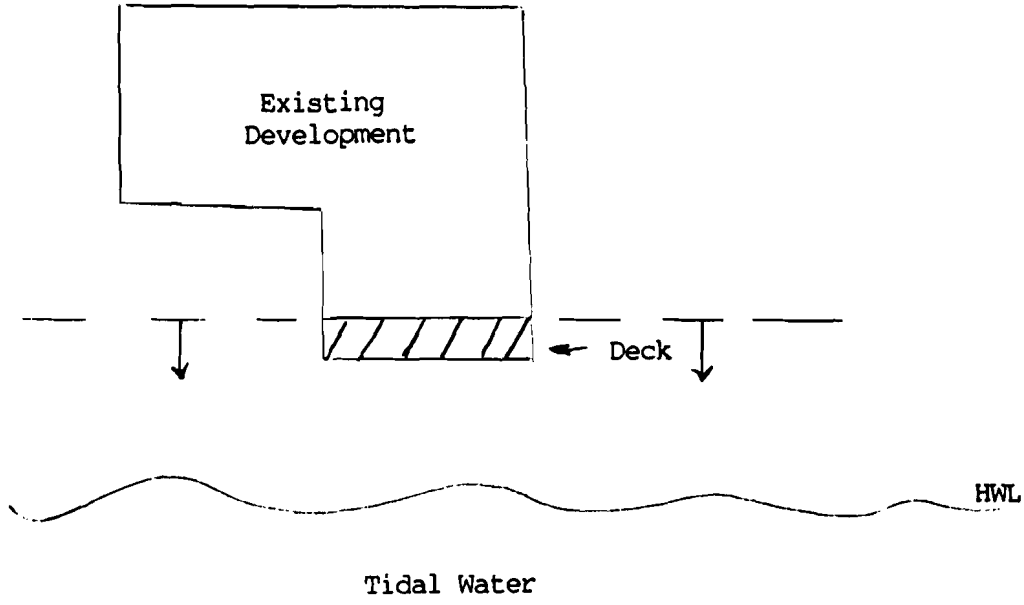

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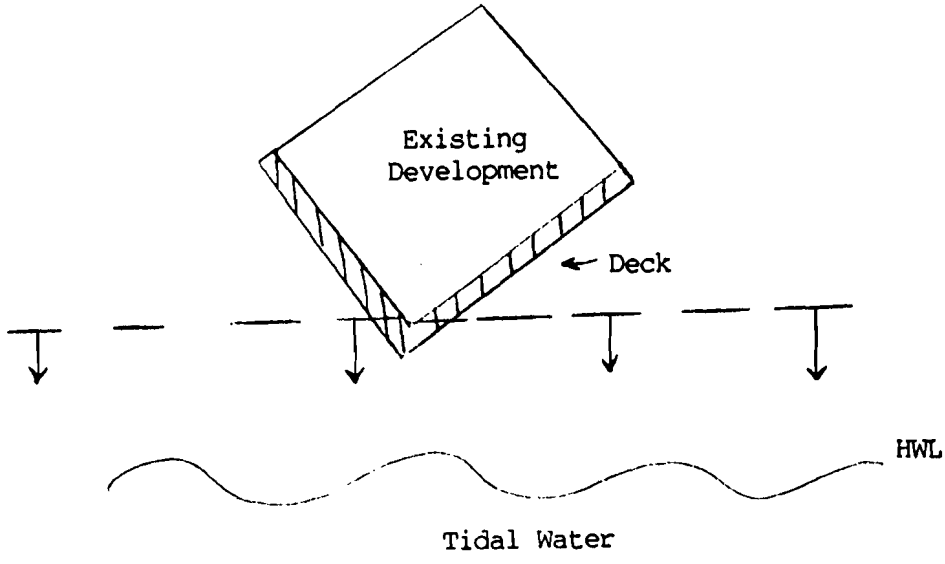

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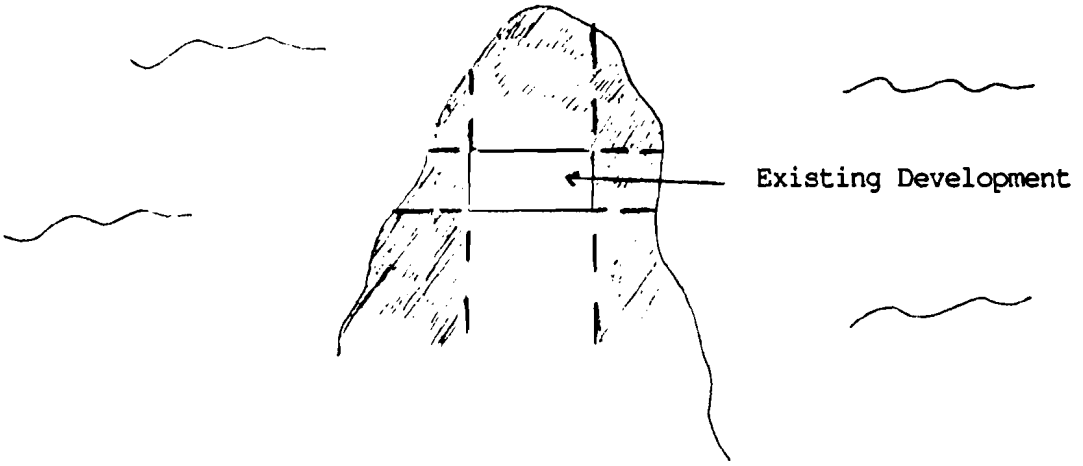
APPENDIX D

A.



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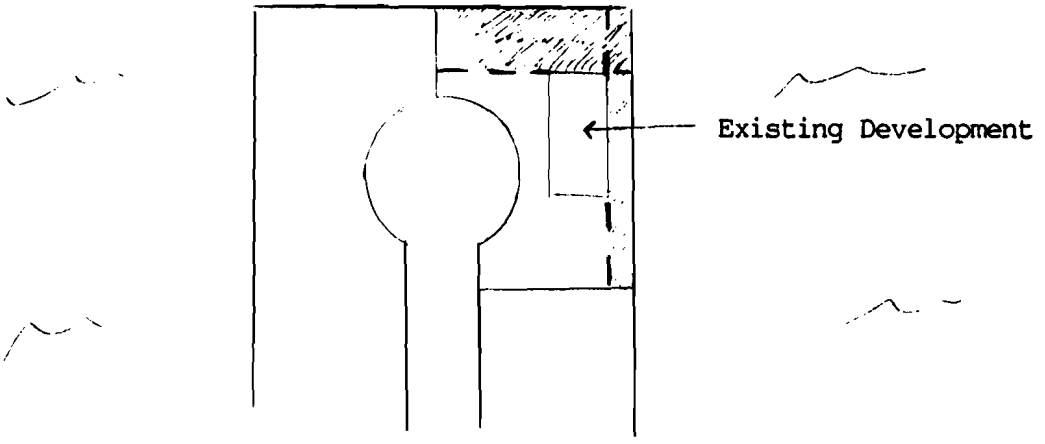
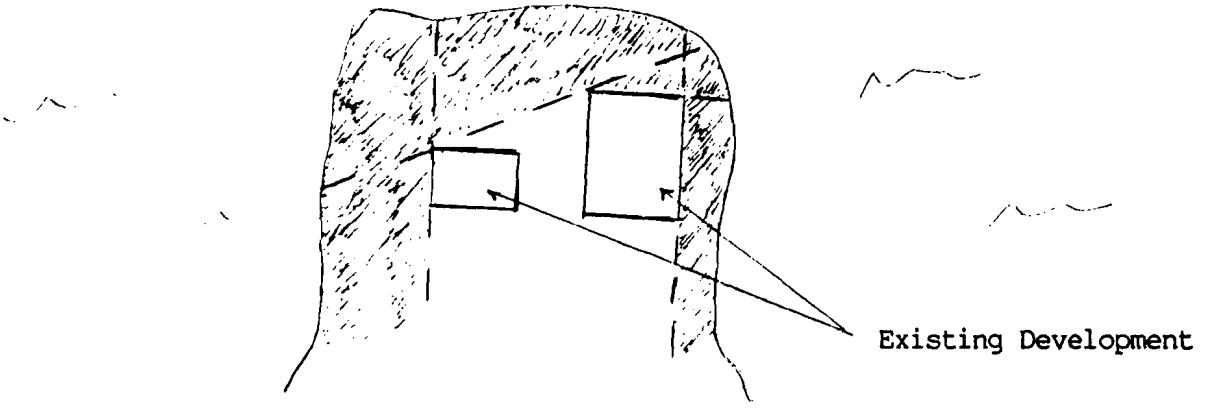


C.



NOTE: Shaded areas denote waterward side of development

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(a)

ENVIRONMENTAL REGULATION

New Jersey Pollutant Discharge Elimination System Permit Fees

Proposed Amendment: N.J.A.C. 7:14A-1.8

Authorized By: Robert C. Shinn, Jr., Commissioner, Department of Environmental Protection.

Authority: N.J.S.A. 58:10A-1 et seq., particularly N.J.S.A. 58:10A-9.

DEP Docket Number: 06-95-02/508.

Proposal Number: PRN 1995-179.

A **public hearing** concerning this proposal will be held on Tuesday, April 18, 1995 beginning at 10:00 A.M. at:

Public Hearing Room, 1st floor East
Department of Environmental Protection
401 East State Street
Trenton, New Jersey 08625

Submit written comments on this proposal by May 2, 1995 to:

Janis E. Hoagland, Esq.
Attn: DEP Docket Number 06-95-02/508
Department of Environmental Protection
Office of Legal Affairs
CN 402
Trenton, New Jersey 08625-0402

The agency proposal follows:

Summary

The New Jersey Department of Environmental Protection (Department) is responsible for administering the New Jersey Pollutant Discharge Elimination System (NJPDES) permit program to regulate the discharge of pollutants to the waters of the State. The NJPDES permit program was authorized by the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., and serves as the delegated State permitting program for discharges to surface water under the Federal Water Pollution Control Act, 33 U.S.C. §§1251 et seq., and the delegated State underground injection control (UIC) program under the Safe Drinking Water Act, 42 U.S.C. §§300f et seq. The rules governing the NJPDES permit program are found at N.J.A.C. 7:14A. All persons who wish to discharge pollutants to waters of the State are regulated under these rules.

Pursuant to N.J.S.A. 58:10A-9, the Department is authorized to "establish and charge reasonable annual administrative fees, which shall be based upon, and shall not exceed, the estimated cost of processing, monitoring and administering NJPDES permits." As authorized by this section, the Department assesses permit fees to cover the costs incurred by the Department in reviewing NJPDES applications; developing site-specific permit conditions (including wasteload allocations, water quality based effluent limitations, stream monitoring and computer modeling); undertaking compliance sampling, site inspections, bioassay testing and evaluation, and data management; and evaluating compliance with the terms and conditions of NJPDES permits. See N.J.A.C. 7:14A-1.8.

The Department historically has distributed the estimated cost of the NJPDES permit program among permittees by category of discharge, with the fees based on complex formulas reflecting the estimated environmental impact of the categorical discharge plus the appropriate minimum fee. Although, as required by N.J.S.A. 58:10A-9, the overall NJPDES permit budget has been based on the estimated cost of processing, monitoring and administering the NJPDES permits, some individual permit fees have not covered the basic costs incurred by the Department, while other individual permit fees have been disproportionately high in comparison with the level of activity by the Department concerning the respective permittees.

To address concerns raised by many permittees about perceived inequities in the current NJPDES permit fee methodology, the Department convened the NJPDES Fee Task Force in July of 1992. Former Senator and Appropriations Committee Chair Laurence Weiss chaired the task force, which was comprised of representatives from the Chemical Industry Council, the Association of Environmental Authorities, New Jersey Business and Industry Association, local governments, public interest groups and Department staff. The mission of the NJPDES Fee Task Force was to evaluate and recommend changes to the NJPDES fee assessment methodology to make fees fairer, more equitable and more predictable.

The NJPDES Fee Task Force held two public hearings to solicit comments from other interested parties. After reviewing the history of the NJPDES permit fee methodology and the public comment received at the two public hearings, the Task Force submitted its report to the Department on March 29, 1993. An addendum to this report was submitted to the Department on December 30, 1993. The recommendations provided by the NJPDES Fee Task Force are the basis for most of the changes to the existing fee assessment methodology proposed herein. However, some of the Task Force's recommendations, such as the suggestion that the Legislature directly appropriate funds to cover part of the NJPDES program costs (see Task Force Recommendation 2 below), are not within the authority of the Department to accomplish and so are not directly addressed by the proposed changes.

A summary of the recommendations which the NJPDES Fee Task Force highlighted in its report is listed below. At this time, the Department is proposing to amend the current fee assessment methodology at N.J.A.C. 7:14A-1.8 to implement some of the recommendations of the task force. Given the timing of this proposal, the Department does not expect to assess the Fiscal Year 1995 (FY95) NJPDES fees under the amended formula until close to the end of the fiscal year. The Department believes that adoption of these amendments will be a first step in addressing perceived inequities in the existing fee assessment methodology. However, since further amendments may be necessary to achieve the Department's goal of more predictable and more reasonable permit fees, the Department welcomes public comment on the overall NJPDES fee methodology.

TASK FORCE RECOMMENDATION 1: As an interim measure, until the NJPDES program reforms are implemented and a new fee formula is developed, the total fees collected from NJPDES permittees should be capped at the Fiscal Year 1992 level of $15.3 million.

DEPARTMENT RESPONSE: Under this proposal, the total amount of NJPDES fees to be assessed in FY95 is $11.2 million.

TASK FORCE RECOMMENDATION 2: General Fund revenues should provide partial support for the NJPDES program as all New Jersey residents impact on the State's water quality and clean water benefits all citizens.

DEPARTMENT RESPONSE: The Department has received $4.3 million in General Fund revenue for the NJPDES permit program for FY95. In Fiscal Year 1996 (FY96), the Department anticipates that the NJPDES Program will be placed "on budget" and that all revenues collected through NJPDES fee assessments will be deposited to the General Fund. Therefore, the Department plans to assess $11.2 million in NJPDES fees again in FY96.

TASK FORCE RECOMMENDATION 3: Until General Fund revenues are provided to the NJPDES permit program, fees should be offset by excess Clean Water Enforcement Act penalty monies and by the elimination of the transfer of $3 million from the Clean Water Enforcement Fund to the General Fund.

DEPARTMENT RESPONSE: As noted above, the Department has received $4.3 million in General Fund revenue for the NJPDES permit program for FY95. In FY96, the Department anticipates that the NJPDES program and the Clean Water Enforcement Program will be placed "on budget." When this occurs, permit fee revenue and Clean Water Enforcement penalties will be deposited directly with the Department of Treasury and the Department of Treasury will appropriate to the Department funding adequate to operate these programs.

TASK FORCE RECOMMENDATION 4: NJPDES fees should be based on the cost of permit issuance and administration, as provided by law, together with environmental impact indicators common to all permittees. At present, there are severe fee equity imbalances, with some permittees paying excessive permit fees and others paying significantly less than the cost of administering their permits.

DEPARTMENT RESPONSE: Although the Department believes that the current fee structure is consistent with N.J.S.A. 58:10A-9, the Department is proposing to address this recommendation by implementing a new minimum fee schedule which is more closely based upon the estimated costs associated with permit issuance, annual inspections, and data management for each permit. The Department is also proposing to simplify the environmental impact calculation for all industrial treatment works discharging to surface water and domestic treatment works discharging to surface water.

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In conjunction with the NJPDES Fee Task Force, the Department has determined that for the category of domestic treatment works discharging to surface water a single type of pollutant, the oxygen demand parameter, is an appropriate indicator of the relative environmental impact throughout the category. Therefore, the Department is proposing to amend N.J.A.C. 7:14A-1.8(c) to simplify the environmental impact calculation for domestic treatment works discharging to surface water so that it is based strictly on the average discharge of biochemical oxygen demand (BOD_5) or carbonaceous biochemical oxygen demand ($CBOD_5$) or other oxygen demand parameter (for permits without a BOD_5 limit) in kilograms per day.

The BOD_5 or other oxygen demand loading of a facility is measured by means of an empirical test in which standardized laboratory procedures are used to determine the relative oxygen requirements of wastewater, effluent, and polluted waters. Nonpolluted natural surface waters are usually saturated with dissolved oxygen, which is available for use by aquatic life forms. When organic waste is discharged into a stream, the dissolved oxygen is utilized instead by the bacteria in the waste in the metabolic process to oxidize the organic matter. Receiving streams are thus depleted of their oxygen by the addition of BOD_5, which is defined as the quantity of oxygen required by bacteria to oxidize the organic matter. Therefore, the determination of a facility's BOD_5 or other oxygen demand loading is an accurate measure of the relative efficiency of a domestic treatment works in removing pollutants from its effluent prior to discharge.

There are several other reasons why the Department has chosen to use BOD_5 as the indicator of relative impact for domestic treatment works discharging to surface water. First, in addition to being an empirical indicator of relative treatment plant efficiency, the use of BOD_5 or other oxygen demand parameter to measure environmental impact encompasses two other factors (flow and concentration or wastewater strength) that are currently part of the environmental impact calculation methodology at N.J.A.C. 7:14A-1.8(c). Second, since BOD_5 limits for domestic treatment works are standardized, the use of BOD_5 as an indicator parameter is more equitable than the current methodology, which is based on the calculation of the total pollutant load for widely varying permits. Third, under 40 CFR §133.101(g), the concept of "secondary treatment" is defined with reference to the BOD_5 or $CBOD_5$ concentrations consistently achievable by a treatment works, further supporting the Department's conclusion that BOD_5 or $CBOD_5$ and environmental impact are fundamentally related. Finally, this approach is consistent with the recommendation of the NJPDES Fee Task Force to simplify the NJPDES permit fee formula, including the calculation of the environmental impact component of the formula.

In summary, using BOD_5 or other applicable oxygen demand parameters to measure the relative environmental impact of a domestic treatment works discharging to surface water results in a NJPDES permit fee formula which is simple and predictable and allows facilities to directly control their NJPDES permit fees by controlling the efficiency of their domestic treatment works.

Although the NJPDES Fee Task Force proposed and discussed several similar options for assessing the portion of the industrial treatment works program budget not funded through minimum fees, neither the Department nor the Task Force could identify a single pollutant such as BOD_5 or a combination of pollutants that would measure relative environmental impact of industrial treatment works in a manner that would generate a reasonable fee schedule. However, at this time, the Department is proposing to simplify the environmental impact formula for industrial treatment works discharging to surface water by eliminating the bioassay factor and stream factor components of the environmental impact calculation under N.J.A.C. 7:14A-1.8(c).

In general, the existing fee assessment formula assumes that if a permittee is not required to conduct bioassay testing, the discharge meets the State standard for toxicity of wastewater discharges. See N.J.A.C. 7:9-5. However, in practice, most facilities that are required to conduct bioassay testing because of a potential toxicity problem have received lower fee assessments under the existing formula than facilities discharging the same pollutant load but not subject to bioassay testing. This result occurred because facilities not subject to bioassay testing were assigned a standard bioassay factor of 1, while most facilities that conducted bioassay testing were able to establish an acutal bioassay factor of 0.5 under the bioassay factor calculation at N.J.A.C. 7:14A-1.8(c)1iii. Since the stated purpose of the current fee assessment methodology is to assess fees in a manner proportionate to the environmental impact of the facility, this result was clearly not intended. In addition, while the Department's Whole Effluent Toxicity (WET) program is now imposing chronic toxicity testing and effluent limitations on those facilities which are meeting the acute toxicity requirements, a factor for chronic testing is not incorporated into the current fee assessment formula. Therefore, the Department has determined that the continued application of a relatively old treatment standard (the bioassay factor) to calculate permit fees is no longer appropriate.

Likewise, the Department has found it problematic to implement the Stream Factor component of the environmental impact calculation for industrial treatment works discharging to surface water. Under N.J.A.C. 7:14A-1.8(c)1iv, the Stream Factor is a composite measure of water quality that is based upon the existing Water Quality Index, Water Use Index, and the Designated Use of the receiving water for the industrial discharge. Although the information upon which the Department bases the Stream Factor is supposed to be reevaluated by the Department every two years, on average the data used by the Department in calculating the Stream Factor has been five years old and not reflective of current water quality. In addition, the Stream Factor has not necessarily been based on data that is representative of water quality at the point of discharge of the regulated facility.

Although the Department continues to believe that it is appropriate to evaluate receiving water as part of evaluating the environmental impact of a discharge (since all pollutant discharges impact their receiving waters), the current Stream Rating Factor has proven to be too problematic and there is currently no reliable alternative source of information for evaluating receiving water quality. Therefore, the Department proposes to eliminate this factor from the fee assessment methodology until such time as a more appropriate measure of receiving water quality can be determined.

In summary, the Department believes that measuring environmental impact solely on the efficiency of industrial treatment works will provide a greater incentive for further reductions in the quantity of pollutants discharged to the environment. Therefore, the Department will continue to determine the environmental impact of industrial treatment works discharging to surface water based on the total weighted pollutant load of the discharge (using all limited pollutants and their associated risk factor) and the heat load of the discharge.

TASK FORCE RECOMMENDATION 5: All dischargers should be assessed fees and the exemption for public school districts should be eliminated at least until General Fund revenue is provided to the NJPDES Program.

DEPARTMENT RESPONSE: The Department believes that the N.J.A.C. 7:14A-1.8(a)2 exemption for public school districts, religious and charitable institutions continues to serve an important public purpose. Since the Department has received General Fund revenue to operate the NJPDES permit program, the Department is not proposing to eliminate the exemption at this time.

Minimum Fee Schedule

As discussed above, the Department is proposing to revise the minimum fee schedule at N.J.A.C. 7:14A-1.8(h) to allocate among all permittees the costs of a wider range of activities which the Department performs annually on behalf of all permittees. The new minimum fee schedule establishes different fees for major and minor discharges to surface water as defined by N.J.A.C. 7:14A-1.9, as well as for the permit categories established by the Department for the purposes of the Environmental Management Accountability Act, P.L. 1991, c.423. See Notice of Classification of Permits Under the Environmental Management Accountability Act, 24 N.J.R. 2632(a) (July 20, 1992). The proposed minimum fees are based on the projected time required to issue a typical permit in each NJPDES permit category, and include the projected number of hours allocated to conducting routine inspection activities, processing Discharge Monitoring Reports or other reports required by permits, and performing fee assessment and other functions. In addition, higher minimum fees will be assessed to ground water facilities constructed as new construction or under State NJPDES approval or Treatment Works approval instead of local Chapter 199 approval under the Realty Improvement, Sewerage and Facilities Act, N.J.S.A. 58:11-23 et seq. See the discussion of proposed N.J.A.C. 7:14A-1.8(h)1iii and iv below.

The projected number of hours used to determine the proposed minimum fees was derived from work plans prepared by the Division of Water Quality and the Division of Enforcement Field Operations. The projected number of hours listed for permit issuance activities represents the Department's estimated cost to develop and issue a

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NJPDES permit. Since NJPDES permits are issued for a period of five years, these costs have been prorated over a five-year period to determine this cost in the form of a yearly minimum fee. The Department's estimates include the time required to review the application, develop appropriate effluent limitations and other permit conditions, issue the draft permit for public comment, prepare the Department's response to public comment and finalize the NJPDES permit.

A second component of the minimum fee is the cost of inspection activities. For the purpose of determining the minimum fee schedule, the Department included the projected number of hours allocated to routine inspection activities based on the frequency of inspection required by the Clean Water Enforcement Act, P.L. 1990, c.28, as applicable. See N.J.S.A. 58:10-6. The Department is currently performing one inspection per year at most NJPDES permitted facilities. During the course of permit oversight and administration, the Department may determine that more frequent inspections are required. Under these proposed amendments, the cost of any additional inspection activities will continue to be distributed among permittees in proportion to the environmental impact of the permittee's discharges as part of the environmental impact portion of the budget.

The third part of the minimum fee is the cost associated with data management activities, including the processing of Discharge Monitoring Reports (DMRs). The Department has estimated the projected number of hours allocated to data management activities by determining the number of hours required for data management activities for a typical facility in each permit category. Included in these cost estimates are the time required for DMR processing, data entry, DMR creation and mailing, and other data management activities such as issuing the Department's Annual Fee Report and Fee Schedule as required by N.J.A.C. 7:14A-1.8(b). These data management activities play a vital role in evaluating and ensuring permit compliance.

The estimated hours required to perform these three major work functions represent the costs incurred by the Department's environmental engineers, environmental specialists, geologists and/or technicians in drafting, issuing and monitoring NJPDES permits. Since these functions cannot be performed without support from the Department's clerical and supervisory/management staff, the Department has also included a 20 percent additive in each minimum fee calculation to cover management/clerical costs.

The Department is proposing to include a provision at N.J.A.C. 7:14A-1.8(a)9iii to clarify the methodology for calculating minimum fees. Also included at proposed N.J.A.C. 7:14A-1.8(a)9 is a provision to phase in the increase in minimum fees over the next three fiscal years. Under this provision, the Department will assess 60 percent of the new minimum fees in FY95, 80 percent in FY96 and will assess the entire amount of the new minimum fees as described at N.J.A.C. 7:14A-1.8(h) in FY97 and all subsequent fiscal years. Note, however, that under proposed N.J.A.C. 7:14A-1.8(a)9iii, the Department does not intend to phase in minimum fees for those general permits listed at N.J.A.C. 7:14A-1.8(h)1vi, 2viii and 3v (that is, those proposed general permit fees that are less than or equal to the current minimum fee of $500.00) or for the one-time residual exemption fees listed at N.J.A.C. 7:14A-1.8(h)3ii and 3iii.

The minimum fee for each permit category is based on the total estimated hours the Department dedicates to each facility per year. The Department has used an average annual salary of $46,300 for a work year comprised of 2,080 hours, for an average hourly rate or Salary Cost of $22.26 per hour. For the purposes of developing the minimum fees at proposed N.J.A.C. 7:14A-1.8(h), the Department has calculated its total personnel cost to encompass fringe benefits and indirect costs. This total personnel cost is based on the Salary Cost of $22.26 per hour multiplied by the fringe benefit rate of 24.25 percent as established by the Department of Treasury, and by the indirect cost rate of 31.18 percent of salary plus fringe, for a total hourly rate of $36.28 per hour. The minimum fees are calculated by multiplying the total personnel cost of $36.28 per hour by the estimated total number of hours allocated to a specific type of NJPDES permit. The Department has rounded the calculated minimum fees to the nearest $50.00 increment. See proposed N.J.A.C. 7:14A-1.8(a)9iii.

The minimum fees are intended to account for only those basic permit development activities that are associated with all permits in a category. The minimum fees do not account for the cost of many key components of the NJPDES permit program, such as the costs associated with water quality monitoring, quality assurance, other data processing activities, data validation, permit adjudications, variances, modification requests, program and regulatory development, water quality standards, water quality analysis, technical manuals, training, and enforcement activities other than site inspections. Under this amendment, these types of costs will continue to be distributed among permittees in proportion to the environmental impact of the permittee's discharge.

Summary of Changes to N.J.A.C. 7:14A-1.8(h):

The Department is proposing to revise the minimum fee structure and schedule at N.J.A.C. 7:14A-1.8(h) as follows:

1. Under proposed N.J.A.C. 7:14A-1.8(h)1i, minor domestic treatment works (DTWs) discharging to surface waters will be assessed a minimum fee of $2,400 beginning in FY97. The Department estimates that this type of permit requires an average of 66.3 hours per year to administer. This estimate is the sum of 20 hours (100 hours prorated over five years) for permit issuance, plus 24.4 hours per year for inspections, plus 10.88 hours per year for data management activities, plus a 20 percent additive for management/clerical activities. As discussed previously, the environmental impact of discharges in this category will be calculated based on oxygen demand using biochemical oxygen demand (BOD_5), carbonaceous biochemical oxygen demand ($CBOD_5$) or other oxygen demand parameter in accordance with proposed N.J.A.C. 7:14A-1.8(c)3. Under the phasing of minimum fees proposed at N.J.A.C. 7:14A-1.8(a)9iii, in FY95 the minimum fee for this cateogry will be $1,450, in FY96 the minimum fee will be $1,900 and thereafter the minimum fee will be $2,400.

2. Under proposed N.J.A.C. 7:14A-1.8(h)1ii, major domestic treatment works (DTWs) discharging to surface waters will be assessed a minimum fee of $6,400 beginning in FY97. (Under N.J.A.C. 7:14A-1.9, domestic treatment works discharging more than one million gallons per day are classified as major DTWs.) The Department estimates that this type of permit requires an average of 177 hours per year to administer. This estimate is the sum of 94.4 hours (472 hours prorated over five years) for permit development and issuance, plus 34 hours per year for inspection activities, plus 18.9 hours per year for data management functions, plus a 20 percent additive for management/clerical activities. As discussed previously, the environmental impact of discharges in the category will be calculated based on BOD_5, $CBOD_5$, or other oxygen demand parameter in accordance with proposed N.J.A.C. 7:14A-1.8(c)3. Under the phasing of minimum fees proposed at N.J.A.C. 7:14A-1.9(a)9iii, in FY95 the minimum fee for this category will be $3,850, in FY96 the minimum fee will be $5,100 and thereafter the minimum fee will be $6,400.

3. Under proposed N.J.A.C. 7:14A-1.8(h)1iii, combined sewer overflows (CSOs) authorized to discharge to surface water under a general permit will be assessed a minimum fee of $5,400 beginning in FY97. The Department estimates that this type of permit requires 149 hours per year to administer. This estimate is the sum of 86 hours (430 hours prorated over five years) for permit development an administration, plus 34 hours for inspection activities, plus 4.5 hours for data management, plus a 20 percent additive for management/clerical activities. Under the phasing of minimum fees proposed at N.J.A.C. 7:14A-1.8(a)9iii, in FY95 the minimum fee for this cateogry will be $3,250, in FY96 the minimum fee will be $4,300 and thereafter the minimum fee will be $5,400. These facilities are not subject to any additional fee based upon environmental impact of the discharge. See proposed N.J.A.C. 7:14A-1.8(c)4.

4. Under proposed N.J.A.C. 7:14A-1.8(h)1iv, domestic treatment works constructed and authorized to discharge to ground water pursuant to N.J.A.C. 7:14A (that is, both constructed and authorized to discharge under a NJPDES permit approval and/or Treatment Works Approval) will be assessed a minimum fee of $3,950 beginning in FY97. These facilities are considered "new construction" and require full NJPDES permit review for both construction and operation. The Department estimates that this type of permit requires an average of 109 hours per year to administer. This estimate is the sum of 57.6 hours (288 hours prorated over five years) for permit issuance, plus 22.4 hours per year for inspection activities, plus 10.88 hours per year for data management activities, plus a 20 percent additive for management/clerial activities. The environmental impact of discharges in this category will be calculated in accordance with existing N.J.A.C. 7:14A-1.8(d)1. Under the phasing of minimum fees proposed at N.J.A.C. 7:14A-1.8(a)9iii, in FY95 the minimum fee for this category will be $2,400, in FY96 the minimum fee will be $3,150 and thereafter the minimum fee will be $3,950.

5. Under proposed N.J.A.C. 7:14A-1.8(h)1v, domestic treatment works constructed under local approval pursuant to Chapter 199 (P.L. 1954, c.199, as amended, codified as the Realty Improvement, Sewerage and

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Facilities Act, N.J.S.A. 58:11-23 et seq.) and subsequently issued a NJPDES discharge to ground water permit will be assessed a minimum fee of $1,600 beginning in FY97. These facilities are considered "existing discharges" which are now subject to NJPDES regulation of their operation after construction as a result of changes to the Realty Improvement, Sewerage and Facilities Act. The Department estimates that this type of permit requires an average of 44 hours per year to administer. This estimate is the sum of 20 hours (100 hours prorated over five years) for permit issuance, plus 10 hours per year for inspection activities, plus 6.6 hours per year for data management activities, plus a 20 percent additive for management/clerical activities. The environmental impact of discharges in this category will be calculated in accordance with existing N.J.A.C. 7:14A-1.8(d)1. Under the phasing of minimum fees proposed at N.J.A.C. 7:14A-1.8(a)9iii, in FY95 the minimum fee for this category will be $950, in FY96 the minimum fee will be $1,300 and thereafter the minimum fee will be $1,600.

6. Under proposed N.J.A.C. 7:14A-1.8(h)1vi, domestic treatment works authorized to discharge to ground water under a general permit, including Class V injection well permits issued pursuant to N.J.A.C. 7:14A-5.5, will be assessed a minimum fee of $500.00. The Department estimates that this type of permit requires an average of 59 hours prorated over five years for issuance and will not involve inspection or data management activities. These facilities will not be subject to any additional fee based on the environmental impact of the discharge. See proposed N.J.A.C. 7:14A-1.8(d)2. Under proposed N.J.A.C. 7:14A-1.8(a)9iii, the minimum fee for this permit category will not be phased.

7. Under proposed N.J.A.C. 7:14A-1.8(h)2i, industrial treatment works authorized to discharge industrial wastewater to surface water under a general permit will be assessed a minimum fee of $1,300 beginning in FY97. The Department estimates that this type of permit requires an average of 36 hours per year to administer. This estimate is the sum of 2.2 hours (11 hours prorated over five years) for permit issuance, plus 22.4 hours per year for inspections, plus 5.6 hours per year for data management activities, plus a 20 percent additive for management/clerical activities. Under N.J.A.C. 7:14A-3.9, the Department develops general permits which can be issued to many permittees with similar discharges. This economy allows the Department to keep the costs of these types of permits relatively low. These facilities will be assessed only a minimum fee of $1,300, and are not subject to any additional fee based on the environmental impact of the discharge. See proposed N.J.A.C. 7:14A-1.8(c)4. This approach is intended to provide a financial incentive for facilities that can seek authorization to discharge under an existing general permit to do so rather than apply for an individual permit. Under the phasing of the minimum fees proposed at N.J.A.C. 7:14A-1.8(a)9iii, in FY95 the minimum fee for this permit category will be $800.00, in FY96 the minimum fee will be $1,050 and thereafter the minimum fee will be $1,300.

8. Under proposed N.J.A.C. 7:14A-1.8(h)2ii, minor industrial treatment works discharging to surface water will be assessed a minimum fee of $2,400 beginning in FY97. The Department estimates that this type of permit requires an average of 66 hours per year to administer. This estimate is the sum of 20 hours (100 hours prorated over five years) for permit issuance, plus 24.4 hours per year for inspections, plus 10.88 hours per year for data management activities, plus a 20 percent additive for management/clerical activities. The environmental impact for discharges in this category will be calculated in accordance with proposed N.J.A.C. 7:14A-1.8(c)1. Under the phasing of minimum fees at N.J.A.C. 7:14A-1.8(a)9iii, in FY95 the minimum fee for this permit category will be $1,450, in FY96 the minimum fee will be $1,900 and thereafter the minimum fee will be $2,400.

9. Under proposed N.J.A.C. 7:14A-1.8(h)2iii, major industrial treatment works discharging to surface water will be assessed a minimum fee of $5,700 beginning in FY97. The Department estimates that this type of permit requires an average of 157.7 hours per year to administer. This estimate is the sum of 393 hours (78.6 hours prorated over five years) for permit issuance, plus 34 hours per year for inspections and sampling, plus 18.88 hours per year for data management, plus a 20 percent additive for management/clerical activities. The environmental impact for discharges in this category will be calculated in accordance with proposed N.J.A.C. 7:14A-1.8(c)1. Under the phasing of minimum fees proposed at N.J.A.C. 7:14A-1.8(a)9iii, in FY95 the minimum fee for this permit category will be $3,400, in FY96 the minimum fee will be $4,550 and thereafter the minimum fee will be $5,700.

10. Under proposed N.J.A.C. 7:14A-1.8(h)2iv, significant indirect users (SIUs) which discharge to Publicly Owned Treatment Works (POTWs) will be assessed a minimum fee of $3,600 beginning in FY97. The Department estimates that this type of permit requires an average of 99 hours per year to administer. This estimate is the sum of 40 hours (200 hours prorated over five years) for permit development and issuance, plus 32 hours per year for inspections and sampling, plus 10.88 hours per year for data management functions, plus a 20 percent additive for management/clerical activities. The environmental impact of discharges in this category will be calculated in accordance with existing N.J.A.C. 7:14A-1.8(g). Under the phasing of minimum fees proposed at N.J.A.C. 7:14A-1.9(a)9iii, in FY95 the minimum fee for this permit category will be $2,150, in FY96 the minimum fee will be $2,900 and thereafter the minimum fee will be $3,600.

11. Under proposed N.J.A.C. 7:14A-1.8(h)2v, industrial treatment works issued an individual permit for the discharge of stormwater runoff will be assessed a minimum fee of $2,350 beginning in FY97. The Department estimates that this type of permit will require an average of 65 hours per year to administer. Under the phasing in of the minimum fees proposed at N.J.A.C. 7:14A-1.8(a)9iii, in FY95, the minimum fee for this permit category will be $1,400, in FY96 the minimum fee will be $1,900, and thereafter the minimum fee will be $2,350. Facilities issued authorizations to discharge stormwater runoff under the general permit NJ0088315 will still be subject to an annual fee of $500.00 in accordance with N.J.A.C. 7:14A-1.8(i). Those facilities authorized to discharge stormwater runoff under general permit NJ0088323 will still be subject to a fee of $200.00 in accordance with N.J.A.C. 7:14A-1.8(j).

12. Under proposed N.J.A.C. 7:14A-1.8(h)2vi, industrial treatment works constructed and authorized to discharge to ground water pursuant to N.J.A.C. 7:14A (that is, both constructed and authorized to discharge under a NJPDES permit approval and/or Treatment Works Approval) will be assessed a minimum fee of $3,950 beginning in FY97. These facilities are considered "new construction" and require full NJPDES permit review for both construction and operation. The Department estimates that this type of permit requires an average of 109 hours per year to administer. This estimate is the sum of 57.6 hours (288 hours prorated over five years) for permit issuance, plus 22.4 hours per year for inspection activities, plus 10.88 hours per year for data management activities, plus a 20 percent additive for management/clerical activities. The environmental impact of discharges in this category will be calculated in accordance with existing N.J.A.C. 7:14A-1.8(d)1. Under the phasing of minimum fees proposed at N.J.A.C. 7:14A-1.8(a)9iii, in FY95 the minimum fee for this permit category will be $2,400, in FY96 the minimum fee will be $3,150 and thereafter the minimum fee will be $3,950.

13. Under proposed N.J.A.C. 7:14A-1.8(h)2vii, industrial treatment works not constructed under N.J.A.C. 7:14A but subsequently issued a NJPDES discharge to ground water permit will be assessed a minimum fee of $1,600 beginning in FY97. These facilities are considered "existing dischargers" which became subject to NJPDES regulation of their operation after construction. The Department estimates that this type of permit requires an average of 44 hours per year to administer. This estimate is the sum of 20 hours (100 hours prorated over five years) for permit issuance, plus 10 hours per year for inspection activities, plus 6.6 hours per year for data management activities, plus a 20 percent additive for management/clerical activities. The environmental impact of discharges in this category will be calculated in accordance with existing N.J.A.C. 7:14A-1.8(d)1. Under the phasing of minimum fees proposed at N.J.A.C. 7:14A-1.8(a)9iii, in FY95 the minimum fee for this permit category will be $950.00, in FY96 the minimum fee will be $1,300 and thereafter the minimum fee will be $1,600.

14. Under proposed N.J.A.C. 7:14A-1.8(h)2viii, industrial treatment works authorized to discharge to ground water under a general permit, including Class V injection well permits issued pursuant to N.J.A.C. 7:14A-5.5, will be assessed a minimum fee of $500.00. The Department estimates that this type of permit requires an average of 59 hours prorated over five years for issuance and will not involve inspection or data management activities. These facilities will not be subject to any additional fee based on the environmental impact of the discharge. See proposed N.J.A.C. 7:14A-1.8(d)2. Under proposed N.J.A.C. 7:14A-1.8(a)9iii, the minimum fee for this permit category will not be phased.

15. Under proposed N.J.A.C. 7:14A-1.8(h)3i, the minimum fee for facilities which land apply, handle or distribute residuals will be $6,700 beginning in FY97. The Department estimates that this type of permit

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requires an average of 185 hours per year to administer. This estimate is the sum of 111.4 hours (557 hours prorated over five years) for permit issuance (these permits typically generate significant public comment and often require a public hearing), plus 32 hours per hour for inspection services, plus 10.88 hours per year for data management, plus a 20 percent additive for management/clerical activities. These facilities will be assessed only the minimum fee of $6,700, and are not subject to any additional fee based on the environmental impact of the discharge. See proposed N.J.A.C. 7:14A-1.8(e). Under the phasing of minimum fees proposed at N.J.A.C. 7:14A-1.8(a)9iii, in FY95, the minimum fee for this permit category will be $4,000, in FY96 the minimum fee will be $5,350 and thereafter the minimum fee will be $6,700.

16. Under proposed N.J.A.C. 7:14A-1.8(h)3ii, the Department will assess facilities a one-time fee of $250.00 for each permit exemption authorizing the land application of a sludge derived product at specific sites in accordance with a Department approved distribution program. This fee is based on an estimated seven hours to review and process such exemption requests. These exemptions are not subject to any additional fee based on the environmental impact of the discharge. See proposed N.J.A.C. 7:14A-1.8(e). Under proposed N.J.A.C. 7:14A-1.8(a)9iii, the minimum fee for this permit category will not be phased.

17. Under proposed N.J.A.C. 7:14A-1.8(h)3iii, a one-time fee of $2,700 will be assessed for a general distribution permit exemption authorizing the distribution and marketing of a sludge derived product not regulated through an individual residuals permit. This fee is based on an estimated review time of 74 hours. This fee will cover the five-year duration of the exemption. These exemptions are not subject to any additional fee based on the environmental impact of the discharge. See proposed N.J.A.C. 7:14A-1.8(e). Under proposed N.J.A.C. 7:14A-1.8(a)9iii, the minimum fee for this new permit category will not be phased.

18. Under proposed N.J.A.C. 7:14A-1.8(h)3iv, facilities issued an individual permit for the land application of food processing residuals will be assessed a minimum fee of $2,550 beginning in FY97. The Department estimates that this type of permit requires an average of 70 hours per year to administer. This estimate is the sum of 36.6 hours (183 hours prorated over five years) for permit issuance, plus 10.5 hours per year for inspection activities, plus 10.88 hours per year for data management activities, plus a 20 percent additive for management/clerical activities. These facilities will be assessed only the minimum fee of $2,550, and are not subject to any additional fee based on the environmental impact of the discharge. See proposed N.J.A.C. 7:14A-1.8(e). Under the phasing of minimum fees proposed at N.J.A.C. 7:14A-1.8(a)9iii, in FY95 the minimum fee for this permit category will be $1,550, in FY96 the minimum fee will be $2,050 and thereafter the minimum fee will be $2,550.

19. Under proposed N.J.A.C. 7:14A-1.8(h)3v, facilities authorized under a general permit for the land application of food processing residuals will be assessed a minimum fee of $500.00. The Department estimates that this type of permit requires an average of 14 hours per year to administer. This estimate is the sum of 11.8 hours per permit development, issuance and management (59 hours over five years). These facilities will only be assessed the minimum fee of $500.00, and are not subject to any additional fee based on the environmental impact of the discharge. See proposed N.J.A.C. 7:14A-1.8(e). Under proposed N.J.A.C. 7:14A-1.8(a)9iii, the minimum fee for this permit category will not be phased.

20. Under proposed N.J.A.C. 7:14A-1.8(h)4iii, operating sanitary landfills issued a discharge to ground water permit will be assessed a minimum fee of $3,950 beginning in FY97. The Department estimates that this type of permit requires an average of 109 hours per year to administer. This estimate is the sum of 57.6 hours (288 hours prorated over five years) for permit development and issuance, plus 22.4 hours per year for inspection activities, plus 10.88 hours per year for data management, plus a 20 percent additive for management/clerical activities. Under the phasing of minimum fees proposed at N.J.A.C. 7:14A-1.8(a)9iii, in FY95 the minimum fee for this permit category will be $2,400, in FY96 the minimum fee will be $3,150 and thereafter the minimum fee will be $3,950. The Division of Solid Waste will also continue to assess fees for closed sanitary landfills. The minimum fee for closed sanitary landfills with an approved closure plan is $500.00 under N.J.A.C. 7:14A-1.8(h)4ii, and that for landfills without an approved closure plan is $2,500 under N.J.A.C. 7:14A-1.8(h)4i.

The proposed changes to the minimum fee schedule are summarized in the following table:

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Type of Permit	Permit Issuance (Five Year)	Permit Issuance (Per Year)	Inspections (Per Year)	Data Management (Per Year)	Total Hours (Per Year)	Management (Per Permit)	Total Hours	Calculated Minimum Fee	Rounded Minimum Fee	1st year fee FY95 60%	2nd year fee FY96 80%	3rd year fee FY97 100%
Minor DTW 7:14A-1.8(h)1i	100	20	24.4	10.88	55.28	11.056	66.336	$2,406.75	$2,400	$1,450	$1,900	$2,400
Major DTW 7:14A-1.8(h)1ii	472	94.4	34	18.88	147.28	29.456	176.736	$6,412.19	$6,400	$3,850	$5,100	$6,700
Combined Sewer Overflow (CSO)-General 7:14A-1.8(h)1iii	430	86	34	4.50	124.5	24.9	149.4	$5,420.41	$5,400	$3,250	$4,300	$5,400
DTW Ground Water New Construction 7:14A-1.8(h)1iv & 2vi	288	57.6	22.4	10.88	90.88	18.176	109.056	$3,956.68	$3,950	$2,400	$3,150	$3,950
DTW Ground Water 7:14A-1.8(h)1v & 2vii	100	20	10	6.60	36.6	7.32	43.92	$1,593.47	$1,600	$ 950	$1,300	$1,600
Groundwater-General Prmt. 7:14A-1.8(h)1vi & 2vii	59	11.8	0	0.00	11.8	2.36	14.16	$ 513.74	$ 500	$ 500	$ 500	$ 500
General Permit-Ind.-DSW 7:14A-1.8(h)2i	10.96	2.192	22.4	5.60	30.192	6.0384	36.2304	$1,314.48	$1,300	$ 800	$1,050	$1,300
Minor Industrial 7:14A-1.8(h)2ii	100	20	24.4	10.88	55.28	11.056	66.336	$2,406.75	$2,400	$1,450	$1,900	$2,400
Major Industrial 7:14A-1.8(h)2iii	393	78.6	34	18.88	131.48	26.296	157.776	$5,724.30	$5,700	$3,400	$4,550	$5,700
SIU 7:14A-1.8(h)2iv	200	40	32	10.88	82.88	16.576	99.456	$3,608.38	$3,600	$2,150	$2,900	$3,600
Stormwater-Individual DSW 7:14A-1.8(h)2v	144	28.8	15	10.60	54.4	10.88	65.28	$2,368.44	$2,350	$1,400	$1,900	$2,350
Residuals 7:14A-1.8(h)3i	556.8	111.36	32	10.88	152.24	30.848	185.088	$6,715.22	$6,700	$4,000	$5,350	$6,700
Residuals-exemption land application 7:14A-1.8(h)3ii		7	0	0.00	7	0	7	$ 253.97	$ 250	$ 250	$ 250	$ 250
Residuals-exemption distribution & marketing 7:14A-1.8(h)3iii		74	0	0.00	74	0	74	$2,684.81	$2,700	$2,700	$2,700	$2,700
Residuals-Food Processors 7:14A-1.8(h)3iv	183.7	36.74	10.5	10.88	58.12	11.624	69.744	$2,530.40	$2,550	$1,550	$2,050	$2,550
Landfill 7:14A-1.8(h)4iii	288	57.6	22.4	10.88	90.88	18.176	109.056	$3,956.68	$3,950	$2,400	$3,150	$3,950

Summary of Additional Changes to N.J.A.C. 7:14A-1.8:

The Department is also proposing the following additional changes to N.J.A.C. 7:14A-1.8:

1. The Department is proposing to include a provision at N.J.A.C. 7:14A-1.8(a)9iii to clarify the methodology for calculating minimum fees. Also included at proposed N.J.A.C. 7:14A-1.8(a)9 is a provision to phase in the increase in minimum fees over the next three fiscal years. Under this provision, the Department will assess 60 percent of the new minimum fees in FY95, 80 percent in FY96 and will assess the entire amount of the new minimum fees as described at N.J.A.C. 7:14A-1.8(h) in FY97 and all subsequent fiscal years. Note, however, that under proposed N.J.A.C. 7:14A-1.9(a)9iii, the Department does not intend to phase in minimum fees for those general permits listed at N.J.A.C. 7:14A-1.8(h)1vi, (h)2viii and (h)3v (that is, those proposed general permit fees that are less than or equal to the current minimum fee of $500) or for the one-time residual permit exemption fees listed at N.J.A.C. 7:14A-1.8(h)3ii and (h)3iii.

2. The Department is proposing to amend N.J.A.C. 7:14A-1.8(a)10 to remove references to total pollutant load, quantity of pollutants discharged and total weighted concentrations. Under the proposed environmental impact formulas at N.J.A.C. 7:14A-1.8(c) through (g), these references are unnecessary.

3. The Department is proposing to amend N.J.A.C. 7:14A-1.8(c) to remove redundant references to N.J.A.C. 7:14A-1.8(i) and (j). Since the permit fees listed at N.J.A.C. 7:14A-1.8(i) and (j) are specifically excluded from the N.J.A.C. 7:14A-1.8(a)9 fee formula, it is not necessary to reference these paragraphs in N.J.A.C. 7:14A-1.8(c), which applies to the environmental impact values to be used in the N.J.A.C. 7:14A-1.8(a)9 fee formula.

4. As discussed above (see Department Response to Task Force Recommendation 4), the Department is proposing to simplify the environmental impact component of the NJPDES permit fee formula for domestic treatment works discharging to surface water by removing these discharges from the existing environmental impact formula at N.J.A.C. 7:14A-1.8(c)1 and promulgating a new environmental impact formula at N.J.A.C. 7:14A-1.8(c)3. The proposed new environmental impact formula measures the environmental impact of these facilities by biochemical oxygen demand (BOD_5), carbonaceous biochemical oxygen demand ($CBOD_5$) or other oxygen demand parameter. As a result, the fee formula for these dischargers will be: Fee = (Environmental Impact × Rate) + Minimum Fee, where Environmental Impact = average kilograms per day of oxygen demand discharged. Since the environmental impact of domestic treatment works discharging to surface water will no longer be measured using a total weighted pollutant load approach, but will depend on the same parameter for all facilities, the risk factors from Table I of N.J.A.C. 7:14A-1.8 will no longer apply to these facilities.

5. As discussed above (see Department Response to Task Force Recommendation 4), the Department is proposing to simplify the environmental impact formula for industrial treatment works discharging to surface water by amending N.J.A.C. 7:14A-1.8(c) to eliminate the Bioassay Factor and Stream Factor at N.J.A.C. 7:14A-1.8(c)1iii and iv. As a result, the fee formula for these dischargers will be: Fee = (Environmental Impact × Rate) + Minimum Fee, where Environmental Impact = Total Pollutant Load + Heat Load.

6. The Department proposes to delete references to the environmental impact calculation for contaminated sites at N.J.A.C. 7:14A-1.8(d)2. In 1993, the Site Remediation Program adopted a new fee assessment methodology at N.J.A.C. 7:14A-1.8(k). See 25 N.J.R. 1358(a) and 4486(a) (September 20, 1993). Under the new methodology, the Department assesses permit fees for facilities conducting ground water remediation based on the actual number of hours coded by the Department and not on environmental impact. The Department is also proposing to amend the minimum fee schedule at N.J.A.C. 7:14A-1.8(h)2 and (h)8 to eliminate the assignment of minimum fees based upon Ground Water

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Monitoring Status, and the classification as a Resource Conservation Recovery Act (RCRA) facility, Industrial Waste Management Facility, and Hazardous Waste Facility. These distinctions are no longer necessary since the proposed minimum fee schedule is based upon the estimated time required for permit issuance, data management and inspection activities.

7. The Department is proposing to delete the minimum fee for transfer stations at N.J.A.C. 7:14A-1.8(h)5. These types of facilities will now be assessed the minimum fee which corresponds to the discharge category of the NJPDES permit under which they are regulated.

8. The Department is proposing to delete N.J.A.C. 7:14A-1.8(h)6, which previously specified the minimum fee for Significant Indirect User permits (SIUs) issued pursuant to N.J.A.C. 7:14A-4. The Department is proposing a new minimum fee schedule for all types of NJPDES permits based upon the estimated cost incurred for permit issuance, inspection and data management activities. The proposed minimum fee for an SIU permit will be $3,600 pursuant to proposed N.J.A.C. 7:14A-1.8(h)2iv. This minimum fee will apply to all facilities receiving a NJPDES SIU permit.

9. The Department is proposing to add a reference at N.J.A.C. 7:14A-1.8(k) to the fees required pursuant to the laboratory certification program rules at N.J.A.C. 7:18. The Department will continue to assess laboratory certification fees under the existing schedule at N.J.A.C. 7:18. The proposed language will not alter the amount of NJPDES fees assessed against the permittees using certified laboratories or the fees assessed against laboratories under the laboratory certification program.

10. The Department is proposing to amend N.J.A.C. 7:14A-1.8 Table I, Risk Categories, to reclassify the risk factor for indirect discharges of animal and vegetable oil and greases by food processors. After further evaluation, the Department has determined that the current risk factor of 100 assigned to indirect dischargers of oil and grease should be downgraded to one for consistency with the risk factor assigned to other biodegradable conventional pollutants such as biochemical oxygen demand (BOD_5), chemical oxygen demand (COD), and total suspended solids (TSS). This also takes into account that these pollutants are readily treated prior to ultimate discharge by the publicly owned treatment works.

Social Impact

The proposed amendment is expected to have a positive social impact by providing for a more equitable distribution of the fees assessed under the NJPDES permit program. In amending the minimum fee schedule, the Department is acting to ensure that each category of permit is assessed a minimum fee that more accurately reflects the amount of Department resources needed to develop, issue and administer permits in that category.

The proposed minimum fee schedule will increase the percentage of the NJPDES program budget derived from the assessment of minimum fees from about five percent to about 25 percent in FY95. The remaining 75 percent of the NJPDES program costs will continue to be assessed in a manner proportionate to the relative environmental impact of the permittee's discharge, pursuant to the fee assessment formula at N.J.A.C. 7:14A-1.8(a)9 and the environmental impact calculation formulas at N.J.A.C. 7:14A-1.8(c) through (g). The percentage of NJPDES program costs recovered through the proposed minimum fees will increase to about 35 percent in FY97 once the entire minimum fee increase is phased in pursuant to proposed N.J.A.C. 7:14A-1.8(a)9iii.

In 1991, the Department phased out the cube root weighting factor of the total pollutant load component of the NJPDES fee formula and implemented a maximum fee provision at N.J.A.C. 7:14A-1.8(a)10. See 23 N.J.R. 1151(a) (April 15, 1991). These changes resulted from the Department's 1987 findings that the use of the cube root of the total pollutant load had the effect of disproportionately distributing fees to small and/or efficient dischargers. In order to remove any "volume discount" which may have existed for facilities discharging multiple pollutants and to require facilities to pay a fee more proportionate to their environmental impact, the Department amended N.J.A.C. 7:14A-1.8(a)10 to base the fee calculation on a direct weighting of the pollutant load. Subsequently, the Department determined that once it started factoring in the entire total pollutant load value into the NJPDES fee formula, the fee calculations would be skewed disproportionately against certain permittees discharging large pollutant loads. Accordingly, the Department instituted a further refinement, the maximum permit fee, in order to prevent any one permittee from paying a greatly disproportionate share of the NJPDES program costs for the permit category and to maintain the reasonable distribution of fees among permittees. However, since there continued to be inequities in the distribution of fees despite these adjustments, the Department convened the NJPDES Task Force to further refine the NJPDES fee assessment formula.

As discussed above, the Department has determined that oxygen demand as measured through BOD_5, $CBOD_5$ or other oxygen demand parameter reasonably predicts environmental impact for domestic treatment works discharging to surface water. Therefore, the Department is proposing to simplify the environmental impact calculation for these facilities. The Department and the NJPDES Fee Task Force evaluated several options for assessing environmental impact for these dischargers, including basing the calculation on wastewater flow, number of persons in the sewer service area and BOD_5. The Department selected BOD_5 as an appropriate measure of relative impact that is within the direct control of the permittee. This will result in fees that are more predictable from year to year. Applying a simpler fee assessment formula and distributing costs based on a readily measured indicator, such as BOD_5, will have a positive social impact.

As a result of this change the Department also anticipates that the per capita share of NJPDES permit fees will now be more similar in each sewer service area of domestic treatment works discharging to surface water. Since the general public funds the facilities which pay these fees through sewer fees or property taxes, these changes should have a positive social impact. Both facilities and ratepayers should also benefit from the application of a fee formula that is more predictable from year to year.

As discussed above, the Department has also determined that the application of a Stream Factor and the Bioassay Factor increases the complexity and reduces the predictability of measuring the environmental impact for industrial treatment works discharging to surface water. Therefore, the Department is proposing to simplify the formula at N.J.A.C. 7:14A-1.8(c) by eliminating these factors. Eliminating these two factors from the environmental impact formula will result in an environmental impact assessment that is within the control of the facility, and is less complex and more predictable.

The proposed minimum fees are expected to result in higher NJPDES permit fees for most small dischargers. However, the proposed minimum fee schedule equitably balances the distribution of the NJPDES program costs among both small and large dischargers by considering the type and complexity of each category of permit issuance. Overall, the proposed minimum fee schedule represents a fairer allocation of NJPDES program costs among all classes of NJPDES permit holders. In general, most facilities paid higher fees prior to the total removal of the cube root factor and the imposition of the maximum fee provision in 1989 than they will once the changes proposed herein are implemented.

The proposed revision of the risk factor for oil and grease from food processing operations from 100 to one is intended to decrease NJPDES permit fees for food processing facilities discharging to publicly owned treatment works (POTWs). The Department believes that this revision is appropriate and will not have a detrimental social impact since oil and grease discharged to POTWs from food processing operations consists of biodegradable animal and vegetable fats and greases. Thus, the revised lower risk factor takes into account that these pollutants are readily treated prior to ultimate discharge by the POTW and will not increase risk to the public.

Economic Impact

The proposed changes to the minimum fee schedule at N.J.A.C. 7:14A-1.8 are not intended to generate additional revenue for the NJPDES program through the annual NJPDES fee assessment process, and are thus expected to have a neutral economic impact on the Department. The Department will again assess a total of $11.2 million in NJPDES fees through the proposed fee assessment formula. However, the proposed amendment will allow the Department to more equitably allocate the cost of administering the NJPDES program among all NJPDES permittees by adjusting the minimum fees for each category of permit in a manner consistent with the technical and environmental complexity of permits in that category. As proposed, the minimum fee schedule for NJPDES dischargers will be tiered from $200.00 to $6,700 depending on the complexity of the permit category.

The Department is proposing to assess only an annual fee to those facilities authorized to discharge under a general permit. As a result, the new fee schedule will provide economic incentives for qualifying facilities to seek authorization under a general permit rather than applying for an individual permit. While the new fee for some general permits

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is larger than the existing minimum fee, the decision not to include an environmental impact factor in the fee formulas for general permits will reduce a permittee's administrative cost and will result in predictable fees for all general permittees. The new fee schedule does not change the fees for the general permits for stormwater discharges listed in N.J.A.C. 7:14A-1.8(i) and (j).

As discussed above, the proposed minimum fees are based upon the estimated number of hours allocated by the Department to NJPDES permit development, inspections, data management and permit administration. Considering the cost associated with these basic services in the minimum fee schedule will result in more of the Department's costs being directly allocated to each facility. This will also decrease the percentage of the NJPDES budget distributed among permittees on the basis of the environmental impact of their discharge.

In Fiscal Year 1994, approximately five percent of the NJPDES program budget was collected from NJPDES permittees in the form of minimum fees. The remainder of the budget was assessed to NJPDES permittees based upon the environmental impact of their discharge. For purposes of comparison, the proposed minimum fee schedule will result in an assessment of approximately 25 percent of the NJPDES budget through minimum fees in FY95. Under proposed N.J.A.C. 7:14A-1.8(a)9iii, the percent of the NJPDES program collected through minimum fees will increase up to about 35 percent in FY97.

The proposed amendment of the minimum NJPDES fees is expected to decrease the "rate" component of the NJPDES fee formula, N.J.A.C. 7:14A-1.8(a)9, which is calculated by subtracting the sum of all minimum fees from the overall budget and dividing by the total environmental impact of all permitted facilities.

The Department has prepared a fee comparison report to evaluate the impact of this proposal by applying the proposed changes to the environmental impact formulas and minimum fee schedule using the same facility data as was used to assess the FY 94 NJPDES permit fees. While the overall amount to be assessed in FY95 is the same as in FY94, some adjustments have been made to the amount assessed by category. For the purpose of this comparison, the Department has assumed that the same number of facilities will exist and are classified as they are now (major, minor, general), and that the total and individual environmental impacts remain the same over the next three years. A copy of this report can be requested from the Division of Water Quality by calling (609) 984-4428. A comparison of sample FY94 assessments with the proposed fees under the new fee assessment formula is provided below. It should be noted that this may not be the actual amount assessed in FY95 as the actual pollutant loadings for facilities are not yet available:

Example 1: A facility defined as a minor domestic treatment works paid $1,256 in FY94. Under this amendment, this facility will be assessed $2,084 in FY95, $2,500 in FY96, and $2,964 in FY97 which includes a minimum fee of $1,450 in FY95, $1,900 in FY96 and $2,400 in FY97.

Example 2: A facility defined as a major domestic treatment works paid $11,166 in FY94. Under this amendment, this facility will be assessed a fee of $10,539 in FY95, $11,429 in FY96 and $12,354 in FY97 which includes a minimum fee of $3,850 in FY95, $5,100 in FY96 and $6,400 in FY97.

Example 3: A facility authorized to discharge under a general industrial surface water permit (other than a stormwater general permit listed in N.J.A.C. 7:14A-1.8(i) and (j)) paid $738.00 in FY94. Under this amendment, all facilities authorized under the general industrial surface water permit would be assessed a fee of $800.00 in FY95, $1,050 in FY96 and $1,300 in FY97 which is the minimum fee for this category of permit.

Example 4: A facility defined as a major industrial discharger paid $62,904 in FY94. Under this amendment, this facility would be assessed a fee of $60,191 in FY95, $56,173 in FY96 and $51,954 in FY97 which includes a minimum fee of $3,400 in FY95, $4,550 in FY96 and $5,700 in FY97.

Example 5: A facility defined as a minor industrial discharger paid $2,237 in FY94. Under this amendment, this facility would be assessed a fee of $2,388 in FY95, $2,752 in FY96 and $3,164 in FY97 which includes a minimum fee of $1,450 in FY95, $1,900 in FY96 and $2,400 in FY97.

Example 6: A facility permitted to land apply residuals paid $9,927 in FY94. Under this amendment, all facilities which land apply residuals other than those from food processing operations would be assessed a fee of $4,000 in FY95, $5,350 in FY96 and $6,700 in FY97 which is the minimum fee for this type of permit.

As discussed above, the proposed minimum fees are expected to result in higher permit fees for most small dischargers. However, the proposed minimum fee schedule equitably balances the distribution of the NJPDES program costs among both small and large dischargers by considering the type and complexity of each category of permit issuance. Overall, the proposed minimum fee schedule represents a fairer allocation of NJPDES program costs among all classes of NJPDES permit holders. In general, most facilities paid higher fees prior to the total removal of the cube root factor and the imposition of the maximum fee provision in 1989 than they will once the changes proposed herein are implemented.

Environmental Impact

The Department anticipates that the proposed amendment of the minimum fee schedule and the environmental impact formula will have neither a positive or negative environmental impact. The proposed changes to N.J.A.C. 7:14A-1.8 will not affect the type of activities conducted by the Department in administering the NJPDES permit program, but will merely shift the allocation of these costs between the minimum fee and the environmental impact components of the NJPDES fee formula. This shift will be accomplished by expanding the class of routine NJPDES program costs assessed in the form of minimum fees and distributing these costs among permit categories in proportion to the technical complexity of the permit and the inspection requirements prescribed by the Clean Water Enforcement Act. The balance of program costs not assessed through minimum fees will still be distributed among permittees in proportion to the environmental impact of the permitted discharge.

The proposed amendment is consistent with the Legislature's current policy, as established in the Department's budget appropriations, of funding the NJPDES permit program primarily through fees assessed to regulated facilities. These permit fees provide the Department with the financial resources to protect the water of the State through enhanced technical evaluation, inspection and monitoring.

Executive Order No. 27 Analysis

Executive Order No. 27(1994), which became effective on January 2, 1995, was issued by Governor Whitman in order to prevent unnecessary State regulation in areas that are already regulated by the Federal government. In order to comply with Executive Order No. 27, administrative agencies which adopt, readopt or amend State regulations that exceed any Federal standards or requirements are required to include a comparison with Federal law.

In 1981, the United States Environmental Protection Agency (U.S. EPA) delegated the responsibility for implementing the National Pollutant Discharge Elimination System (NPDES) in New Jersey to the State. The New Jersey Water Pollution Control Act authorized the Department to accept this delegation. See N.J.S.A. 58:10A-1 et seq., particularly N.J.S.A. 58:10A-2 through 6.

The U.S. EPA does not currently administer a NPDES fee program, nor does it require delegated states to assess permit fees to cover the costs of implementing their delegated permit programs. Decisions on how to fund program costs are decided by each state under applicable state authority. Therefore, only states with enabling legislation, such as New Jersey, may assess fees to administer some or all their permitting program. Where decisions have been made not to assess permit fees, general state revenues are used to fund the permitting programs. The U.S. EPA has proposed to assess Federal permit fees as part of the pending Federal Clean Water Act reauthorization.

Although the U.S. EPA has awarded the Department Federal grants to cover some of the costs associated with implementing activities required under the Federal Water Pollution Control Act, 33 U.S.C. §§1251 et seq., these grants have been used to fund support activities including ambient water quality monitoring, water quality standards development, enforcement and program administration/development and have never constituted a significant portion of the NJPDES permit program budget. Therefore, as authorized by the Legislature, the Department assesses annual permit fees to cover the cost of processing, monitoring and administering the NJPDES permit program. N.J.S.A. 58:10A-9. From 1988 until 1994, the Department fully funded the NJPDES permit program through fees assessed in accordance with N.J.A.C. 7:14A-1.8.

Recently, the Legislature has recognized that many of the activities historically funded through NJPDES permit fees benefit the general public. Therefore, in FY95, the Department was provided with $4.3 million in General Fund revenues for the NJPDES Permit Program. This allowed the Department to reduce the amount assessed through NJPDES fees without reducing the level of services required to fully implement

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the requirements of the Federal Water Pollution Control Act, the New Jersey Water Pollution Control Act and the Clean Water Enforcement Act.

The proposed amendment of N.J.A.C. 7:14A-1.8 is intended to adjust the minimum fee schedule and fee assessment methodology for NJPDES permit fees in order to provide for a simpler and more equitable distribution of permit fees. Since the Federal Water Pollution Control Act does not contain any standards or requirements regarding fees, the proposed amendment of N.J.A.C. 7:14A-1.8 does not exceed any standards or requirements imposed by Federal law. Therefore, no further analysis is required under Executive Order No. 27.

Regulatory Flexibility Analysis

In accordance with the New Jersey Regulatory Flexibility Act (Act), N.J.S.A. 52:14B-16 et seq., the Department has determined that the proposed amendment to N.J.A.C. 7:14A-1.8 will not impose significant reporting, recordkeeping or other compliance requirements on small businesses as defined by the Act. This amendment will alter the fee calculation procedure for many NJPDES permittees, including several hundred permittees qualifying as small businesses under the Act. However, in calculating NJPDES permit fees, the Department uses information currently reported by the permittee on discharge monitoring reports (DMRs), monitoring report forms and/or information submitted as part of the NJPDES permit application or under other permits issued by the Department. Both the existing and revised permit fee formulas and assessment processes allow all NJPDES permittees to fully comply with the fee requirements without the administrative burden or financial expense of retaining any additional professional services.

Since the proposed amendment will raise the minimum fees for each permit category from the current minimum fee of $500.00, some small businesses will incur increased compliance costs in the form of increased minimum fees and/or annual permit fees. The Department is proposing to phase in the new minimum fee schedule, in part, to minimize the impact of these increases on small businesses. See proposed N.J.A.C. 7:14A-1.8(a)9iii. The Department has also determined that assessing only an annual fee to those facilities which are authorized to discharge under a general permit will benefit many small business NJPDES permittees.

The proposed amendment is necessary to allocate among permittees the minimum costs reasonably attributable to the issuance of a permit in each permit category. Therefore, it would not be reasonable or appropriate for the Department to grant preferential treatment beyond what is being offered through the general permit process and the phasing of minimum fee increases to small businesses in the assessment of minimum permit fees. Overall, the proposed minimum fee schedule represents the true minimum cost incurred by the Department to regulate a typical permit in a category.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

7:14A-1.8 Fee schedule for NJPDES permittees and applicants

(a) Except as provided in (i) [and] **, (j) and (l)** below, the general conditions and applicability of the fee schedule for NJPDES permittees and applicants are as follows:

1.-8. (No change.)

9. Except as provided by (k) below, the annual fee for all discharges is calculated by applying the formula: Fee = (Environmental Impact × Rate) + Minimum Fee, where:

i.-ii. (No change.)

iii. The minimum fee for the permit categories listed in (h) below is calculated by multiplying the total hours allocated by the Department for permit issuance, inspection and data management for a typical permit in each category by the Department's total personnel cost and rounding to the nearest $50.00 increment. In FY95, the Department will assess 60 percent of the minimum fee listed in (h) below, except for those permit categories listed at (h)1vi, (h)2viii, (h)3ii, (h)3iii and (h)3v below. In FY96, the Department will assess 80 percent of the minimum fee listed in (h) below, except for those permit categories listed at (h)1vi, (h)2viii, (h)3ii, (h)3iii and (h)3v below. In FY97 and all subsequent fiscal years, the Department will assess 100 percent of the minimum fee listed in (h) below for all permit categories listed in (h) below.

10. [The Department shall use the total pollutant load as calculated in (c)1i below for surface water discharges, the quantity discharged as calculated in (d)1ii below for permittees subject to (d)1 below, or the total weighted concentration as calculated in (d)2ii below for permittees subject to (d)2 below to calculate environmental impact.] The maximum fee to be assessed for any category of discharge shall be 10 percent of the budget for the category of discharge.

11. (No change.)

(b) (No change.)

(c) [Except as provided in (i) and (j) below, the] **The** annual fee for discharges to surface water is calculated by using the following Environmental Impact in the annual fee formula:

1. The Environmental Impact of a discharge to Surface Water **from an industrial treatment works (ITW) regulated under an individual NJPDES permit** is derived by applying the formula: Environmental Impact = (Total Pollutant Load + Heat Load) [× (Bioassay Factor + Stream Factor),] where:

i.-ii. (No change.)

[iii. Bioassay Factor is the effluent limit in the permit divided by the percent effluent resulting in the 96 Hour LC_{50}. Where the effluent limit set forth in the permit is less stringent than the Wastewater Discharge Requirements (N.J.A.C. 7:9-5.1 et seq.), an effluent limit of 50 shall apply. Where the effluent limit set forth in the permit requires No Measurable Acute Toxicity (N.M.A.T.), an effluent limit of 100 shall apply, except:

(1) Where Bioassay testing is not required by the permit, a Bioassay Factor of 1 will be used; or

(2) Where the permit specifies a limit of N.M.A.T. and the mortality is less than or equal to the control mortality, the Department will use a Bioassay Factor of 0.5.

iv. Stream Factor is the sum of the reported Water Quality Index (listed in the New Jersey Water Quality Inventory Report, prepared by the Division of Water Resources and available from the Department) divided by 100, the reported Water Use Index (listed in the New Jersey Water Quality Inventory Report) divided by 50, and the Designated Use Index (derived from the New Jersey Water Quality Inventory Report) assigned by the Department as follows:

Designated Use	Uses met in the Stream Segment
1.00	Segment does not meet designated uses.
0.75	Sometimes meets one use, or a small portion of the watershed meets designated uses.
0.50	Segment meets one designated use.
0.25	A small portion of the watershed does not meet or seasonally does not meet all designated uses.
0.00	All designated uses are met in the watershed.

Note: Designated uses are established by N.J.A.C. 7:9-4. The Department shall use the most recent edition of New Jersey Water Quality Inventory Report.]

2. (No change.)

3. The Environmental Impact of a discharge to surface water from a domestic treatment works (DTW) regulated under an individual NJPDES permit is derived by applying the formula: Environment Impact = Average kilograms per day of oxygen demand discharged, as measured by Biochemical Oxygen Demand (BOD_5), Carbonaceous Biochemical Oxygen Demand ($CBOD_5$) or other oxygen demand parameter selected by the Department, as determined in accordance with (a)7 above.

4. The Environmental Impact value of any type of discharge to surface water regulated under a general permit shall be zero.

(d) Except as provided by (k) below, the annual fee for discharges to ground water, except for residuals and landfills covered in (e) and (f) below, [is based upon the level of monitoring and/or remedial activity required by the Department at the permitted site. Permittees not required to conduct detection monitoring shall use the Environmental Impact in d(1) below in the annual fee formula. Permittees required by the Department to conduct ground water monitoring, which is defined as monitoring performed by the permittee to determine whether current or past discharges have resulted in environmental impact, shall use the Environmental Impact in d(1) below in the annual fee formula. Permittees which are required by the Department, in a NJPDES permit, administrative order, administrative consent order, directive letter, or other form of notice, to

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conduct compliance monitoring in accordance with N.J.A.C. 7:14A-6.15, source removal, and/or ground water remediation, shall use the Environmental Impact in d(2) below in the annual fee formula.] **is calculated by using the following Environmental Impact in the annual fee formula:**

1. The Environmental Impact of a Discharge to Ground Water [for permittees not required to conduct ground water monitoring or permittees required to conduct detection monitoring] **regulated under an individual NJPDES permit** is derived by applying the formula: Environmental Impact = (Risk × Quantity × Ground Water Rating Factor) where:

i.-iii. (No change.)

[2. The Environmental Impact for a Discharge to Ground Water for permittees required to conduct compliance monitoring, source removal, and/or ground water remediation is derived by applying the formula: Environmental Impact = (Area × Total Weighted Concentration × Ground Water Rating Factor) where:

i. Area is:

(1) The total acres of the permitted site; or

(2) Where the permittee has delineated the plume, in accordance with the requirements of the NJPDES permit, the total area in acres affected by the plume based on a surface projection.

ii. Total Weighted Concentration is the sum of all limited pollutant concentrations limited in the NJPDES permit and converted to milligrams per liter (mg/l) (multiplied by their associated risk as listed in Table I. The highest average pollutant concentration detected in any well during the monitoring period selected by the Department in (a)7 above shall be used unless the permittee has delineated the extent of plume as required by their NJPDES permit. Where plume has been delineated, the Department shall use the average pollutant concentration for all wells for the monitoring period selected by the Department in (a)7 above.

(1) Volatile organic compounds, acid extractable compounds, base neutral compounds, pesticides, and PCB's will be deleted from the Total Pollutant Concentration, if reported as non-detectable in all samples for the monitoring period. To calculate the average concentration for a delineated plume, the Department will use zeros for these pollutant concentrations if not detected in a well. For all other pollutants, and volatile organic compounds, acid extractable compounds, base neutral compounds, pesticides, and PCB's detected once, the Department shall calculate the Total Weighted Concentration using one-half the reported minimum detection limit for pollutant concentrations.

iii. Ground Water Rating Factor is the number derived in (d)1ii above.]

2. The Environmental Impact value of any type of discharge to ground water regulated under a general permit shall be zero.

(e) The [annual fee for residuals is calculated by using the following Environmental Impact in the annual fee formula:] **Environmental Impact value for facilities which land apply, handle or distribute residuals listed in (h)3 below shall be zero.**

[1. The Environmental Impact of residuals is derived by applying the formula: Environmental Impact = Pathogen Reduction × (Nitrogen + Total Metals Load), where:

i. Pathogen Reduction is 1 where the residual satisfies the requirements for "Processes to Significantly Reduce Pathogens" set forth at 40 CFR 257 or 0.8 where the residual satisfies the requirements for "Processes to Further Reduce Pathogens" set forth at 40 CFR 257.

ii. Nitrogen is the annual amount of nitrogen (in pounds) generated or land applied to the site.

iii. Total Metals Load is the total metal equivalent in pounds generated or land applied, derived from the average concentration of cadmium, copper, nickel, lead and zinc multiplied by the relative toxicity value of that metal (Cadmium 10.0, Copper 0.4, Nickel 1.0, Lead 1.0, and Zinc 0.2).]

(f)-(g) (No change.)

(h) Except as provided by (k) below, minimum fees are as [follows] **set forth below:**

[1. The minimum fee for Discharge to Surface Water permits shall be $500.00, except that:

i. The minimum fee for hazardous waste facilities regulated by N.J.A.C. 7:26 and for the Industrial Waste Management Facilities regulated by N.J.A.C. 7:14A-4 shall be $10,000.

ii. The fee for NJPDES Permit No. NJ0088323 (N.J.A.C. 7:14A-3, Appendix B) is specified in (j) below.]

1. The minimum fees for domestic treatment works (DTWs) shall be assessed as follows:

i. Minor DTWs issued an individual NJPDES Discharge to Surface Water permit shall be assessed a minimum fee of $2,400;

ii. Major DTWs issued an individual NJPDES Discharge to Surface Water permit shall be assessed a minimum fee of $6,400;

iii. Combined sewer overflows (CSOs) authorized to discharge to surface water under a general permit will be assessed a minimum fee of $5,400;

iv. DTWs constructed under the authority of N.J.A.C. 7:14A and issued an individual NJPDES Discharge to Ground Water permit shall be assessed a minimum fee of $3,950;

v. The DTWs constructed under the authority of the Realty Improvement, Sewerage and Facilities Act, N.J.S.A. 58:11-23 et seq. ("Chapter 199") and subsequently issued an individual NJPDES Discharge to Ground Water permit shall be assessed a minimum fee of $1,600;

vi. DTWs authorized to discharge to ground water under a general permit, including a Class V injection well permit pursuant to N.J.A.C. 7:14A-5.5, shall be assessed a minimum fee of $500.00.

2. The minimum [fee] **fees** for [Discharge to Ground Water (DGW) permits, except for residuals and landfills covered in (h)3 and 4 below,] **industrial treatment works (ITWs)** shall be assessed as follows:

[i. Facilities assigned a Ground Water Monitoring Status Factor of 1 or 2 under (d)1iii(1) above shall be assessed a minimum fee of $500.00;

ii. Facilities assigned a Ground Water Monitoring Status Factor of 5 under (d)1iii(1) above shall be assessed a minimum fee of $1,500;

iii. Facilities assigned a Ground Water Monitoring Status Factor of 10 under (d)1iii(1) above shall be assessed a minimum fee of $5,000;

iv. Facilities who have obtained a ground water discharge permit-by-rule pursuant to N.J.A.C. 7:14A-5.5(a) shall be assessed a minimum fee of $250.00; and

v. Hazardous Waste Facilities regulated by N.J.A.C. 7:26, Industrial Waste Management Facilities (IWMF) regulated by N.J.A.C. 7:14A-4, facilities that have been issued a NJPDES DGW/IWMF permit, facilities with a DGW/IWMF permit-by-rule and facilities with a NJPDES ground water permit for a Resource Conservation Recovery Act (RCRA) unit assigned a Ground Water Monitoring Status of 1 or 2 shall be assessed a minimum fee of $10,000;

vi. Hazardous Waste Facilities regulated by N.J.A.C. 7:26, Industrial Waste Management Facilities (IWMF) regulated by N.J.A.C. 7:14A-4, facilities that have been issued a NJPDES DGW/IWMF permit and facilities with a DGW/IWMF permit-by-rule and facilities with a NJPDES ground water permit for a RCRA unit assigned a Ground Water Monitoring Status of 5 shall be assessed a minimum fee of $20,000; and

vii. Hazardous Waste Facilities regulated by N.J.A.C. 7:26, Industrial Waste Management Facilities (IWMF) regulated by N.J.A.C. 7:14A-4, facilities that have been issued a NJPDES DGW/IWMF permit and facilities with a DGW/IWMF permit-by-rule and facilities with a NJPDES Ground Water permit for a RCRA unit assigned a Ground Water Monitoring Status of 10 shall be assessed a minimum fee of $40,000.]

i. ITWs authorized to discharge to surface water under a general permit shall be assessed a minimum fee of $1,300;

ii. Minor ITWs issued an individual NJPDES Discharge to Surface Water permit shall be assessed a minimum fee of $2,400;

iii. Major ITWs issued an individual NJPDES Discharge to Surface Water permit shall be assessed a minimum fee of $5,700;

iv. ITWs issued a Significant Indirect User (SIU) permit shall be assessed a minimum fee of $3,600;

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v. ITWs issued an individual permit for the discharge of stormwater runoff shall be assessed a minimum fee of $2,350;

vi. ITWs constructed pursuant to N.J.A.C. 7:14A and issued an individual NJPDES Discharge to Ground Water permit shall be assessed a minimum fee of $3,950;

vii. ITWs not constructed pursuant to N.J.A.C. 7:14A but subsequently issued an individual NJPDES Discharge to Ground Water permit shall be assessed a minimum fee of $1,600; and

viii. ITWs authorized to discharge to ground water under a general permit, including a Class V injection well permit pursuant to N.J.A.C. 7:14A-5.5, shall be assessed a minimum fee of $500.00.

3. The minimum [fee] **fees** for [a Residuals permit] **facilities which land apply, handle or distribute residuals** shall be assessed as follows:

i. [The minimum fee for domestic sludge shall be $500.00] **Facilities issued a permit for land application of residuals or residuals handling shall be assessed a minimum fee of $6,700;**

ii. [The minimum fee for non-hazardous industrial sludge shall be $1,000.00] **Permit exemptions authorizing the land application of sludge-derived products at specific sites in accordance with a Department-approved distribution program shall be assessed a fee of $250.00 for the duration of the permit exemption. The Department will not consider a request for a permit exemption complete unless the request is accompanied by the fee;** [and]

iii. [The minimum fee for hazardous industrial sludge shall be $5,000.00] **General distribution permit exemptions providing Department approval of a sludge derived product distribution program which is not directly regulated for residuals handling through an individual NJPDES permit shall be assessed a fee of $2,700 for the duration of the exemption. The Department will not consider a request for a permit exemption complete unless the request is accompanied by the fee;**

iv. Facilities issued an individual permit for land application of food processing residuals shall be assessed a minimum fee of $2,550; and

v. Facilities authorized to land apply food processing residuals pursuant to a general permit shall be assessed a minimum fee of $500.00.

4. The minimum fee for sanitary landfills shall be assessed as follows:

i.-ii. (No change.)

iii. Operating sanitary landfills issued an individual NJPDES Discharge to Ground Water permit shall be assessed a minimum fee of $3,950.

[5. The minimum fee for a transfer station shall be $500.00 and the annual fee for a transfer station shall be $500.00.

6. The minimum fee for a permit to discharge to a Domestic Treatment Works shall be $500.00, except that the minimum fee for a permit issued pursuant to N.J.A.C. 7:14A-4 shall be $10,000.]

[7.]**5.** The minimum fee for an emergency permit issued pursuant to N.J.A.C. 7:14A-2.2 shall be determined based on (h)1 [and 2] **through (h)4** above [but in no case will it be less than $1,000.00].

[8. The minimum fee for land based soil treatment operations shall be $1,500 except for a RCRA unit which shall be subject to the minimum fee of $20,000.]

(i) For NJPDES Permit No. NJ0088315 (N.J.A.C. 7:14A-3, Appendix A, incorporated herein by reference), the annual fee collected under (a) above shall be [the minimum fee of] $500.00 [set forth in (h)1 above]. A request for authorization under that permit shall not be complete unless this fee is included in that request, or unless this permit has been reissued and this fee has already been paid for the billing year in which the RFA is submitted.

(j)-(k) (No change.)

(l) The Department shall assess, where applicable, the fee for laboratory certification pursuant to the schedule set forth at N.J.A.C. 7:18.

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TABLE I
RISK CATEGORIES

Risk Factor 10^0	10^1	10^2	10^3	10^4	10^5
		SURFACE WATER			
TDS Chloride Sulfate Fluoride Iron	TSS Phosphorus Phtahalic Acid Sulfide Molybdenum Bismuth Manganese Zinc	Tin Aluminum Antimony Barium Chromium-trivalent Oil & Grease Surfactants N(nitrite, nitrate Kjeldhal, diss. & Total) Oxidizable Matter Petroleum Hydrocarbons	Styrene Nickel Copper Silver Cobalt Ammonia Cyanide Selenium	Arsenic Beryllium Asbestos Acid fraction compounds Base-Neutral Compounds Volatile Organics	Lead Mercury Cadmium Chromium-hex Pesticides PCB PBB
		GROUND WATER			
TSS Aluminum Phosphorus	TDS Chloride Sodium Antimony Bismuth Sulfate	Iron Manganese Chromium-trivalent Zinc Copper Ammonia Oil & Grease Surfactants Oxidizable Matter TOC	Silver Fluoride Barium Nitrate Phenol Cobalt Selenium Nickel	Lead Arsenic Beryllium Pesticides Acid fraction compounds Base-Neutrals	Mercury Cadmium Chromium-hex Petroleum hydrocarbons Total Volatile Organics (including TTHM)
		INDIRECT DISCHARGERS			
BOD TSS COD **Oil and Grease**	TDS Iron Antimony Bismuth Tin Manganese Inorganic Sulfur Compounds	I, I-Dichloroethylene Copper Zinc Chromium-Trivalent Barium Cyanide Dimethyl phthalate Surfactants [Oil & Grease] Petroleum Hydrocarbons Total Toxic Metals** Nitrogen Compounds/ Ammonia Phenols	Nickel Silver Asbestos Cobalt Selenium Benzene 1,2-Dichloroethane Chloroform Ethylbenzene Naphthalene 1,2,4-Trichlorobenzene Vinyl Chloride Base Neutral Compounds* Acid Extractables Compounds* 1,1,2,2-Tetrachloroethane Bromoethane 1,2-Dichloropropane 1,1-Dichloroethane 1,1,2-Trichloroethane Dichlorobenzene Di-n-butylphthalate Anthracene Tetrachloroethylene Pentachlorophenol Butyl Benzyl Phthalate Di-n-octyl Phthalate	Beryllium I,I,I-Trichloroethane Lead Arsenic Bis (2-ethylhexyl) phthalate Dichlorodifluoromethane Trichlorofluoromethane Total Toxic Organics** Volatile Organics* TVOS as in N.J.A.C. 7:27-17.3** Chlorobenzene Toluene 1,2-Trans-Dichloroethylene Trichloroethylene	Carbon Tetrachloride Mercury Cadmium Chromium, hex & Total Pesticides PCBs Dioxin

*Unlisted
**Not Itemized

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(a)

AIR QUALITY REGULATION PROGRAM

Air Pollution Control
Operating Permits
Proposed New Rules: N.J.A.C. 7:27-22.8, 22.20 through 22.26, 22.28A, 22.28B, 22.30, 22.31, 22.33, 22.34 and 7:27-22 Appendix
Proposed Amendments: N.J.A.C. 7:27-22.1 through 22.6, 22.9 through 22.14, 22.16, 22.18, 22.19 and 22.27 through 22.29

Authorized By: Robert C. Shinn, Jr., Commissioner, Department of Environmental Protection.

Authority: N.J.S.A. 13:1B-3, 13:1D-9 and 26:2C-1 et seq., in particular 26:2C-8.

DEP Docket Number: 11-95-02/496.

Proposal Number: PRN 1995-191.

A **public hearing** concerning this proposal will be held on:
Wednesday, April 5, 1995 at 10:00 P.M. at
New Jersey Department of Environmental Protection
Hearing Room, 1st Floor
401 East State Street
Trenton, New Jersey 08625

Submit written comments by April 19, 1995 to:
Janis E. Hoagland, Esq.
Attention: Docket No. 11-95-02/496
Department of Environmental Protection
Office of Legal Affairs
CN 402
Trenton, New Jersey 08625-0402

The new rules and amendments will become operative 60 days after their adoption (See N.J.S.A. 26:2C-8).

Copies of the proposed new rule and supporting documentation will be available for inspection during normal office hours at:

Atlantic County Health Department
201 South Shore Road
Northfield, New Jersey 08225

Middlesex County Air Pollution Control Program
County Annex Building
841 Georges Road
North Brunswick, New Jersey 08902

DEP Metropolitan Regional Office
2 Babcock Place
West Orange, New Jersey 07052

New Jersey Department of Environmental Protection
Bureau of Enforcement Operations
Central Regional Office
Horizon Center, Building 300
Route 130
Robbinsville, New Jersey 08691

The agency proposal follows:

Summary

The 1990 amendments to the Federal Clean Air Act (CAA) require every State to develop a program for issuing operating permits for certain stationary sources of air contaminant emissions. The United States Environmental Protection Agency (USEPA) has promulgated rules specifying the minimum elements of State operating permit programs. 40 CFR Part 70 (Part 70). The Department of Environmental Protection (Department) is proposing new rules and amendments to existing rules to implement New Jersey's operating permit program in accordance with Part 70.

Currently, the Department regulates air pollution from stationary sources primarily by issuing preconstruction permits and operating certificates. A preconstruction permit is required before a facility may install or alter equipment that is capable of causing emissions of an air contaminant, or control apparatus that prevents or controls emissions of air contaminants. An operating certificate authorizes the operation of the equipment or control apparatus. The existing rules for preconstruction permits and operating certificates are at N.J.A.C. 7:27-8 (subchapter 8).

Under the operating permit program, major facilities in New Jersey will be covered by comprehensive, facility-wide operating permits for air pollution control; the operating permit will replace the subchapter 8 operating certificates for individual pieces of equipment. Minor facilities that do not obtain an operating permit will continue to be covered by equipment-specific preconstruction permits and operating certificates.

The Department originally proposed rules to implement the operating permit program on September 7, 1993 (the 1993 proposal). 25 N.J.R. 3963(a). However, public comments on the 1993 proposal convinced the Department that significant changes were necessary. Therefore, the Department adopted only part of the 1993 proposal, and promised to repropose the rules for the remainder of the operating permit program. 26 N.J.R. 3943(b) (October 3, 1994). Part of the reproposal, regarding operating permit fees, was published in the January 3, 1995 New Jersey Register. 27 N.J.R. 22(b). The proposed amendments and new rules published today contain the remainder of the reproposal. The proposed amendments and new rules also address issues raised in comments on the 1993 proposal which required changes to the rules that were too substantial to be included in the adoption of the 1993 proposal.

In developing the proposed amendments and new rules, the Department worked closely with a group of representatives of the regulated community, the environmental community, and the USEPA. The working group attempted to reach a consensus on every significant issue in the proposed amendments and new rules, and on much of the specific rule language as well. The proposed amendments and new rules reflect that consensus. The major issues addressed in the working group included the following:

- Revisions to the requirements for new, reconstructed and modified sources to incorporate advances in the art of air pollution control, discussed below under N.J.A.C. 7:27-22.33;
- Refining the relationship among administrative amendments, seven-day notice changes, and minor or significant modifications, discussed below under N.J.A.C. 7:27-22.20 through 22.24;
- Providing an opportunity for public input before the Department publishes new or revised air pollution control technical manuals;
- Clarifying when a research and development operation at a facility can be treated as a separate facility, for purposes of determining when an operating permit is required. This change is discussed below under N.J.A.C. 7:27-22.2; and
- Providing the Commissioner of the Department with the discretion to seek or accept public comment on any application (including applications for minor modifications) if the application is of significant public interest.

A discussion of the issues addressed in the proposed amendments and new rules follows.

Relationship of N.J.A.C. 7:27-8 and 7:27-22

In the 1993 proposal, the Department attempted to coordinate the new facility-wide air pollution control operating permit program with the existing subchapter 8 program of equipment-specific preconstruction permits and operating certificates. The 1993 proposal would have established a coordinated permitting process, including a combined permit modification process for facilities subject to both preconstruction review requirements and the operating permit program.

However, many persons who commented on the 1993 proposal felt that the coordinated system would have the opposite effect; they were concerned that the interaction between subchapter 8 and the operating permit rules could cause confusion, delay and duplication of effort in the process of reviewing permit applications and issuing permits. This concern arose in part because the coordinated system included many cross-references between the subchapter 8 rules and the operating permit rules in N.J.A.C. 7:27-22 (subchapter 22); confusion was likely because a facility owner would have had to consult two sets of complex regulatory requirements to determine how to comply.

Under the proposed amendments and new rules, the new operating permit program under subchapter 22 will be separated from the existing preconstruction permit and operating certificate program in subchapter 8. Any facility will be subject to only one of the two subchapters. In other words, a facility that obtains an operating permit under subchapter 22 generally will find all permit requirements applicable to it in subchapter 22, and will not need to refer to subchapter 8; conversely, a facility required to obtain preconstruction permits and operating

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certificates under subchapter 8 will have no need to refer to subchapter 22 to find any applicable requirements. This separation will minimize confusion and unnecessary complication in the air pollution permit rules.

To make the separation of the two sets of rules possible, the proposed amendments and new rules incorporate the preconstruction requirements of subchapter 8 into subchapter 22 virtually verbatim. Those incorporated provisions do not affect the substance of the rules to which subchapter 22 facilities are subject, because those facilities are already subject to the same rules under the existing subchapter 8.

Of course, until a facility obtains an operating permit under subchapter 22, it will still be required to obtain subchapter 8 preconstruction permits and operating certificates and be aware of subchapter 8 requirements. In addition, all existing subchapter 8 permits and certificates for the facility must be maintained in effect until the operating permit is issued. See N.J.A.C. 7:27-22.33(b).

If a facility that will be required to obtain an operating permit commences operation after the applicable deadline for obtaining an operating permit, the owner or operator of the facility must apply for an operating permit. Until the operating permit is issued, the owner or operator must also obtain and maintain all necessary subchapter 8 permits and certificates. See N.J.A.C. 7:27-22.27-22.33(c).

The discussions of specific rule provisions below note where the preconstruction provisions of subchapter 8 are being incorporated into subchapter 22. In incorporating these provisions into subchapter 22, the Department has revised many of them to reflect the re-engineering of the preconstruction permit program (discussed below); in an upcoming proposal, the Department will make corresponding changes to subchapter 8. A discussion of the specific provisions of the proposed amendments and new rules follows.

Re-engineering the preconstruction permit program

Under the New Jersey Air Pollution Control Act, the Department must determine that new or altered equipment incorporates "advances in the art of air pollution control developed for the kind and amount of air contaminant emitted by the applicant's equipment" before issuing an operating certificate. N.J.S.A. 26:2C-9.2. This "state-of-the-art" or "SOTA" requirement has long been a subject of debate in New Jersey. The Department, the Legislature and the regulated community have all singled out SOTA as an essential part of any effort to re-engineer the Department's air pollution control program.

The most time-consuming and difficult aspect of a SOTA analysis is a case-by-case review of the air pollution control technology available for a source operation. In practice, the Department has already eliminated or limited this type of case-by-case review for many smaller, simpler sources, and focused more resources on case-by-case technology reviews for more complex sources with the largest potential emissions. The proposed amendments and new rules will clarify and simplify that practice while codifying it.

Focusing state-of-the-art evaluation on significant sources makes the Department's air pollution control permitting process more efficient and more predictable. The process is more efficient because the bulk of the Department's staffing and resources is concentrated on the sources that have the largest potential impact on air quality; in part as a result of this practice, the Department has nearly eliminated its backlog of air pollution control permit applications for which the review has exceeded the promised time frame. The process will also be more predictable, because the Department's practice will be codified in rules, not just contained in a management philosophy. The following is a more detailed description of the re-engineered air permit process, including the proposed new rule at N.J.A.C. 7:27-22.35 governing state-of-the-art evaluations.

For the most common types of minor source operations, proposed revisions to subchapter 22 (and upcoming revisions to subchapter 8) establish procedures under which the Department will issue general permits. Applicants for permits for those minor sources will be deemed to have incorporated advances in the art of air pollution control if they qualify for and comply with the applicable general permit. The Department estimates that sources in this class will account for approximately half of the permit applications it receives.

Some sources that do not qualify for a general permit will receive a somewhat more detailed review, but still without a case-by-case technology review. A source would be in this class if its potential to emit hazardous air pollutants (HAPs) is less than the de minimis levels established by the USEPA, and its potential to emit any other air contaminants is less than five tons per year. The Department estimates that sources in this class will account for approximately 40 percent of the permit applications it receives. A permit applicant for a source in this class can demonstrate that the source incorporates advances in the art of air pollution control by showing that it will comply with applicable State and Federal standards.

Approximately 10 percent of permit applications are for sources that would not be included in the two classes discussed above. An evaluation of air pollution control technology will be required for these sources. To demonstrate that a permit application meets SOTA requirements, an applicant will use applicable Federal requirements and procedures for best available control technology (BACT), lowest achievable emission rate (LAER) and maximum achievable control technology (MACT).

When a source would emit more than five tons per year of an air contaminant that is not covered by these Federal requirements, the applicant will demonstrate compliance with SOTA by showing that the source uses up-to-date technology and methods that will reasonably minimize emissions of that air contaminant. To assist applicants in this effort, the Department will periodically publish a technical manual that will describe technology, methods and levels of performance that will be considered SOTA. An applicant can rely on the SOTA description in the technical manual if the proposed source meets the applicability criteria for that published SOTA. The Department will seek public input before publishing the SOTA standards and before publishing any revision to the SOTA standards.

The Department would publish the technical manual pursuant to N.J.S.A. 13:1D-111. That statute requires the Department to detail and clarify its interpretation of any standards or other requirements that do not have a fixed meaning, including the identification or stipulation of SOTA. The publication of the technical manual is not subject to rulemaking under the Administrative Procedure Act.

A permit applicant has an alternative to using the technical manual's identification of SOTA. Instead, the applicant may propose a SOTA approach with a case-specific evaluation of available control measures and a justification of the proposed measure. If the Department determines that this case-specific SOTA is consistent with the criteria for SOTA, the applicant can use that SOTA in lieu of what is in the technical manual. This case-specific SOTA is also required if the SOTA technical manual is not applicable to the proposed source operation.

Applicability/Fugitive emissions—N.J.A.C. 7:27-22.2

A facility's potential to emit certain air contaminants determines in large part whether the facility is required to obtain an operating permit. Under the 1993 proposal, fugitive emissions would have been included in the calculation of any facility's potential to emit. Fugitive emissions are released into the atmosphere from equipment such as leaky valves and pumps, without normally passing through a stack or chimney.

The Department received several comments on the 1993 proposal, requesting that the Department exclude fugitive emissions from consideration in determining whether a facility must obtain an operating permit. In addition, the USEPA provided guidance regarding when fugitive emissions should be considered. In response, the Department agreed to repropose and narrow the fugitive emissions provision.

The fugitive emissions provision in the 1993 proposal was significantly more stringent than the USEPA's subsequent interpretation of the corresponding provision of Part 70. The proposed amendments make the State rule essentially consistent with the USEPA's interpretation. Under the proposed amendments, fugitive emissions are not considered in determining a source's potential to emit except in certain specified categories of sources.

Differences remain between the wording of the State rule and the wording of Part 70. However, these differences are primarily clarifications that have no effect on the substance of the rule. A minor substantive difference (primarily concerning sources with the annual potential to emit 25 tons of volatile organic compounds) also remains, but the USEPA has indicated that it intends to make amendments to Part 70 which would eliminate that difference.

Applicability/R&D operations—N.J.A.C. 7:27-22.2

Under the 1993 proposal, research and development (R&D) equipment at a facility could be treated as a separate facility for the purpose of determining whether an operating permit is required. As adopted, the 1993 proposal stated that the R&D portion of the facility would be eligible for this treatment only if it were used solely for R&D operations and had a two-digit Standard Industrial Classification (SIC) code that

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differed from the rest of the facility. The proposed amendments to N.J.A.C. 7:27-22.2 revise this provision, based on consultations with the rule development working group.

The Department is proposing to delete the requirement for the different two-digit SIC code. This requirement unintentionally would have made the separation of R&D and manufacturing equipment impossible in chemical process industries, because the R&D activities and the manufacturing activities in this industry nearly always have the same two-digit SIC code.

The Department is also proposing to delete the requirement that the equipment be used solely for R&D operations. The main purpose of this requirement was to clarify what R&D equipment could be treated as a separate facility. However, the same purpose can be served by requiring instead that the facility maintain adequate records to show when equipment is used for R&D and when it is used for manufacturing. Requiring this recordkeeping, and deleting the requirement that the equipment be used solely for R&D, enables facilities to separate their R&D and manufacturing operations when the same equipment is used for both R&D and manufacturing at different times.

General provisions—N.J.A.C. 7:27-22.3

N.J.A.C. 7:27-22.3 establishes the general requirements and several specific elements of the operating permit program. Subchapter 8 contains a corresponding section, N.J.A.C. 7:27-8.3.

The proposed amendment adds several general provisions to N.J.A.C. 7:27-22.3. Of these, the most significant authorizes a permittee to construct or install equipment at his or her own risk before the Department issues pre-construction approval, if the Department's approval is not required for compliance with an applicable Federal requirement and the construction or installation would not violate an applicable Federal requirement. N.J.A.C. 7:27-22.3(oo). However, the permittee may begin testing or operating the equipment at risk only after the Department issues the preconstruction approval for the construction or installation. N.J.A.C. 7:27-22.3(pp). The Department expects that an upcoming amendment to the Air Pollution Control Act will require it to allow at-risk construction or installation.

Under the Pollution Prevention Act, N.J.S.A. 13:1D-35 et seq., the Department may issue a facility-wide permit. On September 16, 1994, the Department submitted a request to the USEPA to allow a facility-wide permit to constitute a facility's operating permit. If the USEPA approves this request, N.J.A.C. 7:27-22.3(z) would allow facility-wide permits issued after the approval to constitute a facility's operating permit.

N.J.A.C. 7:27-22.3(bb) states that the owner or operator of a facility may voluntarily treat an insignificant source operation as a significant source operation for the purposes of obtaining or modifying an operating permit. The insignificant source operation would then be subject to all subchapter 22 requirements that apply to significant source operations.

The Department may approve a compliance schedule to correct a violation of an applicable requirement, or of a rule or technical manual provision that protects human health and welfare or the environment. Unless there is such a compliance schedule, N.J.A.C. 7:27-22.3(cc) prohibits the Department from approving an application for an initial operating permit, minor modification, significant modification, or renewal that would authorize the violation.

N.J.S.A. 26:2C-19.1 through 19.5 establish an affirmative defense to liability for certain air pollution violations. N.J.A.C. 7:27-22.3(nn) cross-references this affirmative defense.

The remaining proposed amendments to N.J.A.C. 7:27-22.3 do not make significant changes. These proposed amendments are discussed below.

Minor corrections. The proposed amendments to N.J.A.C. 7:27-22.3(d) and (f) revise the terminology to reflect more accurately what is covered by an operating permit. The proposed amendments to N.J.A.C. 7:27-22.3(s) clarify that compliance with Federal, State and local requirements includes obtaining any necessary permits. The proposed amendments to this provision also remove a redundant reference to "notices of planned changes."

Part 70 requires that, if requested, a state must issue operating permits that include alternative operating scenarios. N.J.A.C. 7:27-22.3(l) implements this requirement. The 1993 proposal had provided that, in some cases, a reconfiguration to such an operating scenario can be accomplished through a seven-day notice change. However, N.J.A.C. 7:27-22.3(l) as adopted did not refer to seven-day notice changes. The proposed amendments correct this discrepancy.

The proposed amendments to N.J.A.C. 7:27-22.3(u) and (w) correct cross-references.

The proposed amendments to N.J.A.C. 7:27-22.3(y) clarify confusing language from the 1993 proposal.

Restoration of provisions reserved in the 1993 proposal. The general provisions at N.J.A.C. 7:27-22.3(o) and (p) were contained in the 1993 proposal, but were not adopted because they referred to specific provisions elsewhere in subchapter 22 (such as the provisions for administrative amendments, seven-day notice changes and minor and significant modifications) that also were not adopted. The proposed amendments restore these general provisions to the rule. When necessary, the restored provisions have been revised to reflect the separation of subchapters 8 and 22.

N.J.A.C. 7:27-22.3(o) requires that the operating permit be transferred if a permittee transfers of ownership or operational control of a facility, and the transfer would change the name or identity of the permittee. The transfer would be accomplished through an administrative amendment to the operating permit. The requirement is based on N.J.A.C. 7:27-8.3(c)2, which requires an amendment to a preconstruction permit and certificate if permitted equipment or control apparatus is transferred.

N.J.A.C. 7:27-22.3(p) requires that an approval of a minor modification or significant modification must incorporate all applicable preconstruction requirements.

Incorporation of subchapter 8 provisions. As discussed above, the 1993 proposal attempted to link the operating permit program under subchapter 22 with the existing subchapter 8 program of preconstruction permits and operating certificates. Based on public comments, this reproposal of the operating permit rules separates subchapters 8 and 22. Accordingly, many of the proposed amendments to N.J.A.C. 7:27-22.3 simply incorporate requirements of subchapter 8 essentially verbatim into subchapter 22. A discussion of these incorporations follows.

Equipment or control apparatus that would not qualify as a "significant source operation" is not currently regulated under subchapter 8. The Department did not intend to subject such equipment or control apparatus to regulation under subchapter 22. Accordingly, the proposed amendments to N.J.A.C. 7:27-22.3(b), (c) and (j) limit the applicability of these provisions to significant source operations. In addition, the proposed amendments to N.J.A.C. 7:27-22.3(c) correct the cross-reference to Appendix I, and the terminology used in that cross-reference.

Under subchapter 8, repair or maintenance of equipment or control apparatus is not an "alteration" requiring preconstruction review and need not be reported to the Department as an amendment to a permit or certificate. N.J.A.C. 7:27-22.3(aa) incorporates the same concept into subchapter 22.

As discussed above under "Re-engineering the preconstruction permit program," the Air Pollution Control Act requires the Department to determine that any new or altered equipment incorporates "advances in the art of air pollution control." N.J.A.C. 7:27-22.3(dd) and (ee) incorporates this requirement into subchapter 22. Subchapter 8 contains corresponding provisions at N.J.A.C. 7:27-8.6(b) and 8.8(d).

N.J.A.C. 7:27-8.6(c) currently authorizes the Department to deny an application for a preconstruction permit or certificate if the applicant fails to provide all information requested by the Department within 30 days after the request, or within a longer response period if approved in writing by the Department. N.J.A.C. 7:27-22.3(ff) incorporates this subchapter 8 requirement into subchapter 22.

N.J.A.C. 7:27-8.6(d) currently authorizes the Department to deny an application if the applicant has not paid required fees. N.J.A.C. 7:27-22.3(gg) incorporates this requirement into subchapter 22.

N.J.A.C. 7:27-8.6(e) currently requires the Department to deny a permit application for a paint spray operation unless the operation is served by particulate control apparatus. N.J.A.C. 7:27-22.3(hh) incorporates this requirement into subchapter 22.

N.J.A.C. 7:27-22.3(ii) incorporates a subchapter 8 provision from N.J.A.C. 7:27-8.7(a). N.J.A.C. 7:27-22.3(ii) requires that any construction, installation or changing of any source operation that triggers the need for a minor modification or significant modification of the operating permit must be done in accordance with those modification provisions. The permittee bears full responsibility for adequate design and construction.

N.J.A.C. 7:27-8.7(d) provides for the Department to establish conditions of approval of a permit or certificate. N.J.A.C. 7:27-22.3(jj) incorporates this authority into subchapter 22.

N.J.A.C. 7:27-8.7(e) authorizes the Department to withdraw its approval of a permit when the permittee does not timely begin construction

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or installation, or discontinues construction or installation. N.J.A.C. 7:27-22.3(kk) incorporates this authority into subchapter 22.

Under N.J.A.C. 7:27-22.3(ll), failure to comply with applicable requirements of subchapter 22 may subject a person to potential civil and criminal penalties. Subchapter 8 contains essentially the same provision at N.J.A.C. 7:27-8.26.

Under N.J.A.C. 7:27-22.3(mm), information that the Department will consider in making a decision on an application must be submitted before the Department makes its decision. Subchapter 8 contains essentially the same provision at N.J.A.C. 7:27-8.4(i).

N.J.A.C. 7:27-22.3(qq) concerns the Department's action on an application for approval of an environmental improvement pilot test. Subchapter 8 contains essentially the same provision at N.J.A.C. 7:27-8.3(l).

General application procedures—N.J.A.C. 7:27-22.4

N.J.A.C. 7:27-22.4 establishes the general procedural requirements for operating permit applications.

The existing rules provide that an applicant may submit an application electronically, if the Department approves the electronic submission in writing. The requirement for written approval discourages the electronic submission by making it less convenient. The Department is therefore proposing to eliminate it.

The proposed amendments present two alternatives for the electronic submission of applications. One alternative gives the applicant the option to submit the application electronically; the other alternative requires that all applications be submitted electronically.

The rule development working group expressed its preference for the mandatory electronic submission. Participants in the group noted that the Department's costs would be higher if it allows both electronic and paper submissions than if electronic submissions are required. Limiting the Department's costs will also limit the fees charged to permittees.

The working group participants recognized that some small businesses lack the computer hardware and software needed for electronic submission. Those businesses would incur additional costs to be able to submit documents electronically. However, the working group participants believed that those businesses could have consultants submit documents electronically for them at a minimal cost.

To address the possibility of disagreement on this issue, the Department determined that it would nonetheless propose the two alternatives for mandatory and elective filing. The Department will adopt one of the two alternatives based on the comments it receives.

The proposed amendments also clarify that the general requirements of this section (including electronic filing) apply to notices submitted to the Department, such as those required under N.J.A.C. 7:27-22.20 for administrative amendments and N.J.A.C. 7:27-22.22 for seven-day notice changes.

Application procedures for initial operating permits—N.J.A.C. 7:27-22.5

N.J.A.C. 7:27-22.5 specifies the procedures and deadlines for applying for an initial operating permit. The "initial operating permit" is the first operating permit issued to a facility under subchapter 22.

The proposed amendments correct an error in the 1993 proposal. The 1993 proposal specified dates by which existing facilities are required to submit applications for operating permits; a new facility that had not commenced operation before the specified date would have 12 months after commencing operation to submit the application. However, a new facility that commenced operation just before the specified date would have a very short time to prepare an application. Accordingly, under the proposed amendments the facility must submit an application by the later of the specified date or 12 months after commencing operation. The proposed amendments make similar corrections to the application deadlines for other facilities that become subject to subchapter 22 through other circumstances.

A new facility that will become subject to subchapter 22 must obtain preconstruction and operating approvals. The proposed amendments clarify that the facility need not obtain those approvals under subchapter 8 and then apply separately for an operating permit; instead, the facility can obtain the approvals entirely through subchapter 22 before construction and operation.

The proposed amendments also revise N.J.A.C. 7:27-22.5(b), which concerns administrative completeness of initial permit applications. This provision currently establishes no consequences if the Department fails to complete its administrative completeness review promptly. Accordingly, under the proposed amendments an application would be deemed administratively complete unless the Department advises the applicant otherwise within 60 days after receiving the application.

The proposed amendments also delete N.J.A.C. 7:27-22.5(j). This provision had required the owner or operator to provide the USEPA with a copy of the administratively complete application, unless the USEPA had determined that an application summary would be sufficient. The USEPA has advised the Department that this provision is unnecessary, because the requirements under N.J.A.C. 7:27-22.4(d) for submitting copies of the application are sufficient.

Operating permit application contents—N.J.A.C. 7:27-22.6

N.J.A.C. 7:27-22.6 lists the required contents of an application for an initial operating permit. The bulk of the proposed amendments do not change the substance of this provision. For example, the 1993 proposal contained lengthy descriptions of "exempt activities" and "insignificant source operations"; these descriptions are now included in definitions of those terms in N.J.A.C. 7:27-22.1.

The definition of "insignificant source operation" does differ in one significant respect from the understanding of the term in the 1993 proposal. Under the 1993 proposal, a source operation could not be considered an "insignificant source operation" if it were subject to any application requirement. This restriction would have excluded virtually all source operations, no matter how small, from being considered insignificant source operations. The proposed amendments therefore eliminate this restriction. In addition, the proposed amendments now require the permit application to list application requirements for the insignificant source operations at the facility. N.J.A.C. 7:27-22.6(f)2iii.

The 1993 proposal had required the permit applicant to send a copy of the application to the USEPA. However, Part 70 allows the USEPA flexibility to accept a summary of the application along with relevant portions of the application. The proposed amendments reflect this flexibility.

The 1993 proposal included a provision which referenced the seven-day notice provision in N.J.A.C. 7:27-22.22, and two others which referred to the MACT and GACT provisions in N.J.A.C. 7:27-22.26. Those three provisions were not adopted, because the sections they referenced were not adopted. The proposed amendments restore two of these three provisions to the rule.

One subsection being restored, N.J.A.C. 7:27-22.6(f)5 describes the type of emissions information that must be included in the permit application. Part 70 allows states some flexibility in reporting of emissions information. The proposed amendments to N.J.A.C. 7:27-22.6 and new Appendix I incorporate this flexibility. Under these provisions, if the potential emissions of an air contaminant from a significant source operation or facility do not exceed a threshold established for the air contaminant, the emissions information for that source operation or facility need not be submitted. Specific thresholds are established for each hazardous air pollutant (HAP). For all other air contaminants, the threshold is 0.05 pounds per hour. The basis for these thresholds is described below.

In April 1994, the USEPA proposed de minimis emission rates for HAPs as part of its rules to implement Section 112(g) of the CAA. These rates are based primarily on public health considerations. If a modified source at a facility that emits large quantities of HAPs (more than 10 tons of a single HAP annually, or more than 25 tons of HAPs collectively) exceeds these rates, a case-by-case determination of maximum achievable control technology (MACT) for the source would be required.

The Department used the USEPA's de minimis rates as a starting point in establishing its thresholds for HAP information requirements in the permit application. However, it is important to note that the Department's thresholds serve an entirely different purpose than the USEPA's de minimis rates. The USEPA's rates trigger a major review of control technology; the Department's thresholds trigger only an informational requirement. Accordingly, comparing the two sets of thresholds is not relevant in determining the relative stringency of State and Federal rules. The Department is proposing to set thresholds for its HAP informational requirements at one-tenth of the USEPA de minimis rates.

Consistent with Federal requirements, the Department proposes to use the USEPA's de minimis rates as a trigger for state-of-the-art reviews.

The same thresholds are used in N.J.A.C. 7:27-22.27(e)1iii to limit information that a permittee is required to provide in an alternative operating scenario submitted as a seven-day notice.

Another subsection being restored, N.J.A.C. 7:27-22.6(n), requires an applicant seeking a compliance extension for a MACT or GACT stan-

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dard to demonstrate that sufficient early reductions in HAP emissions have been achieved. This provision is being restored verbatim, except that the cross-reference to the MACT and GACT requirements reflects the codification of those requirements at N.J.A.C. 7:27-22.34.

The subsection from the 1993 proposal which is not being restored, N.J.A.C. 7:27-22.6(k), described what must be included in an application if an applicant would be seeking authorization to replace equipment covered by the operating permit through a seven-day notice. As discussed below, rule provisions governing replacements are being deleted from subchapter 22 because they are superseded by the reconstruction provisions of N.J.A.C. 7:27-22.24A.

Air quality simulation modeling and risk assessment—N.J.A.C. 7:27-22.8

N.J.A.C. 7:27-22.8 concerns the submission of air quality simulation modeling and risk assessment in support of an application for a significant emission source. Air quality simulation modeling and risk assessment are helpful tools for predicting how a facility's emissions of air contaminants may affect public health.

Air quality simulation modeling evaluates the facility's emissions and other factors to project the concentration of contaminants in the ambient air. Risk assessments use the model results to estimate the likelihood that potential exposure to air contaminants will adversely affect public health. Modeling and risk assessment are valuable because many New Jersey communities are located in close proximity to industrialized areas, where they can be affected by emissions of air contaminants.

Modeling and risk assessment can provide those communities with useful information about the level of risk posed by a facility's emissions. In addition, the analysis enables the applicant to identify and reduce risk as part of the design of the operation. For these reasons, the Department already uses such analyses when reviewing applications for preconstruction permits from facilities proposing to emit significant amounts of certain air contaminants.

In the 1993 proposal, the Department had proposed to require air quality simulation modeling and risk assessment in a facility's applications for an initial operating permit and for renewals of the operating permit, if the facility's potential to emit certain hazardous air pollutants exceeded an established threshold. However, several commenters noted that neither the Clean Air Act nor EPA rules require this analysis at this time. Commenters also claimed that the requirement would be costly and burdensome for existing facilities, and that risk assessment should be limited at this time to new and modified facilities. In response to these comments, the Department did not adopt the requirement.

Under proposed new rule N.J.A.C. 7:27-22.8, a permit applicant may voluntarily perform air quality simulation modeling and risk assessment for initial and renewal operating permits. However, the applicant is not required to do so.

As discussed above, the proposed amendments and new rules incorporate preconstruction review provisions from subchapter 8 into subchapter 22. The incorporation is necessary so that the Department can meet its statutory mandate to ensure that no source will receive operating authority until the Department has ascertained that the operation will not result in the violation of any code, rule or regulation N.J.S.A. 26:2C-9.2(c). In practice, this includes a determination that emission increases will not result in air pollution, as that term is defined in the Air Pollution Control Act and N.J.A.C. 7:27-5.

Provisions of the Federal PSD rules and the existing New Jersey emission offset rules, which already require an air quality impact analysis for certain increases in emissions of criteria air pollutants, are also incorporated. An air quality impact analysis includes air quality simulation modeling, but does not include a risk assessment; rather, the predicted ambient concentrations of criteria pollutants are compared to the applicable standards. The proposed new rule continues to provide that if the Federal PSD rules or the emission offset rules require an air quality impact analysis, that analysis must be submitted with the application to modify the operating permit for the emission increase.

Subchapter 8 currently allows the Department to request an air quality impact analysis and risk assessment for any preconstruction permit. Proposed N.J.A.C. 7:27-22.8 is more prescriptive in stating when an air quality impact analysis will be returned, what methods should be used to prepare the analysis, and how the results of the analysis will be evaluated. For example, the Department's Technical Manuals on Air Quality Modeling (#1002) and on Risk Assessment (#1003) are referenced as guidance in the preparation of a protocol for the required analysis.

The purpose of the air quality simulation modeling is to determine whether a source's proposed potential to emit may cause a violation of State or Federal air quality standards, whether it may otherwise threaten human health, welfare and the environment, or whether it will increase concentrations of an air contaminant by more than an amount specified in the Federal PSD rules or State emission offset rules. In some cases, a source's emissions may have the potential to cause one of these impacts even though neither the PSD rules nor the emission offset rules would require air quality simulation modeling. The proposed new rules continue to require air quality simulation modeling in this circumstance.

Public comment—N.J.A.C. 7:27-22.11

Part 70 requires adequate procedures for public notice for applications for the initial issuance of an operating permit, for significant modifications, and for renewals. These procedures must include an opportunity for public comment.

A participant in the rule development working group representing an environmental organization suggested that there should be an opportunity for public comment on minor modifications as well. The Department did have the discretion to seek or accept public comment on minor modifications, but agreed that the rule should guide the exercise of that discretion. The proposed amendments at N.J.A.C. 7:27-22.11 provide that guidance, and are discussed in more detail below under "minor modifications."

Based on the Department's experience and on consultation with representatives of the regulated community, the Department does not believe that these provisions for public comment will burden permittees. It is rare for a modification to generate any public comment. In virtually all of the few cases that generate public comment, the Department can consider the comment and incorporate it into its decision without any delay of that decision or any expense to the permittee. It is also important to note that the forum for public comment under this provision will usually be the submission of written comments, and not the holding of a public hearing.

As discussed below under N.J.A.C. 7:27-22.14, the proposed amendments provide for general permits to be issued through rulemaking and technical manuals. N.J.A.C. 7:27-22.11(b) and N.J.A.C. 7:27-22.11(f) through (k) have been revised to reflect that the same procedures for public participation in individual operating permits also generally apply to general permits. The procedures that apply only to general permits are noted in N.J.A.C. 7:27-22.11(d) and (e). N.J.A.C. 7:27-22.11(d) lists the contents of the notice that the Department will publish for a general permit. In addition to the general information contained in public notices for individual operating permits, the notice for a general operating permit will also outline the source operations that may be covered by the general operating permit, and the proposed conditions of the general permit.

The notice for the general operating permit will be published in the New Jersey Register instead of a local newspaper, which is used for notices on individual permits. N.J.A.C. 7:27-22.11(e). Publishing the notice in the Register will provide Statewide notice, which is appropriate because a draft general permit may be of interest to persons located anywhere in the State.

N.J.A.C. 7:27-22.11(n) specifies that the Department will give notice and accept public comment before a general permit is issued, but not before a particular facility obtains authority to operate under the general permit. This approach provides sufficient opportunity for public participation without making the general permit process duplicative and unnecessarily lengthy for the facilities which qualify for the general permit.

N.J.A.C. 7:27-22.12

Part 70 requires that all proposed operating permits must be submitted to the USEPA for review before the Department may approve the final operating permit. The review and comment procedures in N.J.A.C. 7:27-22.12, as revised by the proposed amendments, continue to be consistent with Part 70.

The proposed amendments to N.J.A.C. 7:27-22.12 detail the nature of the USEPA's role in reviewing a general operating permit. The USEPA's role in reviewing a proposed general operating permit is essentially the same as its role in reviewing a proposed individual operating permit.

However, the USEPA would not review each individual facility's request for authorization under a general permit. The USEPA has advised that the approach in the proposed amendments to N.J.A.C. 7:27-22.12(k)

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is sufficient to satisfy Part 70, without making the general permit process duplicative and unnecessary lengthy for the facilities which qualify for a general permit.

As discussed below under N.J.A.C. 7:27-22.14, the proposed amendments provide for general permits to be issued through rulemaking and technical manuals. Consistent with that provision, N.J.A.C. 7:27-22.12(j) provides that the final general permit will be published in the New Jersey Register.

The existing rules at N.J.A.C. 7:27-22.12(b) already require the Department to transmit the proposed permit to the USEPA. Under amendments to N.J.A.C. 7:27-22.12(a), the Department will also provide a copy of the proposed permit to any interested person, upon request. For an individual operating permit, the Department will also provide a copy to the applicant.

The USEPA noted that if the applicant submits additional information after the application is administratively complete, that information should be made available to the USEPA. Additional supporting information may also be necessary to enable the USEPA to review the application. Accordingly, the proposed amendments at N.J.A.C. 7:27-22.12(c) provide for the Department to supply this information to the USEPA.

General operating permits—N.J.A.C. 7:27-22.14

The 1993 proposal included a procedure for the Department to adopt one or more general operating permits. A general operating permit provides a streamlined means for permitting common, uncomplicated source operations that are generally homogeneous in their operations, processes and emissions. A general permit eliminates the need for a case-by-case permit process for such source operations. Instead, the owner or operator of the source operation need only demonstrate that the source operation meets the criteria for coverage by the general permit, and explain how the source operation will comply with the conditions of the general permit.

As a result, a general permit reduces the burden of the permit process for both the permittee and the Department. In addition, a general permit establishes uniform industry-wide requirements for similar sources in the State, minimizing the likelihood that one member of the industry will have a competitive advantage or disadvantage as a result of the permit.

Under the 1993 proposal, the Department would establish general permits through rulemaking. The proposed amendments to N.J.A.C. 7:27-22.14(a) clarify that the Department may also publish a technical manual for each general permit, pursuant to N.J.S.A. 13:1D-111. The technical manual will contain the information required under N.J.S.A. 13:1D-111. One essential goal of the technical manual will be to detail and clarify the Department's interpretation of standards or other requirements that are not defined by the rule that establishes the general permits or other applicable rules. This approach to general permits is consistent with Part 70.

The Department is working with the Legislature, business and industry, and environmental organizations to develop statutory changes to support the re-engineering of the air pollution permit program. General permits are an essential part of this effort. For this reason, changes may be made to the Air Pollution Control Act to encourage and ease the issuance of general permits. If the statutory changes establish an alternative procedure to issue general permits without rulemaking under the Administrative Procedure Act, the Department will issue general permits in accordance with that procedure.

The proposed amendments to N.J.A.C. 7:27-22.14(b) clarify the effect of obtaining authorization under a general operating permit. When general permits are established, they will include all necessary preconstruction requirements. Accordingly, there will be no need to obtain a separate preconstruction approval for a facility that receives authorization under a general permit.

As discussed above under N.J.A.C. 7:27-22.11 and 22.12, the issuance of the general permit includes all of the notice and opportunity for public comment required under Part 70. Accordingly, N.J.A.C. 7:27-22.14(d) specifies that a facility which receives authorization under a general operating permit would not be subject to duplicative notice and comment proceedings.

Operating permit contents—N.J.A.C. 7:27-22.16

N.J.A.C. 7:27-22.16 lists the elements included in an operating permit. The proposed amendments make minor clarifications and corrections for purposes of consistency.

N.J.A.C. 7:27-22.16(g) currently lists 10 statements that an operating permit will include. The proposed amendments clarify that these 10 statements will not comprise the entire operating permit.

N.J.A.C. 7:27-22.16(l) concerns affirmative defenses to liability for violations of an operating permit. The existing rule refers to two affirmative defenses: the affirmative defense required under Federal regulations at 40 CFR 70.6, and the affirmative defense established under State law at N.J.S.A. 26:2C-19.1 through 19.5. The proposed amendments clarify that the Department does not purport to limit the affirmative defense established under State law by referring to the affirmative defense in the Federal regulations.

Source emissions testing and monitoring—N.J.A.C. 7:27-22.18

As required by Part 70, N.J.A.C. 7:27-22.18 sets forth testing and monitoring requirements. The proposed amendments add a requirement from the existing rules at N.J.A.C. 7:27B-1.4 that the owner or operator of the facility is responsible for providing testing facilities (such as test ports, electricity and test platforms) upon the Department's request. The proposed amendments also state that the Department will seek public input before publishing any new or modified technical manuals governing protocols for testing or monitoring.

Recordkeeping, reporting and compliance certifications—N.J.A.C. 7:27-22.19

N.J.A.C. 7:27-22.19 requires permittees to maintain records, submit reports of source emissions testing and monitoring, submit periodic compliance certifications, and report deviations from operating permit requirements which result in releases of air contaminants. The proposed amendments primarily clarify some confusing language that had been adopted from the 1993 proposal.

One substantive change in the proposed amendments concerns the timing for submitting reports of source emissions testing. The proposed amendments to N.J.A.C. 7:27-22.19(d)1 extend the allotted time for submitting the report, to 45 days after the sampling is completed. This additional time will make it less likely that an extension of the deadline will be necessary, without materially affecting the need for prompt reporting of information.

The other substantive change in the proposed amendments concerns releases of air contaminants resulting from deviations from operating permit requirements. Under the 1993 proposal, if the release posed no potential threat to public health, welfare or the environment and would not likely result in citizen complaints, the permittee was nonetheless required to report the release to the Department by the second business day after the release occurred. Part 70 does not require this second-day notice; it is required under N.J.S.A. 26:2C-19.2, but only if the permittee wishes to assert an affirmative defense to liability for the release. Accordingly, under the proposed amendments the permittee would note the release in the periodic compliance certification, and would not be required to give the second-day notice except to assert the affirmative defense.

Changes to operating permits—N.J.A.C. 7:27-22.20 through 22.24

The operating permit program gives industry more flexibility to make changes at a facility quickly. A variety of changes can be made to existing permits with less paperwork. The procedures for making changes to an operating permit are set forth at N.J.A.C. 7:27-22.20 through 22.24.

Under the proposed new rules, a permittee obtains a change to an operating permit in one of the following ways: through an administrative amendment, a change to a list of insignificant sources, a seven-day notice, a minor modification, or a significant modification. These categories are consistent with Part 70. For each category, the level of review by the Department, the USEPA, other states and the public correlates with the significance of the change.

The provisions of the rule addressing these categories were the most controversial in the 1993 proposal. The public, the regulated community and the USEPA all submitted substantial comments. Many of the views expressed by one commenter conflicted with the views of other commenters. In addition, many of the comments also reflected confusion over the degree of flexibility that Part 70 allows.

For these reasons, the Department did not adopt these provisions of the 1993 proposal. Instead, the Department worked closely with representatives of the regulated community, the environmental community and the USEPA to revise and clarify these provisions for this reproposal.

The most important result of that work was to refine the relationship among administrative amendments (which can be made immediately when an application is submitted to the Department), seven-day notice changes (which can be made upon seven days' notice to the Department and the USEPA), and minor or significant modifications (which require

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a more complex procedure). A change generally can be made through an administrative amendment only if the change would not increase a source's actual emissions or its effects on ambient air quality. A change that increases a source's actual emissions generally can be made through a seven-day notice if the increase would not exceed the source's allowable emissions established in the permit. A change that requires an increase in the source's allowable emissions or that would increase ambient air quality effects must be made as a minor or significant modification, as applicable.

One additional change was needed to address reconstructions, which include replacements of equipment and control apparatus. Under the proposed new rules, the need for a change in an operating permit does not depend on a determination that a "replacement" is occurring; many replacements can be accomplished without the need for a change in the operating permit. Instead, the relevant determination is whether construction, reconstruction or modification is occurring. Provisions for "replacements" are therefore proposed to be deleted from subchapter 22; if a replacement requires a change to the operating permit at all, that change will be addressed by a new section, N.J.A.C. 7:27-22.24A, Reconstruction.

The provisions for administrative amendments, changes to insignificant source operations, seven-day notices, minor modifications and significant modifications, and reconstructions are discussed in more detail below.

Administrative amendments—N.J.A.C. 7:27-22.20

The permittee under an operating permit may use the administrative amendment process to make certain changes in the permit that will not increase actual emissions from the permitted facility, will not cause the emission of a new air contaminant or category of air contaminants, and will not violate any applicable requirement. The permittee may make the change at the facility as soon as the application for the administrative amendment has been submitted to the Department. In addition, for some types of changes (such as changes in names or addresses, or a transfer of ownership), the permittee may make the change up to 30 days before submitting the application.

The 1993 proposal described in detail the procedure for making an administrative amendment, and the types of changes that can be made as administrative amendments. 25 N.J.R. 3979. The proposed new rules allow several additional types of changes to be made as administrative amendments, subject to certain conditions. Using an administrative amendment, a permittee may change the contents of a storage tank; change a stack or chimney; change the relative use of a raw material in a process; introduce a new raw material; or notify the Department that the facility is in compliance with a new applicable requirement that did not previously apply to the facility. These additions are based on comments on the 1993 proposal. The Department agreed that the additions should be made because they are of comparable significance to the other types of changes that could be made as administrative amendments under the 1993 proposal.

The proposed new rules also provide that provisions of a preconstruction permit can be incorporated into an operating permit through an administrative change, if the preconstruction permit was issued with public participation and compliance requirements substantially equivalent to those for operating permits. This is relevant for preconstruction permits issued between the proposal and final issuance of an operating permit.

Generally, the permit shield under N.J.A.C. 7:27-22.17 is not available for administrative amendments. However, Part 70 authorizes the permit shield for preconstruction permit provisions incorporated into an operating permit if the preconstruction permit was subject to public participation and compliance requirements that are substantially equivalent to those for operating permits. The Department therefore has extended the permit shield to this type of administrative amendment.

The 1993 proposal had provided that decreases in maximum allowable emission rates, maximum allowable hours of operation or maximum allowable rate of production could be authorized through an administrative amendment. The USEPA commented that these types of changes should be considered minor modifications instead of administrative amendments. After further discussion, the USEPA agreed that these types of changes can be made as administrative amendments, but only if the operating permit already includes a method by which the Department can verify and enforce the decrease. If the operating permit does not include the verification and enforcement methods, the change must be made as a minor modification or seven-day notice.

Changes to insignificant source operations—N.J.A.C. 7:27-22.21

An "insignificant source operation" is a source operation that is neither an exempt activity or a significant source operation. Part 70 authorizes the Department to allow a permittee to make changes to insignificant source operations without requiring a revision to the operating permit. The permittee may implement the change without giving notice to the Department or the USEPA. However, when the operating permit is renewed, the permittee must include in the renewal application a list of the changes to insignificant sources which change information in the operating permit.

The 1993 proposal had required the permittee to maintain a log book at the facility, with a record of changes made to insignificant source operations. The proposed new rules eliminate that requirement.

Seven-day notice changes—N.J.A.C. 7:27-22.22

The Clean Air Act and Part 70 require the Department to allow certain changes within a permitted facility to be made upon seven days prior notice to the Department and the USEPA. The permittee need not obtain approval from the Department or the USEPA before making the change. A change generally can be made through a seven-day notice if it would not increase the facility's allowable emissions, and would not increase ground-level ambient concentrations of air contaminants above what the permit allows. For example, reducing the height of a stack could increase ground-level ambient concentrations of air contaminants above what the permit allows; if so, that change could not be made with a seven-day notice.

The 1993 proposal outlined the types of changes that could be made through a seven-day notice, and the procedure for making such changes. 25 N.J.R. 3979. Significant changes from the 1993 proposal are discussed below.

N.J.A.C. 7:27-22.22(c) lists the specific types of changes that can be made through a seven-day notice. Several of these types of changes that had been included in the 1993 proposal have been deleted from the proposed new rules. As discussed under N.J.A.C. 7:27-22.20 above, some of those changes would instead be handled as administrative amendments. Also, the 1993 proposal had provided for certain "replacements" of components to be handled as seven-day notice changes. As discussed above, provisions for replacements have been superseded by N.J.A.C. 7:27-22.24A, which addresses reconstructions.

The 1993 proposal had also required a seven-day notice in order to add to, replace or remove "auxiliary devices or appurtenances serving an equipment or control apparatus." This requirement was more stringent than the proposed reconstruction provisions, and was not mandated by Part 70; it is therefore proposed to be deleted. Only major replacements that qualify as "reconstructions" need be reported or permitted under N.J.A.C. 7:27-22.24.

The procedure for making a change through a seven-day notice is essentially the same as provided in the 1993 proposal, with minor changes. Under the 1993 proposal, the Department would issue an acknowledgment of receipt of the notice. The acknowledgment requirement has been deleted from the proposed new rules, to streamline the seven-day notice procedure and minimize the Department resources needed to implement it. The proposed new rules also clarify that the Department may review a seven-day notice change at any time before the operating permit is next renewed, and may take enforcement action if the change did not qualify for the seven-day notice procedure.

Minor modifications—N.J.A.C. 7:27-22.23

Changes to a significant source operation that require an increase in maximum allowable emissions must be made as a minor modification under N.J.A.C. 7:27-22.23, or a significant modification under N.J.A.C. 7:27-22.24. The types of changes that can be made as minor modifications are listed in N.J.A.C. 7:27-22.23(c). In addition, if a change requires an increase in maximum allowable emissions, but is not specifically listed as a significant modification under N.J.A.C. 7:27-22.24, it is treated as a minor modification.

The 1993 proposal outlined the procedure for minor modifications. 25 N.J.R. 3980. Significant changes from the 1993 proposal are discussed below.

Under the 1993 proposal, the minor modification was a two-step process. The permittee would have submitted both an application for a minor modification and an application for a preconstruction permit. The Department would have reviewed both applications simultaneously.

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However, the application for the minor modification would not have been considered administratively complete until the Department approved the preconstruction permit.

Several commenters found this procedure to be redundant, confusing, and likely to cause delay. The Department agreed, and has therefore revised the procedure in the proposed new rules. Under the proposed new rules, the permittee makes a single application for the minor modification. The single application covers both preconstruction and operating requirements, and the administrative completeness of the application is not delayed while the preconstruction aspects are under review. The proposed new rules should reduce the processing time to no more than 90 days for more than 90 percent of minor modifications.

Under the 1993 proposal, the permittee could make the proposed change at his or her own risk once the application was administratively complete. The proposed new rules continue to provide for at-risk changes. However, under the proposed new rules the application becomes administratively complete earlier, without the need to await the issuance of the preconstruction approval.

The proposed new rules clarify that the permittee can construct the proposed changes at risk (upon seven days' notice to the Department) after the application is administratively complete, but cannot commence operation of the proposed changes until after the preconstruction approval is issued. This approach avoids potential harm to public health and the environment that could result from operating equipment that does not meet preconstruction requirements. N.J.A.C. 7:27-22.24A, discussed below, provides an exception to this approach for emergencies.

Another issue addressed by the rule development working group was public participation for minor modifications. The proposed amendments at N.J.A.C. 7:27-22.11 continue to allow the Department to seek or accept public comment whenever it finds a significant degree of public interest in an application for a minor modification. In determining whether to seek or accept public comment, the Department will consider the extent of the proposed emissions increase, the applicant's record of compliance with air pollution control requirements, and any other air pollution control aspects of the application or the facility that might generate public interest. The Department may reject a request for an opportunity to submit public comments, but must provide written notice of the rejection to the person making the request. The notice must specify the reasons for the rejection.

The proposed new rules also differ from the 1993 proposal with respect to the types of changes that are to be processed as minor modifications. The 1993 proposal had provided for certain "replacements" of equipment to be processed as minor modifications; as discussed above, these provisions are superseded by the proposed new rules for reconstructions at N.J.A.C. 7:27-22.24A.

The proposed new rules also delete provisions which would have inappropriately allowed two other types of changes as minor modifications. The USEPA commented that allowing stack height increases which violate the USEPA's Good Engineering Practices (GEP) stack height rule and changes which would result in a violation of this chapter would have conflicted with Part 70 or other USEPA regulations. Consequently, these errors have been corrected in the proposed new rules.

Significant modifications—N.J.A.C. 7:27-22.24

Significant modification procedures are used when a proposed change to a permitted facility does not qualify as an administrative amendment, change to an insignificant source operation, seven-day notice change, or minor modification. Changes that constitute significant modifications involve significant emissions increases or other consequential changes to the operating permit. Therefore, the level of review is more thorough for a significant modification than for other types of changes to permitted facilities.

Under the 1993 proposal, a significant modification required the same type of two-step review that had been proposed for minor modifications. Though the permittee would have applied simultaneously for a preconstruction permit and a significant modification, the application for the significant modification would not have been considered administratively complete until the Department approved the preconstruction permit. This process suffered from the same problems discussed above under minor modifications; accordingly, the proposed new rules for significant modifications establish a process with a single completeness review that corresponds to the revised process for minor modifications.

The types of changes that must be made as significant modifications are listed in N.J.A.C. 7:27-22.24(b). With one exception, this list is essentially the same as the list in the 1993 proposal, with minor clarifications. The only substantial difference is that under the 1993 proposal, any change that did not qualify as an administrative amendment, seven-day notice change or minor modification would be treated as a significant modification. Under the proposed new rules, changes that do not specifically qualify for processing under any provision of N.J.A.C. 7:27-22.20 through 22.24 will be treated as a minor modification, unless Part 70 specifically requires otherwise. This approach reduces the potential number of significant modifications and is consistent with Part 70.

The other changes that must be made as significant modifications are discussed below. All of these changes involve significant emissions increases or other consequential changes. Requiring these changes to be processed as significant modifications is consistent with Part 70. The Department does not intend to expand the USEPA's requirements for significant modifications through this rule. However, when the USEPA's requirements are phrased in general terms, the Department has attempted to describe more specifically the types of changes covered by these general terms.

Under the CAA and Part 70, any change that would be a "modification under . . . Title I" must be processed as a significant modification. The proposed new rules specifically list the types of changes that are subject to this requirement. The changes include those that would cause the facility to be subject to requirements of the emission offset rule at N.J.A.C. 7:27-18, or Federal regulations for NSPS, NESHAPs, PSD or visibility requirements. In addition, a change that would constitute a "modification" under any of these State or Federal regulations must be made as a significant modification.

The USEPA also requires that if an existing Federally enforceable operating permit requires continuous emissions monitoring, a change to a non-continuous method must be processed as a significant modification. In addition, a change must be processed as a significant modificiation if it relaxes a federally enforceable compliance plan (for example, by providing more time to attain compliance).

Other types of changes that must be made as significant modifications include case-by-case determinations of emission limits or other specific standards in a State or Federal rule, such as a facility-specific RACT determination under N.J.A.C. 7:27-19; the relocation of a temporary facility to a site that is not already authorized in the operating permit, if air quality simulation modeling or risk assessment is required under N.J.A.C. 7:27-22.8; changes that enable a facility to avoid an applicable requirement, such as an early reduction of HAP emissions under N.J.A.C. 7:27-22.26 and 22.34; and certain changes of a type that could normally be made through a minor modification or seven-day notice, but do not qualify for either of those procedures.

To apply for approval of a significant modification, the permittee would submit an application that contains the information required in the application for the initial operating permit. However, some of this information would be relevant only to that initial application and would not be relevant to the modification; the application need not include that information.

If a significant modification involves construction, reconstruction or modification of a source operation, the permittee is required to demonstrate that the newly constructed, reconstructed or modified source operation will incorporate advances in the art of air pollution controlfor the air contaminants emitted. N.J.A.C. 7:27-22.24(c); see also N.J.A.C. 7:27-22.3(dd) and (ee), and N.J.A.C. 7:27-22.35. The same requirement applies to minor modifications. In addition, the modification would cause a significant increase in emissions, the modification would be subject to the emissions offset rules at N.J.A.C. 7:27-18.

Reconstruction—N.J.A.C. 7:27-22.24A

A reconstruction involves the replacement of components of a source with components operating on the same engineering principles, at a fixed capital cost that exceeds both of the following thresholds: 50 percent of the fixed capital cost of replacing the entire source, and $80,000 (adjusted for inflation). A replacement that exceeds both of these thresholds requires a change to an operating permit. N.J.A.C. 7:27-22.24A determines whether that change can be made as an administrative amendment or as a minor or significant modification.

The proposed $80,000 threshold for reconstructions is an increase from the $20,000 level in subchapter 8. This increase is in response to the recommendations of the rule development working group. The working group had recommended that no approval should be required for routine replacements of relatively minor equipment or control apparatus, and suggested $80,000 as a level of investment appropriate to this approach.

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The Department recognizes that many reconstructions do not require the level of preconstruction review involved in a significant modification or even a minor modification. Subchapter 8 already provides that equipment or control apparatus (or a substantial component of either one) can be replaced without any preconstruction review, if the replacement is installed less than five years after the original preconstruction permit was issued. N.J.A.C. 7:27-8.3(c)5. The proposed new rules incorporate that provision from subchapter 8 for reconstructions. Under the proposed new rules, a reconstruction can be accomplished through an administrative amendment if the reconstruction occurs less than five years after the original preconstruction approval was issued for the source operation, and the reconstruction would not result in an increase in actual emissions.

Other reconstructions must be made through the procedures for minor or significant modifications, depending on whether Federal reconstruction requirements are triggered. One example of a reconstruction requiring a significant modification would be when Federal reconstruction requirements (such as those in NSPS or NESHAPs) are triggered. Any other reconstruction that cannot be classified as either an administrative amendment or significant modification would be treated as a minor modification.

When an emergency makes reconstruction of a process unit or control apparatus necessary, and the reconstruction would trigger a minor or significant modification, the proposed new rules enable the permittee to reconstruct and operate the unit at risk for 90 days. This provision provides the permittee with time to apply for Department approval of the reconstruction. The emergency situations covered by this provision are sudden and unforeseeable events beyond the permittee's control, requiring immediate corrective action to restore normal operations. An example of such an emergency would be a fire which destroys a process unit which the person seeks to replace and operate immediately.

Department-initiated operating permit modifications—N.J.A.C. 7:27-22.25

As required by Part 70, the proposed new rules at N.J.A.C. 7:27-22.25 list the conditions under which an operating permit will be reopened or revoked prior to its expiration, and establish the procedure for reopening or revoking all or part of the permit. N.J.A.C. 7:27-22.25 was part of the 1993 proposal, but it was reserved along with other provisions regarding changes to operating permits. The proposed new rules reflect minor clarifications of the 1993 proposal in response to public comments, but do not differ substantially from the 1993 proposal.

Before reopening or revoking the permit, the Department must give the permittee 30 days' notice. The Department may specify a shorter time to protect human health or welfare or the environment. Within that time period, the permittee may apply for any necessary permit modifications or take other actions to resolve the issue that made reopening or revocation necessary. If the permittee takes the necessary action, the Department need not revoke or reopen the permit.

It is normally to the permittee's advantage to take the necessary action. The permittee may be ale to take the necessary action through an administrative amendment, seven-day notice, or minor modification. If it becomes necessary for the Department to act, any modification will be processed as a significant modification. The significant modification will include review by the public and the USEPA as well as a public hearing.

Under N.J.A.C. 7:27-22.25(e), the Department must reopen and modify the operating permit if the term of the permit has at least three years remaining and the permittee fails to revise the operating permit to incorporate new or changed applicable requirements. The proposed new rules incorporate the three-year minimum (which had not been included into the 1993 proposal) to be equivalent to Part 70. Reopening is also necessary for a facility that includes one or more units affected by the acid deposition control provisions of Title IV of the CAA, regardless of the remaining term of the permit, if the permittee fails to incorporate new or changed applicable requirements into the operating permit.

In addition, the operating permit will be reopened if either the Department or the USEPA determines that the operating permit contains a material mistake or that inaccurate statements were made in establishing emissions standards, limitations or other provisions or condition of the permit. The permit must also be reopened if the USEPA requires reopening, or if either the Department or the USEPA determines that the permit must be revised to assure compliance with applicable requirements.

Reopening is not necessary if a requirement will not become applicable until after the expiration date of the permit. Such applicable requirements will be incorporated into the permit renewal. However, if the original operating permit or any of its provisions and conditions have been extended pursuant to an application shield, a reopening and modification of the operating permit will still be necessary.

As required by Part 70, the Department will take final action on a modification to incorporate an applicable requirement no later than 18 months after the promulgation of the applicable requirement. This complies with the intent of Part 70 that applicable requirements be expeditiously incorporated into operating permits.

While the reopening is pending, the permittee shall continue to comply with the operating permit during the time provided in any compliance schedule. After that time expires, the permittee shall comply with the new or changed applicable requirement as well as the provisions of the current operating permit.

The Department may revoke an operating permit if the Department determines that the continued use of any part of the facility pursuant to the permit poses a potential threat to public health, welfare, or the environment, or that emissions from the facility would unreasonably interfere with the enjoyment of life and property. This provision is currently included in subchapter 8, and is consistent with the Air Pollution Control Act.

If the USEPA notifies the Department that the USEPA has found cause to revoke or to reopen and modify an operating permit, the Department must propose to determine whether revocation or reopening and modification is appropriate. The Department must provide the proposed determination to the USEPA within 90 days after receiving the notice, unless the USEPA extends the deadline to allow time to obtain additional information from the permittee. The Department will forward the proposed determination to the USEPA and to the permittee.

If the USEPA approves the proposed determination, or fails to act on it within 90 days after receipt, the Department must provide the permittee with notice of the reopening; after the time specified in the notice expires, the Department must then proceed to reopen the permit unless the permittee takes the necessary action to revise the operating permit. If the USEPA objects to the proposed determination, the Department has received 90 days to resolve the objection.

MACT and GACT standards for major HAP facilities—N.J.A.C. 7:27-22.26 and 22.34

N.J.A.C. 7:27-22.26 briefly describes how the Federal maximum achievable control technology (MACT) and generally available control technology (GACT) standards will be incorporated into operating permits. Sources that may be affected by those standards are those that may emit hazardous air pollutants (HAPs).

When the Department first proposed this provision in the 1993 proposal, the USEPA had not yet promulgated its MACT and GACT rules. The Department therefore did not adopt this provision. The proposed new rule at N.J.A.C. 7:27-22.26 is consistent with the MACT and GACT rules that the USEPA has promulgated since the 1993 proposal, and with guidance provided by the USEPA interpreting Part 70. The USEPA has indicated that the proposed new rules include the MACT and GACT provisions that are necessary for interim approval of the State's operating permit program. As the USEPA promulgates additional MACT and GACT rules, the Department will amend N.J.A.C. 7:27-22.26 to reflect them. Since the Federal rules are complex, the Department intends to publish and periodically update a guidance document which will describe the Federal requirements in detail.

N.J.A.C. 7:27-22.26 will not take effect until the USEPA grants interim approval of the New Jersey's operating permit program. After that date, any facility that is subject to a MACT or GACT standard will be required to apply for an initial operating permit or update an existing operating permit in accordance with the schedules and procedures set forth elsewhere in this subchapter.

Some area sources conceivably could be required to obtain operating permits solely to incorporate the MACT and GACT standards. The Department will exempt such sources from subchapter 22 if the USEPA gives states the option of exempting them when it promulgates MACT or GACT standards. Alternatively, the Department will defer subjecting these sources to subchapter 22 if the USEPA authorizes the deferment.

The 1990 amendments to the CAA require a case-by-case MACT determination for major HAP facilities in certain circumstances. A "major HAP facility" is a major facility (or part of a major facility) that has the annual potential to emit at least 10 tons of any hazardous air

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pollutant (HAP), 25 tons of HAPs collectively, or any lesser quantity that the USEPA establishes in a regulation. A case-by-case MACT determination is required if the major HAP facility is constructed, reconstructed or modified before the USEPA promulgates a MACT standard that would apply. A case-by-case MACT determination would also be required if the USEPA does not promulgate an applicable MACT standard within 18 months after the deadline published by the USEPA in the Federal Register.

The USEPA requires owners and operators of facilities subject to MACT or GACT standards to comply with those standards, regardless of the status of the facility's operating permit. However, the 1990 amendments to the CAA do provide that the deadline for compliance can be extended based on the following:

- Reducing a source's HAP emissions before the applicable MACT or GACT standard is promulgated;
- Commencing construction or reconstruction of a source after the USEPA proposes the applicable MACT or GACT standard, but before the standard is promulgated as a final rule; or
- Installing best available control technology (BACT), or attaining the lowest achievable emission rate (LAER) before the USEPA promulgates the applicable MACT or GACT standard.

The proposed new rules provide for extensions in all of these circumstances. See N.J.A.C. 7:27-2.34, 7:27-22.26(i), and 7:27-22.26(j), respectively.

Under the proposed new rules at N.J.A.C. 7:27-22.34, the Department may extend by six years a facility's deadline for complying with a MACT or GACT standard. To be eligible for the extension, the facility must reduce its emission of HAPs before the USEPA promulgates the applicable standard. A reduction of 95 percent of all particulate HAP emissions, or 90 percent of all non-particulate HAP emissions, is required to qualify for the extension. The reduction must be in comparison to a representative base year that is no earlier than 1987. These requirements are consistent with 40 CFR Part 63.

The extension is not available with respect to any health-based standard that the USEPA promulgates under section 112(f) of the Clean Air Act.

Emissions trading—N.J.A.C. 7:27-22.28A and B

Economic incentive programs such as emissions trading are an essential part of the Department's strategy for reducing emissions of air contaminants to meet the requirements of the 1990 CAA amendments. These programs can produce significant environmental and economic benefits.

To facilitate the use of operating permits as an administrative mechanism for establishing emission trading programs, the Department is proposing to amend the emissions trading provisions at N.J.A.C. 7:27-22.28. As adopted in the 1993 proposal, N.J.A.C. 7:27-22.28 provided only intra-facility emissions trading. That is, the 1993 proposal allowed trading of emissions increases and decreases only among source operations within the same facility.

The proposed amendments eliminate the "intra-facility" constraint on emissions trading, and contemplate trading between facilities as well as within a single facility. Specifically, these amendments recognize four types of emissions trading programs that could be implemented through the operating permit: (1) facility-specific emissions averaging programs with a Federally enforceable emissions cap; (2) emissions trading programs approved in advance by the Department on a case-by-case basis; (3) emissions averaging programs established in N.J.A.C. 7:27; and (4) other emissions trading programs promulgated in N.J.A.C. 7:27.

Facility-specific emissions averaging programs with a Federally enforceable emissions cap would be initiated through an application for an initial or renewal operating permit or a significant modification. The requirements for such a program appear in N.J.A.C. 7:27-22.28B. A permittee would obtain approval for a facility-specific emissions averaging program pursuant to the procedures for approving applications for initial or renewal operating permits or significant modifications. Those procedures include an opportunity for public comment.

Emissions trading programs approved in advance by the Department on a case-by-case basis would also be initiated by application from the affected permittee or permittees. The USEPA currently requires that the State obtain USEPA approval of such a program, as a case-by-case revision of the State Implementation Plan (SIP). Once approved, the program could be incorporated into or attached to the operating permits of the affected facilities as a seven-day notice change.

Some emissions averaging programs already exist in N.J.A.C. 7:27. Examples include the mathematical combination provisions of N.J.A.C. 7:27-9.2(d), and the emissions averaging provisions of N.J.A.C. 7:27-19.6. The Department expects to add other trading programs through rulemaking. Once the USEPA approves a rule containing an averaging or trading program as a revision to the SIP, a permittee may implement the program as a seven-day-notice change.

Several concurrent initiatives are expected to result in the development of such programs. Two regional trading initiatives are being jointly sponsored by the Northeast States for Coordinated Air Use Management (NESCAUM) and the Mid-Atlantic Regional Air Management Association (MARAMA). The Emission Reduction Credit (ERC) Demonstration Program is developing recommendations for principles of an open-market emission reduction trading system. The NO_x Emission Budget Task Force is developing model rules for a regional NO_x budget system, pursuant to an Ozone Transport Commission (OTC) Memorandum of Understanding. This budget system would affect large sources of NO_x emissions, primarily utility power plants.

The USEPA is also supporting trading initiatives. In a recent letter, USEPA Assistant Administrator Mary Nichols stated that the USEPA would propose model trading rules by June, 1995.

The Department is also studying the Netherlands' approach to pollution control. This approach is based on long-range planning and voluntary commitments by industry to meet emission reduction targets. Emissions trading is being considered as a mechanism that industries could use to achieve the targets more flexibly and cost-effectively, should such a long-range planning strategy be adopted in New Jersey.

Operating permit renewals—N.J.A.C. 7:27-22.30

N.J.A.C. 7:27-22.30 establishes the procedures for renewal an operating permit. The Department had included a renewal provision in the 1993 proposal, but did not adopt it because public comments and the Department's own review of the provision indicated that some significant changes were necessary.

As in the 1993 proposal, the proposed new rules require that a renewal application must be submitted at least 12 months before the existing permit's expiration in order to be considered timely. To qualify for the application shield under N.J.A.C. 7:27-22.7, the application must be administratively complete before that deadline. Accordingly, the proposed new rules encourage (but do not require) applicants to submit their renewal applications at least 15 months before the existing permit expires. The additional three months will provide time to identify deficiencies in the application and resolve them in time to preserve the application shield. Without an application shield, authorization to operate the permitted facility terminates upon the expiration of its operating permit.

N.J.A.C. 7:27-22.30(d) lists the required contents of a renewal application. The renewal application must summarize all of the changes that have been incorporated into the operating permit through administrative amendments, minor modifications, or significant modifications during the past term of the operating permit.

The renewal application must also list any additional changes to the operating permit that the permittee seeks to include in the operating permit. For these additional changes, the application must include the same information that would have been required to make the change outside of the renewal process as an administrative amendment, seven-day-notice change, minor modification, or significant modification. If the change is a significant modification, it cannot be made until the Department approves the renewal. If the change can be processed as an administrative amendment, seven-day-notice change, or minor modification, at-risk construction or operation is authorized only to the extent authorized under N.J.A.C. 7:27-22.20, 22.22, and 22.23, respectively.

The permittee is also required to submit draft operating permit conditions that reflect any changes made to the facility or its operations through a seven-day-notice change since the operating permit was last issued. If the Department approves the proposed conditions, they will be incorporated into the renewed permit.

Renewal applications are subject to the same requirements for public comment and EPA comment set forth at N.J.A.C. 7:27-22.11 and 22.12.

The 1993 proposal has also required the applicant to describe the proposed methods that would be used to determine the actual emissions of each significant source operation for purposes of preparing emission statements under N.J.A.C. 7:27-21. The proposed new rules delete this requirement and make it voluntary, because Part 70 does not require that this information be included in the renewal application. Similarly,

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under the proposed new rules at N.J.A.C. 7:27-22.8, air quality simulation modeling and risk assessment are voluntary for existing source operations; therefore, the proposed new rules also make it voluntary to include this information in the renewal application.

N.J.A.C. 7:27-22.31 Fees

The Department previously reproposed rules for annual operating permit fees. That reproposal was published in the January 3, 1995 New Jersey Register. 27 N.J.R. 22(b). This proposal does not address annual operating permit fees.

This proposed new rule incorporates preconstruction fees from subchapter 8 into subchapter 22, to follow the incorporation of the substantive preconstruction requirements of subchapter 8 into subchapter 22. In incorporating the subchapter 8 fees, the Department has also narrowed their scope. The preconstruction fees will apply only to minor modifications and significant modifications; within those categories, the fees will be restricted to items of equipment or control apparatus that are parts of significant source operations involved in the modification.

Only fees from subchapter 8 associated with facility changes are proposed to be incorporated. Subchapter 22 will not include any fee corresponding to subchapter 8 operating certificate fees.

The one additional fee established in the proposed amendments concerns registrations for general permits under N.J.A.C. 7:27-22.14. The fee is $250.00 per registration, which is the same fee charged for analogous types of activities under existing rules.

Social Impact

In the 1993 proposal, the Department stated that it expects subchapter 22 to have a positive social impact. The Department therefore expects that a positive social impact will result from the reproposal of provisions of subchapter 22 which had been proposed in 1993 but not adopted. This impact is discussed below, in addition, changes to subchapter 22 since the 1993 proposal will also have positive social impacts which are discussed below.

Subchapter 22 will have a positive social impact by consolidating the paperwork needed to regulate approximately 25,000 stacks at approximately 900 facilities in New Jersey. Under existing rules, each item of new or altered equipment requires a separate operating certificate. In addition, the emission limits, monitoring, recordkeeping and reporting requirements to which a facility is subject are currently found in multiple documents, including permits, certificates, laws and regulations. A subchapter 22 operating permit will address both of these problems. A single operating permit will cover all equipment at a facility, and will include all state and federal requirements applicable to the facility. This consolidation will make it easier for the registered public to understand and comply with the entire air pollution control program. Furthermore, it will provide the information necessary for the Department to accurately assess compliance or noncompliance at a facility.

Subchapter 22 will also increase public involvement in the air pollution control permitting process. Each draft operating permit and significant modifications will be subject to public comment and the possibility of a public hearing. This opportunity for public participation will result in more democratic decision-making based on complete information. In addition, the prospect of public scrutiny of a company's air pollution control practices may improve compliance.

The proposed amendments regarding public comment on applications for minor modifications and other changes will enhance this positive social impact. The Department already has the discretion to seek or obtain public input on minor modifications and other changes, but the proposed amendments will guide the exercise of that discretion. As a result, the Department's decisions to seek or obtain public input will be more predictable. In addition, the requirement for the Department to explain its decisions will make those decisions more credible.

The operating permit will also be helpful in future efforts to encourage facility-wide permitting and "multi-media" pollution reduction. The proposed new operating permit program takes a major step toward a comprehensive understanding of a facility's total air pollution potential by gathering into one document all information regarding a facility's sources of air contaminant emissions.

Material differences from the description in the 1993 proposal are discussed below, as are the significant social impacts of the provisions that had not been discussed in the 1993 proposal.

Consistency with Part 70. As discussed in the summary above, several provisions of the 1993 proposal were more stringent than necessary to comply with Part 70. The proposed amendments make virtually all of subchapter 22 consistent with the requirements of Part 70 (See the Executive Order No. 27 Analysis below for a discussion of the remaining differences). These changes have a positive social impact because they serve the goal of Executive Order No. 27 regarding New Jersey's competitive advantage.

"State-of-the-art" requirements. The revisions to the rules regarding "state-of-the-art" or "SOTA" requirements will have a positive social impact. Under the revisions, the resources of the Department and of permittees will not be diverted to relatively small source operations. Instead, those resources will be focused on the more complex sources with the largest potential emissions. The use of SOTA technical manuals and general permits will also increse the predictability and certainty of SOTA.

Most of the SOTA rule revisions are already reflected in changes to the Department's air pollution control permit practices. However, codifying these practices in a regulation will preserve them against possible future changes in management philosophy, and ensure that the social benefits continue to accrue.

Procedures for changes to operating permits. The proposed new rules refine the relationship among administrative amendments, seven-day notice changes, and minor or significant modifications, so that the level of review is tied to the extent of the potential environmental impact. Under the proposed new rules, the applicability of each of these procedures generally depends on the increase in emissions (if any) or ambient effect (if any) that will result from a change in the operating permit. This refinement will have a positive social impact, because it will focus the resources of the Department and of permittees on the types of changes that may have significant environmental and health impacts.

The provision allowing many reconstructions to be handled as administrative amendments (rather than as minor or significant modifications) will have a similarly positive social impact, for the same reasons.

Technical manuals. The proposed amendments regarding the publication of additional technical manuals will have a positive social impact. The opportunity for public input on draft air pollution control technical manuals will improve the technical manuals because they will reflect issues andpoints of view that otherwise might not have been considered as effectively. In addition, the opportunity for public participation in the development of the technical manuals will make them more credible as regulatory tools.

Research and development operations. The proposed amendments regarding the applicability of subchapter 22 to research and development operations will have a positive social impact. The proposed amendments correct a problem that could have unintentionally and unnecessarily subjected some research and development operations to subchapter 22. That correction will increase flexibility for research and development activities in New Jersey.

Seperation of subchapters 8 and 22. The separation of subchapters 8 and 22 will have a positive social impact. Compliance will be siplified because permittees will need to consult only subchapter 22 after an operating permit is issued.

Emissions trading. The proposed amendments to the emissions trading provisions will have a positive social impact. The proposed amendments will remove potential impediments to implementing an emissions trading system needed to maximize New Jersey's flexibility in meeting air quality goals in the most cost-effective manner.

Economic Impact

As discussed in the 1993 proposal, the Department expects subchapter 22 to have a substantial economic impact. However, much of that impact is attributable to fees that will be paid by the holders of operating permits; as discussed above, the fee provisions of subchapter 22 have been reproposed separately and are not part of this proposal. In addition, much of the remaining economic impact on facilities subject to subchapter 22 will arise from future State and Federal rules regarding air pollution controls, testing, monitoring, recordkeeping and reporting. When those future rules are proposed, the agency responsible for promulgating the rules (which may be the Department, the USEPA or another agency) will discuss their economic impacts.

Other economic impacts of subchapter 22 are discussed below.

A permit applicant will incur costs to prepare and submit a comprehensive operating permit application. The costs include administrative and technical activities. Examples of administrative activities include personnel training, attendance at Department meetings, coordination with the Department, filing, legal assistance and the actual paperwork involved in assembling a comprehensive operating permit. Examples of

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technical activities include calculating emissions, preparing technical descriptions of operations, and selecting monitoring measures.

The Department estimates that the cost of administrative activities will average approximately $5,000. Many facilities will incur costs close to this average. However, the cost could vary greatly from this average for a very large facility with many complex source operations, or for a very simple facility.

The cost of the technical activities will increase as the number of source operations at the facility and their copmlexity increase. These costs will vary greatly depend upon circumstances particular to each facility. The cost of the technical activities could range from $100.00 to $10,000 per significant source operation, depending on the complexity of the source operation and the applicable requirements. However, the Department believes that the vast majority of the source operations at facilities affected by subchapter 22 are not complex. The Department estimates that these facilities will incur costs toward the low end of the range, approximately $500 per significant source operation. There are an average of 30 significant sources per major facility in New Jersey. For these facilities the average cost for the technical work required to prepare and submit an operating permit application is therefore estimated to be $15,000.

Adding the estimated typical administrative costs and technical costs, the Department estimates that the total cost to prepare the permit application will typically average $20,000. The Department expects that it will be significantly less expensive to prepare an application for renewal of an operating permit, because the renewal application will focus on changes to the facility. The cost for a typical renewal application is estimated to be approximately $10,000.

For most operating permit modifications, the administrative cost is expected to range from $100 to $250 per source operation. This cost is approximately the same as the cost for the same activity under current rules. The previously discussed streamlining of the preconstruction permit process will reduce some costs. However, the need to respond to public comments on proposed modifications (which did not previously require an opportunity for public comment) will increase costs in some cases.

In developing subchapter 22, the Department sought to minimize the economic impact on the regulated community while meeting the mandates of Part 70 and protecting air quality. For example, the seven-day notice provision will result in fewer permit changes that require preconstruction permits. This flexibility will make it less costly to accomplish many changes at facilities covered by operating permits.

The Department expects that the same economic impacts will result from the reproposal of provisions of subchapter 22 which had been proposed in 1993 but not adopted. In addition, changes to subchapter 22 since the 1993 proposal will also have economic impacts, which are discussed below.

Incorporation of requirements from subchapter 8. The proposed amendments and new rules incorporate many requirements from subchapter 8 that existing rules already apply to subchapter 22 facilities. This incorporation does not have an economic impact.

Consistency with Part 70. Several provisions of subchapter 22 originally had been more stringent than necessary to comply with Part 70. The proposed amendments and new rules make those provisions consistent with part 70.

The Department expects these changes to have a positive economic impact. Requiring New Jersey businesses to comply with requirements that are more stringent than required under Federal law can put those businesses at a disadvantage with their competitors in states with less stringent requirements. Eliminating that potential competitive disadvantage will have a positive economic impact, but the dollar value of that impact cannot be estimated with any certainty.

"State-of-the-art" requirements. The revisions to the rules regarding "state-of-the-art" or "SOTA" requirements will have a positive economic impact. The costs that permittees incur in making SOTA demonstrations are reduced by the use of general permits and SOTA technical manuals for all but the most complex sources with the largest potential emissions. The amount of that reduction depends upon the circumstances of the particular permitted facility and the nature of the source operation in question. The Department's costs in performing case-by-case SOTA reviews are also reduced by these changes.

The Department will incur additional costs in developing the general permits and SOTA technical manuals. While the Department's net costs will increase over the next two years as a result, its costs should decrease thereafter when the initial SOTA technical manuals are complete and reduce the number of case-by-case technology reviews.

Research and development operations. The proposed amendments regarding the applicability of subchapter 22 to research and development operations will have a positive economic impact upon the owners and operators of R&D operations that otherwise could have been unintentionally and unnecessarily subject to subchapter 22. The extent of that impact depends upon the costs that the owner or operator would have incurred to include the R&D operations in an operating permit.

Public comment on applications. The Department expects the proposed amendments regarding public comment on applications to have no economic impact. As discussed above in the summary, it is rare for a modification to generate any public interest. In virtually all of the few cases that generate any public interest, the Department can consider comments and incorporate them into its decision without any delay of that decision or any expense to the permittee. Conceivably, under the proposed amendments the Department could require a public hearing on an application of extremely active public interest; however, it is unlikely that the proposed amendments would increase a permittee's costs in that circumstance, because the Department's existing practice is to hold a public hearing when merited by significant public interest.

Fugitive emissions. The proposed amendments to N.J.A.C. 7:27-22.2 specify certain types of facilities for which fugitive emissions are relevant to subchapter 22's applicability. This limit on the relevance of fugitive emissions will have a positive economic impact for types of facilities that are not specified in the rule. Owners and operators of those types of facilities will not incur costs to determine fugitive emissions, and may also avoid the need to comply with subchapter 22. The extent of the avoided costs depends upon the nature of the particular facility and its emissions, and on the cost of complying with subchapter 22 that the facility otherwise would have had to incur.

At-risk construction and installation. The proposed amendments to N.J.A.C. 7:27-22.3 allow for at-risk construction and installation of equipment and control apparatus before preconstruction approval is issued, except when restricted by Federal law. Owners and operators of facilities eligible for at-risk construction and installation may avoid costs that would have been associated with the need to await preconstruction approval. However, additional costs may result if the at-risk construction is not consistent with the final permit.

Electronic submission of applications. The proposed amendments contain two alternatives for electronic submission of applications and other documents: one which made electronic submission mandatory, and one which made it optional. If electronic submission is mandatory, then applicants and permittees who lack the computer hardware and software needed for electronic submission will incur additional costs to submit documents. The Department does not expect that these persons will need to incur the full cost of the necessary computer hardware and software: assistance in electronic filing can be expected to be available at lower cost.

Air quality simulation modeling and risk assessment. The proposed new rules make air quality simulation and risk assessment voluntary when an applicant is applying for an initial or renewal operating permit. Compared to the 1993 proposal which made this work mandatory in some circumstances, the proposed new rules will have a positive economic impact on those applicants and permittees who choose to avoid the cost of these evaluations. There is no increased cost for the required modeling for emissions increases, because this is an existing requirement.

Changes to operating permits. The revisions to N.J.A.C. 7:27-22.20 through 22.24 will have a positive economic impact compared to the 1993 proposal. The Department expects that more changes will be eligible for processing as administrative amendments and seven-day notice changes. The cost of processing in this manner will normally be nominal, resulting in a cost savings.

Environmental Impact

In the 1993 proposal, the Department stated that it expects subchapter 22 to have substantial positive environmental impacts. The Department therefore expects that positive environmental impacts will result from the reproposal of provisions of subchapter 22 which had been proposed in 1993 but not adopted. These impacts are discussed below. In addition, changes to subchapter 22 since the 1993 proposal will also have environmental impacts which are discussed below.

Subchapter 22 should improve compliance with existing standards, for the following reasons. First, subchapter 22 will require a permit for many

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facilities or source operations which have not been regulated previously by permits. This will better inform owners and operators of these facilities of the air pollution control requirements that apply to their equipment. Second, subchapter 22 will also require periodic monitoring, recordkeeping and reporting of emissions-related information. This will aid owners and operators and the Department in assessing and improving compliance with existing regulations and standards. Third, public participation will provide an opportunity for the public to identify and recommend changes to operations or permit conditions that could result in further environmental improvements. Finally, locating all requirements applicable to a facility in a single permit will assist the Department's inspectors and enforcement staff in identifying and addressing noncompliance. Improved compliance will tend to reduce emissions of air contaminants, and therefore will have a positive environmental impact.

Subchapter 22 also includes incentives for early reduction of hazardous air pollutant (HAP) emissions. These incentives will promote pollution prevention technologies to reduce activities and raw materials which generate HAP emissions resulting in a further positive environmental impact.

The operating permit will serve as the vehicle for the Department to administer significant parts of the federal air toxics program, the new acid rain program and required reductions in nonattainment air contaminant emissions. Consequently, the operating permit program will assist in obtaining and verifying these reductions.

The proposed amendments and new rules will enhance the positive environmental impact of subchapter 22, by streamlining the administration of the permit process and easing unnecessary burdens on the regulated community. Streamlining the Department's work will minimize the diversion of its limited resources, and maximize the resources that can be focused on significant air contaminant emissions and on protecting the quality of New Jersey's air. Easing unnecessary burdens on the regulated community maximizes the resources available for compliance with important regulatory requirements.

Several provisions of subchapter 22 originally had been more stringent than necessary to comply with Part 70. The proposed amendments and new rules make those provisions consistent with part 70. The Department expects these changes to have no material environmental impact.

Some environmental impact may result from the changes to the requirements for air quality simulation modeling and risk assessment. Postponing risk assessments for existing facilities does forgo potential environmental improvements in advance of the Federal deadlines for risk assessment. However, in order to balance the environmental and economic impacts of risk assessment, the Department is limiting risk assessment at this time to source operations for which there would be an increase in toxic emissions. This is consistent with the practice in most other states.

Executive Order No. 27 Analysis

In accordance with Governor Whitman's Executive Order 27(1994), the Department has reviewed the standards and requirements of the proposed amendments and new rules, and compared them with the standards and requirements imposed by the CAA and Part 70. As discussed below, the proposed amendments and new rules contain some requirements that narrowly exceed the requirements imposed by Federal law.

Air quality simulation modeling. The Federal Prevention of Significant Deterioration (PSD) rules and the new source review provisions of the CAA require an air quality impact analysis (which includes air quality simulation modeling) in specified circumstances. N.J.A.C. 7:27-22.8(a) reflects that requirement. However, N.J.A.C. 7:27-22.8(a)4 also requires air quality simulation modeling in certain narrow circumstances that possibly would not be covered at this time by the Federal requirements.

The State rule would require air quality simulation modeling when a new or modified source's emissions may have the potential to cause one of the following:

- A violation of State or Federal air quality standards;
- An increase in concentrations of an air contaminant by more than an amount specified in the Federal PSD rules or State emission offset rules; or
- Air pollution, as that term is defined in the Air Pollution Control Act.

The third criterion is more stringent than corresponding Federal requirements, because it can include risk assessments to ensure that the facility reduces cancer risks and acute toxic risks posed by increases in emissions of hazardous air pollutants (HAPs). The CAA does not mandate risk evaluation for another five to 13 years, depending on the source category. At that time, the USEPA's risk requirements will cover both new and existing source operations. This proposal would not mandate such evaluations for existing source operations, but would continue New Jersey's current procedures for risk assessments for projected increases in emissions of certain HAPs. The Department would also retain the ability to conduct its own in-house risk assessments from existing facilities, to determine if air contaminants may be causing adverse health effects; N.J.A.C. 7:27-5 enables the Department to take appropriate action to address such health effects.

Air quality simulation modeling is a longstanding requirement incorporated from other State rules that have included it for as much as 10 years. In the Department's experience, residents who may be affected by a facility's emissions demand this type of analysis, because the analysis provides a measure of assurance that the residents' health is protected. That same assurance can help to address potential local opposition to construction or expansion of a facility, which might otherwise hinder the project. Most importantly, the analysis enables the applicant to identify and reduce risk as part of the design of the operation. Typically, the design can reduce risk by changing the location and height of the stack, changing raw materials, or reducing emissions.

The total cost of exceeding the Federal requirement is small. Air quality simulation modeling is infrequently required under State rules in situations where Federal law would not require it as well; in those situations, there is almost always a demand for this analysis by potentially affected residents. The cost of air quality simulation modeling is negligible when risk screening tools are used, and can range between $5,000 and $20,000 when the applicant uses a consultant to prepare a more refined analysis. Given the few additional situations in which only the State rule and not the Federal rule would require it, the total cost of those additional simulations is justified by the ability to respond to the public's need for this information and the ability to avoid significant new risks that would otherwise go undetected.

Applicability—fugitive emissions. N.J.A.C. 7:27-22.2 contains a minor difference with Part 70 as it currently exists. The difference concerns the consideration of fugitive emissions for sources in ozone nonattainment areas. The consideration of fugitive emissions is relevant for determining whether certain specified categories of sources have the annual potential to emit 25 tons of VOCs or NO_x and are therefore subject to operating permit requirements.

However, amendments to Part 70 anticipated from the USEPA would make the State and Federal rules identical. The Department has made N.J.A.C. 7:27-22.2 consistent with the USEPA's advice regarding its intent to amend Part 70.

Regulatory Flexibility Analysis

As required by the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has evaluated the reporting, recordkeeping and other compliance requirements that the proposed amendments and new rules impose upon small businesses. The Regulatory Flexibility Act defines "small business" as "any business which is a resident in this State, independently owned and operated and not dominant in its field, and which employs fewer than 100 full-time employees." Based upon this definition, the Department estimates that approximately 300 of the facilities subject to subchapter 22 are owned or operated by small businesses.

As described in the 1993 proposal, the Department has taken measures to minimize the adverse impact of subchapter 22 upon small businesses. One of these measures is the use of general operating permits for some categories of sources that are frequently owned and operated by small businesses. General permits will minimize the complexity and cost of preparing an operating permit application. In addition, at the request of groups of small businesses in the same industry, the Department may be able to issue general permits for their common types of sources, thus minimizing the complexity of the permit application and its costs.

New Jersey has also established a Small Business Technical Assistance Program. This program will be expanded to assist small businesses in determining applicable requirements of subchapter 22 and completing their operating permit application. The Small Business Technical Assistance Program (SBAP) was created because many small businesses lack the technical expertise and financial resources necessary to evaluate and determine the appropriate mechanisms for compliance with air pollution regulations. The major tasks that the SBAP is intended to provide to small businesses are: access to technical expertise and compliance information; access to methods of pollution prevention and accidental release prevention and detection; timely notification of their rights; and assistance in understanding their obligations to comply with

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the Federal and State regulations. The SBAP will accomplish these tasks by developing guideline documents and providing the information through an electronic bulletin board, a telephone hotline, and workshops/seminars.

The proposed amendments and new rules include additional measures to reduce further the impact of subchapter 22 on the regulated community, including small businesses. As discussed in the Summary above, these measures include expanding the class of changes that can be made through a "seven-day notice" rather than through a permit modification; eliminating provisions that were more stringent than Part 70 required; streamlining the "State-of-the-art" review procedure; and expanding opportunities for at-risk construction and installation of equipment and control apparatus. The reduced compliance costs associated with these changes are discussed in the economic impact statement above.

Some small businesses may be adversely affected if subchapter 22 requires electronic submission of permit applications and other documents. As noted above, some small businesses may lack the computer hardware and software needed for electronic submission. To address the possible concerns of small businesses with mandatory electronic submission, the Department has proposed it as one of two alternatives. Under the other alternative, electronic submission would be voluntary. Based on public comments (including comments from small businesses), the Department will determine which alternative should be adopted.

Based on the measures described above, the Department believes that subchapter 22 as amended will minimize any adverse impact on small business to the extent allowed by Federal and State law, without compromising the Department's obligation to protect public health, safety and welfare.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

7:27-22.1 Definitions

Words and terms, when used in this subchapter, have the meanings given below unless defined at N.J.A.C. 7:27-1.4 or the context clearly indicates otherwise.

. . .

"Air quality impact analysis" means a procedure entailing the use of air quality simulation modeling, for determining whether air contaminant emissions will result in ambient air concentrations that exceed standards established for the protection of human health and welfare and the environment.

. . .

["Alternative operating scenario" means a plan for operating a facility or a portion thereof in a way, or according to a method, or using methods or processes, which are different from other methods or processes used at the facility, or portion thereof. An alternative operating scenario may be incorporated into a permit through issuance of an initial operating permit, minor modification, significant modification, or authorized through a seven-day-notice.]

"Ambient air monitoring" means the measurement of concentrations of one or more air contaminants in the outdoor atmosphere.

"Applicable Federal requirement" means any of the following standards, provisions or requirements as they apply to any source operation in a facility which is subject to this subchapter. Applicable requirements include requirements that have been promulgated or approved by EPA through rulemaking but have future-effective compliance dates:

1. Any standard or other requirement provided for in New Jersey's approved SIP (or FIP, if applicable), including any approved revisions;

2. [Any provision or condition of any preconstruction permit issued pursuant to N.J.A.C. 7:27-8, except for any prohibition of nuisance odors pursuant to N.J.A.C. 7:27-8.8(f)] **Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under Title I of the CAA, including Parts C or D;**

3.-12. (No change.)

. . .

"Applicable State requirement" means any provision, standard or requirement in any statute or rule, as it applies to **air contaminant emissions from** a facility or source operation which is subject to this subchapter, except an applicable Federal requirement. This term includes requirements that have been promulgated by the Department and submitted to EPA as SIP revisions but have not yet been approved by EPA.

. . .

"Area source" [(Reserved)] **means, in respect to MACT and GACT standards, any stationary source of hazardous air pollutant that is not a major HAP facility.**

. . .

"Banking" means the reservation of creditable emission reductions, pursuant to N.J.A.C. 7:27-18, for future use as emission offsets.

"BACT" or "best achievable control technology" has the meaning set forth for this term in the PSD regulations at 40 CFR [52.2.1] **52.21**.

. . .

"Category I" means the class of modification application for the following types of significant source operations:

1. Any gasoline vapor recovery system constructed, installed, or operated at any gasoline dispensing facility; this does not include gasoline vapor recovery systems at bulk terminals;

2. Any woodworking equipment including, but not limited to, saws, planers, and sanders, that has particulate control apparatus which achieves a minimum collection efficiency of 99 percent, and the particulate control apparatus serving the equipment;

3. Any metal working equipment including, but not limited to, welders, grinders, and drill presses, that has particulate control apparatus that achieves a minimum collection efficiency of 99 percent, and the particulate control apparatus serving the equipment.

4. Fossil fuel burning equipment used only for the burning of liquid or gaseous commercial fuel and having a designed heat input rate of less than 10 million BTU per hour; this does not include any equipment used for the burning of coal or other solid fuel, non-commercial fuel, crude oil or process by-products in any form;

5. Stationary storage tanks which have a capacity of less than 20,000 gallons and which are used for the storage of liquid substances and any control apparatus serving such tanks; this does not include any tank used to store a substance which is a TXS;

6. Emergency diesel generators with less than 10 megawatts of electrical output that operate less than 500 hours per year;

7. Any tank, reservoir, container or bin that is used for the storage of solid particles and has particulate control apparatus that achieves a minimum collection efficiency of 99 percent and the particulate control apparatus serving the equipment; this does not include any tank, reservoir, container or bin that is used for the storage of any TXS;

8. Enclosed stationary solid material handling equipment using pneumatic, bucket or belt conveying systems that have particulate control apparatus that achieves a minimum collection efficiency of 99 percent and the particulate control apparatus serving the equipment; this does not include any equipment used to handle any material which is a TXS;

9. Any paint spray operation or other surface coating operation that has particulate control and that uses less than one half gallon of paint per hour and the particulate control apparatus serving the spray booth; this does not include any paint spray operation or surface coating operation which emits any TXS;

10. Any enclosed sandblasting equipment that has a control apparatus that achieves a minimum particulate control efficiency of 99 percent;

11. Any plastics grinding equipment; and

12. Any open top surface cleaner which is equipped with a cover and free-board chiller. This does not include any surface cleaner which uses a HAP.

"Category II" means the class of modification application for any type of significant source operation except those types which re defined above as belonging to Category I.

. . .

"Compliance schedule" means the portion of a compliance plan which fulfills the requirements of N.J.A.C. 7:27-[22.8(c)7ii]**22.9(c)5ii**.

. . .

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["De minimis emission threshold" means, in respect to the emission of air contaminants, the quantity of any air contaminant which does not exceed the applicable de minimis emissions level set forth in Table C or Table D at N.J.A.C. 7:27-8, Appendix I].

...

["Development" means investigations in a laboratory or pilot plant directed toward the structuring or establishment of methods of manufacture or of specific designs of salable substances, devices or procedures, based upon previously discovered facts, scientific principles or substances. Development shall not include production for sale of established products through established processes; nor shall it include production in plant, works or semi-works equipment for distribution through market-testing channels.]

...

"Draft general operating permit" means the version of a general operating permit which is developed by the Department and released for public input and an opportunity for a public hearing pursuant to N.J.A.C. 7:27-22.11. After receiving and considering the comments on the draft general operating permit, the Department will develop a proposed general operating permit for submittal to EPA for approval prior to issuing a final general operating permit.

...

"Effective stack height" means the distance to the plume center line from the ground as determined by adding the plume rise to the physical height of the stack.

...

"Environmental improvement pilot test" means a sampling and analytical program using prototype equipment or processes on a temporary basis for the purpose of collecting data necessary for the design of a full scale process to achieve an environmental improvement, or for the purpose of determining the feasibility of using the equipment or process for a particular environmental improvement.

...

"Exempt activity" means [any activity which is identified as an exempt activity pursuant to the requirements for application contents at N.J.A.C. 7:27-22.6(c).] **one of the following:**

1. Source operations which have no potential for emitting any air contaminant, including but not limited to:

i. Stationary storage tanks which are used for the storage of water or distillates of air; and

ii. Enclosed stationary material handling equipment using pneumatic, bucket or belt conveying systems from which no emissions of air contaminants occur;

2. Any of the following activities, if the activity supports the one or more production processes of the facility, and does not itself constitute a facility production process or a part thereof:

i. Office activities and the equipment and implements used therein, such as typewriters, printers, and pens;

ii. Interior maintenance activities and the equipment and supplies used therein, such as janitorial cleaning products and air fresheners; this does not include any cleaning of production equipment;

iii. Bathroom and locker room ventilation and maintenance;

iv. Copying and duplication activities for internal use and for support of office activities at the facility;

v. The activities of maintenance shops, such as welding, gluing, and soldering, performed indoors or outdoors;

vi. First aid or emergency medical care provided at the facility, including related activities such as sterilization and medicine preparation;

vii. Laundry operations that service uniforms or other clothing used at the facility;

viii. Architectural maintenance activities conducted to take care of the buildings and structures at the facility, including repainting, reroofing, and sandblasting;

ix. Exterior maintenance activities conducted to take care of the grounds of the facility, including lawn maintenance;

x. Food preparation to service facility cafeterias and dining rooms;

xi. The use of portable space heaters which reasonably can be carried and relocated by an employee; and

xii. Any laboratory hood used for research and development, quality assurance and quality control testing and sampling activities;

3. The engine of any vehicle, including but not limited to any marine vessel, any vehicle running upon rails or tracks, any motor vehicle, any forklift, any tractor, or any mobile construction equipment;

4. Storage tanks, reservoirs, containers, or bins used on any farm for the storage of agricultural commodities produced by or consumed in the farm's own operations. This does not include storage tanks, reservoirs, containers or bins used by distributors of agricultural commodities or by research facilities which develop products for use in agricultural production;

5. Potable water treatment equipment, not including air stripping equipment;

6. A storage tank maintained under a pressure greater than one atmosphere provided that any vent serving such storage tank has the sole function of relieving pressure under emergency conditions; or

7. Equipment which is used for the sole purpose of woodworking by sanding, drilling, cutting or planing, unpainted wood ow wood products, and which vents into a room.

...

"Federally enforceable" means any limitation or condition on operation, production, or emissions that can be enforced by EPA. These limitations and conditions that can be enforced by EPA include, but are not limited to, those established pursuant to:

1. Any standard of performance for new stationary sources (NSPS) promulgated at 40 CFR 60, or promulgated under 42 USC 7411;

2. Any national emission standard for hazardous air pollutants (NESHAP) promulgated at 40 CFR 61, 40 CFR 63, or promulgated under 42 USC 7412;

3. Any standard or other requirement provided for in a SIP that has been approved by EPA, or promulgated through rulemaking by EPA; **or**

4. Any permit **or order** issued pursuant to requirements established at 40 CFR 51, Subpart I **(including any preconstruction permit issued pursuant to N.J.A.C. 7:27-8 or N.J.A.C. 7:27-22)**; 40 CFR 52.21; 40 CFR 70; 40 CFR 71; **40 CFR 72.** [or

5. Any permit or order issued pursuant to requirements established under the Air Pollution Control Act, N.J.S.A. 26:2C-1 et seq., or this chapter, except to the extent that the permit or order includes any prohibition established solely pursuant to N.J.A.C. 7:27-8.8(f) or N.J.A.C. 7:27-5.]

...

"Final general operating permit" means the version of the general operating permit issued by the Department after completion of the procedures required by this subchapter for a draft general operating permit and a proposed general operating permit.

...

"General operating permit" means a standardized operating permit, which may be used to provide authorization to operate numerous similar source operations, groups of source operations, or facilities, each of which meets the applicability criteria set forth in the general operating permit, and is issued pursuant to the procedures in N.J.A.C. 7:27-[22.24]**22.14**.

...

"Insignificant source operation" means a source operation which is [included in the list of insignificant source operations set forth in the application contents requirements at N.J.A.C. 7:27-22. 6(e)] **smaller than the applicability levels for significant source operations and not an exempt activity.**

...

["Intra-facility emissions trading" means the averaging of emissions of a given air contaminant from two or more source operations within a facility, such that their total emissions collectively are less than a federally enforceable emissions cap.]

...

"Major Hazardous Air Pollutant (HAP) facility" means a major facility, or part thereof, which emits or has the potential to emit:

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1. Ten tons or more per year of any HAP;
2. Twenty five tons or more per year of any **combination of HAPs** [, collectively]; or
3. Such lesser quantity, or different criterion, as the EPA may establish by rule.

. . .

"Minor modification" means a change made at a permitted facility in accordance with N.J.A.C. 7:27-[23]**22.23**.

"Modification of a major HAP facility" [(Reserved)] **means, when used at N.J.A.C. 7:27-22.26, any physical change in, or change in the method of operation of, a major HAP facility, which:**

1. Increases the facility's actual emissions of any HAP by more than an amount established by EPA as de minimis for that HAP at 40 CFR 63; or

2. Results in the emission of any HAP not previously emitted, in more than the amount established by EPA as de minimis for that HAP at 40 CFR 63.

. . .

"NESHAP" means a National Emission Standard for a Hazardous Air Pollutant as promulgated under 40 CFR 63 **and 61**.

"New facility" means a facility which has not commenced operation as of the applicable date of the provision for which this term is being used.

. . .

"Operating permit" means a permit issued by the Department pursuant to this subchapter to authorize the use of one or more source operations from which air contaminants may be emitted. This term includes a general operating permit which is applicable facility wide, but does not include a general operating permit which applies only to a part of a facility (unless the general operating permit is itself incorporated into a facility wide operating permit). This term also includes an operating permit issued for a temporary facility; for a facility [,or part thereof,] subject to a MACT or GACT standard pursuant to N.J.A.C. 7:27-22.26; or for a component of a facility pursuant to N.J.A.C. 7:27-22.5[(i)]**(j)**.

"Operating scenario" means a plan for operating a facility or a portion thereof in a way, or according to a method, or using methods or processes, which are different from other methods or processes used at the facility, or portion thereof. An operating scenario may be incorporated into a permit through issuance of an initial operating permit, minor modification, significant modification, or authorized through a seven-day-notice.

. . .

"Potential to emit" means the maximum aggregate capacity of a source operation or of a facility to emit an air contaminant under its physical and operational design. Any physical or operational limitation on the capacity of a source operation or a facility to emit an air contaminant, including **any limitation on fugitive emissions as a result of any applicable requirement,** control apparatus, and restrictions on hours of operation or on the type or amount of material combusted, stored or processed, shall be treated as part of its design, if the limitation is Federally enforceable. [Fugitive] **Unless otherwise indicated, fugitive** emissions shall be included in the determination of potential to emit. However, the determination shall not include any banked emission reductions that are held by the owner or operator.

. . .

"Process unit" means a piece of equipment, or a group of pieces of equipment, used to produce a single intermediate or final product, or used to reach a single planned result. A process unit can operate independently of other equipment if supplied with sufficient feed or raw materials and sufficient storage facilities for the product. The storage and transfer of product or raw materials to and from the process unit are considered separate from the process unit for the purposes of making reconstruction determinations. Where several identical process units operate at the same facility, each producing a single product or result, each shall be considered a separate process unit for the purposes of a reconstruction determination. Product recovery equipment is considered part of a process unit, not a control apparatus.

. . .

"Proposed general operating permit" means the version of a general operating permit which is developed by the Department pursuant to N.J.A.C. 7:27-22.12, after receipt and consideration of public comments on the draft general operating permit. The Department forwards the proposed general operating permit to EPA for review, pursuant to the procedures at N.J.A.C. 7:27-22.12, prior to the issuance by the Department of the final general operating permit.

. . .

"Rate of production" means the quantity per unit of time of any process intermediate, product, by-product, or waste generated through the use of any [equipment,] **significant** source operation [,or a process].

"Raw material" means any input to a significant source operation, including fuels, but excluding heat and other forms of energy. Such inputs may include mixtures, composites, compounds, and elemental substances.

. . .

"Reconstruct" or "reconstruction" means the replacement of any portion of a process unit, or of control apparatus, with equipment or control apparatus which operates on the same engineering principles, if the fixed capital cost of replacing the portion exceeds both of the following amounts:

1. Fifty percent of the fixed capital cost that would be required to construct a comparable new process unit or control apparatus; and

2. $80,000, in 1995 dollars adjusted by the CPI.

. . .

["Research" means investigations directed toward the discovery of facts, scientific principles, reactions, or substances].

"Research and development facility" means any stationary source whose primary purpose is to conduct research and development into processes and products, including academic and technological research and development, where such source is operated under the close supervision of technically trained personnel and is not engaged in the manufacture of products for commercial sale in commerce, except in a de minimis manner.

. . .

"Significant net emission increase" means an emission increase of any air contaminant determined pursuant to the procedures set forth in N.J.A.C. 7:27-18.7 to be a significant net emission increase.

"Significant source operation" means any source operation which is [not an exempt activity or an insignificant source operation.] **one of the following:**

1. Equipment used in a manufacturing process involving a surface coating operation or graphic arts operation including, but not limited to, spray and dip painting, roller coating, electrostatic depositing, surface stripping or spray cleaning, from which direct or indirect emissions of air contaminants occur and in which the quantity of coating or cleaning material used in any source operation is equal to or greater than one half gallon in any one hour;

2. All unheated open top surface cleaners having a top opening of greater than six square feet (0.56 square meters);

3. All heated open top surface cleaners;

4. All conveyorized surface cleaners;

5. Equipment, in addition to that set forth in paragraph 2, 3, and 4 above, used in a process involving surface cleaning or preparation including, but not limited to, degreasing, etching, pickling, or plating, from which direct or indirect emissions of any air contaminant occur from a tank or vessel, the capacity of which is in excess of 100 gallons;

6. Equipment, used in a process, other than as set forth in paragraph 1, 2, 3, 4, and 5 above, from which direct or indirect emissions of any air contaminant occur and in which the combined weight of all raw materials, excluding air and water introduced into any one source operation is in excess of 50 pounds in any one hour;

7. Stationary storage tanks which have a capacity in excess of 10,000 gallons and which are used for the storage or liquids, except water or distillates of air, not including a storage tank maintained

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under a pressure greater than one atmosphere provided that any vent serving such storage tank has the sole function of relieving pressure under emergency conditions;

8. Stationary storage tanks which have a capacity of 2,000 gallons or greater and which are used for the storage of VOC having a vapor pressure or sum of partial pressures of 0.02 pounds per square inch absolute (one millimeter of mercury) or greater at standard conditions, not including a storage tank maintained under a pressure greater than one atmosphere provided that any vent serving such storage tank has the sole function of relieving pressure under emergency conditions;

9. Tanks, reservoirs, containers and bins which have a capacity in excess of 2,000 cubic feet and which are used for the storage of solid particles;

10. Stationary material handling equipment using pneumatic, bucket or belt conveying systems from which direct or indirect emissions of air contaminants occur;

11. Commercial fuel burning equipment having a heat input rate of 1,000,000 BTU per hour or greater to the burning chamber;

12. Any equipment used for the burning of noncommercial fuel, crude oil or process by-products in any form;

13. Any incinerator, except incinerators constructed, installed or used in one or two-family dwellings or in multi-occupied dwellings containing six or less family units, one of which is owner occupied;

14. Any waste or water treatment equipment which may emit air contaminants including, but not limited to, air stripping equipment, aeration basins, surface impoundments, lagoons, sludge tanks, dewatering equipment, soil cleaning equipment, conveying equipment, digesters, thickeners, flocculators, driers, fixation equipment, composting equipment, pelletizing equipment and grit classifying equipment. For water treatment equipment, the concentration in the water of any TXS must equal or exceed 100 parts per billion by weight or the total concentration in the water of VOC must equal or exceed 3,500 parts per billion by weight;

15. Equipment used for the purpose of venting a closed or operating dump, sanitary landfill, hazardous waste landfill, or other solid waste facility, directly or indirectly into the outdoor atmosphere including, but not limited to, any transfer station, recycling facility, or municipal solid waste composting facility;

16. Any source operation which has the potential to emit any TXS at a rate greater than 0.1 pounds per hour (45.4 grams per hour);

17. Any equipment required to have air pollution control apparatus pursuant to any applicable provision of N.J.A.C. 7:27-16;

18. Newspaper printing equipment from which direct or indirect emissions of air contaminants occur and in which the quantity of coating material used in any source operation is equal to or greater than one half gallon in any one hour.

. . .

"Source operation" means any process, or any identifiable part thereof, that emits or can reasonably be anticipated to emit any air contaminant either directly or indirectly into the outdoor atmosphere. A source operation may include one or more pieces of equipment or control apparatus. This **term does** not include the term "emissions unit" as defined at 40 CFR 70.2.

. . .

["Substantial component" means, in respect to replacement, any equipment or control apparatus, or any component of equipment or control apparatus, if:

1. The total fixed capital cost exceeds:

i. For Category I sources, $20,000 as calculated in 1989 dollars; or

ii. For Category II sources, 50 percent of the total fixed capital cost of replacement or $20,000 as calculated 1989 dollars, whichever is greater;

2. The equipment or control apparatus, or the component, is designated in the conditions of approval of the operating permit or preconstruction permit in effect as a substantial component.]

. . .

"Temporary facility" means a **major** facility which, by design, is intended to be operated at more than one location and which is relocated more than once in five years.

"Testing" means a procedure for the determination of the kind and amount of one or more air contaminants or air contaminant precursors present. This term includes, but is not limited to, sampling, sample custody, analysis, and reporting of findings.

. . .

7:27-22.2 Applicability

(a) This subchapter applies to any facility which is one of the following:

1. A facility which emits or has the potential to emit [(any determination of a facility's potential to emit shall include fugitive emissions, as defined at N.J.A.C. 7:27-22.1), in the aggregate, any air contaminant in an amount which equals or exceeds the following applicability levels:

i. Twenty-five tons per year of VOC or NO_x;

ii. Ten tons per year of lead;

iii. Ten tons per year of any HAP;

iv. Twenty-five tons per year of any combination of HAPs;

v. Such lesser quantity of any HAP as the EPA may establish by rule, pursuant to 42 USC 7412(a)(1), as a major HAP facility; or

vi. One hundred tons per year of any other air contaminant;] **a Hazardous Air Pollutant (HAP) in an amount which equals or exceeds the amounts listed in (a)1i through iv below. For the purposes of this paragraph, the calculation of potential to emit shall include fugitive emissions, as defined at N.J.A.C. 7:27-22.1.**

i. Ten tons per year of any HAP;

ii. Twenty-five tons per year of any combination of HAPs;

iii. Such lesser quantity of any HAP as the EPA may establish by rule, pursuant to 42 USC 7412(a)(1), as the threshold amount for a major HAP facility.

iv. Such quantity of any radionuclides as the EPA may establish by rule.

2. A facility which emits or has the potential to emit any of the air contaminants listed below in (a)2xxvii Table I, in an amount which equals or exceeds the threshold amount for that contaminant. For the purposes of this paragraph, the calculation of potential to emit shall include fugitive emissions only if the facility falls into one or more of the following categories:

i. Coal cleaning plants (with thermal dryers);

ii. Kraft pulp mills;

iii. Portland cement plants;

iv. Primary zinc smelters;

v. Iron and steel mills;

vi. Primary aluminum ore reduction plants;

vii. Primary copper smelters;

viii. Municipal incinerators capable of charging more than 250 tons of refuse per day;

ix. Hydrofluoric, sulfuric, or nitric acid plants;

x. Petroleum refineries;

xi. Lime plants;

xii. Phosphate rock processing plants;

xiii. Coke oven batteries;

xiv. Sulfur recovery plants;

xv. Carbon black plants (furnace process);

xvi. Primary lead smelters;

xvii. Fuel conversion plant;

xviii. Sintering plants;

xix. Secondary metal production plants;

xx. Chemical process plants;

xxi. Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

xxii. Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

xxiii. Taconite ore processing plants;

xxiv. Glass fiber processing plants;

xxv. Charcoal production plants;

xxvi. Fossil-fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input; or

xxvii. All other stationary source categories regulated by a standard promulgated under 42 U.S.C. 7411, Standards of Performance for New Stationary Sources. However, for a facility in this category,

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fugitive emissions need only be included when calculating the potential to emit those air contaminants which EPA has regulated for that stationary source category.

Table I

Air contaminant	Threshold level
Carbon Monoxide	100 tons per year
PM-10 100	tons per year
TSP	100 tons per year
Sulfur Dioxide	100 tons per year
Oxides of Nitrogen	25 tons per year
VOC	25 tons per year
Lead	10 tons per year
Any other Air Contaminant	100 tons per year

Recodify existing 2.-5. as **3.-6.** (No change in text.)

(b)-(c) (No change.)

(d) For the purposes of determining applicability pursuant to (a) above, an owner or operator may elect to treat [any part(s) of a facility, which part(s) is used solely for] **a** research and development operation[s], as a separate facility [in cases where the research and development facility has a two-digit SIC code which differs from the rest of the facility, and is not a support facility. If any research and development operations of a facility are treated separately for the purposes of (a) above, the emissions or the potential to emit of those operations may be considered separately from the emissions or potential to emit of the remainder of the facility.], **if the operation is used primarily for research and development or operated in compliance with air pollution control permits issued for the site, the Pilot Plant Permit Procedure, or the Laboratory Operations Permit Procedure published by the Department. For source operations whose primary function changes on an ongoing basis between manufacturing products for commercial use and research and development operations, the source operations may be considered part of a separate research and development facility only during the period of time when those source operations are being used for research and development purposes. Appropriate documentation shall be maintained at the facility to delineate when source operations are used for research and development purposes. If any research and development operation is treated separately for applicability purposes, the emissions or the potential to emit of the operation may be considered separately from the emissions or potential to emit of the remainder of the facility. If any research and development equipment is also used for other operations, the emissions from the equipment shall be calculated separately for each use of the equipment, such that only the emissions generated during research and development are included in the calculation of research and development emissions.**

(e) (No change.)

7:27-22.3 General provisions

(a) (No change.)

(b) The owner or operator of a facility subject to this subchapter shall ensure that no person shall use or operate any **significant** source operation at the facility without a valid operating permit for the facility, which covers the source operation.

(c) The owner or operator of a facility subject to this subchapter shall ensure that no air contaminant is emitted from any **significant** source operation [, group of source operations, or any other portion of the facility] at a rate, calculated as the potential to emit, that exceeds the applicable [de minimis emission level] **threshold for reporting emissions** set forth in Table [C] A or [D] B [at N.J.A.C. 7:27-8,] **in the** Appendix **to this subchapter, incorporated herein by reference**, unless emission of the air contaminant is authorized by the operating permit.

(d) A permittee shall ensure that any source operation[, equipment, or control apparatus] **and any other activity** covered by the operating permit, and all components connected to, attached to, or serving the source operation[, equipment or control apparatus,] are operated and maintained properly and according to the requirements of the operating permit.

(e) (No change.)

(f) Each owner and each operator of any facility, [equipment, or] source operation, **or activity** to which this subchapter applies is responsible for ensuring compliance with all requirements of this subchapter. If the owner and operator are separate persons, or if there is more than one owner or operator, each owner and each operator is jointly and severally liable for any fees due under this subchapter, and for any penalties for violation of this subchapter.

(g)-(i) (No change.)

(j) The expiration of an operating permit terminates the facility's right to operate **any significant source operation at the facility,** unless an application shield is in effect pursuant to N.J.A.C. 7:27-22.7.

(k) (No change.)

(l) The Department may issue an operating permit which allows a facility to operate under one or more [alternative] operating scenarios, pursuant to N.J.A.C. 7:27-22.27, or which authorizes [intra-facility] emissions trading, pursuant to N.J.A.C. 7:27-22.28. Each [alternative] operating scenario or any [intra-facility] emissions trading for which an applicant seeks approval shall be proposed in the application for the initial operating permit, **seven-day-notice change,** a minor modification, a significant modification, or a renewal, as appropriate. No change to an operating permit is required for any change in operation that is authorized by the operating permit pursuant to any approved [alternative] operating scenario or [intra-facility] emissions trading.

(m)-(n) (No change.)

[(o)-(p) (Reserved)]

(o) Any transfer of ownership or operational control of a facility covered by an operating permit, which would change the name or identity of the permittee for the facility, requires the transfer of the operating permit. An administrative amendment for such a transfer shall be submitted to the Department by the permittee prior to the transfer being made, in accordance with N.J.A.C. 7:27-22.20. No person to whom ownership or operational control is transferred shall commence operation at the facility until the application for the administrative amendment for the transfer has been received by the Department.

(p) Any approval for a change made at a facility subject to this subchapter, which constitutes a minor modification pursuant to N.J.A.C. 7:27-22.23 or a significant modification pursuant to N.J.A.C. 7:27-22.24, shall incorporate all applicable preconstruction requirements.

(q)-(r) (No change.)

(s) Except as otherwise provided in this subchapter, the submittal of any information or application by a permittee including, but not limited to, an application or notice for any change to the operating permit, including any administrative amendment, any minor or significant modification, renewal, a notice of a seven-day notice change, a notice of [planned changes or notice of] past or anticipated noncompliance, does not stay any operating permit condition, nor relieve a permittee from the obligation to **obtain other necessary permits and to** comply with all applicable Federal, State, and local requirements.

(t) (No change.)

(u) If an additional applicable requirement becomes applicable to the facility, or an applicable requirement which was previously applicable to the facility changes, the permittee shall act to have the new applicable requirement or the change incorporated into the operating permit, in accordance with the procedures set forth in [this subchapter] **N.J.A.C. 7:27-22.25.**

(v) (No change.)

(w) Except as provided in the permit shield provisions at N.J.A.C. 7:27-22.17, an operating permit does not relieve any person from the obligation to comply with all applicable provisions of this chapter, including preconstruction requirements under [N.J.A.C. 7:27-8] **this subchapter**, to obtain any other necessary authorizations from other governmental agencies, or to comply with all other applicable Federal, State, and local laws, rules or regulations.

(x) (No change.)

(y) [If the] **The owner or operator of any** facility [is in operation] **which contains equipment or control apparatus that is subject to**

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or preconstruction permit and operating certificate requirements under N.J.A.C. 7:27-8 shall continue to [, an applicant for an initial operating permit must] obtain, **maintain, and renew all preconstruction permits and operating certificates** [and, as applicable, renew all operating certificates] required pursuant to N.J.A.C. 7:27-8 until [the] **an** operating permit is issued [by the Department] **for the facility.**

(z) For a facility with an approved facility-wide permit issued under N.J.S.A. 13:1D-35 et seq., the facility-wide permit shall constitute the operating permit if:

1. EPA approves the Department's request (submitted to USEPA on September 16, 1994) to allow a facility-wide permit to constitute a facility's operating permit; and

2. The facility-wide permit was issued after the date of such EPA approval.

(aa) The provisions of N.J.A.C. 7:27-22.20, 22.22, 22.23, and 22.24, concerning modifications to operating permits, shall not apply to repair or maintenance of a significant source operation.

(bb) This subchapter shall not preclude the owner or operator of a facility from voluntarily treating an insignificant source operation as a significant source operation for the purposes of obtaining or modifying an operating permit. Treating an insignificant source operation in such a manner shall subject it to all of the requirements in this subchapter which apply to a significant source operation.

(cc) The Department shall deny an application for an initial operating permit, minor modification, significant modification, or renewal, if approval of the application would authorize a violation of any applicable requirement, or a contravention of other criteria established by the Department by rule or pursuant to technical manuals published with public input, to protect human health and welfare and the environment, unless the Department simultaneously approves a compliance schedule to achieve compliance.

(dd) The Department will deny an application for a minor modification or significant modification of an operating permit that constitutes construction, reconstruction, or modification unless the applicant shows, to the satisfaction of the Department, that the significant source operation covered by the proposed permit provisions incorporates advances in the art of air pollution control pursuant to N.J.A.C. 7:27-22.35, Advances in the art of air pollution control.

(ee) No person shall carry out, or allow to be carried out, any change designated in this subchapter as a minor modification or significant modification to any source operation unless the changed source operation incorporates advances in the art of air pollution control pursuant to N.J.A.C. 7:27-35, Advances in the Art of Air Pollution Control.

(ff) The Department may deny an application for an initial operating permit, minor modification, significant modification, or renewal, if the applicant fails to provide all information requested by the Department within 30 days after the request, or within a longer response period if approved in writing by the Department.

(gg) The Department may deny an application for an initial operating permit, minor modification, significant modification, or renewal, if the applicant fails to pay any monies due and owing to the Department, and those monies are related to the fees specified in N.J.A.C. 7:27-22.31.

(hh) The Department will deny an operating permit application, or modification to an operating permit, that includes a paint spray operation that is a significant source operation, unless at a minimum the operation is served by particulate control apparatus.

(ii) No person may construct, install, or change any source operation for which a minor modification or significant modification of the operating permit is required pursuant to this subchapter other than as described in N.J.A.C. 7:27-22.23 and 22.24, respectively. Full responsibility for adequate design and construction shall be with the person to whom the Department has issued the permit.

(jj) The Department may establish conditions of approval of any operating permit, administrative amendment, minor modification, or significant modification. In the event that a discrepancy exists between the information in an application and the conditions of its approval, the conditions of approval shall prevail.

(kk) The Department may withdraw its approval of an operating permit, minor modification, or significant modification if the person to whom the Department has issued the permit or modification:

1. Does not begin construction or installation within one year from the date of approval of the permit or modification; or

2. Discontinues construction or installation for a period of more than one year.

(ll) Any person who is subject to the provisions of this chapter and who fails to conform to its requirements may be subject to civil penalties in accordance with N.J.A.C. 7:27A-3 or criminal penalties pursuant to N.J.S.A. 26:2C-19 or both.

(mm) Any information which the Department needs to take into consideration in making a decision on an application shall be submitted to the Department for incorporation into the application prior to the Department making a decision on the application.

(nn) An affirmative defense to liability shall be available pursuant to the conditions of this section for penalties or other sanctions for violating certain provisions or conditions of an operating permit. The affirmative defense shall be available for a violation of a provision or condition of the operating permit only if:

1. The violation occurred as a result of an equipment malfunction, an equipment start-up or shutdown, or during the performance of necessary equipment maintenance; and

2. The affirmative defense is asserted and established as required by N.J.S.A. 26:2C-19.1 through 19.5 and any implementing rules.

(oo) Equipment or control apparatus may be installed at risk prior to preconstruction approval if:

1. Such installation is not required for compliance with a federal applicable requirement;

2. The installation does not violate a federal applicable requirement;

3. An administratively complete application has been received by the Department pursuant to the procedures at N.J.A.C. 7:27-22.23 or 22.24, at least seven days prior to the intended installation; and

4. A written notice of the intent to undertake the action has been received by the Department at least seven days prior to the commencement of the action.

(pp) No permittee shall test or operate air pollution control apparatus or process equipment that has been installed at risk, pursuant to (oo) above, until a minor modification or significant modification of the operating permit has been submitted and a preconstruction approval has been issued by the Department.

(qq) For a person seeking approval of an environmental improvement pilot test, as defined at N.J.A.C. 7:27-22.1, of air pollution control equipment or other environmental clean-up equipment, the Department will take final action on the application for preconstruction approval within 30 days of an administratively complete application. An administratively complete application shall meet all application contents requirements for a minor modification of the operating permit set forth at N.J.A.C. 7:27-22.23(f) and (g). The approval will be effective for 90 days, and may be renewed by application to the Department. The fee for an environmental improvement pilot test is set forth at N.J.A.C. 7:27-22.31.

7:27-22.4 General application procedures

(a) The procedures in this section apply to all applications **and notices** submitted to the Department pursuant to this subchapter. Specific procedures for initial operating permits, administrative amendments, seven-day-notice changes, minor modifications, significant modifications, and renewals can be found at N.J.A.C. 7:27-22.5, 22.20, 22.22, 22.23, 22.24, and 22.30, respectively.

[(b) (Reserved)

(c) If the applicant obtains prior written approval from the Department, an applicant may submit an application to the Department electronically, using predefined standards and information exchange protocols to be contained in the Department's Technical Manual on Electronic Transfer of Information, which will be available from the Department at the address listed at N.J.A.C. 7:27-22.3(t). This technical manual will specify a data dictionary and a file format, and any ANSI X12 compliant conventions required by the Department.]

(**Agency Note:** The Department is proposing two alternative provisions governing the electronic submission of applications. Each

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is set forth in two subsections, N.J.A.C. 7:27-22.4(b) and (c), shown below. The first alternative provision allows the applicant the option of submitting applications electronically. The second alternative provision mandates the electronic submission of all applications.)

FIRST ALTERNATIVE

(b) Any application or any notice of a seven-day-notice change shall be submitted to the Department on forms obtained from the Department at the address at N.J.A.C. 7:27-22.3(t), or in accordance with electronic data interchange (EDI) procedures established by the Department.

(c) An applicant may submit an application or notice to the Department electronically, using predefined standards and information exchange protocols to be contained in the Department's Technical Manual on Electronic Transfer of Information, which will be available from the Department at the address listed at N.J.A.C. 7:27-22.3(t). This technical manual will specify a data dictionary and a file format, and any ANSI X12 compliant conventions required by the Department.

SECOND ALTERNATIVE

(b) Any application for an initial operating permit, administrative amendment, minor modification, significant modification, or renewal, or seven-day-notice change shall be submitted to the Department electronically, in accordance with electronic data interchange (EDI) procedures established by the Department.

(c) Predefined standards and information exchange protocols for electronic data interchange (EDI) are contained in the Department's Technical Manual on Electronic Transfer of Information, available from the Department at the address listed at N.J.A.C. 7:27-22.3(t). This technical manual will specify a data dictionary and a file format, and any ANSI X12 compliant conventions required by the Department. END OF ALTERNATIVE PROVISIONS

(d) [Any application or notice shall be submitted to the Department at the address given in N.J.A.C. 7:27-22.3(t).] A copy of any application or notice submitted to the Department shall also be submitted to EPA at the following address, unless EPA waives the requirement for notice at 40 CFR 70.8, or determines that an application summary, with any relevant portion of the permit application, may be submitted in lieu of the complete application.

United States Environmental Protection Agency, Region II
Air Compliance Branch
26 Federal Plaza, Room 500
New York, New York 10278

(e) An applicant for an initial operating permit[,] **or** operating permit renewal [or significant modification] is encouraged to submit an application to the Department no less than 90 days prior to the applicable application deadline set forth at N.J.A.C. 7:27-22.5[,] **or** 22.30, [and 22.24,] respectively.

(f) (No change.)

7:27-22.5 Application procedures for initial operating permits

(a) (No change.)

(b) The owner or operator of a facility subject to this subchapter shall submit a timely and administratively complete application for an initial operating permit. To be considered timely, an administratively complete application for an initial operating permit shall be submitted to the Department no later than the applicable deadline established in this section. An applicant for an initial operating permit is encouraged to submit the application to the Department no less than 90 days prior to the applicable application deadline set forth in this section. Within 30 days of receipt of an application, the Department will issue a letter detailing any deficiencies in respect to administrative completeness in the application, thereby providing the applicant the opportunity to correct the deficiencies prior to the complete application deadline listed at (c) below. **An application shall be deemed administratively complete if the Department does not notify the applicant, within 60 days of its receipt of the application, that additional information is required.**

(c) For [any facility which commences operation prior to the applicable deadline at (c)3 below] **an existing facility subject to this subchapter**, the applicable deadline for submitting an administratively complete application for an initial operating permit is the earliest deadline below which applies to the facility:

1.-2. (No change.)

3. For all other facilities, by the deadline in the table below as determined by the facility's primary SIC code**, as registered with the New Jersey Secretary of State:**

SIC Code	Complete Application deadline	Suggested Early Submittal
2000 through 2086	8/15/95	5/15/95
2088 through 2199	8/15/95	5/15/95
4900 through 4910	8/15/95	5/15/95
4911(1)	8/15/95	5/15/95
4912 through 4939	8/15/95	5/15/95
6400 through 6999	8/15/95	5/15/95
8300 through 9999	8/15/95	5/15/95
4911(2)	11/15/95	8/15/95
4200 through 4399	11/15/95	8/15/95
5900 through 6399	11/15/95	8/15/95
7000 through 7199	11/15/95	8/15/95
7500 through 8299	11/15/95	8/15/95
0000 through 1299	5/15/96	2/15/96
1400 through 1999	5/15/96	2/15/96
3200 through 3599	5/15/96	2/15/96
4000 through 4199	5/15/96	2/15/96
4400 through 4499	5/15/96	2/15/96
4800 through 4899	5/15/96	2/15/96
5300 through 5499	5/15/96	2/15/96
1300 through 1399	11/15/96	8/15/96
2700 through 2799	11/15/96	8/15/96
2900 through 2999	11/15/96	8/15/96
3600 through 3999	11/15/96	8/15/96
4500 through 4799	11/15/96	8/15/96
7300 through 7499	11/15/96	8/15/96
2200 through 2599	5/15/97	2/15/97
3000 through 3199	5/15/97	2/15/97
5000 through 5299	5/15/97	2/15/97
5500 through 5899	5/15/97	2/15/97
7200 through 7299	5/15/97	2/15/97
2087	11/15/97	8/15/97
2600 through 2699	11/15/97	8/15/97
2835 through 2899	11/15/97	8/15/97
2800 through 2834	5/15/98	2/15/98
4940 through 4999	5/15/98	2/15/98

(1) If the facility is located in Atlantic, Burlington, Gloucester, Hudson, Hunterdon, Salem, Union, Camden, Monmouth, Sussex, or Warren County.

(2) If the facility is located in Bergen, Cape May, Cumberland, Essex, Mercer, Middlesex, Ocean, Morris, Passaic, or Somerset County.

(d)-(e) (Reserved)

(f) For a new facility [that has not commenced operation as of the applicable deadline set forth in (c) above] **subject to this subchapter**, the deadline for submitting [the] **an initial operating permit** application is [12 months after commencing operation.] **the later of the following:**

1. The applicable deadline set forth at (c) above; or

2. Twelve months after the new facility commences operation.

(g) A new facility subject to this subchapter may either obtain preconstruction and operating approval pursuant to N.J.A.C. 7:27-8 or such facility may elect to obtain both preconstruction and operating permit approval by the submittal and approval of an operating permit application pursuant to this subchapter prior to construction of the facility.

[(g)]**(h)** For an existing facility that becomes subject to this subchapter through a change to the facility or to any source operation, or to the use thereof, the applicable deadline for submitting

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the application for an initial operating permit is [12 months after the new or changed source operation commences operation.] **the later of the following:**

1. The applicable deadline set forth at (c) above; or

2. Twelve months after the new or changed facility commences operation.

[(h)]**(i)** For a facility that becomes subject to this subchapter through a change to any applicable requirement, or creation of a new applicable requirement,[other than a MACT or GACT standard,] the applicable deadline for submitting the application for an initial operating permit, ***if no deadline is specified in the new requirement,*** is [12 months after the effective date of the new applicable requirement, unless a different application deadline is specified in the text of the new requirement.] **the later of the following:**

1. The applicable deadline set forth at (c) above; or

2. Twelve months after the effective date of the new applicable requirement.

[(i)]**(j)** (No change in text.)

[(j) The owner or operator shall provide a copy of the administratively complete application for an initial operating permit to the EPA within 30 days of the determination that the application is administratively complete, unless EPA has determined under 40 CFR 70.8 that an application summary, with any relevant portion of the permit application, may be provided to EPA in lieu of the entire application.]

7:27-22.6 [Application] **Operating permit application** contents

(a) (No change.)

(b) [(Reserved)] **The required contents of an application for authorization to operate under a general operating permit, an administrative amendment, a minor modification, a significant modification, or a renewal of an operating permit are not set forth in this section, but rather are set forth at N.J.A.C. 7:27-22.14, 22.20, 22.23, 22.24, and 22.30, respectively. Requirements for submitting a notice of a seven-day-notice change are set forth at N.J.A.C. 7:27-22.22.**

(c) Any source operation at a facility subject to this subchapter shall be included in the facility's application for an operating permit, except for exempt activities **as defined at N.J.A.C. 7:27-22.1.** [A source operation shall be an exempt activity only if it is:

1. Not subject to any applicable requirement; and

2. One of the following types of source operations:

i. Source operations which have no potential for emitting any air contaminant, including but not limited to:

(1) Stationary storage tanks which are used for the storage of water or distillates of air; and

(2) Enclosed stationary material handling equipment using pneumatic, bucket or belt conveying systems from which no emissions of air contaminants occur;

ii. Any of the following activities, if the activity supports the one or more production processes of the facility, and does not itself constitute a facility production process or a part thereof:

(1) Office activities and the equipment and implements used therein, such as typewriters, printers, and pens;

(2) Interior maintenance activities and the equipment and supplies used therein, such as janitorial cleaning products and air fresheners; this does not include any cleaning of production equipment;

(3) Bathroom and locker room ventilation and maintenance;

(4) Copying and duplication activities for internal use and for support of office activities at the facility;

(5) The activities of maintenance shops, such as welding, gluing, and soldering, performed indoors or outdoors;

(6) First aide or emergency medical care provided at the facility, including related activities such as sterilization and medicine preparation;

(7) Laundry operations that service uniforms or other clothing used at the facility;

(8) Architectural maintenance activities conducted to take care of the buildings and structures at the facility, including repainting, reroofing, and sandblasting;

(9) Exterior maintenance activities conducted to take care of the grounds of the facility, including lawn maintenance;

(10) Food preparation to service facility cafeterias and dining rooms;

(11) The use of portable space heaters which reasonably can be carried and relocated by an employee;

(12) Laboratory hoods used for research and development, quality assurance and quality control testing and sampling activities.

iii. The engine of any vehicle, including but not limited to any marine vessel, any vehicle running upon rails or tracks, any motor vehicle, any forklift, any tractor, or any mobile construction equipment;

iv. Storage tanks, reservoirs, containers, or bins used on any farm for the storage of agricultural commodities produced by or consumed in the farm's own operations. This does not include storage tanks, reservoirs, containers or bins used by distributors of agricultural commodities or by research facilities which develop products for use in agricultural production;

v. Potable water treatment equipment, not including air stripping equipment.]

(d) All source operations which are not exempt [pursuant to (c) above] **as defined at N.J.A.C. 7:27-22.1 and are significant or insignificant source operations** shall be included in a facility's application for an operating permit. Source operations shall be classified as either significant or insignificant, [in accordance with (e) below] **as defined at N.J.A.C. 7:27-22.1.** Different types and amounts of information are required for significant and insignificant source operations in the application for an operating permit.

(e) In an application, an owner or operator may claim a source operation to be an insignificant source operation [if the source operation is:] **as defined at N.J.A.C. 7:27-22.1.**

[1. Not subject to an applicable requirement;

2. Not listed in N.J.A.C. 7:27-8.2(a) or listed in N.J.A.C. 7:27-8.2(b), and not an exempt activity per 22.6(c). This includes all equipment listed at N.J.A.C. 7:27-8.2(a) or (b), regardless of its exempt or non-exempt status under the preconstruction permit program.]

(f) An application for an initial operating permit shall include all information required by the application form, the instructions accompanying the application form, and the applicable completeness checklist(s) for the application. This shall include, but is not limited to, the following:

1. (No change.)

2. For the source operations proposed to be classified as insignificant source operations pursuant to (d) or (e) above, the following information:

i. (No change.)

ii. An estimate of the total emissions from all insignificant source operations, listed separately for each criteria pollutant; **and**

iii. A listing of applicable requirements which generally apply to insignificant source operations at the facility;

3. For each **significant** source operation at the facility which will be subject to the operating permit, [other than exempt activities or those listed in (e) above as proposed insignificant source operations,] information including but not limited to the following:

i.-ii. (No change.)

iii. Identification of any stack or chimney which serves the source operation and specification of:

(1) (No change.)

(2) Any stack designation assigned [at] **by** the facility for [any] **the** stack or chimney; and

iv. (No change.)

4. A general description of each of the facility's production processes and products, identified by SIC Code, in sufficient detail to determine which applicable requirements apply to the facility. This description shall set forth for each production process:

i.-ii. (No change.)

iii. A general description of the operating scenario used to produce the product(s) or intermediate product(s), and a description of any [alternative] operating scenarios which may be used to

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produce the same product(s) or intermediate product(s). Such description of an [alternate] operating scenario shall be prepared pursuant to N.J.A.C. 7:27-22.27;

5. The following information pertaining to emissions at the facility:

i. For each significant source operation, each air contaminant that it may emit and its potential to emit that air contaminant, including any [fugitive] **non-captured** emissions, in tons per year, and any other units, for example pounds per hour, required to verify compliance with any applicable requirement. If the source operation's potential to emit a given air contaminant does not exceed the applicable [de minimis] **threshold for reporting** emissions [threshold] set forth in Table [C] **A** or [D] **B** [of N.J.A.C. 7:27-8,] **in the** Appendix **to this subchapter**, the air contaminant need not be included;

ii. For the facility, each air contaminant, if any, emitted as fugitive emissions and not associated with any source operation; the cause of that air contaminant being emitted as fugitive emissions; and a reasonable estimate of the facility's fugitive emissions of that air contaminant, in tons per year, and any other units required to verify compliance with any applicable requirement. However, if the facility's potential to emit a given air contaminant as fugitive emissions does not exceed the [maximum exempt emissions] **applicable** threshold **for reporting emissions** set forth in Table [C] **A** or [D] **B** [of N.J.A.C. 7:27-8,] **in the** Appendix **to this subchapter**, the information required by this paragraph need not be given in respect to that air contaminant;

iii.-ix. (No change.)

6. For each significant source operation at the facility or, if applicable, for each group of source operations or for the facility as a whole, information pertaining to air pollution control requirements as follows:

i.-ii. (No change.)

iii. For each applicable requirement, each provision of the applicable requirement which sets forth a maximum allowable emissions limitation, a limitation on operation affecting emissions, or a work practice standard[s] affecting emissions applicable to the facility;

iv.-v. (No change.)

vi. If the owner or operator seeks to have, pursuant to N.J.A.C. 7:27-22.3(m), the operating permit include an alternative emission limit for any significant source operation or any group of significant source operations, a demonstration that:

(1) The **proposed** alternative emissions limit is allowed in the SIP;

(2) The proposed alternative emissions limit is equivalent to, or more stringent than, that contained in an applicable requirement; and

(3) The **proposed** alternative emissions limit is quantifiable, accountable, enforceable, and based on replicable procedures;

7.-9. (No change.)

10. A statement that a copy of the application, **or a summary of the application with any relevant portion of the permit application as determined by EPA under 40 CFR 70.8,** has been sent to EPA [or, if so requested by the Department, summaries of the application have been so submitted, in order to provide notice to the EPA]; and

11. (No change.)

(g) Any applicant who seeks an operating permit authorizing the operation of a production process in one or more alternative modes shall propose these modes as [alternative] operating scenarios, in the application for an operating permit or significant modification, pursuant to N.J.A.C. 7:27-22.27. If the Department approves one or more [alternative] operating scenarios as part of an operating permit, the production process may be operated in any of the [approved] modes **specified in the approved operating permit**, and may be changed between those modes, without modification of the operating permit or notification to the Department.

(h) Any applicant who seeks an operating permit authorizing [intra-facility] emissions trading pursuant to N.J.A.C. 7:27-22.28 shall propose the [intra-facility] emissions trading in an application for an initial operating permit. An applicant may propose emissions trading for more than one group of source operations at the facility.

(i)-(m) (No change.)

(n) [(Reserved)] **If an applicant for an initial operating permit seeks to have a compliance extension for a MACT or GACT standard incorporated into the operating permit, the applicant shall demonstrate in the application, pursuant to N.J.A.C. 7:27-22.34, that sufficient early reductions of HAP emissions have been achieved.**

7:27-22.8 [(Reserved)] **Air quality simulation modeling and risk assessment**

(a) An applicant for an initial operating permit for a new major facility, or for a minor modification or significant modification to an existing operating permit, shall conduct air quality simulation modeling in accordance with (c) below if:

1. The application is subject to PSD air quality impact analysis requirements set forth at 40 CFR 52;

2. The application is subject to the air quality impact analysis requirements set forth at N.J.A.C. 7:27-18.4;

3. The application includes relocation of a temporary facility to a site not specifically authorized in the operating permit, and air quality simulation modeling or risk assessment was required for the location(s) authorized in the operating permit; or

4. The application includes source operations which, based on screening procedures published in technical manuals by the Department, have the potential to cause any of the adverse air quality effects listed in (b)1 through 4 below.

(b) The air quality simulation modeling shall be used to determine whether the potential to emit proposed in the permit application may cause:

1. A violation of any New Jersey Ambient Air Quality Standard (NJAAQS) or National Ambient Air Quality Standard (NAAQS);

2. An exceedance of a Prevention of Significant Deterioration (PSD) increment as defined in 40 CFR 52;

3. An increase in the ambient air concentration that equals or exceeds the significant air quality effect level, as set forth in Table 1 of N.J.A.C. 7:27-18.4(a), in a nonattainment area for any air contaminant; or

4. Air pollution as defined in P.L. 1954 c.212 (N.J.S.A. 26:2C-1 et seq.).

(c) The air quality simulation modeling shall be conducted using procedures published in technical manuals by the Department and in accordance with a protocol approved in advance by the Department. The protocol shall document how the air quality simulation modeling is to be conducted and how the results of the analysis are to be presented to the Department. The protocol shall be prepared in accordance with the Department's technical manuals on Air Quality Modeling (technical manual 1002) and Risk Assessment (technical manual 1003), available at the following address:

New Jersey Department of Environmental Protection
Map Sales and Publications Office
CN 417
Trenton, New Jersey 08625-0417
Telephone: (609) 777-1039

(d) An applicant not subject to (a) above may voluntarily perform air quality simulation modeling and risk assessment for existing source operations and submit these to the Department, to be made available as part of the public review process for applications for initial operating permits or renewals.

1. Performance of voluntary modeling and risk assessment should be considered by the applicant if the facility's potential to emit any hazardous air pollutant exceeds the thresholds contained in the Department's technical manual for Risk Assessment for Operating Permits (technical manual 1004), available at the address in (c) above.

2. Guidance on conducting air quality simulation modeling and risk assessment is available in the Department's technical manual for Risk Assessment for Operating Permits (technical manual 1004), available at the address in (c) above.

3. An applicant for an initial operating permit or the renewal of an operating permit may voluntarily prepare a risk assessment based on ambient air quality monitoring of actual levels of hazardous air pollutants, in lieu of an assessment based on air

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quality simulation modeling. Guidance on conducting air monitoring is available at the following address:

New Jersey Department of Environmental Protection
Office of Air Quality Management
CN 418
Trenton, New Jersey 08625-0418
Attention: Air Monitoring
Telephone: (609) 292-0138

(e) Any new or revised technical manuals referenced in this section will be subject to public input prior to finalization.

7:27-22.11 Public comment

(a) (No change.)

(b) The Department will provide a public comment period on each draft operating permit **and each draft general operating permit**, during which the Department will accept written comments on the draft [operating] permit. The public comment period will be specified in the notice published pursuant to (c) **and (d)** below, and shall be at least 30 days.

(c) (No change.)

(d) The Department will provide public notice of the opportunity for public input on each draft general operating permit. The notice will include:

1. Proposed criteria for the types and sizes of source operations that may be covered by the general operating permit;

2. Proposed conditions of construction or operation, including monitoring, recordkeeping, and reporting requirements, for persons who obtain this general operating permit; and

3. The public comment information listed in (c)4 through 7 above.

[(d)]**(e)** The Department will publish the notice for each draft operating permit in a newspaper of general circulation in the area where the facility which is the subject of the application is located and will mail the notice to persons on a mailing list developed by the Department, including to persons who request in writing to be on the mailing list. **The Department will publish the notice for each draft general operating permit in the New Jersey Register to ensure that the notice is published Statewide.** The Department may also provide additional notice by using any other means the Department finds appropriate for assuring adequate notice to the public of the opportunity for public comment.

[(e)]**(f)** Whenever there is a significant degree of public interest, the Department will hold a public hearing on the draft operating permit **or draft general operating permit**. The Department may schedule a public hearing and include it in the notice of opportunity for public comment pursuant to (c) **or (d)** above or, if the Department does not schedule a hearing, any person may request that the Department hold a public hearing on [a] **the** draft [operating] permit. A request for a public hearing shall be submitted in writing to the Department no later than the published date of the close of the comment period, and shall include a statement of issues to be raised at the public hearing. The issues raised shall be relevant to the draft [operating] permit under review by the Department.

[(f)]**(g)** (No change in text.)

[(g)]**(h)** If in response to a request for a public hearing, the Department schedules a public hearing on a draft operating permit **or draft general operating permit**, the close of the public comment period shall be at 5:00 P.M. on the second State business day following the date of the public hearing unless a later date is specified in the notice provided pursuant to [(f)] **(g)** above. The Department may further extend the comment period by announcing the extension and its duration at the public hearing.

[(h)]**(i)** At any public hearing on a draft operating permit **or draft general operating permit**, the Department may, at its discretion:

1.-2. (No change.)

[(i)]**(j)** The Department shall maintain for five years a record of all persons who provided oral or written comment during the public comment period for an operating permit **or general operating permit** and of the issues raised. Such records will be available to the public.

[(j)]**(k)** The Department, on or before publishing notice of a draft operating permit **or draft general operating permit** pursuant to (b) **or (c)** above, shall also give notice to the head of the designated air pollution control agency of any affected state, and will accept and consider any comments which are received from the affected state prior to the close of the public comment period. If the Department does not accept any recommendation provided in writing by an affected state during the public comment period, the Department will so inform the affected state and EPA in writing, setting forth the Department's reasons for not accepting the recommendation.

(l) Notwithstanding (a) above, the Commissioner of the Department may also seek or accept public comment whenever it finds a significant degree of public interest in any application, including, but not limited to, applications for minor modifications, or whenever the Department determines such comment might clarify one or more issues involved in the decision on the permit application. In determining whether to seek or accept public comment, the Department shall consider factors germane to the subject application and the applicable requirements. These factors may include, but are not limited to, the following:

1. The extent of any emissions increase;

2. The applicant's record of compliance with air pollution control requirements; and

3. Any other air pollution control aspects of the application or facility which might make the application of particular interest to the public.

(m) The Department shall notify those who submitted a written request of the Department's decision regarding their request. The Department's notification shall be in writing, and if the decision is a denial, the notification shall include a discussion of the factors in (l) above, as well as a description of all other factors which formed the basis for the Department's decision.

(n) The Department shall grant a facility's request to operate under a general operating permit without repeating the public comment procedures specified in this section if the general operating permit includes applicable requirements for all relevant source operations at the facility.

7:27-22.12 EPA comment

(a) After the close of the public comment period and consideration of the comments on [the] a draft operating permit **or draft general operating permit**, the Department will prepare a proposed operating permit **or proposed general operating permit** for EPA review. [The Department will provide a copy of the proposed operating permit to EPA, the applicant and, upon request, to any other interested person.] **The Department will provide a copy of the proposed operating permit or proposed general operatin permit to EPA and, upon request, to any other interested person. The Department will also provide a copy of the proposed operating permit to the applicant.**

(b) The Department will transmit the proposed operating permit **or proposed general operating permit** to EPA, together with a copy of [the following:

1. Any information provided by the applicant to the Department subsequent to the application being deemed administratively complete;

2. Any] **any** comments received from the public and from any affected state during the public comment period, and the Department's response to these comments[; and

3. Any other supporting information necessary for EPA to review the application.]

(c) In addition to the information transmitted to EPA pursuant to (b) above, the Department will transmit the following with any proposed operating permit:

1. Any information provided by the applicant to the Department subsequent to the application being deemed administratively complete; and

2. Any other supporting information necessary for EPA to review the application.

[(c)]**(d)** If EPA objects to the proposed operating permit **or proposed general operating permit** pursuant to the requirements of 40 CFR 70.8 during the 45 days following EPA's receipt of the proposed [operating] permit, the Department will revise the proposed [operating] permit to address EPA objection(s), and will

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submit the revised proposed [operating] permit to EPA, the applicant **(if applicable)**, and, upon request, to any other interested person.

[(d)]**(e)** If the Department does not, within 90 days after its receipt of an objection from EPA, submit to EPA a proposed operating permit **or proposed general operating permit**, revised to the satisfaction of EPA, the EPA may take final action on the [application for an operating] permit.

[(e)]**(f)** If EPA does not object to the proposed operating permit **or proposed general operating permit** within the 45 days following EPA's receipt of the proposed [operating] permit pursuant to [(c)] **(d)** above or within 45 days following EPA's receipt of the revised proposed [operating] permit pursuant to [(d)]**(e)** above, the Department will take final action on the application **related to the proposed operating permit** pursuant to N.J.A.C. 7:27-22.13 **or on the proposed general operating permit**, except as provided in [(g)]**(h)** below.

[(f)]**(g)** If EPA does not object to the proposed operating permit **or general operating permit** within the 45 day period as set forth at [(e)]**(f)** above, any person may petition the EPA during the 60 days after the expiration of EPA's 45-day comment period, and may request that EPA object to the proposed operating permit **or proposed general operating permit**. Any petition to EPA shall be based only on an objection that was raised by the petitioner with reasonable specificity during the public comment period unless:

1.-2. (No change.)

[(g)]**(h)** If EPA, in response to a petition made pursuant to [(f)] **(g)** above, objects to the proposed operating permit **or proposed general operating permit** before the Department has issued the permit, the Department will not issue a final operating permit **or final general operating permit** until the EPA's objection is addressed to EPA's satisfaction.

[(h)]**(i)** If EPA, in response to a petition made pursuant to [(f)] **(g)** above, objects to the proposed operating permit **or proposed general operating permit** after the Department has issued a final operating permit **or final general operating permit**, the EPA may modify, terminate, or revoke the operating permit **or general operating permit**.

(j) A final general operating permit, including applicability criteria, application procedures, and conditions, will be published by the Department in the New Jersey Register.

(k) The Department shall grant a facility's request to operate under a general operating permit without repeating the EPA comment procedures specified in this section if all significant source operations at the facility are covered by the general operating permit.

7:27-22.13 Final action on an application

(a) (No change.)

(b) After the Department has issued an initial operating permit, or a minor modification, significant modification, or operating permit renewal, the Department will provide a copy of the [initial operating] permit, as issued, to EPA.

7:27-22.14 General operating permits

(a) The Department may**promulgate a rule to** issue one or more general operating permits[, promulgated through rulemaking.], **pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-2 et seq. The Department may also publish a technical manual for each general permit, pursuant to N.J.S.A. 13:1D-111. The technical manual shall contain the information required under N.J.S.A. 13:1D-111, including, but not limited to, information that details and clarifies the Department's interpretation of standards or other requirements that are not defined by regulation.** [Such rulemaking will be conducted in accordance] **However, if the Air Pollution Control Act, N.J.S.A. 26:2C-1 et seq., establishes an alternative procedure for issuing general permits without rulemaking under the Administrative Procedure Act, the Department will issue general permits in accordance with that procedure. Otherwise, in issuing a general permit, the Department shall comply** with:

1.-2. (No change.)

3. EPA comment procedures set forth at N.J.A.C. 7:27-22.12; [and]

4. Any other procedural requirements related to the issuance of an operating permit[.]**; and**

5. N.J.S.A. 13:1D-111.

(b) In accordance with the procedures set forth in this section, an owner or operator may apply to the Department for authorization under a general operating permit to operate any source operation, group of source operations, or facility which meets the applicability criteria set forth in a general operating permit issued by the Department. **A separate application for a preconstruction permit is not required. Approval of the general operating permit shall also constitute preconstruction permit approval.** If the general operating permit applies to the entire facility, the general operating permit may serve as the operating permit for the facility. If the general operating permit applies to a part of the facility, the general operating permit may serve as a component of the operating permit for the facility.

(c) (No change.)

(d) The Department shall grant a facility's request to operate under a general operating permit without repeating the public and EPA comment procedures specified in (a) above if the general operating permit includes applicable requirements for all relevant source operations at the facility.

[(d)]**(e)** (No change in text.)

7:27-22.15 Temporary facility operating permits

(a) The Department may issue an operating permit to an owner or operator of a temporary facility which authorizes operation in more than one location during the term of the operating permit, provided that all locations at which the facility may be operated are listed in [the application for] the operating permit.

(b)-(e) (No change.)

7:27-22.16 Operating permit contents

(a)-(f) (No change.)

(g) Each operating permit shall include**, but not be limited to,** the following statements:

1.-10. (No change.)

(h) An operating permit may contain [alternative] operating scenario(s) pursuant to N.J.A.C. 7:27-22.27, provided that:

1. The applicant has proposed the [alternative] operating scenarios in the application for the operating permit; and

2. The Department is satisfied, based on the information provided by the applicant, that each source operation included in the [alternative] operating scenario:

i.-ii. (No change.)

(i) For any [alternative] operating scenario included, the operating permit shall contain permit conditions, including, but not limited to, the following:

1. (No change.)

2. The permittee shall ensure that operation under each such [alternative] operating scenario complies with all permit conditions, applicable requirements, and the requirements of this chapter.

(j) An operating permit may contain provisions for [intra-facility] emissions trading within one or more groups of source operations, pursuant to N.J.A.C. 7:27-22.28.

(k) For any authorization of [intra-facility] emissions trading included, the operating permit shall contain permit conditions, including, but not limited to, the following:

1. (No change.)

2. The permittee shall ensure that operation, notwithstanding the [intra-facility] emissions trading, meets all permit conditions, applicable requirements, and the requirements of this chapter.

(l) [The operating permit shall contain provisions for the assertion of an affirmative defense to liability for penalties for any violation of the operating permit occurring as a result of an equipment malfunction, an equipment startup, an equipment shutdown, or during the performance of necessary equipment maintenance. The affirmative defense shall be asserted and established as required by P.L. 1993, c. 89 (adding N.J.S.A. 26:2C-19.1 through 26:2C-19.5) and any rules and regulations that the Department promulgates thereunder, and shall meet all of the requirements thereof. The permit shall also contain a provision for the assertion of an affirmative defense

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of emergency to liability for penalties or other sanctions for noncompliance with any technology based emission limitation in the operating permit, provided that the affirmative defense is asserted and established in compliance with 40 CFR 70.6(g) and meets all the requirements thereof.] **The operating permit shall contain provisions for the assertion of an affirmative defense to liability for penalties or other sanctions for violating certain provisions or conditions of the operating permit. The affirmative defense shall apply to a violation of a technology based emission limitation in the operating permit only if:**

1. The violation occurred as a result of an equipment malfunction, an equipment start-up or shutdown, or during the performance of necessary equipment maintenance; and

2. The affirmative defense is asserted and established as required by N.J.S.A. 26:2C-19.1 through 5 and any implementing rules.

(m)-(t) (No change.)

7:27-22.18 Source emissions testing and monitoring

(a) This section sets forth the procedures by which the Department will implement the source emissions testing and monitoring requirements contained in an approved operating permit. **Any deadline in this section may be extended through written approval by the Department, unless prohibited by Federal regulations.** Such procedures shall be consistent with the federal rules for enhanced monitoring of stationary sources, set forth at 40 CFR Part 64. [Any deadline in this section may be extended through written approval by the Department.]

(b) Within 90 days after approval of the operating permit, or within the time frame specified in the operating permit, a permittee shall submit, pursuant to this section, a request for approval of a protocol prepared in accordance with the Department's **published** technical manual on Air Contaminant Testing and Monitoring. The protocol shall describe how the permittee proposes to carry out any source emissions testing or monitoring, including any type of CMS monitoring, required by the operating permit. **Any revisions of the technical manual will be subject to public input prior to finalization.**

(c)-(h) (No change.)

(i) The owner or operator of a facility subject to this subchapter shall, upon request of the Department, provide testing facilities, exclusive of instrumentation and sensing devices, as may be necessary for the Department to determine the kind and amount of air contaminants emitted from any significant source operation at the facility. During testing by the Department, the significant source operation shall be operated, within their capacities, under conditions requested by the Department. The testing facilities may be either permanent or temporary, at the discretion of the owner or operator of the facility, and shall conform to all applicable laws, regulations, and rules concerning safe construction and safe practice.

[(i)]**(j)** Each permittee shall meet all requirements of the approved protocol during the term of the operating permit.

7:27-22.19 Recordkeeping [and], reporting **and compliance certification**

(a) (No change.)

(b) Source emissions testing or monitoring records shall contain, at a minimum, the following information, unless alternative types of records or recordkeeping are expressly approved in the operating permit:

1.-5. (No change.)

6. The operating conditions, as specified in the operating permit, existing at the time of sampling or measurement. If the record indicates a deviation from applicable requirements at a facility equipped with a CMS, the permittee shall include all **CMS** data recorded beginning one hour before the recorded deviation and continuing through one hour after the recorded deviation.

7.-9. (No change.)

(c) (No change.)

(d) A report submitted pursuant to (c) above shall be submitted:

1. For a source emissions test report, within [30] **45** days after the completion of the sampling, unless a longer period for submittal is approved in advance in writing by the Department; and

2.-3. (No change.)

(e)-(f) (No change.)

(g) Any deviation from operating permit requirements which results in a release of air contaminants [in a quantity or concentration which poses] **shall be reported to the Department as follows:**

1. [A] **If the air contaminants are released in a quantity or concentration which poses a** potential threat to public health, welfare or the environment or which might reasonably result in citizen complaints, [shall immediately be reported by the permittee] **the permittee shall report the release** to the Department:

i. Immediately on the Department hotline at (609) 292-7172, pursuant to N.J.S.A. 26:2C-19(e); **and**

ii. As part of the compliance certification required in (f) above. However, if the deviation is identified through source emissions testing, it shall be reported through the source emissions testing and monitoring procedures at N.J.A.C. 7:27-22.18(e)3; or [Any deviation from operating permit requirements which results in a release of air contaminants in a quantity or concentration which poses]

2. If the air contaminants are released in a quantity or concentration which poses no potential threat to public health, welfare or the environment and which will not likely result in citizen complaints, **the permittee shall report the release** [shall be reported in writing by the permittee] to the Department [by 5:00 P.M. on the second business day after the deviation occurred,] **as part of the compliance certification required in (f) above,** except for deviations identified by source emissions testing reports, **which shall be reported through the procedures at N.J.A.C. 7:27-22.18(e)3; or**

3. If the air contaminants are released in a quantity or concentration which poses no potential threat to public health, welfare or the environment and which will not likely result in citizen complaints, and the permittee intends to assert the affirmative defense afforded by N.J.A.C. 7:27-22.16(l), the violation shall be reported by 5:00 P.M. of the second full calendar day following the occurrence or of becoming aware of the occurrence, consistent with the N.J.A.C. 7:27-22.16(l).

(h)-(j) (No change.)

7:27-22.20 Administrative amendments [(Reserved)]

(a) A permittee may make any of the changes to an operating permit listed at (b) below through the procedures for an administrative amendment set forth in this section. If the requirements of this section are met, the permittee may, at its own risk, make the change at the facility upon submittal of the amendment, but no sooner. The Department will act on an application for an administrative amendment within 60 days of receipt of an administratively complete application, pursuant to (g) below.

(b) A change may be made as an administrative amendment if the proposed change does not violate an applicable requirement, and does not constitute a seven-day-notice change, minor modification, or significant modification, and the change is:

1. A change in company name or mailing address; division name; plant name or address; name or address of each owner's agent; or name or telephone number of the on-site facility manager, any additional plant contact, or of any responsible official (as defined at N.J.A.C. 7:27-1.4);

2. Correction of any typographical error, including a mistake in the spelling, punctuation, or formatting of text, but excluding a change to any word, term, number or usage which would allow an emission increase or would constitute a seven-day-notice change, minor modification, or significant modification;

3. A transfer of ownership or operational control of the facility;

4. A change in any company stack designation;

5. Any of the following decreases, provided that the decrease is measurable and verifiable, and that a method by which the Department can verify and enforce the decrease is already included in the operating permit in effect:

i. A decrease in the maximum allowable rate of emission of any air contaminant or category of air contaminants;

ii. A decrease in maximum allowable hours of operation per time period; or

iii. A decrease in maximum allowable rate of production;

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6. An increase in the frequency of any monitoring, recordkeeping or reporting required by the operating permit;

7. A change that incorporates into the operating permit provisions of a preconstruction permit, provided that the preconstruction permit:

i. Was issued through public participation requirements substantially equivalent to those for operating permits pursuant to N.J.A.C. 7:27-22.11; and

ii. Includes compliance requirements substantially equivalent to those for operating permits pursuant to N.J.A.C. 7:27-1.31, 22.9, 22,18, and 22.19;

8. A change in the contents of a storage tank, bin, silo, or other storage container, if such change in contents is not already covered by the operating permit in effect, provided such change does not:

i. Involve the use or storage of any new HAP; or

ii. Cause the storage tank to become, pursuant to N.J.A.C. 7:27-16.2(b), subject to any control requirement to which the storage tank was not previously subject;

9. Any of the following changes to a stack or chimney, or the use thereof, provided the change complies with EPA's stack height regulations at 40 CFR 51 (governing stacks over 65 meters high):

i. A change in the number of stacks or chimneys serving the significant source operation, provided that the change does not result in any effective stack height lower than that of the tallest stack or chimney existing prior to the change;

ii. A decrease in the diameter of a stack or chimney, provided that the exhaust is vented upward;

iii. The replacement of an existing stack or chimney with a taller stack or chimney, provided that this results in an effective stack height which is no less than that existing before the change; or

iv. An increase in the exit temperature or volume of gas emitted from a stack or chimney if the temperature or volume is limited in the operating permit;

10. A change in the relative use of any raw material in a process outside of the range authorized in the operating permit, provided there is no increase in actual emissions from the process unit;

11. The introduction of a raw material, not authorized in the operating permit in effect, provided there is no increase in actual emissions from the process unit;

12. Reconstruction of a process unit or control apparatus if the date of installation of the reconstructed process unit or control apparatus is less than five years after the date of approval of the permit authorizing the installation of the original process unit or control apparatus, provided the reconstruction causes no increases in actual emissions from the process unit or control apparatus; or

13. Notification that the facility is in compliance with a new applicable requirement which was not previously applicable to the facility, provided that;

i. The facility is operating in compliance with the applicable requirement as of the date it becomes applicable to the facility;

ii. No change to any source operation or to any production process is made at the facility to comply with the applicable requirement; and

iii. The new applicable requirement was not promulgated under Title III of the CAA, unless USEPA specifically indicates that the requirement may be incorporated into the operating permit with an administrative amendment.

(c) A permittee shall, pursuant to (d) and (e) below, submit a timely and administratively complete application for any change being made pursuant to this section as an administrative amendment.

(d) To be deemed timely, an application for an administrative amendment shall be submitted to the Department and EPA prior to the change being made, except for applications submitted pursuant to (b)1 or 3 above. For applications submitted pursuant to (b)1 or 3 above, that application shall be submitted to the Department and EPA within 30 days of the change being made.

(e) To be deemed administratively complete, an administrative amendment shall include the Department assigned operating permit number, a copy of the portion of the operating permit which will be affected by the administrative amendment, a description of the change, and a copy of the revised portions of the operating permit reflecting the administrative amendment. For a transfer of ownership or operational control of the facility, the administrative amendment shall also include the information required in (f) below.

(f) To process a transfer in ownership or operational control pursuant to (b)2 above, a permittee shall attach to the application for an administrative amendment a written agreement between the current and new permittees, specifying the date for the transfer of ownership or operational control, permit responsibility, coverage and liability.

(g) Within 60 days of the Department's receipt of an application for an administrative amendment, the Department shall:

1. Approve the administrative amendment, thereby making the administrative amendment part of the operating permit; or

2. Notify the permittee that the change was not eligible for processing as an administrative amendment. In this event, a permittee must submit the appropriate application to modify the operating permit. The permittee may be subject to penalties for noncompliance with the operating permit during the time the change was in effect, pursuant to N.J.A.C. 7:27A.

(h) A change made through an administrative amendment shall not be covered by any permit shield contained in the operating permit, except for administrative amendments made pursuant to (b)7 above. The permit shield shall become effective upon approval of the administrative amendment by the Department.

(i) A permittee may elect to make as a minor modification any change authorized to be made as an administrative amendment.

7:27-22.21 Changes to insignificant source operations [(Reserved)]

(a) A permittee may, pursuant to this section, make certain changes to an insignificant source operation, or to the use thereof, without notifying the Department or EPA until the renewal of the operating permit. In the application for the renewal of the operating permit, the permittee shall identify any such changes which affect information in the operating permit. Such changes could include the addition or deletion of insignificant source operations that have occurred during the term of the operating permit.

(b) Any change made to an insignificant source operation during the term of an operating permit, including the construction or installation of a new insignificant source operation, may be made pursuant to the procedures set forth in (a) above, provided that the change:

1. Is not prohibited in the operating permit;

2. Is not subject to any requirements under the acid deposition control provisions at Title IV of the CAA;

3. Is not a modification under any provision of Title I of the CAA; and

4. Does not cause the source operation to become subject to an applicable requirement, to which it was not previously subject and which is not already included as a requirement of the operating permit.

(c) A change which is made pursuant to this section shall not be covered by any permit shield.

(d) If the Department determines that the change was not eligible for processing as a change to an insignificant source operation, the permittee may be subject to penalties for noncompliance with the permit, pursuant to N.J.A.C. 7:27A-3.

7:27-22.22 Seven-day-notice changes [(Reserved)]

(a) A permittee may make any of the changes listed at (c) below through the procedures for a seven-day-notice change set forth in this section. The Department shall attach the notice of the seven-day-notice change to the operating permit, but shall not revise the operating permit until the next application for a renewal. If the requirements of this section are met, a permittee may make a seven-day-notice change seven days after the Department's receipt of the notice of the change.

(b) Any other provision of this section notwithstanding, no change may be made pursuant to this section if the change would:

1. Require an increase in any allowable emissions limit established in the operating permit, including any maximum allowable emissions rate (whether expressed as pounds per hour, tons

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per year, total pounds, total tons, or other units expressed as a rate of emissions or total emissions) or concentration limit or any emissions cap;

2. Cause the emission of a new air contaminant or class of air contaminants;

3. The change is a minor modification or significant modification, as defined at N.J.A.C. 7:27-22.23 or 22.24, respectively;

4. Change a monitoring, recordkeeping, or reporting requirement set forth in the operating permit, if the changed requirement would be less stringent than, the existing requirement;

5. Constitute a modification under any provision of Title I of the CAA; or

6. Subject the facility to the requirements of the acid deposition control provisions in Title IV of the CAA, or would violate such requirements.

(c) Except as provided at (b) above, any of the following changes may be made as seven-day-notice changes, pursuant to the procedures of this section:

1. Any reconfiguration to an operating scenario, including an alternative configuration or a change in the production process, not authorized in the operating permit in effect, provided that the notice to the Department of the change contains the information required at N.J.A.C. 7:27-22.27 (Operating scenarios) and that the operating scenario conforms with the requirements of that section;

2. The attachment of an emissions trading program to an operating permit pursuant to N.J.A.C. 7:27-22.28A(d) (Emissions trading);

3. A change in operation to an emissions trading program attached to an operating permit pursuant to N.J.A.C. 7:27-22.28A(g);

4. Relocation of a temporary facility to a site not specifically authorized in the operating permit, unless air quality simulation modeling or risk assessment is required pursuant to N.J.A.C. 7:27-22.8(a)3;

5. Any change to a source operation which does not cause actual emissions to exceed allowable emissions in the operating permit and does not cause the emission of a new air contaminant not specified in the operating permit, provided the change does not constitute a minor modification or significant modification pursuant to N.J.A.C. 7:27-22.23 or 22.24; or

6. Any change to an existing significant source operation, or construction or installation of any new significant source operation, at a facility with an approved facility-wide permit, as defined at N.J.A.C. 7:27-22.1, provided that:

i. The production process containing the significant source operation is identified in and subject to an approved facility-wide permit issued under N.J.S.A. 13:1D-35 et seq.;

ii. The proposed change, construction, or installation is either:

(1) Allowed under the facility-wide permit; or

(2) Documented in a modification to a Pollution Prevention Plan which satisfies the requirements of N.J.A.C. 7:1K-3 and 4, or in a Pollution Prevention Assessment as defined in N.J.A.C. 7:1K-1.5; and

iii. The proposed change, construction, or installation does not cause any of the following:

(1) An increase in the generation of nonproduct output per unit of production manufactured by the significant source operation or production process;

(2) An exceedance of the maximum allowable concentration or rate of emission of any air contaminant for the production process or the entire facility, whichever is more stringent;

(3) An exceedance of the maximum allowable concentration or effluent limitation of any discharge to waters of the State; or

(4) The addition of a new production process.

(d) A permittee shall, pursuant to (e) and (f) below, submit a timely and administratively complete notice for any change being made, pursuant to this section as a seven-day-notice change.

(e) To be deemed timely, a notice must be received by the Department and EPA at least seven days prior to the change being made at the facility.

(f) To be deemed administratively complete, the notice shall include all information required by the form of seven-day-notice obtained from the Department, including but not limited to the following information:

1. A description of the planned change, and a statement of the reason the change is being made;

2. The date(s) or schedule for when the change will be made, or a description of the types of circumstances under which the change would be made;

3. The specific source operations that will be changed or will be affected by the change;

4. For each source operation given in (f)3 above, the change in the quantity or rate of actual emissions as a result of the change;

5. Specification of any permit requirement or applicable requirement that will be:

i. Complied with through the change; or

ii. No longer applicable as a result of the change;

6. A statement affirming that, after implementation of the seven-day-notice the facility will continue to comply with all applicable requirements; and

7. Certification of the notice of the change in accordance with N.J.A.C. 7:27-1.39.

(g) To be administratively complete, any notice submitted pursuant to (c)6 above for a modification of equipment or control apparatus, or installation of new equipment or control apparatus, at a facility with an approved facility-wide permit, shall include a Pollution Prevention Plan Modification or Pollution Prevention Assessment pursuant to N.J.A.C. 7:1K-3 and 4 in addition to the items required in (f) above.

(h) No permittee shall make a change at a facility pursuant to this section unless the written notice of the change is submitted to both the Department and EPA at least seven days before the change is made.

(i) The Department may review a seven-day-notice change at any time prior to the next renewal of the operating permit. If the Department finds that the change was inconsistent with the requirements for a seven-day-notice change, the Department will notify the facility and may take enforcement action.

(j) Upon receipt of a notice of a seven-day-notice change, the Department will file the notice as an attachment to the operating permit. The permittee shall include all such changes in the application for the next renewal of the operating permit, in accordance with N.J.A.C. 7:27-22.30.

(k) The permittee shall attach a copy of each notice submitted pursuant to this section to the copy of the operating permit the permittee maintains at the facility.

(l) The permit shield described at N.J.A.C. 7:27-22.17 shall not apply to any change made pursuant to this section.

(m) A permittee may elect to make any change authorized to be made as a seven-day-notice change as a minor modification or significant modification.

7:27-22.23 Minor modifications [(Reserved)]

(a) A permittee may make any change listed at (c) below through the minor modification procedures set forth in this section. Minor modifications are set forth in (c) below, and include changes which may increase actual emissions by insignificant amounts, and other changes which do not increase emissions, but may increase ambient concentrations of air contaminants. The Department shall, upon approval of an application for a minor modification of the operating permit, incorporate the changes into the permit. A separate application for a preconstruction permit is not required. The permittee shall not make any change proposed in a minor modification of the operating permit until the Department has approved the minor modification, except as specified in (a)1, 2, and 3 below.

1. Equipment and control apparatus may be installed at risk pursuant to the requirements of N.J.A.C. 7:27-22.3(oo).

2. The proposed minor modification may, at the permittee's risk, be made at the facility after the administratively complete application is received by the Department, and a preconstruction approval has been issued by the Department.

3. Any permittee who elects to implement the change proposed in an application prior to the Department's final decision on the minor modification (after the EPA review period) shall comply with

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both the applicable requirements governing the change and the conditions of preconstruction approval contained in the proposed minor modification. During this time, the facility need not comply with any outdated existing operating permit provisions it seeks to modify. However, if the permittee fails to comply with the proposed permit provisions during this time, or the minor modification is not approved, the existing permit provisions it seeks to modify shall be enforced.

(b) (Reserved)

(c) Construction or installation of any new significant source operation, reconstruction of a process unit or control apparatus made pursuant to N.J.A.C. 7:27-22.24A, or any of the following changes to existing significant source operations, shall be made as a minor modification unless the change violates an applicable requirement or constitutes a significant modification pursuant to N.J.A.C. 7:27-22.24:

1. A change in the location of the point of discharge of any air contaminant from a significant source operation into the outdoor atmosphere, unless the change is authorized in the permit in effect;

2. Any of the following changes to a significant source operation, or to the use thereof, if the change may exceed the allowable concentration or allowable rate of any air contaminant emission:

i. Change in the relative use, expressed in percent by weight, of any raw material in the operation of a significant source operation, including the introduction of a new raw material not authorized in the operating permit in effect; or

ii. Change in the production process in which the significant source operation is used;

3. An increase in any maximum allowable emission rate or concentration, or any emissions cap;

4. Emission of any air contaminant or class of air contaminants not authorized by the operating permit in effect;

5. Any change to a stack or chimney, or the use thereof, not authorized in the operating permit in effect, including any change to a stack dispersion parameter including, but not limited to, temperature, velocity, direction, or volumetric flow rate, if the change may result in an increase in the ambient concentration of any air contaminant;

6. Any increase in the concentration of any air contaminant in the influent to existing control apparatus, if the influent is limited in the operating permit in effect;

7. Any increase in the total hours of operation per time period or the rate of production above that authorized in the operating permit in effect;

8. Reduction of the frequency of testing, monitoring, recordkeeping or reporting,

provided the frequency is not less than that in any applicable requirement.

9. Any of the following decreases, if a method by which the Department can verify and enforce the decrease is not already included in the operating permit in effect:

i. A decrease in the maximum allowable rate of emission of any air contaminant or category of air contaminants;

ii. A decrease in maximum allowable hours of operation per time period;

iii. A decrease in maximum allowable rate of production;

10. At the option of the applicant, any change which is eligible to be processed as an administrative amendment, a change to an insignificant source operation or a seven-day-notice change pursuant to N.J.A.C. 7:27-22.20, 22.21,or 22.22, respectively, or any other change which is not required to be processed as a significant modification pursuant to N.J.A.C. 7:27-22.24.

(d) Any change that is a minor modification and that constitutes construction, reconstruction or modification of a source operation, shall incorporate advances in the art of air pollution control pursuant to N.J.A.C. 7:27-22.35, Advances in the art of air pollution control.

(e) A permittee shall, pursuant to (f), (g), (h) and (p) below, submit an administratively complete application for a minor modification of the operating permit for any change being made pursuant to this section as a minor modification.

(f) In order to be considered administratively complete, an application for a minor modification of the operating permit shall meet all application contents requirements for an initial operating permit set forth at N.J.A.C. 7:27-22.6, except that an application for a minor modification of the operating permit shall include only such information as is relevant to the proposed modification. In addition, the application shall include, at a minimum:

1. A description of the proposed change, the allowable and estimated actual emissions before and after the change, and any new applicable requirements which will apply if the change occurs;

2. The proposed draft operating permit reflecting the proposed change; and

3. Certification by a responsible official, consistent with N.J.A.C. 7:27-1.39, that the proposed change is eligible to be processed as a minor modification pursuant to (c) above.

(g) To be deemed administratively complete, any application proposing the incorporation into the operating permit of a new operating scenario or a new authorization for emissions trading, not authorized by the existing operating permit, shall also meet the requirements set forth at N.J.A.C. 7:27-22.27 or 22.28, respectively.

(h) If the application for a minor modification of the operating permit is administratively incomplete, the Department may deny the application, or request additional information.

(i) If the Department determines that an application for a minor modification of the operating permit is administratively complete, the Department will, within five working days, notify the EPA and any affected state that the application is administratively complete. EPA and affected states will have 45 days from their receipt of such notice to notify the Department of any objection to, or comment on, the application. Such objection or comment shall be sent to the Department at the address set forth at N.J.A.C. 7:27-22.3(t). When the Commissioner of the Department determines that there is a significant degree of public interest in an application for a minor modification, the Department may provide an opportunity for public comment consistent with N.J.A.C. 7:27-22.11.

(j) Within 90 days after the application is administratively complete, or 15 days after the completion of EPA's 45 day review period, whichever is later, the Department will;

1. Approve the modification;

2. Deny the modification;

3. Determine that the modification requires processing as a significant modification. In such a case, the Department will terminate the application and so notify the applicant; or

4. In consultation with the applicant, revise the applicant's proposed operating permit modifications, submit a new proposed permit modification to EPA for review, approve the modification as revised, and transmit it to the applicant.

(k) Once the Department approves a minor modification, the Department will send a copy of the revised portions of the operating permit to EPA.

(l) The Department will not take final action on an application for a minor modification until EPA's 45-day review period has expired, or until EPA has notified the Department that it will not object to the approval of the modification, whichever comes first, or until any EPA objections have been resolved. As stated in (a)1 above, equipment or control apparatus may be installed at risk pursuant to the requirements of N.J.A.C. 7:27-22.3(oo).

(m) If the Department does not, in its final action on the application, accept any recommendation on the proposed minor modification submitted by an affected state, the Department will notify EPA and the affected state of its reasons for not accepting the recommendation.

(n) An applicant may request that the Department group-process two or more applications for minor modifications to operating permits if they meet the requirements of (n)1 below. Under group processing procedures, a permittee may request that all pending applications for minor modifications be group-processed. The Department will then process the applications together, using the procedures set forth in this section, including the provisions at (n)1, 2, and 3 below, which apply specifically to group processing of minor modification applications.

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1. Minor modifications may be submitted for group processing only if:

i. Each proposed permit modification meets the criteria in this section for minor permit modifications; and

ii. The allowable emissions increases which would be caused by the modifications would, in the aggregate, be less than the least of the following:

(1) Ten percent of the total allowable emissions allowed by the operating permit for the source operations for which the changes are requested. If the source operation emits more than one contaminant, the increase of each contaminant shall be calculated separately. For example, if a unit is permitted to emit 10 tons per year of SO_2 and one ton per year of lead, minor modifications could not be group processed unless the aggregate increase in allowable SO_2 emissions resulting from the modifications would be less than one ton per year, and the aggregate increase in allowable lead emissions resulting from the modifications would be less than 0.1 ton per year;

(2) Twenty percent of the threshold amount of the contaminant listed at N.J.A.C. 7:27-22.2(a)1, Applicability. For example, for a facility which emits VOCs, modifications could not be group processed unless the total allowable emission increases of VOCs resulting from the modifications would be less than five tons per year; or

(3) Five tons per year.

2. To obtain approval for group processing, the permittee shall submit an application for group processing which shall consist of a list of all of the facility's pending applications for minor modifications of the operating permit, and a determination of whether the aggregated modifications equals or exceeds the threshold set under (n)1ii above.

3. Within five business days of receipt of an application for group-processing, the Department will notify EPA and affected States of the requested minor modifications. The Department will also prepare a quarterly report for EPA and affected states listing the group-processed minor modification applications that have been received during the quarter.

4. The Department shall act on an application for a minor modification of the operating permit submitted for group processing within 180 days of receipt of the request for group processing or within 15 days after the end of EPA's 45 day review period, whichever is later.

7:27-22.24 Significant modifications [(Reserved)]

(a) Notwithstanding any other provision of this subchapter, a permittee is required to make any of the changes listed at (b) through the significant modification procedures set forth in this section. The Department shall, upon its approval of an application for a significant modification of the operating permit, incorporate the change(s) into the permit. A separate application for a preconstruction permit is not required. Approval of the significant modification shall also constitute preconstruction approval. The permittee shall not make the change proposed in a significant modification of the operating permit until the Department has approved the significant modification.

(b) Construction or installation of any new significant source operation, reconstruction of a process unit or control apparatus made pursuant to N.J.A.C. 7:27-22.24A, or changes to existing significant source operations, shall be made as a significant modification if any of the following criteria apply:

1. A change which causes the facility to be subject to, or which would constitute a modification pursuant to, any of the following:

i. Emission offset requirements at N.J.A.C. 7:27-18.2(a) and (b);

ii. NSPS regulations at 40 CFR 60;

iii. NESHAPS regulations at 40 CFR 61 or 63;

iv. PSD regulations at 40 CFR 52; or

v. Federal visibility regulations promulgated pursuant to 42 USC 7491 or 7492;

2. Any significant change in existing Federally enforceable operating permit conditions related to changing the monitoring method from continuous emission monitoring to parametric monitoring or periodic stack testing;

3. A change which relaxes any Federally enforceable recordkeeping or reporting required by the operating permit;

4. A change which relaxes any Federally enforceable provision of the compliance plan, including any lengthening of the time that a source operation is in noncompliance beyond the schedule contained in the compliance plan;

5. A change which requires a case-by-case determination of an emission limitation or other specific standard contained in a State or Federal rule. This includes, for example, an application for a variance from a specific emission limit. This does not include determination of advances in the art of air pollution control;

6. A relocation of a temporary facility to a site, other than is authorized in the operating permit, if air quality simulation modeling or risk assessment is required for the application pursuant to N.J.A.C. 7:27-22.8;

7. A change which establishes or changes a permit condition for which there is no corresponding underlying applicable requirement, and which the facility has assumed to avoid an applicable requirement to which the facility would otherwise be subject. Such conditions include:

i. A Federally enforceable emissions cap assumed to avoid classification as a major facility or to avoid becoming subject to:

(1) Emission offset requirements pursuant to N.J.A.C. 7:27-18.2;

(2) NSPS regulations at 40 CFR 60;

(3) NESHAPS regulations at 40 CFR 61 or 63;

(4) PSD regulations at 40 CFR 52; or

(5) Federal visibility regulations promulgated pursuant to 42 USC 7491 or 7492; or

ii. An alternative emissions limit for early reductions of HAPs approved pursuant to N.J.A.C. 7:27-22.34 and the regulations promulgated under 42 USC 7412(i)(5);

8. Any incorporation into the operating permit of a new operating scenario if such an incorporation does not qualify as a seven-day-notice change pursuant to N.J.A.C. 7:27-22.22, or a minor modification pursuant to N.J.A.C. 7:27-22.23; or

9. Any incorporation into the operating permit of a new authorization of emissions trading, if such an incorporation does not qualify as a seven-day-notice change pursuant to N.J.A.C. 7:27-22, or a minor modification pursuant to N.J.A.C. 7:27-22.23.

(c) Any change that is a significant modification and that constitutes construction, reconstruction or modification of a source operation, shall incorporate advances in the art of air pollution control pursuant to N.J.A.C. 7:27-22.35, Advances in the art of air pollution control.

(d) Compliance with N.J.A.C. 7:27-18 shall be demonstrated for any significant modification that includes an emission increase.

(e) A permittee shall, pursuant to (f) below, submit an administratively complete application for the significant modification of the operating permit for any change at a facility which, pursuant to (b) above, constitutes a significant modification.

(f) To be deemed administratively complete, an application for a significant modification of the operating permit shall meet all application contents requirements for an initial operating permit set forth at N.J.A.C. 7:27-22.6, except that an application for a significant modification of the operating permit shall include only such information as is relevant to the proposed modification.

7:27-22.24A Reconstruction

(a) Reconstruction of a process unit or control apparatus shall be made as an administrative amendment to the operating permit pursuant to N.J.A.C. 7:27-22.20 if:

1. The date of installation of the reconstructed process unit or control apparatus is less than five years after the date of approval of the permit authorizing the installation of the original process unit or control apparatus;

2. The reconstruction causes no increases in actual emissions from the process unit or control apparatus; and

3. The reconstruction is not a significant modification.

(b) Reconstruction of a process unit or control apparatus shall be made as a significant modification to the operating permit

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pursuant to N.J.A.C. 7:27-22.24 if the reconstruction would trigger any of the criteria for significant modifications listed at N.J.A.C. 7:27-22.24(b).

(c) Reconstruction of a process unit or control apparatus shall be made as a minor modification to the operating permit pursuant to N.J.A.C. 7:27-22.23 if the reconstruction cannot be processed as an administrative amendment or significant modification, as set forth at (a) and (b) above.

(d) In the case of an emergency, as defined at N.J.A.C. 7:27-22.1, the Department may authorize a permittee to reconstruct and to operate a process unit or control apparatus for 90 days at risk, in order to allow time for the permittee to apply for Department approval of the reconstruction, where a minor or significant modification of the operating permit is required. An example of such an emergency would be a fire which destroys a process unit which the person wishes to replace and operate immediately. The emergency approval shall be conditioned on the permittee submitting an application for the change within 30 days pursuant to (a), (b), or (c) above, cooperating fully with the Department during the application and review process, and complying with all applicable requirements.

7:27-22.25 Department initiated operating permit modifications

(a) An operating permit may be revoked, or reopened and modified, for cause by the Department pursuant to this section. Any Department initiated permit revocation or reopening and modification shall affect only those parts of the operating permit for which cause to reopen exists.

(b) Upon a written request from the Department, a permittee shall furnish to the Department, within 30 days or within a longer time period established by the Department in the request, any information that the Department may request to determine whether cause exists for revoking, or reopening and modifying the permit.

(c) At least 30 days prior to reopening an operating permit, the Department will notify the permittee that action is necessary to modify the operating permit and that the Department will revoke, or reopen and modify, the operating permit unless the permittee acts to apply for the necessary modification(s). A shorter time period may be provided if the Department determines that continued operation of the facility under its current operating permit may adversely affect human health or welfare, or the environment.

(d) The notice of a reopening made pursuant to (c) above will contain a requirement that the permittee act to resolve the issue which caused the need for the reopening, and a reasonable deadline for action. Such action shall be processed as a significant modification if the permittee does not act to apply for the necessary modification(s).

(e) The Department shall reopen and modify an operating permit if any of the following occur:

1. The permittee fails to act within the time specified in the notice in (d) above to incorporate any of the following into the operating permit:

i. An additional applicable requirement which has become applicable to the facility and the remaining term of the existing permit is three years or more; or

ii. A change to an applicable requirement which was previously applicable to the facility and the remaining term of the existing permit is three years or more;

2. The permittee fails to act within the time specified in the notice in (d) above to incorporate any of the following into the operating permit:

i. An additional applicable requirement which has become applicable to an affected Title IV facility; or

ii. A change to an applicable requirement which was previously applicable to an affected Title IV facility;

3. The Department or EPA determines that the permit contains a material mistake or that inaccurate statements were made in establishing the emissions standards, limitations or other provisions or conditions of the permit;

4. EPA requires the reopening of an operating permit for cause pursuant to 40 CFR 70.7(g); or

5. The Department or EPA determines that the operating permit must be revised to assure compliance with applicable requirements.

(f) No reopening is required to incorporate an applicable requirement pursuant to (e) above, if the date the requirement will become applicable to the facility is later than the date on which the operating permit is due to expire, unless the original permit or any of its provisions and conditions has been extended pursuant to an application shield in accordance with N.J.A.C. 7:27-22.7.

(g) If a reopening is required pursuant to (e)1 or 2 above, the permittee shall submit an administratively complete application, within the time specified by the Department, for an operating permit modification pursuant to N.J.A.C. 7:27-22.24, significant modifications. The Department shall ensure that final action to incorporate the additional applicable requirement into the operating permit is completed within 18 months of the promulgation of the applicable requirement.

(h) During the period that the reopening is pending, the permittee shall comply with the compliance schedule provided in any additional applicable requirement which applies to the facility and: until the final compliance deadline for any applicable requirement, the current operating permit; or after the final compliance deadline for any applicable requirement, the new applicable requirement and any provisions of the current operating permit which are not affected by the new applicable requirements.

(i) The Department may revoke an operating permit, or a portion of the operating permit, if the Department determines that continued use of the facility, or a portion of the facility, pursuant to the current operating permit, poses a potential threat to public health, welfare, or the environment, or that emissions from the facility would unreasonably interfere with the enjoyment of life or property.

(j) If EPA notifies the Department that cause exists to revoke or reopen and modify an operating permit, the Department shall, within 90 days of its receipt of the notice, forward to the EPA a proposed determination of revocation, or of reopening and modification, as appropriate. EPA may extend the 90-day deadline (for the Department to provide a proposed determination) an additional 90 days, if the EPA determines that additional information from the permittee, is needed. The Department will transmit a copy of EPA's notification and DEP's determination to the permittee.

(k) As required by 40 CFR Part 70.7(g), if EPA approves the determination proposed by the Department pursuant to (j) above, or fails to act on it within 90 days of EPA's receipt of the proposed determination, the Department shall proceed with a permit reopening. At least 30 days prior to reopening the operating permit, the Department will notify the permittee that action is necessary to modify the operating permit and that the Department will revoke, or reopen and modify, the operating permit unless the permittee acts to apply for the necessary modification(s). A shorter time period may be provided if the Department determines that continued operation of the facility under its current operating permit may adversely affect public health or welfare, or the environment.

(l) As required by 40 CFR Part 70.7(g)(4), if EPA objects to the Department's proposed determination within 90 days, the Department has 90 days from receipt of an EPA objection to resolve any objection that EPA makes and to re-open, modify and reissue, or to revoke, the operating permit in accordance with the EPA's objection.

(m) Notwithstanding (j), (k) and (l) above, if the permittee, at any time during the reopening process, submits an administratively complete application for the necessary modification which will, if issued, obviate the necessity for the reopening, the Department will process the modification application if this is the most expeditious procedure to resolve the issue. If the modification procedure does not resolve the issue which caused the reopening, the Department will then proceed with the reopening.

(n) This section shall not be construed to allow the extension of the compliance deadline in any applicable requirement. Implementation of applicable requirements shall proceed in accordance with any deadlines established in the applicable requirement.

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(o) This section shall not limit the Department's authority to pursue any form of relief or remedy provided by law or regulation, including injunctive relief, pursuant to N.J.S.A. 26:2C-19(a), civil administrative penalties pursuant to N.J.S.A. 26:2C-19(b), civil penalties pursuant to N.J.S.A.26:2C-19(d) and criminal sanctions pursuant to N.J.S.A. 26:2C-19(f).

7:27-22.26 MACT and GACT standards [Reserved]

(a) This section shall take effect upon EPA's interim approval of the Department's operating permit program.

(b) Except as provided at (c) and (d) below, an owner or operator of a facility subject to an EPA-promulgated MACT or GACT standard, or a case-by-case MACT standard, shall submit an application to the Department to have the MACT or GACT standard incorporated into the facility's operating permit pursuant to the relevant provisions of N.J.A.C. 7:27-22.5 for initial operating permits, N.J.A.C. 7:27-22.20 for administrative amendments, N.J.A.C. 7:27-22.23 for minor modifications, or N.J.A.C. 7:27-22.24 for significant modifications.

(c) An owner or operator of an area source subject to an EPA-promulgated MACT or GACT standard is not required to obtain an operating permit if the MACT or GACT standard as promulgated by EPA explicitly states that state agencies are given the option of excluding affected area sources from the requirement to obtain operating permits, provided that the only reason for needing an operating permit is the MACT or GACT standard.

(d) An owner or operator of an area source subject to an EPA-promulgated MACT or GACT standard may postpone applying for an operating permit for five years from the promulgation of the MACT or GACT standard, if the MACT or GACT standard as promulgated by EPA explicitly states that state agencies may defer the requirement to obtain operating permits for affected area sources, provided that the only reason for needing an operating permit is the MACT or GACT standard.

(e) A facility or source operation shall be subject to a MACT or GACT standard promulgated by EPA if:

1. The facility or source operation is in operation at the time the MACT or GACT standard is promulgated, and the facility or source operation meets the applicability criteria set forth in the MACT or GACT standard;

2. The facility or source operation is subsequently proposed to be modified such that the facility or source operation would meet the applicability criteria set forth in the MACT or GACT standard; or

3. A new facility or source operation is constructed such that the new facility or source operation meets the applicability criteria set forth in the MACT or GACT standard.

(f) A case-by-case MACT standard shall be established for a facility or any source operation(s) which constitutes a major HAP facility if any of the following occur:

1. The construction of a major HAP facility, if EPA has not promulgated a specific MACT standard applicable to the new source operation(s);

2. The reconstruction of a major HAP facility, if EPA has not promulgated a specific MACT standard applicable to the reconstructed source operation(s);

3. The modification of a major HAP facility, if EPA has not promulgated a specific MACT standard applicable to the new or modified source operation(s), provided that:

i. Any physical change in, or change in the method of operation of, the major HAP facility increases the facility's actual emissions of any HAP by an amount that exceeds the deminimis emission rates set forth in the EPA document "Documentation of Deminimis Rates for Proposed 40 CFR 63 Subpart B" (EPA 453/R-93-035); or

ii. Any physical change in, or change in the method of operation of, the major HAP facility results in the emission of any HAP not previously emitted in an amount that exceeds the deminimis emission rates set forth in the EPA document "Documentation of Deminimis Rates for Proposed 40 CFR 63 Subpart B" (EPA 453/R-93-035); or

4. The failure of EPA to promulgate the specific MACT standard applicable to an existing major HAP facility by 18 months after the deadline set by EPA for such promulgation at 58 FR 63941.

(g) Case-by-case MACT standards established for major HAP facilities, or source operations which constitute a major HAP facility, shall be established as part of the Department's preconstruction approval in accordance with the requirements of N.J.A.C. 7:27-22.33 and 22.35.

(h) The Department may allow a six year extension of time for complying with a MACT or GACT standard promulgated by EPA for one or more source operations at a facility, if the source operation achieves sufficient early reductions of HAP emissions as described in N.J.A.C. 7:27-22.34.

(i) A source operation for which construction or reconstruction is commenced after EPA proposes an applicable MACT or GACT standard, but before the MACT or GACT standard is promulgated, shall not be required to comply with the standard as promulgated until three years after the date construction or reconstruction is commenced, provided that the source operation, as authorized in the preconstruction permit, complies with the MACT or GACT standard as proposed. However, the source operation will still be subject to the operating permit application requirements described in (b) above.

(j) A facility which has installed BACT, pursuant to a permit required under 40 CFR 52.21, or LAER, pursuant to N.J.A.C. 7:27-18, prior to EPA's promulgation of a MACT or GACT standard applicable to that facility, shall not be required to comply with the MACT or GACT standard until five years after the date of that installation of BACT or LAER, if the BACT or LAER controls the same pollutant(s) as that identified in the MACT or GACT standard. However, the facility will still be subject to the operating permit application requirements described in (b) above.

7:27-22.27 [Alternative operating] **Operating** scenarios

(a) The Department will include [alternative] operating scenarios in an operating permit, if the [alternative] operating scenarios meet all applicable requirements, including, but not limited to, all applicable emission standards.

1. [Alternative operating] **Operating** scenarios may, as appropriate, be incorporated into a permit through an application for an initial operating permit, a significant modification, or a minor modification pursuant to N.J.A.C. 7:27-22.5, 22.24 or 22.23, respectively.

2. [Alternative] **New** operating scenarios may be authorized through a notice of a seven-day-notice change pursuant to N.J.A.C. 7:27-22.22, provided the emission limit for a source operation included in [alternative] operating scenarios which are being added by a seven-day-notice to an existing operating permit shall not exceed the maximum allowable emission limits in the existing operating permit for the source operation.

(b) At a facility authorized to operate under one or more [alternative] operating scenarios, the permittee shall maintain contemporaneous information on the change from one operating scenario to another. This can be any means of recording information associated with the scenario in question, either manually or electronically, including but not limited to: batch sheets, production sheets, fuel records, and process records.

(c) The permittee shall ensure that operation under an [alternative] operating scenario meets all permit conditions, applicable requirements, and the requirements of this chapter.

(d) An applicant or permittee seeking authorization for [alternative] operating scenarios shall provide to the Department, in the application for an initial operating permit, significant modification, or minor modification, or in a seven-day-notice, at least the following information:

1. A description of each proposed [alternative] operating scenarios, including, but not limited to, information on any emission changes from existing approved operating scenarios;

2. The specific source operations that are to be included in the proposed [alternative] operating scenarios;

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3. If the equipment combusts fuel, the fuels that will be used under the proposed [alternative] operating scenarios, and the maximum quantity of fuel proposed to be used annually;

4. The product(s) that will be produced under the proposed [alternative] operating scenarios; and

5. For any operating parameter addressed or limited in the existing operating permit that may be changed under the proposed [alternative] operating scenario, proposed ranges or limits for that parameter relevant to air contaminant emissions. This shall include, but not be limited to, parameters such as the quantity or type of raw material used. Operating parameters which do not affect emissions need not be included in the [alternative] operating scenario. As long as the facility operates within the range or limit of each specified parameter in an approved operating scenario, such operation shall be considered consistent with that operating scenario.

(e) In addition to the information required at (d) above, the following information shall be provided to the Department if the [alternative] operating scenario is proposed to be added to an existing operating permit as a seven-day-notice:

1. For each source operation included in the [alternative] operating scenario:

i. (No change.)

ii. A demonstration that each of the emissions limits listed pursuant to (e)i above will not be exceeded under the proposed [alternative] operating scenario; and

iii. A demonstration that, under the proposed [alternative] operating scenario, any new air contaminant not authorized by the existing operating permit would be emitted at a rate less than the applicable [de minimis emission levels] **threshold for reporting emissions** set forth in [Tables C and D at N.J.A.C. 7:27-8,] **Table A or B in the** Appendix **to this subchapter.**

[7:27-22.28 Intra-facility emissions] **7:27-22.28A Emissions trading**

(a) [Intra-facility] **Pursuant to this section a permittee may implement an** emissions trading [programs providing for trading within an emissions cap shall be allowed] **program** at a facility subject to this subchapter [if:

1. Authorization obtained pursuant to (c) below for the intra-facility].

(b) Such an emissions trading program may be:

1. A facility-specific emissions averaging program with a federally enforceable emissions cap, pursuant to N.J.A.C. 7:27-22.28B;

2. An emissions trading program approved by the Department and, if so required by EPA, approved by EPA as a case-by-case revision to New Jersey's SIP;

3. An emissions averaging program set forth in this Chapter, such as the mathematical combination provisions of N.J.A.C. 7:27-9.2(d) or the emissions averaging provisions of N.J.A.C. 7:27-19.6; or

4. Any other emissions trading program set forth in this chapter.

(c) Except as provided in (d) below, the emissions trading program [is] **shall be**:

[i.]**1.** Incorporated in the **initial** operating permit approved by the Department; or

[ii. Attached] **2. Incorporated in the operating permit through a renewal or a significant modification of the operating permit.**

(d) In lieu of the procedures in (c) above, an emissions trading program may be attached to the operating permit through a [notice of a] seven-day-notice change [or a minor modification] pursuant to [N.J.A.C. 7:27-22.22(c)10 and in accordance with (h) below; and

2.] **the seven-day-notice change procedures set forth in N.J.A.C. 7:27-22.22(c)2 or 3, provided that:**

1. The emissions trading program is one which:

i. Pursuant to (b)2 above is approved by the Department and approved by EPA as a case-by-case revision to New Jersey's SIP; or

ii. Pursuant to (b)3 or 4 above is promulgated in provisions of this Chapter and which has been approved by EPA as a revision to New Jersey's SIP; and

2. The attachment is eligible to be made by a seven-day-notice change pursuant to N.J.A.C. 7:27-22.22(b) and pursuant to the provisions and conditions of the SIP revision or the provisions of this chapter on which the emissions trading program is based.

(e) The emissions trading program [conforms] **shall conform** with the **applicable provisions of:**

1. The Federal emissions trading policy published on December 4, 1986, in the Federal Register, Volume 51, No. 233; [the]

2. The economic incentive program rules published on April 7, 1994, in the Federal Register, Volume 59, No. 67; [or any]

3. Any other **applicable** emissions trading **regulations or** guidance issued by EPA; **and**

4. Any applicable requirements in a rule, order, or permit issued by the Department.

(f) An emissions trading program incorporated into the operating permit shall be implemented pursuant to the applicable provisions and conditions of the operating permit. An emissions trading program attached to the operating permit in accordance with (d) above shall be implemented:

1. If the program is one which is pursuant to (b)2 above approved in advance by the Department, in accordance with the provisions and conditions of the SIP revision; or

2. If the program is one which is pursuant to (b)3 and 4 above promulgated in provisions of this chapter, in accordance with the applicable provisions of this chapter.

(g) A permittee may seek authorization, through a significant modification or a renewal, to modify an emissions trading program which has been incorporated into an operating permit to accommodate a change to the emissions trading program. Also, if the emissions trading program is one allowed pursuant to (d) to be attached to an operating permit, a permittee may change the program through a seven-day-notice change, provided that the change is eligible to be made by a seven-day-notice change pursuant to N.J.A.C. 7:27-22.22(b) and pursuant to the provisions and conditions of the Department's approval or the provisions of this chapter on which the emissions trading program is based.

(h) A permit shield pursuant to N.J.A.C. 7:27-22.17 shall apply to an emissions trading program only if the program is incorporated into the operating permit through an initial operating permit, an operating permit renewal, or a significant modification. A permit shield shall not apply to a program, or any modifications to a program, which is attached to an operating permit through a seven-day-notice to an operating permit.

7:27-22.28B Facility-specific emissions averaging programs

(a) A permittee may obtain approval for and implement a facility-specific emissions averaging program at a facility subject to this subchapter pursuant to this section, provided that no averaging program set forth in a promulgated rule would apply. Such a program shall be on a case-by-case basis, developed and approved for implementation at a specific facility.

(b) [Intra-facility] **Such a facility-specific** emissions [trading] **averaging program** shall be limited to the group of source operations and to the air contaminants authorized for **the facility-specific** emissions [trading] **averaging** program incorporated in [or attached to] the operating permit. The source operations included shall be a **specific** group of source operations proposed by the applicant and approved by the Department. **The facility-specific emissions averaging program shall subject these source operations collectively to a federally enforceable emissions cap.**

[(c) Any owner or operator may seek authorization for an intra-facility emissions trading program in an application for an initial operating permit, significant modification, or a renewal, as appropriate. Alternatively, an owner or operator may obtain authorization for emissions trading pursuant to the mathematical combination provisions of N.J.A.C. 7:27-9.2(d), the emissions averaging provisions of N.J.A.C. 7:27-19.6, or any emissions trading provisions of this Chapter that expressly allow an emissions trading program to be attached to an operating permit pursuant to this section through a seven-day-notice change or a minor modification.]

[(d)]**(c)** An application [or a seven-day-notice] submitted to obtain authorization [for an] **to implement a facility-specific** emissions [trading] **averaging** program shall provide information to the Department including, but not limited to, the following:

1. A description of the planned [intra-facility] emissions [trading] **averaging** program;

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2. A statement of the purpose for seeking authorization for [an intra-facility] **the** emissions [trading] **averaging** program at the facility. Such a statement shall indicate, for example, if the purpose of the authorization is to establish an emissions cap so as to avoid being classified as a major facility or avoid becoming subject to requirements, such as:

i. Emission offset requirements pursuant to N.J.A.C. 7:27-18.2; or

ii. PSD regulations at 40 CFR 52;

3. Specification of any permit condition or applicable requirement that would be:

i. Complied with through the [intra-facility] emissions [trading] **averaging** program; or

ii. No longer applicable as a result of the emissions [trading] **averaging** program;

4. The specific source operations that would be included in the emissions [trading] **averaging** program;

5. For each source operation subject to the emissions [trading] **averaging** program, each air contaminant for which the quantity or rate of actual emissions may be increased or decreased as a result of the [intra-facility] emissions [trading] **averaging** program;

6. For each air contaminant identified pursuant to (d)5 above, the proposed federally enforceable emissions cap for the group of source operations that are to be included in the emissions [trading] **averaging** program;

7.-10. (No change.)

[(e) A permittee may modify operating permit provisions regarding intra-facility emissions trading through the procedures for a seven-day-notice change to accommodate a change to a source operation which is subject to the emissions cap provided that:

1. The change to the source operation is eligible to be made by a seven-day-notice change pursuant to the provisions of this Chapter on which the emissions trading program is based; and

2. The modification would not result in the need to increase the emissions cap.]

[(f)]**(d)** If the Department approves the incorporation of [an intra-facility] **a facility-specific** emissions [trading] **averaging** program in an operating permit, the Department shall establish in the operating permit:

1. A Federally enforceable cap on the aggregate emissions for the group of source operations included in the [intra-facility] emissions [trading] **averaging** program authorized by the operating permit; and

2. (No change.)

[(g)]**(e)** The Department shall not approve any [intra-facility] **facility-specific** emissions [trading] **averaging** program proposed for an operating permit, **or any proposed modification thereto,** if [any]:

1. Any State rule or Federal regulation, which is an applicable requirement, requires **for any source operation included in the proposed emissions averaging program, or for the modification thereto,** case-by-case approval of any increase in emissions from [any] **that** source operation [included in the emissions trading], unless such case-by-case approval has already been issued by the Department and EPA pursuant to the procedures in the applicable requirement; **or**

2. The emissions averaging program, or the proposed modification thereto, could result in an increase in the aggregate maximum allowable emissions from the source operations included in the emissions averaging program.

[(h) A permittee may implement an intra-facility emissions trading program explicitly authorized in the rules which have been approved as part of the SIP, even if such an emissions trading program is not expressly authorized in the operating permit, provided that:

1. The intra-facility emissions trading program is conducted pursuant to the following provisions of this Chapter:

i. The mathematical combination provisions of N.J.A.C. 7:27-9.2(d); or

ii. The emissions averaging provisions of N.J.A.C. 7:27-19.6; or

iii. Any provisions of this Chapter that expressly allow an emissions trading program to be incorporated into an operating permit pursuant to this section;

2. The Department and EPA are provided notice of the permittee's intent to implement the intra-facility emissions trading program through the seven-day-notice change procedures set forth in N.J.A.C. 7:27-22.22, or through a minor modification or significant modification; and

3. The new intra-facility emissions trading program will not result in any increase in the aggregate maximum allowable emissions from the source operations included in the emissions trading program.]

[(i)]**(f)** A permittee authorized to implement [an intra-facility] **one or more facility-specific** emissions [trading program] **averaging programs** shall maintain an emissions [trading] log at the facility **for all source operations subject to the averaging program(s).** [In this log the] **The** permittee shall **maintain this** record on a daily basis [the emissions trading that has occurred]. Specifically, the log shall reflect for each day:

1. Whether the facility complied with the operating permit by operating within one or more emissions caps established for one or more groups of source operations; and

2. [If compliance is achieved through meeting the emissions cap for any group of source operations and for any air contaminant, for that] **For each** group of source operations and for [that] **each** air contaminant **subject to an emissions cap,** the following information:

i.-ii. (No change.)

[(j)]**(g)** The permittee shall ensure that operation pursuant to the authorized [intra-facility] **facility-specific** emissions [trading] **averaging** program meets all **applicable** permit conditions and applicable requirements, including the requirements of this chapter.

[(k) A permit shield shall apply only to an intra-facility emissions trading program which is incorporated into an operating permit through issuance of an initial operating permit, an operating permit renewal, or a significant modification.]

7:27-22.29 Facilities subject to acid deposition control

(a) (No change.)

(b) An administratively complete application to incorporate Phase II Title IV requirements into the operating permit shall be submitted:

Recodify existing i.-iii. as **1.-3.** (No change in text.)

(c)-(k) (No change.)

7:27-22.30 Renewals [(Reserved)]

(a) A permittee shall renew the operating permit through the procedures set forth in this section. At the time of submittal of an application for renewal, an applicant who proposes to make change(s) at the facility may include the proposed change(s) with the renewal application, identifying which are administrative amendments, seven-day-notice changes, minor modifications, or significant modifications. The Department may, upon its renewal of the permit, incorporate the change(s) into the operating permit, rather than process each separately.

1. The permittee shall not make any significant modification proposed in the application for renewal until the Department approves the renewal.

2. Construction or operation of source operations pursuant to any administrative amendment, seven-day-notice change, or minor modification proposed in the application for renewal, shall be done consistent with the requirements of N.J.A.C. 7:27-22.20, 22.22, and 22.23, respectively.

(b) The permittee shall submit, pursuant to (c) and (d) below, a timely and administratively complete application for the renewal of the operating permit.

(c) To be considered timely, an application for renewal shall be received by the Department at least 12 months prior to expiration of the operating permit. However, consistent with N.J.A.C. 7:27-22.4(e), the applicant is encouraged to submit the renewal application at least 15 months prior to expiration of the operating permit, so that the Department can notify the applicant of any deficiencies in the application. This will allow the applicant to correct any deficiencies, and to better ensure that the application is administratively complete by the renewal deadline. Only applications which are administratively complete by the renewal deadline will be eligible for coverage by an application shield.

(d) To be deemed administratively complete, an application for renewal of an operating permit shall include all information re-

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quired by the application form for the renewal and the following:

1. A summary of all the changes that have been incorporated into the operating permit through administrative amendments, minor modifications, or significant modifications during the past five-year term of the initial operating permit or the most recent renewal thereof;

2. Any additional changes to the operating permit which the permittee seeks to have included in the operating permit. For these changes the permittee shall set forth all information required pursuant to the procedures for an administrative amendment, seven-day-notice change, minor modification, or significant modification, pursuant to N.J.A.C. 7:27-22.20, 22.22, 22.23 or 22.24, as applicable;

3. Any changes which the permittee has submitted as a seven-day-notice change since the date of issuance of the most recent operating permit, and which the permittee seeks to have incorporated into the operating permit;

4. Changes made to information required in the operating permit for insignificant source operations at the facility;

5. A summary of the results of any source emissions testing or monitoring that has been performed since the date of issuance of the most recent operating permit for the source operations included in the operating permit; and

6. Proposed draft operating permit conditions that:

i. Reflect any change to the facility or its operations made through a seven-day-notice change since the last operating permit issuance; and

ii. Reflect any change to the facility or its operations proposed for inclusion in the renewed operating permit.

(e) In addition to the information required at (d) above, an applicant may submit proposed methods to be used to determine the actual emissions of each significant source operation, for the purpose of preparing emission statements required for the facility pursuant to N.J.A.C. 7:27-21. This is useful where a different method is more accurate than the general methods provided for in the guidelines for emission statement preparation.

(f) An application for the renewal of an operating permit may, at the applicant's option, include air quality simulation modeling and risk assessment for the facility or a portion thereof, pursuant to N.J.A.C. 7:27-22.8 Where a modification of the operating permit requires air quality simulation modeling, pursuant to N.J.A.C. 7:27-22.8, such modeling shall be submitted with the application.

(g) If an administratively complete application for renewal is received by the Department at least 12 months prior to the date the operating permit expires, the facility will be covered by the application shield set forth at N.J.A.C. 7:27-22.7.

(h) An application for renewal of an operating permit is subject to the requirements for public comment and EPA comment set forth at N.J.A.C. 7:27-22.11 and 22.12.

(i) Unless a facility subject to this subchapter is covered by an application shield pursuant to N.J.A.C. 7:27-22.7, the right to operate the facility terminates upon the expiration of its operating permit.

(j) If an operating permit has expired, the conditions of the operating permit remain enforceable until the operating permit is reissued, except as provided in acid deposition control regulations promulgated by EPA under Title IV of the CAA.

7:27-22.31 Fees

(a)-(j) (Reserved)

(k) A permittee shall submit, for each application for a modification of an operating permit, a modification service fee consisting of:

1. The base fee for application review, from the Base Fee schedule in (r) below; and

2. Any applicable fees for additional services, assessed in accordance with the Supplementary Fee Schedule in (s) below.

(l) Prior to taking final action on any modification, the Department will invoice the applicant for any unpaid fee due pursuant to (k) above. The applicant shall submit all fees to the Department within 60 days of receipt of the invoice.

(m) The fee due pursuant to (k) above is applicable to each application for a modification on which the Department takes final action on or after the date on which this section is operative, regardless of when the application was submitted.

(n) Consistent with N.J.A.C. 7:27-22.10(e) and (f), if an applicant fails to submit additional information on the application, requested by the Department, by the due date provided in the request, the Department may deny the application. In such a case, a new fee shall be due for any subsequent application.

(o) If the operating permit requires the Department to incur any of the following charges, the permittee shall reimburse the Department for the full amount of these charges:

1. The charges billed by a telephone company for the maintenance of a dedicated telephone line for the electronic transmission of data; or

2. The charges billed by a laboratory for analyzing audit samples.

(p) Any request for banking of emission credits, for an approval of an environmental improvement pilot test, or for a general permit registration, shall be accompanied by the applicable application fee set forth in the Base Fee Schedule below at (r)2, 3 or 4.

(q) A modification service fee shall include the applicable application fee set forth in the Base Fee Schedule in (r) below.

(r) The Base Fee Schedule is as follows:

Activity	Basis	Amount
1. Modification Application[1]		
i. Category I	Per application	$100.00
ii. Category II	Per first new or modified significant source operation, Per each additional new or modified significant source operation, provided that identical equipment to be used in identical processes and using identical materials shall be treated as one piece of equipment (or significant source operation) for fee calculations.	$500.00 plus $350.00
2. Banking		
i. Base application review	Per significant source operation	200.00
ii. Verification	Per significant source operation	200.00
iii. Transfer of facility ownership	Per significant source operation	50.00
iv. Withdrawal of credits	Per significant source operation	200.00
v. Donation of credits to the State of New Jersey	Per significant source operation	0.00
3. Application for environmental improvement pilot test	Per application	250.00
4. General Permit Registration	Per registration	250.00

[1]Should both Category I and Category II equipment and control apparatus be included in a single application, the new or modified Category I equipment and control apparatus will be subject to the Category I fee; and the new or modified Category II equipment and control apparatus will be subject to the Category II fee.

(s) The Supplementary Fee Schedule is as follows:

Activity	Basis	Amount
1. Prevention of significant deterioration		
i. Engineering review	Per air contaminant	$500.00
ii. Implement public comment procedures	Per comment period	$500.00
2. Ambient air monitoring		
i. Review protocol	Per protocol	$500.00
ii. Inspect monitoring locations and equipment installation	Per inspection	$500.00

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iii. Review quality assurance plan	Per plan	$500.00
iv. Review data	Per report	$500.00
3. Air quality impact analysis		
i. Evaluate protocol	Per protocol	$500.00
ii. Review screening modeling	Per review	$500.00
iii. Review refined modeling	Per review	$500.00
4. Risk assessment		
i. Evaluate protocol	Per protocol	$500.00
ii. Review risk assessment	Per review	$500.00
5. Testing		
i. Evaluate source-specific testing protocol		
(1) Process materials testing	Per protocol	$450.00
(2) Source emission testing	Per protocol	$500.00
ii. On-site monitoring of sample collection pursuant to an approved source-specific testing protocol		
(1) Process materials testing	Per collection event	$200.00
(2) Source emissions testing	Per performance test	$500.00
iii. Review testing report		
(1) Process materials testing	Per report	$200.00
(2) Source emissions testing	Per report	$500.00
6. Audit performance of continuous monitoring system		
i. Evaluate protocol	Per protocol per permit	$500.00
ii. Observe testing	Per protocol per permit	$500.00
iii. Review testing report	Per report	$500.00

7:27-22.33 Preconstruction review

(a) This section sets forth the procedures by which the Department will implement the preconstruction review requirements of N.J.S.A. 26:2C-1 et seq., as they apply to facilities subject to this subchapter.

(b) The owner or operator of a facility subject to this subchapter, which is in operation prior to the applicable application deadline at N.J.A.C. 7:27-22.5(c), shall obtain and maintain all preconstruction permits and operating certificates required pursuant to N.J.A.C. 7:27-8 until an operating permit is issued for the facility. These approvals will be superseded by the operating permit when it is issued.

(c) The owner or operat or of a facility subject to this subchapter, which commences operation after the applicable application deadline at N.J.A.C. 7:27-22.5(c), shall submit an application for an initial operating permit by the deadline established at N.J.A.C. 7:27-22.5(f). Until the issuance of an operating permit for the facility, the owner or operator of the facility shall obtain and maintain all preconstruction permits and operating certificates required pursuant to N.J.A.C. 7:27-8. These approvals will be superseded by the operating permit when it is issued.

(d) An application for a minor modification pursuant to N.J.A.C. 7:27-22.23, or a significant modification pursuant to N.J.A.C. 7:27-22.24, shall be subject to preconstruction review, which will include a demonstration that any equipment or control apparatus which is constructed, reconstructed, or modified incorporates advances in the art of air pollution control for the kind and amount of air contaminant emitted pursuant to N.J.A.C. 7:27-22.35.

(e) The Department will perform the preconstruction and operating permit reviews of an application for a minor or significant modification simultaneously. Ordinarily, the Department will issue an operating permit modification which includes preconstruction approval. However, if requested by an applicant for a modification, the Department will issue the preconstruction approval simultaneously with the draft permit which is forwarded to EPA pursuant to N.J.A.C. 7:27-22.12. This preconstruction approval will authorize the permittee to begin construction and operation of a minor modification, at the permittee's own risk, in accordance with N.J.A.C. 7:27-22.23. For a significant modification of the operating permit, the permittee may begin construction of a significant modification, but may not operate the modified facility until final issuance of the significant modification.

(f) If a facility or source operation becomes subject to a case-by-case MACT standard pursuant to N.J.A.C. 7:27-22.26(c) prior to issuance of an operating permit for the facility, the owner or operator of the facility shall establish a case-by-case MACT standard pursuant to N.J.A.C. 7:27-22.26(e). The owner or operator of the facility shall obtain and maintain a preconstruction permit and operating certificate pursuant to N.J.A.C. 7:27-8, which applies the case-by-case MACT standard to the appropriate source operation(s), until an operating permit covering the facility is issued which incorporates the case-by-case MACT standard.

7:27-22.34 Early reduction of HAP emissions

(a) This section shall take effect upon EPA's interim approval of the Department's operating permit program.

(b) The Department may allow a six year extension of time for complying with a MACT or GACT standard promulgated by EPA for one or more source operations at a facility, if the source operation achieves sufficient early reductions of HAP emissions. To be eligible for such a compliance extension, an applicant shall demonstrate that, between the end of a representative year and the date upon which EPA proposed the MACT or GACT standard, the relevant source operation(s) at the facility achieved at least the following emission reductions:

1. Ninety percent of all non-particulate HAP emissions; and
2. Ninety-five percent of all particulate HAP emissions.

(c) An applicant seeking an extension pursuant to (b) above shall, in accordance with the procedures at 40 CFR 63 Subpart D, provide to the Department:

1. The quantity of verifiable actual emissions released from the facility during a representative year no earlier than 1987. No year may be used as the representative year for which there is any evidence that emissions during that year are artificially or substantially greater than emissions in other years prior to implementation of emissions reduction measures; and

2. A demonstration that the emissions in (c)1 above were reduced by at least the amounts required in (b) above, between the end of the representative year and the date upon which EPA proposed the MACT or GACT standard.

(d) If the Department approves the compliance extension, the Department will incorporate the compliance extension into the operating permit for the facility. The owner or operator of a source operation for which a compliance extension is approved, and incorporated by the Department into the operating permit, may delay compliance with the MACT or GACT standard otherwise applicable to the source operation for six years after the original compliance date, provided that all conditions of the operating permit are met, and the emission reductions demonstrated to have been achieved pursuant to (c) above are maintained throughout that time.

(e) A compliance extension pursuant to this section shall not be available with respect to any standard or requirement promulgated by EPA to protect health and the environment pursuant to 42 USC 7412(f). If EPA promulgates such a health-based standard, any facility subject to the health-based standard shall comply with such standard according to the schedule set by EPA.

7:27-22.35 Advances in the art of air pollution control

(a) An applicant for a minor modification or significant modification of an operating permit shall demonstrate that any newly constructed, reconstructed or modified equipment will incorporate advances in the art of air pollution control for the air contaminants emitted, consistent with this section.

(b) For a significant source operation with a potential to emit each hazardous air pollutant (HAP) lower than the de minimis levels adopted by EPA pursuant to 42 U.S.C. 7412(g), and a potential to

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emit all other air contaminants and categories of air contaminants in amounts less than five tons per year individually, advances in the art of air pollution control is compliance with:

1. Reasonably available control technology (RACT) for the air contaminants emitted as set forth in this chapter;

2. Standards of Performance for New Sources of Air Pollution (NSPS), where applicable, as set forth at 40 CFR 60;

3. Any National Emission Standards for Hazardous Air Pollutants (NESHAP), where applicable, as set forth at 40 CFR 61, 63 or promulgated under 42 USC 7412; and

4. Any other applicable State or Federal standard or regulation, including any general operating permit issued pursuant to N.J.A.C. 7:27-22.14 which applies to that source operation.

(c) For a source operation with a potential to emit any HAPs at more than the de minimis levels specified by EPA, or with a potential to emit any other air contaminant or air contaminant category in an amount more than five tons per year, advances in the art of air pollution control is compliance with all of the following which apply:

1. Best Available Control Technology (BACT) where applicable, as set forth at 50 CFR 52.21 for air contaminant emission increases subject to standards for prevention of significant deterioration (PSD) pursuant to 40 CFR 51;

2. Lowest Achievable Emission Rate (LAER) where applicable, as set forth at 40 CFR 51.165(a)(xiii) and N.J.A.C. 7:27-18 for air contaminants which cause a significant net emissions increase of a nonattainment air contaminant in an area which is nonattainment for that contaminant;

3. Maximum Achievable Control Technology (MACT) or Generally Achievable Control Technology (GACT), where applicable, for air contaminants subject to 40 CFR Subpart 63, governing HAPs;

4. A general operating permit issued pursuant to N.J.A.C. 7:27-22.14 which applies to that source operation; and

5. The use of up-to-date technology and methods, reflected in equipment and procedures, that when applied to an emission source will reasonably minimize emissions of that contaminant, for any other air contaminant not covered under (c)1, 2, 3, or 4 above, emitted by a source operation with the potential to emit greater than five tons per year of that air contaminant.

i. The Department will periodically publish technical manuals containing technology, methods, and performance levels which can be used by applicants for demonstrating advances in the art of air pollution control, after public input and comment. Such technology, methods and performance levels shall have been demonstrated to be reliable for similar air contaminant discharge parameters, and shall be available at reasonable cost commensurate with the reduction in air pollution.

ii. Once the Department has published a technical manual for advances in the art of air pollution control pursuant to (c)5i above, any application submitted which shows compliance with the technical manual shall be considered to incorporate advances in the art of air pollution control for the source operations covered by the technical manual. The Department will periodically review and update the technical manuals, with public notice and input. If the Department amends a technical manual, only applications submitted after the final publication of the amended technical manual shall be subject to it.

iii. Instead of relying on a technical manual for advances in the art of air pollution control, the applicant may propose case by case advances in the art of air pollution control, applicable to a specific source operation. If the Department confirms that the proposal includes up-to-date technology and methods reflected in equipment and procedures, that when applied to an emission source will reasonably minimize emissions, this shall constitute advances in the art of air pollution control for that specific source operation.

APPENDIX

TABLE A

Thresholds for Reporting Emissions of Air Contaminants Other than Hazardous Air Pollutants (HAPs)

Air Contaminant	Hourly Emissions (pounds per hour)
VOC	0.05
TSP	0.05
PM-10	0.05
NO_x	0.05
CO	0.05
SO_2	0.05
Any other air contaminant (1)	0.05

(1) This air contaminant category shall apply to any other air contaminant, other than hazardous air pollutants (HAPs) that the facility has the potential to emit in a quantity greater than or equal to 100 tons per year.

TABLE B

Thresholds for Reporting Emissions of Hazardous Air Pollutants (HAPs)

CAS Number	Air Contaminant	Annual Emissions (tons per year)	Annual Emissions (pounds per year)
75070	Acetaldehyde	0.9	1800
60355	Acetamide	0.1	200
75058	Acetonitrile	0.4	800
98862	Acetophenone	0.1	200
53963	2-Acetylaminofluorene	0.0005	1
107028	Acrolein	0.004	8
79061	Acrylamide	0.002	4
79107	Acrylic acid	0.06	120
107131	Acrylonitrile	0.03	60
107051	Allyl chloride	0.1	200
92671	4-Aminobiphenyl	0.1	200
62533	Aniline	0.1	200
90040	o-Anisidine	0.1	200
71432	Benzene	0.2	400
92875	Benzidine	0.00003	0.06
98077	Benzotrichloride	0.0006	1.2
100447	Benzyl chloride	0.01	20
92524	Biphenyl	1	2000
117817	Bis(2-ethylhexyl)phthalate	0.5	1000
542881	Bis(chloromethyl)ether	0.00003	0.06
75252	Bromoform	1	2000
106990	1,3-Butadiene	0.007	14
156627	Calcium cyanamide	1	2000
105602	Caprolactam	1	2000
133062	Captan	1	2000
63252	Carbaryl	1	2000
75150	Carbon disulfide	0.1	200
56235	Carbon tetrachloride	0.1	200
463581	Carbonyl sulfide	0.5	1000
120809	Catechol	0.5	1000
133904	Chloramben	0.1	200
57749	Chlordane	0.001	2
7782505	Chlorine	0.01	20
79118	Chloroacetic acid	0.01	20
532274	2-Chloroacetophenone	0.006	12
108907	Chlorobenzene	1	2000
510156	Chlorobenzilate	0.04	80
67663	Chloroform	0.09	180
107302	Chloromethyl ethyl ether	0.01	20
126998	Chloroprene	0.1	200
1319773	Cresols/Cresylic acid	0.1	200
95487	o-Cresol	0.1	200
108394	m-Cresol	0.1	200
106445	p-Cresol	0.1	200
98828	Cumene	1	2000
94757	2,4-D	1	2000
547044	DDE	0.001	2
334883	Diazomethane	0.1	200

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132649	Dibenzofurans	0.5	1000
96128	1,2-Dibromo-3-chloropropane	0.001	2
84742	Dibutylphthalate	1	2000
106467	1,4-Dichlorobenzene	0.3	600
91941	3,3-Dichlorobenzidine	0.02	40
111444	Dichloroethyl ether	0.006	12
542756	1,3-Dichloropropene	0.1	200
62737	Dichlorvos	0.02	40
111422	Diethanolamine	0.5	1000
121697	N,N-Diethyl aniline	0.1	200
64675	Diethyl sulfate	0.1	200
119904	3,3-Dimethoxybenzidine	0.01	20
60117	Dimethyl aminoazobenzene	0.1	200
119937	3,3-Dimethyl benzidine	0.0008	1.6
79447	Dimethyl carbamoyl chloride	0.002	4
68122	Dimethyl formamide	0.1	200
57147	1,1-Dimethyl hydrazine	0.0008	1.6
131113	Dimethyl phthalate	1	2000
77781	Dimethyl sulfate	0.01	20
534521	4,6-Dinitro-o-cresol	0.01	20
51285	2,4-Dinitrophenol	0.1	200
121142	2,4-Dinitrotoluene	0.002	4
123911	1,4-Dioxane	0.6	1200
122667	1,2-Diphenylhydrazine	0.009	18
106898	Epichlorohydrin	0.2	400
106887	1,2-Epoxybutane	0.1	200
140885	Ethyl acrylate	0.1	200
100414	Ethyl benzene	1	2000
51796	Ethyl carbamate	0.08	160
75003	Ethyl chloride	1	2000
106934	Ethylene dibromide	0.01	20
107062	Ethylene dichloride	0.08	160
107211	Ethylene glycol	1	2000
151564	Ethylene imine	0.0003	0.6
75218	Ethylene oxide	0.01	20
96457	Ethylene thiourea	0.06	120
75343	Ethylidene dichloride	0.1	200
50000	Formaldehyde	0.2	400
76448	Heptachlor	0.002	4
118741	Hexachlorobenzene	0.001	2
87683	Hexachlorobutadiene	0.09	180
77474	Hexachlorocyclopentadiene	0.01	20
67721	Hexachloroethane	0.5	1000
822060	Hexamethylene-1,6-diisocyante	0.002	4
680319	Hexamethylphosphoramide	0.001	2
110543	Hexane	1	2000
302012	Hydrazine	0.0004	0.8
7647010	Hydrochloric acid	1	2000
7664393	Hydrogen fluoride	0.01	20
123319	Hydroquinone	0.1	200
78591	Isophorone	1	2000
58899	Lindane	0.001	2
108316	Maleic anhydride	0.1	200
67561	Methanol	1	2000
72435	Methoxychlor	1	2000
74839	Methyl bromide	1	2000
74873	Methyl chloride	1	2000
71556	Methyl chloroform	1	2000
78933	Methyl ethyl ketone	1	2000
60344	Methyl hydrazine	0.006	12
74884	Methyl iodide	0.1	200
108101	Methyl isobutyl ketone	1	2000
624839	Methyl isocyanate	0.01	20
80626	Methyl methacrylate	1	2000
1634044	Methyl tert butyl ether	1	2000
101144	4,4-Methylene bis(2-chloraniline)	0.02	40
75092	Methylene chloride	1	2000
101688	Methylene diphenyl diisocyanate	0.01	20
101779	4,4'-Methylenedianiline	0.1	200
91203	Naphthalene	1	2000
98953	Nitrobenzene	0.1	200
92933	4-Nitrobiphenyl	0.1	200
100027	4-Nitrophenol	0.5	1000
79469	2-Nitropropane	0.1	200
684935	N-Nitroso-N-methylurea	0.00002	0.04
62759	N-Nitrosodimethylamine	0.0001	0.2
59892	N-Nitrosomorpholine	0.1	200
56382	Parathion	0.01	20
82688	Pentachloronitrobenzene	0.03	60
87865	Pentachlorophenol	0.07	140
108952	Phenol	0.01	20
106503	p-Phenylenediamine	1	2000
75445	Phosgene	0.01	20
7803512	Phosphine	0.5	1000
7723140	Phosphorus	0.01	20
85449	Phthalic anhydride	0.5	1000
1336363	Polychlorinated biphenyls	0.0009	1.8
1120714	1,3-Propane sultone	0.003	6
57578	beta-Propiolactone	0.01	20
123386	Propionaldehyde	0.5	1000
114261	Propoxur	1	2000
78875	Propylene dichloride	0.1	200
75569	Propylene oxide	0.5	1000
75558	1,2-Propylenimine	0.0003	0.6
91225	Quinoline	0.0006	1.2
106514	Quinone	0.5	1000
100425	Styrene	0.1	200
96093	Styrene oxide	0.1	200
1746016	2,3,7,8-TCDD	0.00000006	0.00012
79345	1,1,2,2-Tetrachloroethane	0.03	60
127184	Tetrachloroethylene	1	2000
7550450	Titanium tetrachloride	0.01	20
108883	Toluene	1	2000
95807	2,4-Toluene diamine	0.002	4
584849	2,4-Toluene diisocyanate	0.01	20
95534	o-Toluidine	0.1	200
8001352	Toxaphene	0.001	2
120821	1,2,4-Trichlorobenzene	1	2000
79005	1,1,2-Trichloroethane	0.1	200
79016	Trichloroethylene	1	2000
95954	2,4,5-Trichlorophenol	0.1	200
88062	2,4,6-Trichlorophenol	0.6	1200
121448	Triethylamine	1	2000
1582098	Trifluralin	0.9	1800
540841	2,2,4-Trimethylpentane	0.5	1000
108054	Vinyl acetate	0.1	200
593602	Vinyl bromide	0.06	120
75014	Vinyl chloride	0.02	40
75354	Vinylidene chloride	0.04	80
1330207	Xylenes	1	2000
95476	o-Xylenes	1	2000
108380	m-Xylenes	1	2000
106423	p-Xylenes	1	2000
	CHEMICAL COMPOUND CLASSES		
	Antimony compounds (except those listed*)	0.5	1000
7783702	Antimony pentafluoride	0.01	20
8300745	Antimony potassium tartrate	0.1	200
1309644	Antimony trioxide	0.1	200
1345046	Antimony trisulfide	0.01	20
	Arsenic & inorganic arsenic compounds	0.0005	1
7784421	Arsine	0.0005	1
	Beryllium compounds (except Be salts*)	0.0008	1.6
	Beryllium salts	0.000002	0.004
	Cadmium compounds	0.001	2
130618	Cadmium oxide	0.001	2
	Chromium compounds (except hexavalent & trivalent)	0.5	1000
	Hexavalent Chromium compounds	0.0002	0.4
	Trivalent Chromium compounds	0.5	1000
10025737	Chromic chloride	0.001	2
744084	Cobalt metal and compounds (except those listed*)	0.01	20
10210681	Cobalt carbonyl	0.01	20
62207765	Fluomine	0.01	20
	Coke oven emissions	0.003	6
	Cyanide compounds (except those listed*)	0.5	1000

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151508	Potassium cyanide	0.01	20
143339	Sodium cyanide	0.01	20
	Glycol ethers (except those listed*)	0.5	1000
110805	2-Ethoxy ethanol	1	2000
111762	Ethylene glycol monobutyl ether	1	2000
108864	2-Methoxy ethanol	1	2000
	Lead and compounds (except those listed*)	0.001	2
78002	Tetraethyl lead	0.001	2
75741	Tetramethyl lead	0.001	2
7439965	Manganese and compounds (except those listed*)	0.08	160
12108133	Methylcyclopentadienyl manganese	0.01	20
	Mercury compounds (except those listed*)	0.001	2
	Elemental mercury	0.001	2
748794	Mercuric chloride	0.001	2
10045940	Mercuric nitrate	0.001	2
62384	Phenyl mercuric acetate	0.001	2
	Nickel compounds (except those listed*)	0.1	200
13463393	Nickel carbonyl	0.01	20
12035722	Nickel refinery dust	0.008	16
	Nickel subsulfide	0.004	8
	Polycyclic organic matter (except those listed*)	0.001	2
56553	Benz(a)anthracene	0.001	2
225514	Benz(c)acridine	0.001	2
50328	Benzo(a)pyrene	0.001	2
205992	Benzo(b)fluoranthene	0.001	2
218019	Chrysene	0.001	2
53703	Dibenz(a,h)anthracene	0.001	2
189559	1,2:7,8-Dibenzopyrene	0.001	2
57976	7,12-Dimethylbenz(a)anthracene	0.001	2
193395	Indeno(1,2,3-c,d)pyrene	0.001	2
7782492	Selenium compounds (except those listed*)	0.01	20
7783075	Hydrogen selenide	0.01	20
7488564	Selenium sulfide (mono and di)	0.01	20
13410010	Sodium selenate	0.01	20
10102188	Sodium selenite	0.01	20

*For this chemical group, specific compounds or subgroups are named specifically in this table. For the remainder of the chemicals of the chemical group, a single de minimis value is listed; this value applies to compounds which are not named specifically.

(a)

POLICY AND PLANNING/AIR QUALITY MANAGEMENT

Control and Prohibition of Volatile Organic Compounds from Consumer and Commercial Products

Proposed New Rules: N.J.A.C. 7:27-24

Authorized By: Robert C. Shinn, Jr., Commissioner, Department of Environmental Protection.

Authority: N.J.S.A. 13:1B-3 and 26:2C-1 et seq., in particular 26:2C-8.

DEP Docket Number: 09-95-02/514.

Proposal Number: PRN 1995-192.

A **public hearing** concerning this proposal will be held on:
Wednesday, April 19, 1995 at 1:00 P.M.
Department of Environmental Protection
401 East State Street
Hearing Room—First Floor, East Wing
Trenton, New Jersey

Submit written comments by May 10, 1995 to:
Janis E. Hoagland, Esq. (Docket #09-95-02/514)
Department of Environmental Protection
Office of Legal Affairs
CN 402
Trenton, New Jersey 08625-0402

These proposed new rules will become operative 60 days after adoption by the Commissioner (see N.J.S.A. 26:2C-8).

The agency proposal follows:

Summary

The Department of Environmental Protection (the Department) herein proposes new rules to limit emissions of volatile organic compounds (VOC) from certain consumer and commercial products. The following categories of products would be affected by these proposed rules:

air fresheners
bathroom and tile cleaners
carburetor choke cleaners
cooking sprays (aerosol)
dusting aids
engine degreasers
fabric protectants
floor polishes and waxes
furniture maintenance products (aeorsols)
general purpose cleaners
glass cleaners
hair sprays
hair mousses
hair styling gels
household adhesives
insecticides
laundry prewashes
laundry starch products
nail polish removers
oven cleaners
shaving creams
antiperspirants and deodorants

On January 12, 1995, at the Department's hearing room at 401 East State Street in Trenton, the Department held a public workshop regarding a draft consumer product rule. Notice of this workshop was published in the New Jersey Register on January 3, 1995 at 27 N.J.R. 27(a), and was mailed to 3,950 interested parties compiled by the Department. Notices of the workshop were also published in the following newspapers: Star Ledger, December 21, 1994; Courier Post, December 17, 1994; Asbury Park Press, December 17, 1994; Trenton Times, December 17, 1994; Atlantic City Press, December 24, 1994; and The Record, December 17, 1994. Thirty-two people attended the workshop. The Department received written comments from 16 organizations.

The Department has based these proposed rules upon similar rules proposed or adopted by other states' environmental regulatory agencies and upon input from the January 12, 1995 public workshop. The Department expects that the proposed new rules would reduce emissions of VOC, from a 1990 baseline, by 6.3 tons per day in New Jersey. These emission reductions would contribute to achievement of the National Ambient Air Quality Standard (NAAQS) for ground level ozone.

Legal Background

On January 27, 1987, plaintiffs American Lung Association of New Jersey, the Natural Resources Defense Council, the New Jersey Chapter of the Sierra Club, the New Jersey Audubon Society, the American Littoral Society, the New Jersey Environmental Federation, the New Jersey Environmental Lobby, and the New Jersey Public Interest Research Group brought suit in United States District Court, District of New Jersey, against the Governor of the State of New Jersey, the Commissioner of the Department, and the Administrator of the United States Environmental Protection Agency (EPA) in the New Jersey District of the United States District Court. This case is hereafter referred to as *ALA vs. Kean*. In their lawsuit, the plaintiffs claimed that the Department violated provisions of its 1983 State Implementation Plan (SIP) by not adopting various "extraordinary measures" rules for the control of volatile organic compounds (VOC), including a rule to regulate VOC emissions from solvent-based consumer and commercial products.

The plaintiffs filed a motion for summary judgment in this matter on April 28, 1987. On November 19, 1987, Judge Harold A. Ackerman, U.S.D.J., granted the plaintiffs' motion and issued a decision and Scheduling Order which required the Department to adopt the following VOC control measures in accordance with the timetables set out in that order: stage II vapor recovery of gasoline, barge loading of gasoline, architectural coatings, solvent-based consumer and commercial products, small industrial surface coating operations, small manufacturing operations, and automobile refinishing operations.

The Department promulgated regulations for all of the VOC control measures set forth in Judge Ackerman's order including new rules at N.J.A.C. 7:27-23 which limited the VOC emissions from several

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categories of consumer/commercial products, specifically architectural coatings and air fresheners (see 21 N.J.R. 462(a), February 24, 1989). Subsequent amendments to subchapter 23 were adopted by the Department on October 13, 1989 (21 N.J.R. 3488(a), November 6, 1989) and on June 10, 1990 (22 N.J.R. 2145(a), July 16, 1990).

Following the 1989 promulgation of subchapter 23, an appeal was brought in the Superior Court, Appellate Division, by Scott's Liquid Gold, a consumer products manufacturer, challenging the regulation and, specifically, the air freshener provisions of the rule, on substantive and procedural grounds. The Appellate Division, in a decision dated February 26, 1990, reversed the promulgation of the air freshener rule and remanded it to the Department. See *In the Matter of the Adoption of Regulations Governing Volatile Organic Substances in Consumer Products, N.J.A.C. 7:27-23,* No. A-1226-89T1, Superior Court, Appellate Division dated February 26, 1990. The air freshener provisions in subchapter 23 were subsequently repealed (see 22 N.J.R. 2145(a), July 16, 1990).

On July 26, 1993, the plaintiffs in *ALA vs. Kean* filed a motion in the United States District Court, District of New Jersey, to enforce the November 19, 1987 scheduling order. Specifically, ALA sought to compel the Department to promulgate a regulation for the control of VOC emissions from consumer and commercial products. On June 29, 1994, Judge Ackerman ordered the Department to adopt a solvent-based consumer and commercial products rule in accordance with an amended scheduling order. That order was amended by a consent order dated October 11, 1994, which slightly revised the June 29, 1994 scheduling order. Pursuant to that order, the Department is currently obligated to adopt a consumer and commercial products regulation which requires full compliance by April 30, 1996.

Ground level ozone

In the presence of sunlight and oxides of nitrogen, VOCs undergo complex atmospheric photochemical reactions, and form "smog" which contains ground level ozone. The primary National Ambient Air Quality Standard (NAAQS) for ground level ozone is 0.12 parts per million (ppm) or 235 micrograms per cubic meter. This primary NAAQS for ozone is designed to protect public health.

The United States Environmental Protection Agency (EPA) has designated all of New Jersey as violating the NAAQS for ground level ozone. Warren County, which is part of the Allentown-Bethlehem-Easton Metropolitan Statistical Area, has been classified as a Marginal non-attainment area. Atlantic and Cape May Counties, which are part of the Atlantic City Metropolitan Statistical Area, have been classified as a Moderate non-attainment area. Mercer, Burlington, Camden, Gloucester, Salem, and Cumberland Counties, which are part of the Philadelphia-Wilmington-Trenton Consolidated Metropolitan Statistical Area, have been classified as a Severe 1 non-attainment area. Sussex, Passaic, Bergen, Morris, Essex, Hudson, Hunterdon, Somerset, Union, Middlesex, Monmouth, and Ocean Counties, which are part of the New York-Northern New Jersey-Long Island Consolidated Metropolitan Statistical Area, have been classified as a Severe 2 non-attainment area. These classifications reflect the degree to which the ozone NAAQS is exceeded in the different areas. The following map shows the various non-attainment classifications.

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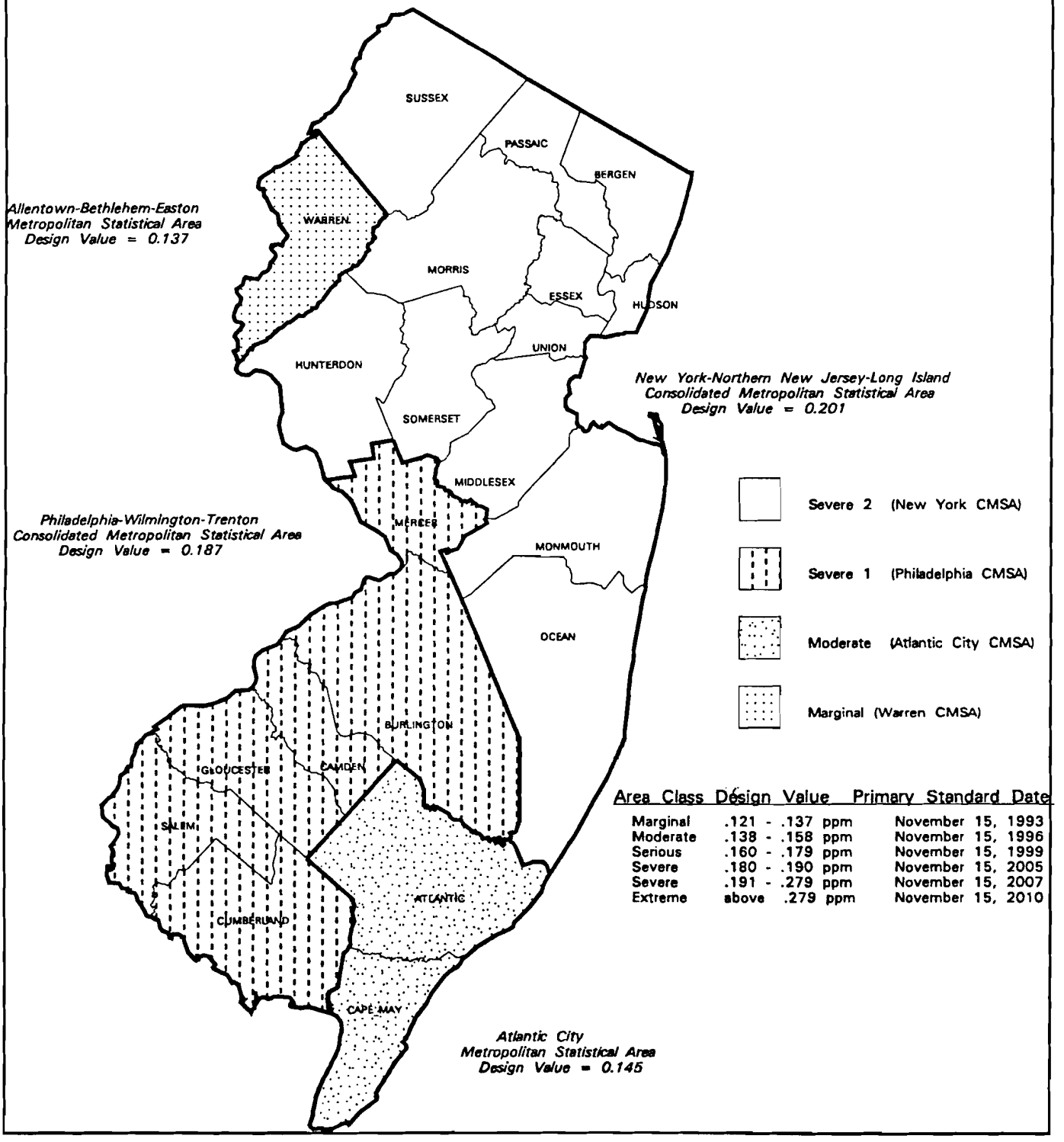
New Jersey
EPA 1991 Ozone Designations



Area Class	Design Value	Primary Standard Date
Marginal	.121 - .137 ppm	November 15, 1993
Moderate	.138 - .158 ppm	November 15, 1996
Serious	.160 - .179 ppm	November 15, 1999
Severe	.180 - .190 ppm	November 15, 2005
Severe	.191 - .279 ppm	November 15, 2007
Extreme	above .279 ppm	November 15, 2010

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Data from the 15 ozone monitoring sites in New Jersey indicate that the primary NAAQS for ozone was exceeded during 18 days in the State of New Jersey during 1993. During 1994, there were only seven days in which the primary NAAQS for ozone was exceeded at the 15 monitoring stations in New Jersey. Although the number of exceedance days in 1994 is the lowest on record since ozone has been monitored in New Jersey, further emission reductions of ozone precursors are needed to attain the NAAQS for ozone.

Short-term effects of elevated ozone concentrations on healthy exercising adults and children include coughing, painful breathing and loss of certain lung functions. The connection between respiratory disease and high levels of ozone has been reported by the University of Medicine and Dentistry of New Jersey (UMDNJ). After studying data from nine central New Jersey hospitals, UMDNJ researchers found that the incidence of asthma attacks rose from seven to 10 percent when elevated levels of ozone were reported by the Department. These effects are exacerbated in sensitive populations, particularly the elderly, those with pre-existing respiratory diseases and children who play outdoors. Long-term effects are also of concern, because much of New Jersey's population has been exposed to unhealthful levels of ozone throughout their lifetime. Although chronic effects have not been conclusively demonstrated, repeated exposure to ozone over a lifetime causes biochemical and structural changes in the lung and may be a causal factor in the development of chronic respiratory diseases.[1]

Increased ozone levels also cause damage to foliage. One of the earliest and most obvious manifestations of ozone's impact on the environment is its impact on sensitive plants. Subsequent effects include reduced plant growth and decreased crop yield. A reduction in ambient ozone concentrations would mitigate damage to foliage, fruits, vegetables, and grains.

The oxidizing properties of ozone lead to accelerated degradation of various human-made materials such as rubber, plastics, dyes and paints. Attainment of the NAAQS for ozone would reduce the rate of degradation of both natural and synthetic materials, thus preventing excess expenditure on maintenance and replacement of property.

Summary of proposed rules

N.J.A.C. 7:27-24.1 Definitions

Many of the definitions of terms used in this subchapter define the categories of products being regulated. The Department has generally intended to define the same population of consumer products as regulated in other states in order to be regionally consistent and because these definitions have been found to be useful. However, the Department has made some minor changes to some of these definitions in order to be consistent with terminology typically used in other subchapters within N.J.A.C. 7:27 and in order to improve the structure and clarity of the definitions.

The definitions of the terms "ASTM," "CARB," "Department" and "EPA" identify abbreviations or acronyms for organizations and are general in nature. ASTM stands for the American Society of Testing and Materials. CARB stands for the California Air Resources Board. Department is used to describe the New Jersey State Department of Environmental Protection. EPA abbreviates the United States Environmental Protection Agency.

The term "volatile organic compound" or "VOC" and "person" used in subchapter 24 have the same definitions used elsewhere in N.J.A.C. 7:27.

The definition of the term "consumer product" includes products that are sold retail or wholesale and used by household, commercial or institutional consumers. The Department has not proposed the list of product types used in the CARB definition of "consumer product" (that is: including, but not limited to, detergents; cleaning compounds; polishes; floor finishes; cosmetics; personal care products; home, lawn, and garden products; disinfectants; sanitizers; and automobile specialty products) because Table 1 at N.J.A.C. 7:27-24.3 lists the types of consumer products regulated in this proposed subchapter. The term "consumer product" does not include paint, or architectural coatings. The criteria for determining whether a specific consumer product must meet a VOC content limit is completely independent of whether the product is used for commercial, institutional, household, or consumer applications, unless otherwise specified in a definition of a particular product category.

The other definitions at N.J.A.C. 7:27-24.1 are used in the substantive portions of the rule and are discussed below with the particular section of the rule.

N.J.A.C. 7:27-24.2 Applicability, exemptions, and exclusions

N.J.A.C. 7:27-24.3(a) is general in nature and states that only the consumer products listed in Table 1 at N.J.A.C. 7:27-24.3 are subject to the subchapter. The requirements of the VOC content limits apply to the manufacturers of consumer products that are sold and used in the State of New Jersey. Responsibility is also placed upon companies that distribute consumer products for use in New Jersey. Although distributors cannot control the VOC content of the products they handle, they should be knowledgeable that certain consumer products have VOC content limits and select the products that they distribute accordingly. Manufacturers of consumer products which would not comply with the proposed rules should notify the companies to whom they supply their products that these products are non-compliant in New Jersey and should not be sold for use in New Jersey.

N.J.A.C. 7:27-24.2(b) contains the exemptions for specified categories of consumer products. This subsection exempts consumer products that are sold in New Jersey for shipment and use outside of the State of New Jersey from the VOC content limits, administrative and testing requirements of this subchapter. This exemption reflects the Department's intent to regulate only the manufacture and distribution of consumer products that are actually used in New Jersey and not to interfere in the transportation of goods that are destined for outside of the State.

This subsection also exempts bait station insecticides containing less than 0.5 ounces of bait would from the subchapter. Bait station insecticides usually contain a food-like substance laced with a chemical pesticide. The rationale for this exempting bait station insecticides is that such insecticides do not emit VOCs and all bait station insecticides would comply with the VOC content standards since they contain no solvents or propellants. The limit of 0.5 ounces of bait is specified to reflect the weight of bait material that is typically used in such products. This exemption is consistent with similar rules in the other states.

Air fresheners and insecticides that contain at least 98 percent para-dichlorobenzene are excluded from the VOC content limits, administrative and testing requirements of this subchapter. This exemption excludes mothballs and toilet odor blocks. Para-dichlorobenzene is the active ingredient in these products and there are no existing acceptable alternatives for the functions that these products provide. This exemption is also consistent with similar regulations in other states.

Air fresheners that consist entirely of fragrance, less excluded compounds, are also excluded form this subchapter, in a manner consistent with regulations promulgated by other states. The intent of this exemption is to exclude air fresheners in which a fragrance is impregnated on cardboard or other material, such as in car fresheners or potpourri. Excluding the weight of the substrate, such products would consist entirely of fragrance. Therefore, the active ingredient is present in concentrate form, which would result in less VOC emissions.

The Department has also provided exclusion for household adhesives that are sold in containers of a specified size or that have a specified net weight. The first of these exclusions is for household adhesives sold in containers of one fluid ounce or less. This first exclusion is designed primarily to address cyanoacrylate based adhesives, often referred to as "super glues." Upon exposure to moisture these adhesives polymerize rather than volatilizing into the air. Other states which regulate the VOC content of household adhesives also use this same exemption language. The other exclusions are for household adhesives sold in containers of more than 16 fluid ounces or which have a net weight of more than one pound. Therefore, to maintain consistency with the exemptions established in similar rules by other states, the Department is using the same exemption language for household adhesives.

N.J.A.C. 7:27-24.2(c) states that the VOC content limits at N.J.A.C. 7:27-24.3 do not apply to consumer products manufactured prior to April 30, 1996, provided such consumer products have a date of manufacture code on the container or packaging. This provision allows manufacturers and distributors sufficient notice and a reasonable amount of time to comply with these rules. Additionally, this provision is meant to allow an unlimited sell-through period for products manufactured prior to the full compliance date of April 30, 1996, eliminating the additional burden and cost associated with a limited sell-through period for "grandfathered" consumer products. A limited sell-through period for products manufactured before April 30, 1996 could produce negative environmental consequences if those products were disposed of after the sell-through period expired.

N.J.A.C. 7:27-24.2(d) exempts from the VOC content limits at N.J.A.C. 7:27-24.3 those consumer products that have received an Innovative Product exemption from the California Air Resources Board (CARB).

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The concept behind CARB's Innovative Product provisions is to provide an alternative to complying with the specified standard found in the rule. Under CARB's rule, innovative products may be exempted from VOC content standards if the manufacturer of the innovative product demonstrates that, due to some characteristics of the formulation, design delivery system or other factor, VOC emissions from the use of the innovative product would be less than the emissions from use of a representative product that meets the VOC content standard. The Department agrees with the concept of CARB's Innovative Product exemption. Since the emissions of the innovative product are compared to a representative product on a per use basis, the Department believes that CARB's decisions on innovative products would also be appropriate in New Jersey. Therefore, the Department proposes to exempt from the VOC content standards at N.J.A.C. 7:27-24.3, all consumer products that have been granted an Innovative Products exemption by CARB. A copy of CARB's decision and all statements of conditions of approval must be sent to theDepartment at the address indicated in the text of the proposed rule in order for the manufacturer to benefit from the exemption.

N.J.A.C. 7:27-24.2(e) provides relief from extraordinary economic hardship for manufacturers of consumer products by exempting from the VOC content standards at N.J.A.C. 7:27-24.3 products that have been granted variances by other state agencies. This provision would apply to manufacturers that submit the approvals (along with any conditions or limitations of approval) from another state to the Department. Currently, CARB grants "variances" and the Texas Natural Resource Conservation Commission grants similar "alternative control requirements." Both of these procedures allow manufacturers of consumer products an opportunity to apply for a limited exemption based upon extraordinary economic hardship. Through this subsection, the Department would accept the approvals of other states as valid for New Jersey until they expire or are revoked.

N.J.A.C. 7:27-24.2(f) excludes certain substances for the purposes of determining the VOC content of consumer products, specifically: (1) VOCs with known low vapor pressures of less than 0.1 millimeters of mercury at 20 degrees Celsius; (2) VOCs with unknown vapor pressures consisting of more than 12 carbon atoms per molecule compounds; and (3) VOCs with unknown vapor pressures that have melting points higher than 20 degrees Celsius and do not sublime. Due to their very low volatility, these compounds are less likely to be emitted into the air and more likely to fate mechanisms other than volatilization. Examples of such compounds include high molecular weight resins used in hair sprays and the heavy oils used in furniture polishes. This subsection also excludes fragrances up to a combined two percent by weight contained in any consumer product. This exclusion is designed to allow de minimis quantities of these substances so that the products may be marketed in an appealing manner to consumers.

At proposed N.J.A.C. 7:27-24.2(g), manufacturers of consumer products that are registered under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) are exempt from the labelling requirements at N.J.A.C. 7:27-24.4(b) because FIFRA law preempts state agencies from requiring changes to the labels of FIFRA registered products. However, in order for manufacturers of FIFRA registered products that were manufactured before the compliance deadline and that exceed the VOC content limits at N.J.A.C. 7:27-24.3(a) Table 1 take advantage of the sell-through period, they would need to voluntarily label such products with the month and year of manufacture (or a date code).

N.J.A.C. 7:27-24.3 VOC content standards

N.J.A.C. 7:27-24.3(a) sets forth the VOC content standards at Table 1. This provision restates that the VOC content standards only apply to consumer products manufactured after April 30, 1996.

Table 1 identifies the categories of consumer products regulated under this subchapter and the VOC content standards for such products. The categories and definitions are modelled predominantly after CARB's consumer product rules. This Table includes all of the categories in the CARB rule, with beginning effective dates from January 1, 1993 through January 1, 1995, except dual purpose air freshener/disinfectants, non-aerosol furniture maintenance products, aerosol insect repellants, personal fragrance products, automotive windshield wiper fluid, and charcoal lighter fluid. The proposed new VOC content standards does not include California's "technology forcing" content standards with effective dates starting January 1, 1996. However, the Department may propose standards for additional consumer product categories or may propose more stringent standards for existing categories at a later date. Each product category listed in Table 1 is intended to encompass the same products as described by the same category in the CARB rule. Other states (such as New York, Massachusetts, and Texas) have promulgated similar rules as well. Rhode Island has adopted consumer products rules as a contingency measure, that is, the rules will only become effective 90 days after the date that EPA notifies Rhode Island that it has failed to achieve a 15 percent reduction of VOC emissions from the 1990 baseline.

For each category regulated by other states' rules, the VOC content limits are identical, with the exception of the standards for antiperspirants and deodorants. Discussion of the differences between the states' standards for antiperspirants and deodorants is detailed below.

The following is a summary of the categories and VOC content standards specified in Table 1 at proposed N.J.A.C. 7:27-24.3.

The air freshener group is divided into four categories by product form: single phase aerosols, double-phase aerosols, liquid/pump, and solid/gel. The Department is not proposing the dual-purpose air freshener/disinfectant standard promulgated by California and Rhode Island as many such products have been re-labelled in order to remove claim to air freshening capabilities and as manufacturers of such products are experiencing great difficulty in meeting the 60 percent VOC content standard because the active ingredients are generally VOCs. Other states (such as in Texas and Massachusetts) that regulate air fresheners also exclude this category of air fresheners in their rules.

The antiperspirant group is divided into two categories based on product form: aerosol and non-aerosol. The VOC content standard for aerosol antiperspirants is 60 percent by weight High Volatility Organic Compounds (HVOC). The proposed term HVOC is defined at proposed N.J.A.C. 7:27-24.1 to mean those VOCs that exert a vapor pressure greater than 80 millimeters of mercury (mm Hg) at 20 degrees Celsius. The definition of this term is consistent with the definitions used in other states' regulations. Unlike California, New York, and Rhode Island, the Department is not proposing a Medium Volatility Organic Compound (MVOC)—vapor pressure between two and 80 mm Hg—standard of 20 percent by weight in addition to the HVOC standard for aerosol antiperspirants. These states' regulations also have an exemption for existing antiperspirants containing ethanol, which would otherwise be considered an MVOC. It is the Department's understanding that this regulatory structure discourages reformulation and puts new product formulations at a competitive disadvantage. Therefore, the Department is proposing only an HVOC standard for aerosol antiperspirants, similar to that promulgated by Texas and Massachusetts. The Department is proposing an HVOC content standard of zero percent for non-aerosol antiperspirants and no MVOC standard for the same reason just described with regard to aerosol antiperspirants.

The bathroom and tile cleaner group is also divided based on product form into aerosol and non-aerosol product categories. The Department is proposing VOC content standards of seven percent by weight for aerosol bathroom/tile cleaners, and five percent by weight for all other forms of bathroom/tile cleaners. These standards are consistent with those promulgated in California, Texas and Rhode Island. In the proposed definition of "bathroom and tile cleaner," the Department excludes products specifically designed to clean toilet bowls or toilet tanks.

The Department is proposing a VOC content standard of 75 percent by weight for carburetor choke cleaners. The definition of this "carburetor choke cleaner" at proposed N.J.A.C. 7:27-24.1 excludes products designed to be introduced into fuel storage tanks and fuel lines. The VOC content standard and definition are consistent with those promulgated by California and Texas.

The Department is proposing a VOC content standard of 18 percent by weight for aerosol cooking sprays. The proposed VOC content standard and definition of "cooking spray" are consistent with those promulgated by California and Texas.

The Department is proposing HVOC content standards of 20 percent by weight for aerosol deodorants and zero percent by weight for non-aerosol deodorants. For the same reasons as described above with regard to the standards proposed for antiperspirants, the Department is not proposing MVOC standards for these categories. The proposed standards and definition of "deodorant" are consistent with those promulgated by Massachusetts and Texas.

The Department is proposing VOC content standards of 35 percent by weight for aerosol dusting aids and seven percent by weight for all other forms of dusting aids. The proposed definition of "dusting aid" does not include products which consist entirely of compressed gases

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for use in electronic or other specialty areas. The term "wax," used in the definition of "dusting aid," is defined in a manner consistent with other states' definitions. The proposed standards and definitions are consistent with those promulgated by California and Texas.

The Department is proposing a VOC content standard of 75 percent by weight for engine degreasers. This standard and definition of the "engine degreaser" are consistent with those promulgated by California, Texas, Massachusetts and Rhode Island.

The Department is proposing a VOC content standard of 75 percent by weight for fabric protectants. The definition of "fabric protectant" excludes silicone-based products whose function is to provide water repellency, or products designed for use solely on fabrics which are labeled for "dry clean only" and sold in containers of 10 fluid ounces or less. This standard and the definition are consistent with those promulgated by California and Texas.

The Department is proposing VOC content standards of seven percent by weight for floor polishes and waxes for flexible flooring material, 10 percent by weight for floor polishes and waxes for nonresilient flooring, and 90 percent by weight for wood floor wax. The definition of "floor polish or wax" excludes spray buff products, products designed solely for the purpose of cleaning floors, floor finish strippers, products designed for unfinished wood floors, and coatings subject to architectural coating rules at N.J.A.C. 7:27-23. These definitions and standards are consistent with those promulgated in California, Massachusetts, Rhode Island, and Texas.

The Department is proposing a VOC content standard of 25 percent by weight for aerosol furniture maintenance products. The definition of "furniture maintenance product" excludes dusting aids, products designed solely for the purpose of cleaning, and products designed to leave a permanent finish such as stains, sanding sealers and lacquers. This definition is consistent with those promulgated by California, Texas, Massachusetts and Rhode Island. The Department is not proposing the seven percent by weight VOC standard for furniture maintenance products in liquid or pump form, since this standard would effectively ban most of the liquid/pump furniture maintenance products that are currently sold. At this time, the Department does not intend to ban any particular category of consumer product or any particular form in which the product is delivered. Therefore, in order to avoid forcing consumers to choose an aerosol form of such products, the Department is not proposing the seven percent VOC content standard for liquid/pump furniture maintenance products. This is consistent with the consumer products regulations promulgated by Texas.

The Department is proposing a VOC content standard of 10 percent by weight for general purpose cleaners. The definition of "general purpose cleaner" excludes cleaning products designed to clean specific substrates in certain situations and degreasers. The VOC content standard and definition are consistent with those promulgated by California, Texas, Massachusetts, Rhode Island, and New York. New York uses the term "all-purpose cleaner" which has a slightly different definition.

The Department is proposing VOC content standards of 12 percent by weight for aerosol glass cleaners, and eight percent by weight for all other forms of glass cleaners. The definition of "glass cleaner" excludes products designed solely for the purpose of cleaning optical materials used in eyeglasses, photographic equipment, scientific equipment and photocopying machines. The VOC content standards and definition are consistent with those promulgated by California, Texas, Massachusetts and Rhode Island.

The Department is proposing a VOC content standard of 16 percent by weight for hair mousses. The VOC content standard and definition of "hair mousse" are consistent with those promulgated by California, Texas, and Rhode Island.

The Department is proposing a VOC content standard of 80 percent by weight for hair sprays. The VOC content standard is consistent with that promulgated by California, Texas, Massachusetts, New York and Rhode Island. The definition of "hair spray" is consistent with that promulgated by California, Texas, and Massachusetts. The definitions in the New York and Rhode Island regulations are slightly different.

The Department is proposing a VOC content standard of six percent by weight for hair styling gels. The VOC content standard and definition of "hair styling gel" are consistent with those promulgated by California, Texas, and Rhode Island.

The household adhesive group is divided into four categories: aerosol, contact, construction and panel, and general purpose. The Department is proposing a VOC content standard of 75 percent by weight for aerosol household adhesives, 80 percent by weight for contact adhesives, 40 percent by weight for construction and panel adhesives, and 10 percent by weight for general purpose adhesives. The definition of "household adhesive" excludes products used on humans or animals, adhesive tape, contact paper, wallpaper, shelf liners, or any other product with an adhesive incorporated onto or in an inert substrate. The definition of "general purpose adhesive" excludes contact adhesives or construction and panel adhesives. The VOC content standards and definitions are consistent with those promulgated by California and Texas. However, the sizes of household adhesives covered under this rule are listed in the exemptions at N.J.A.C. 7:27-24.2 rather than in the definitions where they are found in the CARB rule.

The insecticide group is divided into five categories: crawling bug, flea and tick, flying bug, foggers, and lawn/garden. The Department is proposing a VOC content standard of 40 percent by weight for crawling bug insecticides, 25 percent by weight for flea and tick insecticides, 35 percent by weight for flying bug insecticides, 45 percent by weight for fogger insecticides, and 20 percent by weight for lawn and garden insecticides. These VOC content standards are consistent with those adopted by California, Texas, Massachusetts and Rhode Island. The definition of "insecticide" excludes products that are designed for agricultural use or structural pest control or are restricted materials (that is materials requiring a permit for use or possession). Additionally, the definition excluded solid fertilizers that also have insecticidal properties because they do not emit VOCs and are not intended to be regulated in this category. This additional exclusion is being proposed in response to a comment to the draft New Jersey consumer product rule which was the subject of the January 12, 1995 public workshop. The definition of the term "crawling bug insecticide" excludes products designed to be used exclusively on humans or animals. The definition of "flea and tick insecticide" excludes products that are designed to be used exclusively on humans or animals and their bedding. The definition of "flying bug insecticide" excludes wasp and hornet insecticides and products that are designed to be used exclusively on humans or animals. "Wasp and hornet insecticide" and "lawn and garden insecticide" are also defined. The proposed VOC content standards and definitions are consistent with those promulgated by California, Texas, Rhode Island and Massachusetts.

The Department is proposing a VOC content standard of 22 percent by weight for laundry prewashes in aerosol or solid form, and five percent by weight for all other forms of laundry prewashes. The VOC content standards and definitions of "laundry prewash" are consistent with those adopted by California, Texas, and Massachusetts.

The Department is proposing a VOC content standard of five percent by weight for laundry starch products. The VOC content standard and definition of "laundry starch product" are consistent with those promulgated by California and Texas.

The Department is proposing a VOC content standard of 85 percent by weight for nail polish removers. The VOC content standard and definition of "nail polish remover" are consistent with those promulgated by California, Rhode Island and Texas.

The Department is proposing VOC content standards of eight percent by weight for aerosol/pump spray oven cleaners, and five percent by weight for liquid oven cleaners. The VOC content standard and definition of "oven cleaner" are consistent with those promulgated by California, Rhode Island and Texas.

The Department is proposing a VOC content standard of five percent by weight for shaving creams. The VOC content standard and definition of "shaving cream" are consistent with those promulgated by California and Texas.

N.J.A.C. 7:27-24.3(b) addresses the VOC content of products that are to be diluted before use, such as some general purpose cleaners and bathroom/tile cleaners. Specifically, the VOC content of such consumer products is determined at the recommended minimum dilution according to the product label. This recommended minimum dilution is for normal use and does not include incidental use of a concentrated product to be applied for special purposes like hard-to-remove soils and stains. This language is consistent with similar language adopted by California, New York, Texas, Rhode Island and Massachusetts.

N.J.A.C. 7:27-24.2(c) allows consumer products registered under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) one additional year beyond the April 30, 1996 compliance deadline (see proposed N.J.A.C. 7:27-24.2(a) and 24.3(a)) to comply with the VOC content standards due to the long administrative process required whenever FIFRA registered products incur any changes to the product contents or packaging occur. This provision would provide relief to manufac-

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turers of FIFRA registered products that would experience administrative difficulties in meeting the April 30, 1996 compliance deadline.

N.J.A.C. 7:27-24.4 Administrative requirements

Proposed N.J.A.C. 7:27-24.4(a) requires manufacturers of consumer products subject to the proposed rule to submit a registration report to the Department by October 1, 1996. The purpose of this provision is to identify the manufacturers of products affected by the rules and to identify which categories of products they manufacture. The contents of the letter of registration are very basic and only include the name and address of the manufacturer, a contact person and telephone number, and a list of the categories of products that the company manufactures that are subject to a VOC content standard.

N.J.A.C. 7:27-24.4(b) would require manufacturers of consumer products subject to the proposed rules to display on each consumer product container or packaging the month and year in which the product was manufactured (or a code indicating such date). This provision would not apply to products which are offered to consumers free of charge for the purpose of sampling the product. The purpose of such date-coding is to verify whether the product was required to meet the VOC content limits specified in Table 1, for only products that are manufactured after April 30, 1996 would be required to meet the VOC content limits. The actual day or date of the month is not required to be labelled because it would not facilitate the determination of compliance with the proposed rules. Pursuant to proposed N.J.A.C. 7:27-24.4(c), a manufacturer which uses a date code must provide the Department information on the meaning of that code within 30 days upon request by the Department or its representative.

N.J.A.C. 7:27-24.4(d) would require manufacturers of consumer products to keep records of compliance determination for a period of at least three years and to make such records available to the Department within 30 days. The purpose of this provision is to provide a means of compliance verification.

N.J.A.C. 7:27-24.4(e) would require manufacturers of consumer products to submit the information required to be kept in subsection (d) in addition to estimations of the product quantities sold in New Jersey upon request of the Department. Such information is to be prepared using forms provided by the Department within 90 days of such request. This provision would allow the Department to conduct an emission estimation survey at a future date. The Department may initiate such a survey in the future in order to (1) more accurately estimate VOC emissions from consumer products in New Jersey, (2) more accurately estimate the effectiveness of the proposed rule, or (3) gather information to study any potential further emission reductions that could be realized from additional limitations of the VOC contents of consumer product categories proposed herein or additional consumer product categories for regulation, more specifically to establish future effective VOC limits.

N.J.A.C. 7:27-24.4(f) would require retailers to identify the distributor or other source of a consumer product upon request of the Department in order for the Department to carry out enforcement of the proposed subchapter. This is the only requirement imposed on retailers (who otherwise do not manufacture or distribute consumer products) in this subchapter.

N.J.A.C. 7:27-24.5 Test methods

The proposed rules do not cite any specific analytical method for determining the VOC content of consumer products as such methods are currently being developed by CARB and EPA. The intent of N.J.A.C. 7:27-24.5(a) is to allow the use of such methods as they become available. However, existing test methods (such as Methods 18, 24 and 24A at 40 CFR Part 60; NIOSH Method 1800; or EPA Method 8240) may be appropriate for some consumer products. Therefore, until methods that are developed specifically for consumer products are available, the regulated community and the Department may use existing methods, as appropriate, in order to confirm the VOC content of certain consumer products by analytical means.

Until specific analytical methods become available, compliance with this proposed rule will rely heavily upon manufacturer's records of the constituents used to produce the consumer products. This concept is expressed at N.J.A.C. 7:27-24.5(b). As mentioned previously, manufacturers would be required to keep such records and make them available to the Department as specified at proposed N.J.A.C. 7:27-24.4(d).

N.J.A.C. 7:27-24.5(c) requires that when it is necessary to determine if a product is a solid or a liquid, the test to be used is the well established American Society for Testing and Materials' analytical method D4359-90.

N.J.A.C. 7:27-24.6 Federal supersession

This section addresses any potential conflicts between the proposed rules and any national consumer products rules be issued by the United States Environmental Protection Agency in the future. Specifically, the Department outlines the various scenarios that could be created by Federal rulemaking and how the rules proposed herein should be viewed in light of that Federal action. Generally, proposed N.J.A.C. 7:27-24.6 provides that where a Federal rule establishes a VOC content limit or product applicability criteria that differs from the State's requirement, the Federal rule shall supersede the Department's regulation. However, where the Federal rule does not regulate the VOC content of a product category for which the Department has established a limit, the Department's regulation shall remain in effect. The intent of this section is to maintain a national consistency of consumer product regulation while at the same time, maintaining State standards where the Federal government has not occupied the field.

N.J.A.C. 7:27-24.7 Civil or criminal penalties for failure to comply

The civil administrative, civil, and criminal penalty provisions of N.J.S.A. 26:2C and N.J.A.C. 7:27A-3 will apply to persons who violate any provision of this subchapter, with respect to the magnitude and types of violations. Since the Department is not now proposing a specific penalty schedule for subchapter 24, penalty assessments for any violation of this subchapter will be handled in accordance with N.J.A.C. 7:27A-3, and in particular, N.J.A.C. 7:27A-3.5, Civil penalty determination—general.

Social Impact

The proposed new rules will have a positive social impact in that they would reduce the emissions of VOCs, precursors to ground level ozone, thereby lowering concentrations of ozone in the outdoor atmosphere and reducing the adverse impacts of ground level ozone (as discussed in the Summary above) to the residents of New Jersey. In addition, because the proposed new rules maintain consistency with standards adopted by other states, consumers are not expected to see much, if any, differences in the availability or effectiveness of regulated products that consumers are accustomed to using. This is due to the fact that some manufacturers of products that are marketed in New Jersey have already begun to reformulate products to meet the same standards in other states.

Economic Impact

The requirements of these proposed rules would predominantly impact manufacturers of consumer products that are sold for use in New Jersey. The Department recognizes that a large segment of such manufacturers are located in New Jersey. Costs associated with compliance for manufacturers would include reformulation of non-compliant products, recordkeeping, and reporting requirements.

The Department has not conducted any current cost analyses for reformulating consumer products. The Department is seeking comments regarding the economic impact of the proposed rules and urges affected manufacturers to submit such cost data. However, some of the cost figures cited in available sources of information follow. In the background document for its proposed antiperspirant and deodorant VOC standards, CARB estimated the cost of reformulating aerosol products to be $0.50 to $1.20 per pound of VOC propellants removed. This background document also states that the Chemical Specialties Manufacturing Association (CSMA) claimed the cost to comply would be $150.00 to $49.00 per pound of VOC reduced. In CARB's August 1990 Staff Report, the cost to reformulate a product was estimated to range between $100,000 and $2,000,000; the cost to reformulate a product on an annual basis was estimated to range between $16,000 to $500,000 per year; the total cost to the industry was estimated to range between 11 and 360 million dollars; and the cost effectiveness was estimated to be $0.05 to $1.70 per pound of VOC reduced. In CARB's October 1991 Staff Report for Phase II, the estimated cost to reformulate a non-complying product ranged from $76,000 to $1,100,000; the estimated annualized cost to reformulate a product ranged from $15,600 to $270,000; the total estimated cost to industry was between 13 and 205 million dollars; and the estimated cost-effectiveness ranged from $0.01 to $1.04 per pound of VOC reduced. In CSMA's comments on the Department's draft consumer product rule (the subject of the January 12, 1995 public workshop), CSMA stated that CARB's "Phase II" consumer product regulations cost over $500,000 per product (annualized cost of $131,895) and that the cost effectiveness ranged between $16.49 and $82.43 per pound VOC reduced ($32,980 to $164,860 per tons VOC reduced).

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Since these proposed rules maintain consistency, to a large extent, with other states' standards, consumer products that are subject to these proposed rules that have already been reformulated to comply with other states' consumer product rules would not need to be reformulated again. Thus, the costs associated with compliance with New Jersey's proposed consumer product rules would therefore be negligible for manufacturers of consumer products that already comply with the proposed rules. This scenario may be prevalent in the industry on a national or regional level because of the difficulty of marketing different formulations of a product for different areas.

In developing these rules, the Department has attempted to minimize the economic impact to manufacturers of consumer products by proposing VOC content standards that are consistent with other states' standards, by minimizing the reporting and recordkeeping provisions, by avoiding requirements for the labelling of VOC contents of consumer products, by accepting CARB's innovative product exemptions, and by accepting other states' variances.

Distributors, retailers, and others in the product supply network, that do not manufacture consumer products for use in New Jersey would incur little or no economic impacts, since nearly all of the compliance costs would be incurred by the manufacturers. However, distributors are responsible for ensuring that the products they provide for use in New Jersey do meet the VOC standards. Companies that manufacture or distribute non-compliant consumer products in New Jersey for shipment and use outside of New Jersey would also need to keep documentation of the shipment destination.

The Department anticipates that consumers of products regulated in these proposed new rules will incur little or no additional costs as a result of these new requirements. Although manufacturers of reformulated products will likely pass the costs of reformulation through to the purchasers of such products, there are indications that many products available to consumers may already meet the VOC content standards. Therefore, the cost of products that already meet the VOC content standards would not change as a result of the proposed rules. For products that need to be reformulated in order to comply with the proposed rules, the cost to purchasers of such products would depend on the cost of reformulation (which may vary among the product industries), the quantity of product sold, and other market forces. However, the Department expects that any change in costs of products as a result of the proposed rule will be insignificant.

The Department will incur some additional costs associated with the collection and processing of the registration reports as proposed at N.J.A.C. 7:27-24.4(a), the innovative product exemptions at N.J.A.C. 7:27-24.2(d), and the variance exemptions at N.J.A.C. 7:27-24.2(e). The Department will also incur operational costs to enforce the proposed standards.

Environmental Impact

The proposed new rules will have a positive environmental impact by reducing emissions of VOC, thereby reducing the formation of ground level ozone. The environmental impacts of elevated concentrations of ground level ozone are discussed in detail in the Summary above.

The Department has estimated the emission reductions that would be achieved by these proposed rules by analyzing available data on VOC emissions from the consumer products that would be regulated by these proposed rules and data on the estimated emission reductions realized in California.

In order to estimate the emissions of VOCs from the categories of products in this proposed rule, the Department extracted 1990 national emission data from EPA's draft consumer product survey results and proportioned this information with 1990 census figures. The Department then applied the percent emission reductions described in CARB's background documentation to these emission estimations to estimate the emission reductions that would be achieved in New Jersey by the proposed rules from a 1990 baseline. This emission reduction calculation methodology does not make any distinction between emission reductions that might have already occurred and those which would occur from the present until the compliance date of April 30, 1996. Emission reductions that might have already occurred since 1990 may be due to: (1) consumer products that have been reformulated in order to meet other states' consumer products that are sold in New Jersey, (2) other formulation changes since 1990 in products sold in New Jersey, or (3) changes in the amount of certain products sold and used in New Jersey since 1990. The Department's emission reduction calculation methodology also depends on the premise that VOC emissions from consumer products are directly proportional to population, more specifically, that the ratio of emissions in New Jersey to national emissions corresponds with the ratio of New Jersey's population to the national population.

Further limitations of this calculation methodology include: (1) some of the VOC standards that CARB proposed and based its emission reductions upon changed upon adoption (such as the VOC content standards for household adhesives, glass cleaners, and bathroom/tile cleaners); (2) CARB's VOC content standards for antiperspirants and deordorants also differ from the rules proposed herein; and (3) in estimating emission reductions, CARB also relied on the premise that any 1,1,1,tricholorethane (TCA), an excluded VOC, in consumer products would be replaced on a one-to-one basis with VOCs due to the restrictions on TCA due to its stratospheric ozone depleting properties; this premise was especially evident in CARB's emission reduction estimates for fabric protectants. Therefore, there are several sources of uncertainty in the estimated New Jersey emission reductions for the above mentioned categories.

Notwithstanding the previously described limitations to the emission reduction calculation methodology, the following two charts show the estimated emission reductions that would be achieved in New Jersey by the proposed rules from a 1990 baseline.

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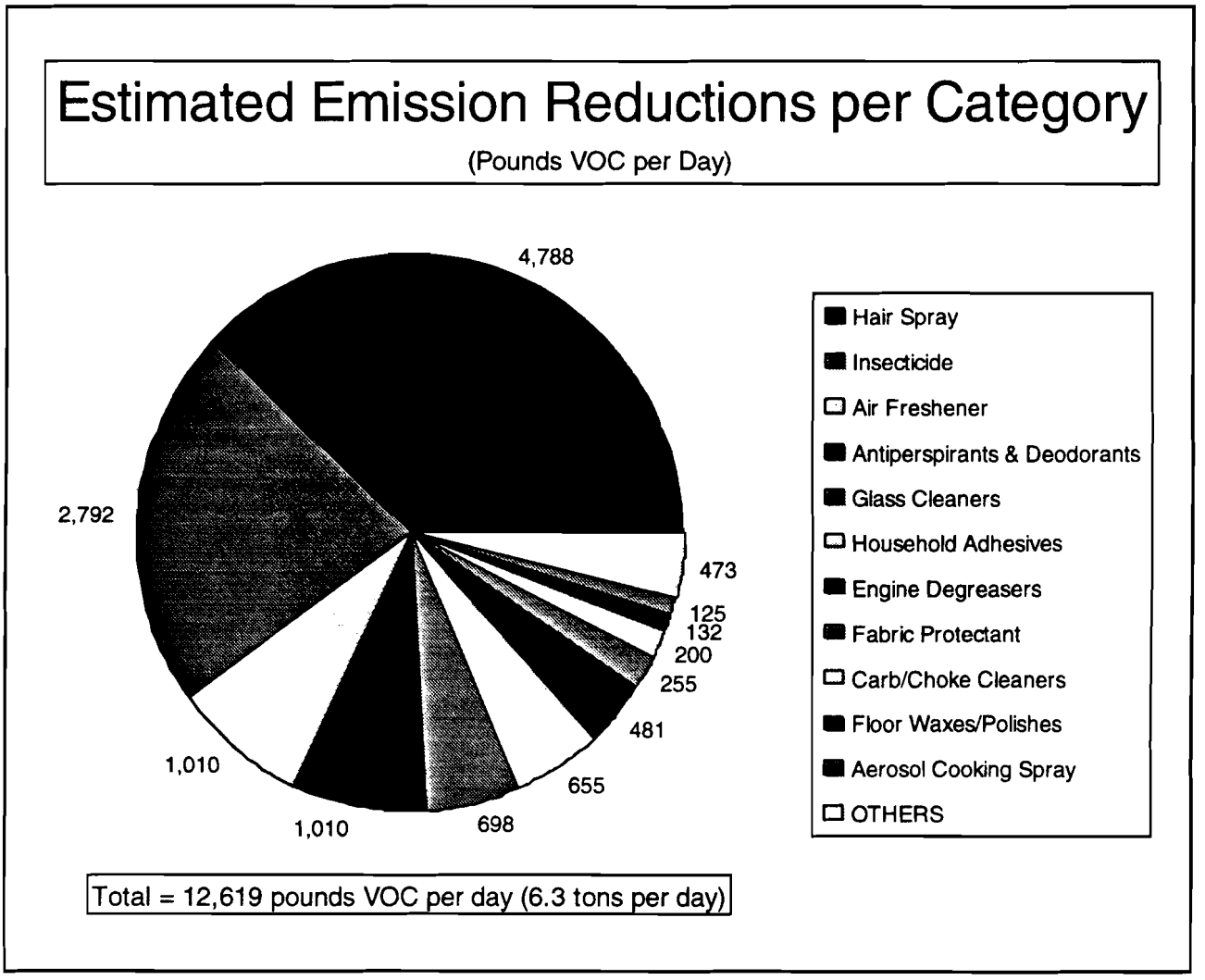

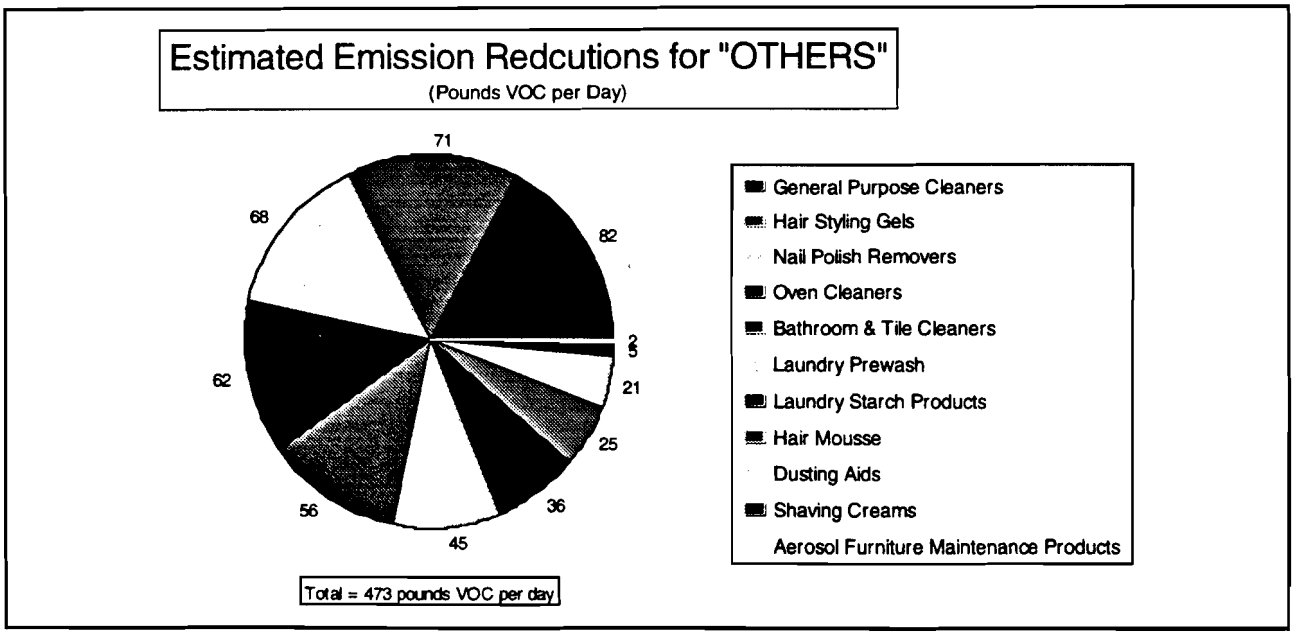

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The total estimated emission reductions of 12,619 pounds of VOC per day represent a 9.5 percent reduction from the 1990 emission inventory of VOC emissions from consumer products. The 1990 emission inventory for VOC emissions from consumer products is 133,425 pounds VOC per day (66.7 tons VOC per year). This emission figure was derived from an emission factor based on national estimates of solvent use as supplied by EPA in its "Procedures for the Preparation of Emission Inventories for Carbon Monoxide and Precursors of Ozone: Volume I—General Guidance for Stationary Sources (EPA-450/4-91-016)." This emission factor is 6.3 pounds of VOC per capita per year and includes the following subcategories of consumer products: household products, toiletries, aerosol products, rubbing compounds, windshield washing fluids, polishes and waxes, nonindustrial adhesives, space deordorants, moth control products, and laundry detergents and treatments.

Executive Order No. 27 Statement

There are no current Federal standards that limit the VOC emissions of consumer/commercial solvents. However, under 42 U.S.C. §7511b(3) the United States Environmental Protection Agency (EPA) is required to issue national regulations or Control Techniques Guidelines (CTGs) regarding consumer products. These Federal regulations or CTGs are due at four intervals, once every two years after the report required under 42 U.S.C. §7511b(2) is submitted to Congress. The report is presently expected to be submitted to Congress by March 1995. Therefore, EPA's first set of regulations or CTGs would be due by March 1997. EPA staff has indicated to the Department that EPA is preparing for rulemaking and expects a notice of proposed rulemaking to be published by August 1995. Since future Federal regulations (or federal guidance) are planned that will potentially regulate the same consumer products and VOC emissions which would be regulated under the rules proposed herein, the Department has proposed language at N.J.A.C. 7:27-24.6 that would eliminate any possible exceedance of a future federal standard. It should be noted that Congress specifically authorized states to regulate VOC emissions from consumer products at 42 U.S.C. §7511b(e)(3)(7) even if EPA promulgated regulations so long as the state consults with EPA before promulgation.

Notwithstanding any future Federal regulations which would establish VOC content limits for consumer/commercial solvents pursuant to the Clean Air Act, New Jersey is required by the Clean Air Act at 42 U.S.C. §7410(m) to implement all provisions of pre-1990 State Implementation Plans (SIPs), unless the SIP is subsequently revised and approved by EPA. Since New Jersey committed to adopt regulations which limit the VOC emission from consumer and commercial solvents in its 1983 State Implementation Plan, the Department is still required to implement this commitment. This commitment was reaffirmed by the United States District Court in *ALA vs. Kean* which resulted in the decision and scheduling order requiring this rulemaking.

Federal law requires that the non-attainment areas in New Jersey shall comply with the National Ambient Air Quality Standard for ozone. The emission reductions which would be achieved by the implementation of these rules would contribute to the achievements of the NAAQS as required by Federal Law.

Regulatory Flexibility Analysis

These proposed new rules would apply to manufacturers and distributors of the consumer products listed at N.J.A.C. 7:27-24.3 as described in the Summary above. Some such companies that would be affected by these new proposed rules may be small businesses as defined by the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.; businesses that employ fewer than 100 full-time employees.

Manufacturers of consumer products to be sold and used in New Jersey would be responsible for complying with the VOC content standards at N.J.A.C. 7:27-24.3 and for properly date-coding the products as specified at N.J.A.C. 7:27-24.4. Manufacturers would also be responsible for submitting a one-time letter of registration to the Department and would be required to keep records of the VOC contents of the consumer products that are sold for use in New Jersey. Upon request of the Department, manufacturers would be required to submit a report that details the VOC content and estimated quantity of sales in New Jersey. Manufacturers include re-labelers and re-packagers.

Distributors would be responsible for verifying that the consumer products they provide for sale or sell to retailers for use in New Jersey are in compliance with these proposed new rules. Distributors that sell consumer products that would not comply with these proposed rules, but are being sold for shipment and use outside of the State of New Jersey would be required to keep documentation of the destination of the shipments.

The Department recognizes that the economic cost of these proposed rules may be proportionally higher for small manufacturers who may produce a limited product line and who do not currently market their products in states which already have VOC content limit regulation. However, by proposing standards already employed in several other states, the Department anticipates that product manufacturers of all sizes will be able to reformulate products in time to meet the compliance deadline of April 30, 1996.

In developing the proposed new rules, the Department has attempted to balance the environmental impacts of the rule against the economic impact of the requirements. To reduce the economic impact on businesses, and particularly on small businesses, the Department has proposed minimal reporting and recordkeeping requirements which will prevent higher levels of expenditures for administrative costs. In addition, these proposed new rules provide some flexibility for manufacturers of consumer products by providing for acceptance of California Air Resources Board's approvals of Innovative Products exemptions and by the acceptance of other states' approvals for variances.

While the new rules may require the use of professionals such as chemists or engineers to reformulate products or test for product compliance with the proposed VOC standards, the Department anticipates that many manufacturers will already employ such professionals as part of their existing staff or on a consultant basis since such services play a fundamental role in manufacturing processes. As a result, it is difficult to anticipate what, if any, additional costs will be incurred by the regulated community with regard to professional services. To the extent that the regulated community will need other professional services not currently employed, those costs are factored into the discussion of reformulation costs found in the Economic Impact statement of this proposal.

The Department solicits information regarding small businesses that would be affected by these rules.

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Rhode Island Department of Environmental Management, Air Pollution Control Regulation No. 31, Control of Volatile Organic Compounds from Commercial and Consumer Products.

Rhode Island Department of Environmental Management, Adoption of Air Pollution Control Regulation Nos. 30, 31, 32 and 33; A.H. File No. 94-05-AP, March 1, 1994.

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Full text of the proposed new rules follows:

SUBCHAPTER 24. CONTROL AND PROHIBITION OF VOLATILE ORGANIC COMPOUNDS FROM CONSUMER AND COMMERCIAL PRODUCTS

7:27-24.1 Definitions

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise.

"Aerosol product" means a consumer product that incorporates a pressurized spray system that dispenses product ingredients by means of a propellant or mechanically induced force. This term does not include pump sprays.

"Agricultural use" means the use of any pesticide or method or device for the control of pests in connection with the commercial production, storage or processing of animal or plant crops. This term does not include pesticides which are intended for and are labeled in packages or containers for:

1. Home use, that is use in a household or immediate environment;
2. Structural pest control;
3. Industrial use, that is use for or in a manufacturing, mining, or chemical process, or in use in the operation of factories, processing plants, and similar sites; or
4. Institutional use, that is within the confines of, or on property necessary for the operation of buildings such as hospitals, schools, libraries, auditoriums, and office complexes.

"Air freshener" means a consumer product including, but not limited to, sprays, wicks, powders and crystals, designed for the purpose of masking odors, or freshening, cleaning, scenting, or deodorizing the air. This term does not include products that are used on the human body, products that function primarily as cleaning products, disinfectant products claiming to deodorize by killing germs on surfaces, or institutional/industrial disinfectants offered for sale solely through institutional and industrial channels of distribution. In determining whether a product is an air freshener, all verbal and visual representations regarding product use on the label and packaging, and in the product's literature and advertising may be considered. The presence of and representation about a product's fragrance and ability to deodorize resulting from surface application shall not constitute a claim of air freshening.

"All other forms" means all consumer product forms for which no form-specific VOC standard is specified. Unless specified otherwise by the applicable VOC standard, this term includes, but is not limited to, solids, liquids, wicks, powders, crystals, and cloth or paper wipes (towelettes).

"Antiperspirant" means a consumer product including, but not limited to, aerosols, roll-ons, sticks, pumps, pads, creams, gels, and squeeze bottles, which is marketed for the purpose of reducing perspiration in the human axilla by at least 20 percent in at least 50 percent of a target population.

"ASTM" means the American Society for Testing and Materials, 1916 Race Street, Philadelphia, PA 19103.

"Bait station insecticide" means an insecticide consisting of a container enclosing an insecticidal bait that is designed to be ingested by insects and is composed of solid material feeding stimulants with less than five percent active ingredients.

"Bathroom and tile cleaner" means a consumer product designed to clean tile or surfaces in bathrooms. This term does not include products specifically designed to clean toilet bowls or toilet tanks.

"CARB" means the California Air Resources Board.

"Carburetor-choke cleaner" means a consumer product designed to remove dirt and other contaminants from a carburetor. This term does not include products designed to be introduced directly into the fuel lines or fuel storage tank prior to introduction into the carburetor.

"Construction and panel adhesive" means a one-component household adhesive which has gap filling capabilities and which distributes stress uniformly throughout the bonded area resulting in a reduction or elimination of the need for use of mechanical fasteners. These materials are generally applied from caulking cartridges.

"Consumer" means a person who seeks, purchases, or acquires any consumer product for personal, family, household or institutional use. This term does not include a person acquiring a consumer product for resale.

"Consumer product" means a chemically formulated product sold at retail or wholesale and used by household, commercial or institutional consumers. This term does not include paint, or architectural coatings.

"Contact adhesive" means a household adhesive that meets all of the following four criteria:

1. Is nitrile based, or contains polychlorobutadiene (neoprene, chloroprene, bayprene), or latex;
2. Forms an instantaneous, non-repositionable bond when applied in two substrates;
3. Exhibits a minimum 30 minute bonding range when dry to the touch; and
4. Bonds only to itself without the need for reactivation by solvents or heat.

"Container" means the part or parts of the consumer product which serve only to contain, enclose, incorporate, deliver, dispense, wrap or store the chemically formulated substance or mixture of substances which is solely responsible for accomplishing the purposes for which the product was designed or intended. This term includes any article onto or into which the principal display panel is incorporated, etched, printed or attached.

"Cooking spray" means an aerosol product designed either to reduce sticking on cooking and baking surfaces or to be applied on food, or both.

"Crawling bug insecticide" means any insecticide that is designed for use against ants, cockroaches, or other crawling household arthropods, including, but not limited to, mites, silverfish, or spiders. This term does not include products designed to be used exclusively on humans or animals.

"Deodorant" means a consumer product including, but not limited to, aerosols, roll-ons, sticks, pumps, creams and squeeze bottles, that is intended by the manufacturer to be used to minimize odor in the human axilla by retarding the growth of bacteria which cause the decomposition of perspiration.

"Department" means the New Jersey Department of Environmental Protection.

"Device" means an instrument which is designed for trapping, destroying, repelling or mitigating any pest or any other form of plant or animal life, other than humans and other than bacteria, virus or other microorganism on or in living humans or other living animals. This term does not include equipment used for the application of pesticides if the equipment is sold separately from the pesticide. Additionally, the term does not include any instrument which is a firearm.

"Double phase aerosol air freshener" means an aerosol air freshener with liquid contents in two or more distinct phases that requires the product container to be shaken before use to mix the phases, producing an emulsion.

"Dusting aid" means a consumer product designed to assist removing dust and other soils from floors and other surfaces without leaving a wax or silicone-based coating. This term does not include products which consist entirely of compressed gases for use in electronic or other specialty areas.

"Engine degreaser" means a consumer product designed to remove grease, grime, oil and other contaminants from the external surfaces of engines and other mechanical parts.

"EPA" means the United States Environmental Protection Agency.

"Fabric protectant" means a consumer product designed to be applied to fabric substrates to protect the surface from soiling from dirt and other impurities or to reduce absorption ot water into the fabric's fibers. This term does not include silicone-based products

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whose function is to provide water repellency, or products designed for use solely on fabrics which are labeled for "dry clean only" and sold in containers of 10 fluid ounces or less.

"Flea and tick insecticide" means an insecticide that is designed for use against fleas, ticks, their larvae, or their eggs. This term does not include products that are designed to be used exclusively on humans or animals and their bedding.

"Flexible flooring material" means asphalt, cork, linoleum, no-wax, rubber, seamless vinyl, and vinyl composite flooring.

"Floor polish or wax" means a wax, polish or any other consumer product designed to polish, protect, or enhance floor surfaces by leaving a protective coating that is designed to be periodically replenished. This term does not include spray buff products, products designed solely for the purpose of cleaning floors, floor finish strippers, products designed for unfinished wood floors, and coatings subject to architectural coating rules at N.J.A.C. 7:27-23.

"Flying bug insecticide" means an insecticide that is designed for use against flying insects or other flying arthropods, including, but not limited to, flies, mosquitoes, moths or gnats. This term does not include wasp and hornet insecticides or products that are designed to be used exclusively on humans or animals.

"Fogger insecticide" means an insecticide designed to release all or most of its contents, as a fog or mist, into indoor areas during a single application.

"Fragrance" means a substance or mixture of aroma chemicals, natural essential oils, or other functional components with a combined vapor pressure not in excess of two millimeters of Mercury at 20 degrees Celsius (°C), the sole purpose of which is to impart an odor or scent, or to counteract a malodor.

"Furniture maintenance product" means a wax, polish, conditioner, or any other consumer product designed for the purpose of polishing, protecting or enhancing finished wood surfaces other than floors. This term does not include dusting aids, products designed solely for the purpose of cleaning, and products designed to leave a permanent finish such as stains, sanding sealers and lacquers.

"Gel" means a colloid in which the dispersed and continuous phases conbine to form a semisolid material such as jelly.

"General purpose adhesive" means a non-aerosol household adhesive designed for use on a variety of substrates. This term does not include contact adhesives or construction and panel adhesives.

"General purpose cleaner" means a consumer product designed for general all-purpose cleaning, in contrast to cleaning products designed to clean specific substrates in certain situations. This term includes products designed for general floor cleaning, kitchen or countertop cleaning, and cleaners designed to be used on a variety of hard surfaces, but does not include degreasers.

"Glass cleaner" means a consumer product designed primarily for the purpose of cleaning surfaces made of glass. This term does not include products designed solely for the purpose of cleaning optical materials used in eyeglasses, photographic equipment, scientific equipment and photocopying machines.

"Hair mousse" means a consumer product that is a hairstyling foam designed to facilitate styling of a coiffure and provide limited holding power.

"Hair spray" means a consumer product designed primarily for the purpose of dispensing droplets of a resin on and into hair coiffure which will impart sufficient rigidity to the coiffure to establish or retain the style for a period of time.

"Hair styling gel" means a high viscosity, often gelatinous, consumer product that contains a resin and is designed for the application to hair to aid in styling and sculpting of the hair coiffure.

"High volatility organic compound (HVOC)" means any volatile organic compound that exerts a vapor pressure greater than 80 millimeters of mercury (mm Hg) when measured at 20 degrees Celsius (°C).

"Household adhesive" means any household product that is used to bond one surface to another by attachment. This term does not include products used on humans or animals, adhesive tape, contact paper, wallpaper, shelf liners, or any other product with an adhesive incorporated onto or in an inert substrate.

"Household product" means a consumer product that is primarily designed to be used inside or outside of living quarters or residences that are occupied or intended for occupation by individuals, including the immediate surroundings.

"HVOC" (see "high volatility organic compound").

"Insecticide" means a pesticide that is designed for use against insects or other arthropods. This term does not include any product that is:

1. Designed for agricultural use;
2. Designed for structural pest control; or
3. A restricted material that require a permit for use and possession.

Additionally, for the purpose of this subchapter, this term does not include solid fertilizers that also have insecticidal properties.

"Label" means any written, printed, or graphic matter affixed to, applied to, attached to, blown into, formed, molded into, embossed on, or appearing upon any consumer product or consumer product package, for purposes of branding, identifying, or giving information with respect to the product or to the contents of the package.

"Laundry prewash" means a consumer product that is designed for application to a fabric prior to laundering and that supplements and contributes to the effectiveness of laundry detergents or provides specialized performance.

"Laundry starch product" means a consumer product that is designed for application to a fabric, either during or after laundering, to impart and prolong a crisp, fresh look and that may also act to help ease ironing of the fabric. This term includes, but is not limited to, fabric finish, sizing, and starch.

"Lawn and garden insecticide" means an insecticide designed primarily to be used in household lawn and garden areas to protect plants from insects or other arthropods.

"Liquid" means a substance or mixture of substances which is capable of a visually detectable flow as determined pursuant to ASTM D-4359-90. This term does not include powders or other materials that are composed entirely of solid particles.

"Manufacturer" means any person who imports, manufactures, assembles, produces, packages, repackages, or relabels a consumer product. If the container or package of the consumer product lists two companies, firms or establishments, the manufacturer is the party which the product is "manufacturer for" or "distributed by, as noted on the container or package of the consumer product.

"Maximum allowable VOC content (percent by weight)" means the total weight of VOC, except those VOCs exempted at N.J.A.C. 7:27-24.2(f), allowed to be in the consumer product. This term is expressed as a percentage of the total net weight of the product exclusive of the container or package and is calculated according to the following equation:

$$\text{Percent by weight} = \frac{B-C}{A} \times 100$$

where:

A = net weight of unit (excluding container and packaging)
B = weight of VOCs per unit
C = weight of VOCs exempted under N.J.A.C. 7:27-24.2(f) per unit

"Nail polish" means a clear or colored coating designed for application to the fingernails or toenails including, but not limited to, lacquers, enamels, acrylics, base coats and top coats.

"Nail polish remover" means a consumer product designed to remove nail polish and coatings from fingernails or toenails.

"Nonresilient flooring" means flooring of a mineral material(s) which is not flexible. This term includes terrazzo, marble, slate, granite, brick, stone, ceramic tile and concrete.

"Oven cleaner" means any consumer product designed to clean and to remove dried food deposits from oven walls.

"Packaging" means the part or parts of the consumer product which serve only to contain, enclose, incorporate, deliver, dispense, wrap or store the chemically formulated substance or mixture of substances which is solely responsible for accomplishing the purposes

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for which the product was designed or intended. This term includes any article onto or into which the principal display panel is incorporated, etched, printed or attached.

"Person" means any individual or entity and shall include, without limitation, corporations, companies, associations, societies, firms, partnerships, and joint stock companies, and shall also include, without limitation, all political subdivisions of this State or any agencies or instrumentalities thereof.

"Pesticide" means a consumer product which includes any substance or mixture of substances labeled, designed, or intended for use in preventing, destroying, repelling or mitigating any pest, or any substance or mixture of substances labeled, designed or intended for use as a defoliant, desiccant, or plant regulator. This term does not include any substance, mixture of substances, or device which the EPA does not consider to be a pesticide.

"Principal display panel or panels" means that part, or those parts, of a label that are so designed as to most likely be displayed, presented, shown, or examined under normal and customary conditions of display or purchase.

"Product category" means the category which best applies to a given consumer product as defined in this section and listed at N.J.A.C. 7:27-24.3 Table 1.

"Product form" means the applicable form which most accurately describes the product's dispensing form, including aerosols, gels, liquids, pump sprays, and solids.

"Propellant" means a liquefied or compressed gas that is used in whole or in part, such as a cosolvent, to expel a liquid or any other material from the same self-pressurized container or from a separate container.

"Pump spray" means a packaging system in which the product ingredients within the container are not under pressure and from which the product is expelled only while a pumping action is applied to a button, trigger, or other actuator.

"Restricted materials" means pesticides established for restricted use under section 3(d) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA, 7 U.S.C. 136-136y).

"Shaving cream" means an aerosol product which dispenses a foam lather intended to be used with a blade or cartridge razor or other wet-shaving system in the removal of facial or other bodily hair.

"Single phase aerosol air freshener" means an aerosol air freshener which has the liquid contents in a single homogeneous phase and which does not require that the product container be shaken before use.

"Solid" means a subtance or mixture of substances which is not capable of visually detectable flow as determined under ASTM D-4359-90. The substance or mixture of substances may be in a form either whole or subdivided (such as particles comprising a powder).

"Spray buff product" means a consumer product designed to restore a worn floor finish in conjunction with a floor buffing machine and special pad.

"Volatile organic compound" or "VOC" means any compound of carbon (other than carbon monoxide, carbon dioxide, carbonic acid, metallic carbonates, metallic carbides, and ammonium carbonate) which participates in atmospheric photochemical reactions. For the purpose of determining compliance with emission limits or content standards, VOC shall be measured by test methods in the approved SIP (such as N.J.A.C. 7:27B-3) or 40 CFR Part 60, Appendix A, as applicable, or which have been approved in writing by the Department and are acceptable to EPA. This term does not include the compounds which EPA has excluded from its definition of VOC in the list set forth at 40 CFR 51.100(s)(1), which is incorporated by reference herein, together with all amendments and supplements. The list at 40 CFR 51.100(s)(1) currently includes the compounds and the classes of perflurocarbons set forth below:

methane
ethane
methylene chloride (dichloromethane)
1,1,1-trichloroethane (methyl chloroform)
trichlorofluoromethane (CFC-11)
dichlorodifluoromethane (CFC-12)
trifluoromethane (HFC-23)
1,1,2-trichloro-1,2,2,-trifluoroethane (CFC-113)
1,2-dichloro-1,1,2,2-tetrafluoroethane (CFC-114)
chloropentafluoroethane (CFC-115)
chlorodifluoromethane (HCFC-22)
2,2-dichloro-1,1,1-trifluororethane (HCFC-123)
2-chloro-1,1,1,2-tetrafluoroethane (HCFC-124)
1,1-dichloro-1-fluoroethane (HCFC-141b)
1-chloro-1,1-difluroethane (HCFC-142b)
pentafluoroethane (HFC-125)
1,1,2,2-tetrafluoroethane (HFC-134)
1,1,1,2-tetrafluoroethane (HFC-134a)
1,1,1-trifluoroethane (HFC-143a)
1,1-difluoroethane (HFC-152a)
parachlorobenzotrifluoride (PCBTF)
cyclic, branched or linear completely methylated siloxanes

Classes of perfluorocarbons:

cyclic, branched, or linear, completely fluorinated alkanes
cyclic, branched, or linear, completely fluorinated ethers with no unsaturations
cyclic, branched, or linear, completely fluorinated tertiary amines with no unsaturations
sulfur containing perfluorocarbons with no unsaturations and with sulfur bonds only to carbon and fluorine

If there is any conflict between the list at 40 CFR 51.100(s)(1) and the list set forth above, the list at 40 CFR 51.100(s)(1) shall control.

"Wasp and hornet insecticide" means an insecticide that is designed for use against wasps, hornets, yellow jackets or bees by allowing the user to spray a high volume directed stream or burst from a safe distance at the intended pest or its hiding place.

"Wax" means a natural material or synthetic thermoplast substance generally of high molecular weight hydrocarbons or high molecular weight esters of fatty acids or alcohols, except glycerol and high polymers (plastics). This term includes, but is not limited to, substances derived from the secretions of plants and animals such as carnuba wax and beeswax, substances of a mineral origin such as ozocerite and paraffin, and synthetic polymers such as polyethylene.

"Wood floor wax" means a wax-based consumer product for use solely on wood floors.

7:27-24.2 Applicability, exemptions, and exclusions

(a) This subchapter applies to any person who sells, offers for sale, holds for sale, distributes, supplies, or manufactures any consumer product for use in New Jersey as specified at N.J.A.C. 7:27-24.3.

(b) The provisions of N.J.A.C. 7:27-24.3, 24.4, and 24.5 below do not apply to the following:

1. Any consumer product that is sold, supplied, offered for sale, held for sale, or manufactured for sale in New Jersey for shipment and use exclusively outside of the State of New Jersey. Documentation indicating the final destination of product shipments shall be made available to representatives of the Department upon request;

2. Any bait station insecticide that contains bait that is not more than 0.5 ounces by weight;

3. Any air freshener or any insecticide which contains at least 98 percent by weight para-dichlorobenzene;

4. Any air freshener consisting entirely of one or more of the following:

i. Fragrance;
ii. Inorganic compounds;
iii. Compounds excluded from the definition of VOC; and
iv. The compounds specified in (f) below; and

5. Any household adhesive sold in:

i. A container of one fluid ounce or less;
ii. A container of more than 16 fluid ounces; or
iii. A product unit which, less packaging, weighs more than one pound.

(c) The maximum allowable VOC content limits (percent by weight) in N.J.A.C. 7:27-24.3 below do not apply to any consumer

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product manufactured prior to April 30, 1996, provided that the product is labelled with the date of manufacture or a date code as specified at N.J.A.C. 7:27-24.4(b) below which shows that the product was manufactured prior to April 30, 1996.

(d) The maximum allowable VOC content limits in N.J.A.C. 7:27-24.3 below do not apply to any consumer product if CARB has granted to the manufacturer of that product an Innovative Product Exemption pursuant to the CARB's consumer products regulations at Title 17, Subchapter 8.5, Article 1, Section 94503.5 or Article 2, Section 94511 of the California Code of Regulations, provided that the manufacturer claiming this exclusion submits a copy of the CARB exemption decision and CARB's statement of the conditions of its approval of the exemption to the following address:

Attn: Innovative Consumer Product
Bureau of Air Quality Planning
Department of Environmental Protection—CN 418
401 East State Street, 7th Floor
Trenton, New Jersey 08625-0418

(e) The maximum allowable VOC content limits in N.J.A.C. 7:27-24.3 below do not apply to any consumer product if an agency of another state has granted to the manufacturer of that product a variance (such as pursuant to the CARB consumer products regulations at Title 17, Subchapter 8.5, Article 1, Section 94514 or Article 2, Section 94505 of the California Code of Regulations or pursuant to Texas Natural Resources Conservation Commission's regulations at Title 30, Chapter 115, subchapter G, paragraph 614). This exclusion shall be effective in New Jersey until the other state agency's approved variance expires or is revoked, at which time the exclusion from the requirements of this subchapter shall automatically expire. This exclusion shall be effective in New Jersey provided that the manufacturer claiming this exlcusion submits a copy of the state agency's exemption decision and statement of the conditions of its approval of the exemption to the following address:

Attn: Consumer Product Variance
Bureau of Air Quality Planning
Department of Environmental Protection—CN 418
401 East State Street, 7th Floor
Trenton, New Jersey 08625-0418

(f) The following compounds are excluded when determining compliance with the VOC limits specified at N.J.A.C. 7:27-24.3:

1. Any VOC which exerts a vapor pressure less than or equal to 0.1 millimeters of mercury at 20 degrees Celsius (°C);
2. Any VOC which consists of more than 12 atoms of carbon per molecule, if its vapor pressure is unknown;
3. Any VOC which has a melting point higher than 20 degrees Celsius and does not sublime, if its vapor pressure is not known; and
4. Any fragrances up to a combined level of two percent by weight contained in any consumer product.

(g) The requirements of N.J.A.C. 7:27-24.4(b) and (c) below do not apply to consumer products registered under Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA, 7 U.S.C. section 136-136y).

7:27-4.3 VOC content standards

(a) Except as provided at N.J.A.C. 7:27-24.2(b) through (e) and subsection (c) below, no person shall manufacture, distribute, or supply any consumer product for use in New Jersey which was manufactured after April 30, 1996, and contains VOC in excess of the limits specified in Table 1 below:

TABLE 1
VOC CONTENT LIMITS FOR CONSUMER PRODUCTS

Consumer Product Category	Maximum Allowable VOC Content (percent by weight)
Air fresheners	
Single phase aerosol	70
Double-phase aerosol	30
Liquid/pump	18
Solid/gel	3
Antiperspirants	
Aerosol	HVOC 60
Non-aerosol	HVOC 0
Bathroom and tile cleaners	
Aerosols	7
All other forms	5
Carburetor choke cleaners	75
Cooking sprays, aerosol	18
Deodorants	
Aerosol	HVOC 20
Non-aerosol	HVOC 0
Dusting aids	
Aerosol	35
All other forms	7
Engine degreasers	75
Fabric protectants	75
Floor polishes/waxes	
Products for flexible flooring material	7
Products for nonresilient flooring	10
Wood floor wax	90
Furniture maintenance products, aerosol	25
General purpose cleaners	10
Glass cleaners	
Aerosols	12
All other forms	8
Hair mousses	16
Hair sprays	80
Hair styling gels	6
Household adhesives	
Aerosol	75
Contact	80
Construction and panel	40
General purpose	10
Insecticides	
Crawling bug	40
Flea and tick	25
Flying bug	35
Foggers	45
Lawn and garden	20
Laundry prewash	
Aerosol/solids	22
All other forms	5
Laundry starch products	5
Nail polish removers	85
Oven cleaners	
Aerosol/pump sprays	8
Liquids	5
Shaving creams	5

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(b) For consumer products for which the label, packaging, or accompanying literature specifically states that the product should be diluted prior to use, the limits specified in (a) above shall apply to the product only after the minimum recommended dilution has taken place. Such minimum recommended dilution does not include recommendations for incidental use of a concentrated product to deal with limited special applications such as hard-to-remove soils or stains.

(c) For those consumer products that are registered under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA, 7 U.S.C. Section 136-136y), the most effective date of the VOC standards specified in (a) above is April 30, 1997.

7:27-24.4 Administrative requirements

(a) Any manufacturer that manufactures a consumer product for sale in New Jersey that is required to meet a VOC content limit in N.J.A.C. 7:27-24.3 above shall submit a registration report to the Department by not later than October 1, 1996. Any manufacturer of a new consumer product for sale in New Jersey that is required to meet a VOC content limit in N.J.A.C. 7:27-24.3 above shall submit a registration report by no later than five months after the initial date of manufacture for sale in New Jersey.

1. The registration shall include the following information:

i. The name of the manufacturer;

ii. The full mailing address of the manufacturer;

iii. The name and telephone number of contact person; and

iv. A list of the categories of products manufactured that are subject to a VOC content limit at N.J.A.C. 7:27-24.3 (for example: lawn and garden insecticides, aerosol household adhesives, floor wax for non-resilient flooring).

2. The registration shall be sent to the Department at the following address:

Attn: Consumer Product Registration
Bureau of Air Quality Planning
Department of Environmental Protection—CN 418
401 East State Street
Trenton, New Jersey 08625-0418

(b) Each manufacturer of a consumer product subject to N.J.A.C. 7:27-24.3 above shall clearly display on each consumer product container or packaging the month and year in which the product was manufactured (or a code indicating such date). This subsection does not apply to products which are offered to consumers free of charge for the purpose of sampling the product.

(c) If a manufacturer uses a code indicating the date of manufacture in order to comply with (b) above, the manufacturer shall provide to the Department or its representative within 30 days a description of such code upon request.

(d) Each manufacturer of a product subject to a VOC content limit in N.J.A.C. 7:27-24.3 shall keep records demonstrating compliance with the VOC content limits. Such records shall consist of the results of testing or the calculations based upon the constituents used to manufacture the product as required at N.J.A.C. 7:27-24.5(a) or (b). These records are required to be kept for a period of at least three years. Such records shall be made available within 30 days of receipt of request by the Department.

(e) Within 90 days of a request by the Department, each manufacturer shall submit the information required to be kept in (d) above in addition to estimates of the quantities of consumer products sold in New Jersey on forms provided by the Department.

(f) A person who holds for sale, offers for sale, or sells any consumer product to a consumer shall, upon request, identify the distributor or company from whom the consumer product was obtained to the Department or its representative upon request.

7:27-24.5 Test methods

(a) Any person performing tests to determine compliance with the VOC content limits in N.J.A.C. 7:27-24.3 shall use methods which are shown to accurately determine the concentration of VOCs in a product. Such methods shall include any methods issued by EPA or CARB which have been established for the measurement of VOCs in consumer products.

(b) Compliance determinations may also be demonstrated through calculation of the VOC content of a consumer product from records of the amounts of constituents used to make the product.

(c) Testing to determine whether a product is a liquid or a solid shall be performed using ASTM D4359-90, which is incorporated by reference herein.

7:27-24.6 Federal supersession

(a) If EPA promulgates any consumer or commercial product regulation pursuant to 42 U.S.C. 7511b(e) which conflicts with the applicability standards or VOC content limits in this subchapter, the applicability standards or VOC content limits of the conflicting portion of the Federal regulation shall automatically supersede the applicability standards or the VOC content limits in this subchapter as follows:

1. If the Federal regulation establishes a VOC content standard for a category of consumer products that is also regulated in this subchapter, the VOC content standard shall be superseded where:

i. The Federal VOC content standard is either more stringent or less stringent than the VOC content standard in this subchapter; or

ii. The Federal standard is expressed in units other than the units expressed in this subchapter (for example: percent by volume, weight by VOC per volume of product, or emissions per use);

2. If the Federal regulation establishes a scope of applicability for a category of consumer products that is also regulated in this subchapter, the scope of applicability in this subchapter shall be supersed where:

i. The scope of applicability of the category in the Federal rule is defined differently; or

ii. The scope of applicability in the Federal rule provides a different exclusion or exemption as to which products within the category are required to meet the VOC standard; or

3. If the Federal regulation excludes specific compounds or substances from the allowable VOC content for any specific category of consumer products or all categories of consumer products, the same compounds or substances shall be excluded from the allowable VOC content for the same categories in this subchapter.

(b) If the Federal regulation does not establish a VOC content standard (or does not otherwise limit the emissions of VOC) for a category of consumer products that is regulated in this subchapter, the provisions of this subchapter that regulate such a category shall remain in full force and effect.

7:27-24.7 Civil or criminal penalties for failure to comply

Any person subject to this subchapter shall be responsible for ensuring compliance with all requirements of this subchapter. Failure to comply with any provision of this subchapter may subject the person to civil penalties in accordance with N.J.A.C. 7:27A-3 and applicable criminal penalties, including, but not limited to, those set forth at N.J.S.A. 26:2C-19(f)1 and 2.

(a)

ENFORCEMENT

Noise Control

Proposed Readoption with Amendments: N.J.A.C. 7:29

Authorized By: Robert C. Shinn, Jr., Commissioner, Department of Environmental Protection.

Authority: N.J.S.A. 13:1D-1 et seq., 13:1G-1 et seq., specifically 13:1G-4.

DEP Docket Number: 08-95-02/505.

Proposal Number: PRN 1995-193.

A **public hearing** concerning this proposal will be held on:

Wednesday, April 12, 1995 at 1:00 P.M.
New Jersey Department of Environmental Protection
Public Hearing Room
401 East State Street, 1st Floor
Trenton, New Jersey 08625

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Submit written comments, identified by the Docket Number given above, by April 19, 1995 to:

Janis Hoagland, Esq.
Office of Legal Affairs
New Jersey Department of Environmental Protection
CN 402
Trenton, New Jersey 08625-0402

The agency proposal follows:

Summary

Pursuant to Executive Order No. 66(1978), N.J.A.C. 7:29 expires on May 21, 1995. The current rules in this chapter establish noise control standards and the procedures for measuring noise from stationary sources. The New Jersey Department of Environmental Protection ("Department") has reviewed these rules, and has determined them to be necessary, reasonable and proper for the purposes for which they were originally promulgated. However, as a result of complaints from the public, petitions for rulemaking, and new laws passed by the Legislature, the Department proposes to amend certain provisions in this readoption. In addition, the Department is proposing to include a new section on the enforcement of the Noise Control Act ("Act"), N.J.S.A. 13:1G-1 et seq.

This summary will first describe the substantive provisions of each section in N.J.A.C. 7:29-1 and 2 proposed for readoption. The summary will then discuss the proposed amendments to N.J.A.C. 7:29-1.1, 1.3, and 1.4, and the proposed new rule at N.J.A.C. 7:29-1.6. Finally, the issue of noise from motor vehicle racetracks will be discussed.

The Act, N.J.S.A. 13:1G-1 et seq., was passed by the Legislature in 1971. In enacting the statute, the Legislature found that the people of New Jersey should be ensured an environment that is free from noise which unnecessarily degrades the quality of life; that the levels of noise in communities have reached a degree which endangers the health, safety and welfare of the people of the state; and that this threat could be abated by the adoption and enforcement of noise standards.

The Act also created a Noise Control Council ("Council") which consists of 13 members appointed by the Governor: four members are from specific departments in State government, and the remaining members are from the public. The Council is authorized to study the codes, rules and regulations promulgated by the Department with regard to noise control and to make recommendations to the Commissioner of the Department for improvements. The Council is also authorized to hold public hearings concerning existing noise control statutes and regulations and to report its findings to the Commissioner. In addition, the Council has the authority to veto the adoption, amendment or repeal of any rule before action is taken by the Commissioner.

The Department of Health, the Department, and the Council worked together to draft standards for the levels of sound emanating from industrial and commercial operations. The Department proposed these standards in 1973. The standards developed were health-based and were designed to prevent the deleterious physical effects that may result from exposure to excessive noise. At the time of proposal, the Department asserted that "loud noise will cause temporary or permanent hearing damage. Noise is also connected with many cases of high blood pressure, stomach ulcers, heart trouble, muscle tension, nervous disorders and mental breakdowns. It also interferes with speech and disturbs sleep." The proposed standards were based on information dealing with speech interference and sleep interruption. Specifically, daytime sound levels were determined by speech interference criteria, while nighttime levels were dictated by sleep interruption information.

On January 16, 1974, the Department adopted noise control rules which were codified at N.J.A.C. 7:29. In 1985, the rules were substantially amended to make the technical definitions in the regulations consistent with terminology used and accepted by the acoustical profession and to clarify the meaning and extent of the definitions.

Section Summary

The following is a brief section-by-section description of the current noise control rules. Subchapter 1 establishes the General Provisions and subchapter 2 establishes the Procedures for the Determination of Noise from Stationary Sources.

N.J.A.C. 7:29-1.1 defines the words and terms used throughout subchapter 1.

N.J.A.C. 7:29-1.2 establishes the standards for sound levels emanating from industrial, commercial, public service, or community service facilities. Specifically, this section prohibits continuous sound levels, when measured from a residential property line, from exceeding 65 dBA between 7:00 A.M. and 10:00 P.M. and from exceeding 50 dBA between 10:00 P.M. and 7:00 A.M. This section also prohibits impulsive sound in the air in excess of 80 decibels.

N.J.A.C. 7:29-1.3 provides requirements regarding the testing and operation of stationary emergency signaling devices.

N.J.A.C. 7:29-1.4 provides for exceptions of certain noise sources from the operational performance standards in N.J.A.C. 7:29-1.2.

N.J.A.C. 7:29-1.5 states the requirement that sound shall be measured in accordance with the test equipment methods and procedures outlined in N.J.A.C. 7:29-2.

N.J.A.C. 7:29-2.1 defines the words and terms used throughout subchapter 2.

N.J.A.C. 7:29-2.2 sets forth the requirement that testing shall be conducted in accordance with the test methods specified in this subchapter. This section also provides that alternative methods, procedures or instruments may be used if approved by the Department.

N.J.A.C. 7:29-2.3 sets forth the requirement that sound levels shall be determined by a qualified investigator using instruments and procedures prescribed by the Department.

N.J.A.C. 7:29-2.4 states that sound from a source under investigation shall be measured when the source is operating at normal and routine conditions.

N.J.A.C. 7:29-2.5 sets forth in general where, how and under what conditions the noise determination tests shall be performed. This section also sets forth the calibration and certification requirements for the measuring devices.

N.J.A.C. 7:29-2.6 establishes the requirements for the equipment that is to be used during testing and measurements.

N.J.A.C. 7:29-2.7 specifies how the tests and measurements shall be reported. This section contains a detailed list of the information that shall be included in the reports.

N.J.A.C. 7:29-2.8 explains the steps that must be taken prior to actual test measurements. It includes the requirements of a survey, observation of whether the sound is steady or transient, wind speed measurement and instrument selection.

N.J.A.C. 7:29-2.9 lays out step by step the actual procedures used to calibrate the equipment and to make measurements to determine conformance with the sound limits set forth in N.J.A.C. 7:29-1.

N.J.A.C. 7:29-2.10 directs how measured data is to be corrected to account for other sound sources that are not related to the facility being investigated and evaluated. This section provides a detailed procedure to be followed in making any such corrections.

N.J.A.C. 7:29-2.11 defines the qualifications that are required of individuals performing the test methods and procedures set forth in this subchapter.

N.J.A.C. 7:29-2.12 provides for the incorporation by reference of other testing criteria for equipment, including sound level meters. These testing criteria are found in ANSI:SI.11-1966, ANSI:SI.4-1971 and IEC Publication 651.

Proposed Amendments

N.J.A.C. 7:29-1.1: The Department is proposing to add a definition of the term "agricultural activities" to clarify the scope of activities that would be exempted from the noise control rules.

The Department is also proposing to include a definition of "authorized enforcement agency" since this term is used in proposed new rules N.J.A.C. 7:29-1.6 regarding enforcement.

The Department is also proposing to define the terms "emergency" and "emergency services personnel" which are used in P.L. 1992, c.122 (codified as N.J.S.A. 13:1G-4.2). The Department is proposing to implement the provisions of P.L. 1992, c.122 by amending N.J.A.C. 7:29-1.3.

Further, the Department is proposing to define "outdoor venue" since the Department is proposing to include a partial exception at N.J.A.C. 7:29-1.4 for sound from outdoor venues.

Finally, the Department is proposing to amend the definition of "stationary emergency signaling device" to clarify that the Department only intends to regulate such devices when they are being used or tested for local emergencies, not for national or State emergencies.

N.J.A.C. 7:29-1.3: The Department proposes to amend N.J.A.C. 7:29-1.3 in order to implement the provisions of P.L. 1992, c.122 (codified as N.J.S.A. 13:1G-4.2), which became effective on October 22, 1992. In enacting this statute, the Legislature directed the Department to promulgate rules implementing this provision. In order to be consistent with the rest of N.J.A.C. 7:29-1.3, the Department proposes to use the term "stationary emergency signaling device" rather than the term "siren

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or other sound emitting device" used by the Legislature. It is the Department's belief that these terms have the same meaning, and are therefore interchangeable.

N.J.S.A. 13:1G-4.2 provides that "[a] siren or other sound emitting device used to alert firefighters, or other emergency services personnel of a fire or other emergency shall be located no closer than 250 feet from any elementary school or adjacent school yard or playground..." The Department proposes to add N.J.A.C. 7:29-1.3(d) to implement this statutory provision. In proposing N.J.A.C. 7:29-1.3(d), the Department notes that this provision will not apply to emergency signaling devices that are located on the fire station or on facilities operated by a fire department, first aid, rescue or emergency squad.

N.J.S.A. 13:1G-4.2 also includes a provision outlining that this legislation is not applicable to "sirens or other sound emitting devices placed in service before July 16, 1992 and located in municipalities with a population of less than 25,000 persons and with a population density of more than 2,500 persons per square mile, according to the latest federal decennial census." Accordingly, the Department proposes to include this provision at N.J.A.C. 7:29-1.3(e).

Finally, N.J.S.A. 13:1G-4.2 clarifies that the provisions set forth therein are not intended to apply to "a siren or other sound emitting device used to alert the public of an emergency pursuant to the provisions of the emergency management act, P.L. 1942, c.251 (C. App. A:9-33 et seq.), or any applicable Federal laws or regulations pertaining to emergency planning and preparedness. Proposed N.J.A.C. 7:29-1.3(f) codifies this provision.

The Department emphasizes that the proposed amendments as well as the existing provisions of N.J.A.C. 7:29-1.3 do not govern the use of stationary emergency signaling devices to warn the public or emergency personnel of a national or State emergency pursuant to the provisions of the emergency management act. The rules and the above referenced law also do not apply when stationary emergency signaling devices are used or tested as part of the operations of the National Warning System, pursuant to the Federal Emergency Management Agency's Civil Preparedness Guide 1-16, or pursuant to the Federal Emergency Management Agency's Guide for the Evaluation of Alert and Notification Systems for Nuclear Power Plants, FEMA Rep. 10. The rules and the above referenced law only pertain to the use of stationary emergency signaling devices to alert local emergency services personnel and/or local citizens of a local emergency such as a fire.

The Department also proposes to add N.J.A.C. 7:29-1.3(g) to clarify situations involving dual purpose emergency signaling devices. A dual purpose emergency signaling device is one which can be used either to alert the public of a national or State emergency or to alert local emergency services personnel of a local emergency, such as a fire or medical emergency. It is the Department's intent that these dual purpose emergency signaling devices will not be subject to the provisions in N.J.A.C. 7:29-1.3(d), (e) and (f). However, when these dual purpose emergency signaling devices are used for local purposes, they will be subject to all other provisions in N.J.A.C. 7:29-1.3.

In addition, the Department proposes to include a provision at N.J.A.C. 7:29-1.3(h) which states that emergency signaling devices do not have to comply with the operational performance standards at N.J.A.C. 7:29-1.2 when they are being operated or tested in accordance with the requirements in N.J.A.C. 7:29-1.3. This proposed provision is added to clarify that emergency signaling devices may be operated or tested in accordance with N.J.A.C. 7:29-1.3 without being subject to an enforcement action for exceeding the standards in N.J.A.C. 7:29-1.2.

Finally, the Department proposes to amend N.J.A.C. 7:29-1.3(c). Currently, this subsection states that emergency signaling devices may only be used for testing and for emergency purposes where personnel and equipment are mobilized. In addition, these devices may only be tested during certain hours and for a specified duration and frequency. Several entities have recently asked the Department if, pursuant to the noise control rules, they may use their township's fire department sirens to announce that schools will be closed due to a weather emergency. Since the rules allow stationary emergency signaling devices to be used when personnel and equipment are mobilized and since personnel and equipment are mobilized during a weather emergency, the rules allow the use of stationary emergency signaling devices to announce school closings resulting from a weather emergency. The Department is clarifying in the rules that stationary emergency signaling devices may be used for this purpose.

N.J.A.C. 7:29-1.4: The proposed amendments to this section include exceptions for three noise sources from the operational performance standards at N.J.A.C. 7:29-1.2. Specifically, the Department proposes to amend the exception which pertains to agriculture. The Department also proposes to include an exception for the normal operation of handgun, rifle, shotgun, skeet shooting or trapshooting ranges, and for the operation of outdoor venues for an extra hour during the summer months.

The existing regulations at N.J.A.C. 7:29-1.4(a)1 provide an exemption for sound from agriculture. The Department has received complaints regarding noise emanating from vehicles and operations not associated with normal farming activities. For example, some farmers operate soda and ice cream stands in conjunction with their roadside farm stands. The sound emanating from the fans used to keep the soda and ice cream cool can be excessive and has been the source of complaints. The Department believes that only the selling of farm-related products on farmlands qualifies for the agricultural exemption. Therefore, unless the ice cream is produced on the farm on which it is being sold, a roadside farm stand selling ice cream would not constitute an agricultural activity. In addition, the Department has received complaints of excessive noise emanating from diesel-powered refrigeration trucks which are used to make green tomatoes turn red. These trucks are not located on farmlands nor are they operated in conjunction with farms. The Department does not consider this to be an agricultural activity. Therefore, the Department is proposing to include a definition of "agricultural activities" at N.J.A.C. 7:29-1.1 in order to clarify the types of activities that are considered by the Department to be agricultural and as such, would be exempt pursuant to N.J.A.C. 7:29-1.4(a)1. Under this proposed definition, activities performed on farmlands in order to cultivate the soil, produce crops, or raise livestock would be exempt from compliance with the noise standards. In addition, activities associated with the growing, producing, processing, or selling of farm-related products, as long as those activities are conducted on farmlands, would be considered agricultural activities.

The Department is proposing to add an exemption at N.J.A.C. 7:29-1.4(a)13 for sound from the normal operation of handgun, rifle, shotgun, skeet shooting or trapshooting ranges which have been maintained continuously in the same location since January 24, 1972. This exemption reflects the provisions of P.L. 1991, c.391, codified at N.J.S.A. 13:1G-21.1, 21.2 and 21.3, which became effective on January 16, 1992. In enacting this statute, the Legislature directed the Department to promulgate regulations implementing this provision. N.J.S.A. 13:1G-21.2 states that "an owner of a handgun, rifle, shotgun, skeet shooting or trapshooting range in this State shall be immune from liability where the liability is based upon noise resulting from normal operation of the range..." Further, N.J.S.A. 13:1G-21.3 states that "this act shall apply only to a handgun, rifle, shotgun, skeet shooting or trapshooting range located in this State which has been maintained continuously in the same location since January 24, 1972."

The Department is proposing to include a partial exception at N.J.A.C. 7:29-1.4(b) for sound from outdoor venues. Currently, N.J.A.C. 7:29-1.2 requires outdoor venues, along with all other sound sources not specifically exempted pursuant to N.J.A.C. 7:29-1.4, to comply with the 65 dBA noise standard between the hours of 7:00 A.M. and 10:00 P.M. and to comply with the 50 dBA noise standard between the hours of 10:00 P.M. and 7:00 A.M. The Department is proposing to allow outdoor venues to operate at the daytime noise level of 65 dBA until 11:00 P.M. rather than 10:00 P.M., for the period from Memorial Day through and including Labor Day of each year. The Department believes that the State has an interest in promoting the entertainment and tourism industries in New Jersey. Outdoor venues comprise a significant portion of the entertainment and tourism industries. Allowing outdoor venues to operate for an additional hour during the summer months should stimulate the entertainment and tourism industries and, accordingly, New Jersey should derive substantial benefits from the resultant growth of these industries.

N.J.A.C. 7:29-2.6: The Department is proposing to amend N.J.A.C. 7:29-2.6 which sets forth requirements for the instrumentation to be used during sound measurement activities. Specifically, this section states that a tape measure, compass and thermometer shall be required. The Department is proposing to make the use of these pieces of equipment optional since it is not necessary to use this equipment in order to obtain accurate sound level measurements.

N.J.A.C. 7:29-2.11: The Department is proposing to amend N.J.A.C. 7:29-2.11 which sets forth requirements for the qualifications of personnel performing noise measurements. Specifically, this section states that if a person completes a re-certification course entitled "Community Noise—A Short Course" which is offered by Rutgers University, that person shall be qualified to make noise measurements. However, this

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section does not state how often the course must be completed. Therefore, the Department is proposing to require that this re-certification course be completed at least once every two years. Persons employed by local health agencies which are certified pursuant to the County Environmental Health Act to implement a noise control program are required to be re-certified in noise every two years pursuant to the County Environmental Health Standards of Administrative Procedure and Performance at N.J.A.C. 7:1H-3.2. Further, the Department currently recommends that persons employed by entities other than certified local health agencies complete the noise re-certification course every two years in order to be certified to perform noise measurements, and such persons have been complying with this recommendation.

Proposed New Rule

N.J.A.C. 7:29-1.6: The Department is proposing to include a new rule regarding the initiation of enforcement actions and the imposition of civil penalties for violations of the Act and the rules promulgated pursuant thereto. This proposed new rule includes language regarding grace periods because the Department believes that certain violations warrant grace periods. Specifically, upon identification by the Department or an authorized enforcement agency of a minor violation, the imposition of penalties should be suspended and the violator should be provided with a period of time to correct the violation. This proposed section lists the types of violations that should be considered minor and states that the authorized enforcement agency shall not seek to collect a penalty for a minor violation if the violator corrects the violation within a specified period of time. If the violator does not correct the minor violation within a specified period of time or if the violation is not considered minor pursuant to the criteria listed in this section, the authorized enforcement agency may seek to collect a civil penalty. This section also includes a list of factors that may be considered by the authorized enforcement agency to reduce a penalty during the settlement of an enforcement action initiated for a violation of the noise rules.

Since 1974, the Department has implemented a noise control program pursuant to the Act and the rules adopted pursuant thereto. Eighteen certified county and local health agencies currently play a major role in implementing and enforcing the noise control rules and receive money from the Department through the County Environmental Health Act grant program to support their noise control efforts. The County Environmental Health Act, N.J.S.A. 26:3A2-28, authorizes the Department to delegate specified environmental programs to certified local health agencies. To become certified, a local health agency must submit a work program which outlines the program it wishes to implement and demonstrates that the agency can meet the Department's environmental performance standards for that program. The Commissioner of the Department approves the work programs and certifies the agency to perform the work set forth in the work program. A municipality which is not a certified health agency may also implement and enforce a noise program by adopting an ordinance that is more stringent than the Act. It is the Department's goal to have the entire noise control program implemented and enforced by municipalities or certified local health agencies by the middle of 1995 since the locals are better situated to address noise related issues and because there is no funding or staff to support a State noise control program.

In conjunction with the proposed new rule regarding enforcement, the Department is proposing to include a definition of "authorized enforcement agency." Specifically, an authorized enforcement agency is defined as the Department, a local health agency certified pursuant to the County Environmental Health Act to perform noise enforcement activities, a municipality with a Department approved noise control ordinance, or an employee of a county or municipal government, working within their employer's jurisdiction, who has received noise enforcement training and who is currently certified in noise enforcement. The last portion of this definition is intended to refer to police, housing, health and code enforcement officials who have been trained and certified in noise enforcement.

Motor Vehicle Racetracks: N.J.A.C. 7:29-1.4 exempts several types of activities or sources of noise from compliance with the standards set forth in the rules. In particular, N.J.A.C. 7:29-1.4(a)5 exempts sound from motor vehicle racetracks. However, as explained in the Basis and Background document prepared in conjunction with the noise control rules proposed in 1973, the Department intended to regulate noise from motor vehicle racetracks in future regulations.

The Department has become increasingly aware of the excessive levels of noise produced by racetracks and the effects such levels have on residents of neighboring communities. Specifically, residents have complained that they cannot enjoy their property, their house and windows vibrate, they cannot sleep, they are disturbed while resting or relaxing, they cannot hear their television, and the noise has interfered with their conversations. The Department has received numerous letters from citizens expressing concern regarding the level and duration of noise emanating from racetracks and has also received petitions for rulemaking from Waterford, Manalapan and Flemington Townships to address the issue of noise from racetracks.

In October 1992, the Council conducted a public hearing on the issue of noise from racetracks. In June 1993, the Council transmitted its findings and recommendations to the Commissioner of the Department. The Council found, among other things, that "there exists a serious noise problem in residential communities adjacent to motor vehicle racetracks" and recommended that the Department delete motor vehicle racetracks from the exceptions listed at N.J.A.C. 7:29-1.4.

The Department agrees that noise emanating from motor vehicle racetracks adversely impacts the quality of life of residents living near the racetracks. However, the Department believes that requiring racetracks to comply with the daytime and nighttime sound levels prescribed in N.J.A.C. 7:29-1.2 would cause significant economic hardship for the racetracks, deprive racing fans of the enjoyment of certain types of racing, and may force certain racetracks in New Jersey to close. The Department believes that an alternate approach is needed and recently met with the owners of three large racetracks in New Jersey to discuss the regulation of noise from their facilities. The racetrack owners agreed to work with the Department to address this issue. The Department will continue to work with the Council, racetrack owners and operators, residents and legislators to address this matter quickly and effectively.

Social Impact

The readoption of this chapter will ensure that standards exist to regulate the levels of noise emanating from industrial, commercial, public service, and community service facilities. The Department or authorized enforcement agency will have the authority to enforce these standards thereby ensuring that communities surrounding existing or new noise sources are quiet and in keeping with the environment envisioned by the Act. Therefore, the readoption will have a positive social impact since the public will benefit from facilities' compliance with the rules.

Activities performed on farmlands in order to cultivate the soil, produce crops, or raise livestock would be exempt from compliance with the noise standards. In addition, activities associated with the growing, producing, processing, or selling of products, as long as those activities are performed within the confines of the farm, would be considered agricultural activities. The proposal to include a definition of agricultural activities in the rules may have a positive social impact on citizens who were previously disturbed by noise emanating from vehicles and operations not directly related to normal farming activities and not conducted on farmlands. In proposing to define "agricultural activities," it is the Department's intent to clarify that the exemption in N.J.A.C. 7:29-1.4 applies only to activities which are associated with the farm and which are conducted on farmlands. For example, a farmer selling soda on his farmlands is not considered an agricultural activity whereas a farmer selling, on his farmlands, ice cream which he produced on his farm, would be considered an agricultural activity.

On the other hand, the proposal to define agricultural activities may have a negative social impact on entities who erroneously considered their activities to be agricultural and who must now devise a method to comply with the sound limits in the noise control regulations.

The proposal to allow outdoor venues to operate at the daytime noise level until 11:00 P.M. rather than 10:00 P.M. will affect the owners and operators of outdoor venues, those who attend events held at outdoor venues, and citizens living near outdoor venues. Under the proposal, the owners and operators of outdoor venues will be able to conduct events at their facilities, during the summer months, from 7:00 A.M. until 11:00 P.M. that do not exceed the 65 dBA standard without receiving an enforcement action for violating the nighttime noise standard. The Department expects that the owners and operators of outdoor venues as well as those who attend events held at outdoor venues will react positively to this proposal.

Allowing certain entertainment facilities to operate at the daytime noise levels at N.J.A.C. 7:29-1.2(a)1 for an additional hour before requiring them to lower the sound level to comply with nighttime noise levels may have a slight adverse social impact on those who live in the vicinity of these facilities; citizens living near outdoor venues, which qualify for the proposed exception, may be disturbed that the levels of sound

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emanating from outdoor venues may be 65 dBA until 11:00 P.M. The Department notes though that this special exception will be limited to the summer months, therefore any adverse social impact resulting from this proposed amendment will be of limited duration. It is also important to note that the level of sound emanating from these facilities between 10:00 P.M. and 11:00 P.M. cannot exceed 65 dBA, which does not necessarily mean that the noise level will continuously be at 65 dBA.

The Department is proposing to implement legislation, signed into law by former Governor Florio on January 16, 1992, which exempts the owners of handgun, rifle, shotgun, skeet shooting and trapshooting ranges ("firing ranges") from compliance with the noise standards. The law and the proposed rule affect the owners and operators of firing ranges that have been maintained continuously in the same location since January 24, 1972, those who utilize such firing ranges, and those who live near such firing ranges. The rule may have a positive social impact on the owners and operators of firing ranges to which the rule applies; the owners and operators of firing ranges do not have to restrict operation of the firing range in order to comply with the sound level standards in the noise regulations. Similarly, the rule may have a positive social impact on those people who utilize firing ranges because their enjoyment of the ranges will not be hampered as a result of operating restrictions that may have had to be employed.

On the other hand, the rule may have a negative social impact on residential communities located near firing ranges; the firing ranges do not have to comply with the daytime and nighttime sound levels in the noise control regulations therefore nearby citizens may be disturbed by the levels of sound emanating from the firing ranges. However, because the Department is codifying an exemption required by law, the Department does not have the ability to avert any negative social impacts that may or may have resulted from the passage of this legislation.

The Department is proposing to implement legislation, signed into law by former Governor Florio on October 22, 1992, which restricts the location of certain stationary emergency signaling devices placed into service after July 16, 1992. This law and proposed rule require certain signaling devices to be located no closer than 250 feet from an elementary school or playground. This rule may have a positive social impact on children who attend elementary school or visit playgrounds located near stationary emergency signaling devices since the legislation was intended to protect children from the adverse effects of extremely loud and unexpected noise. As stated in the Senate County and Municipal Government Committee Statement accompanying passage of this law, the close-range sounds emitted by stationary emergency signaling devices have been known to terrify and even damage the hearing of young children.

Including a section in the rules regarding enforcement serves to clarify some of the procedures currently in use, and to institute new procedures, such as grace periods. This section should have a positive social impact. Employing the grace period philosophy will promote compliance by allowing those members of the regulated community who are committed to working diligently and cooperatively toward compliance to invest time and capital into measures which will lead to compliance, instead of into potentially costly litigation and the payment of monetary penalties. Incorporating the statutory provision at N.J.S.A. 13:1G-14 regarding penalties into the regulations should help to discourage non-compliance since potential violators will be on notice of the penalties that may be imposed. In addition, it is the Department's goal to have the entire noise control program implemented and enforced by municipalities and certified local health agencies in the near future. This should also have a positive social impact; promoting local enforcement of the noise control regulations should result in more effective enforcement since local enforcement agencies are better situated to address noise related issues.

The proposal to make the use of certain noise measuring equipment optional will have neither a positive nor negative social impact. Sound levels can be measured accurately and compliance can be determined regardless of whether a tape measure, compass or thermometer is required or is optional.

The proposal to require that personnel conducting noise measurements must complete, every two years, a noise re-certification course offered by Rutgers University should have neither a positive nor negative social impact for the following reasons. Persons employed by local health agencies which are certified pursuant to the County Environmental Health Act to implement a noise control program are required to be re-certified in noise every two years pursuant to the County Environmental Health Standards of Administrative Procedure and Performance at N.J.A.C. 7:1H-3.2. Further, the Department currently recommends that persons employed by entities other than certified local health agencies complete the noise re-certification course every two years in order to be certified to perform noise measurements, and such persons have been complying with this recommendation.

Economic Impact

The readoption of this chapter will have little or no economic impact on persons complying with the noise level standards. However, persons subject to this chapter who exceed the noise standards may have to evaluate their facilities to identify noise abatement strategies. The actual abatement measures could range from a simple noise barrier costing a few hundred dollars to a multi-phased abatement plan that utilizes barriers as path controls or treats the source of noise itself. The range of cost depends on the number of individual sources of noise, the corresponding sound levels, the distance between the noise sources and the receiving properties, reflective and absorptive surfaces nearby, etc.

The proposal to include a definition of agricultural activities in the regulations may have a positive economic impact on farmers. Because the proposed definition of agricultural activities provides that sound from activities associated with farms and performed on farmlands does not have to comply with the daytime and nighttime sound limits in the noise control rules, farmers who perform such activities will not have to expend financial resources to ensure that these activities comply with the noise limits in the regulations. On the other hand, entities who conduct activities which they believe constitute agriculture under the existing noise control regulations but which are not considered agriculture under the proposed definition, may have to expend money to implement noise abatement measures to ensure that the sound levels are in compliance with N.J.A.C. 7:29-1.2. Therefore, the proposed amendment may have a negative economic impact on these people.

This proposal to allow outdoor venues to operate at the daytime noise level until 11:00 P.M. rather than 10:00 P.M. will economically impact the owners and operators of outdoor venues. The Department expects that the proposal will have a positive economic impact on the owners and operators of these facilities. Extending the daytime sound level standards for an hour will enable them to conduct events at their facilities that do not end until 11:00 P.M. and that do not exceed the 65 dBA standard without receiving an enforcement action for violating the nighttime noise standard. In addition, the owners and operators of outdoor venues may derive extra revenue from being able to operate for an additional hour at the daytime sound levels and may also achieve economic savings by not having to implement noise abatement measures in order to lower the sound levels to 50 dBA by 10:00 P.M.

The provision exempting handgun, rifle, shotgun, skeet shooting and trapshooting ranges may have a positive economic impact on the owners and operators of firing ranges that have been maintained continuously in the same location since January 24, 1972; these facilities will not have to implement noise reduction measures in order to comply with the sound levels in the noise control regulations. In addition, the owners and operators of firing ranges may derive economic benefit from not being required to restrict operations of the firing ranges in order to meet the sound level requirements in the regulations.

The rule restricting placement of stationary emergency signaling devices may have a slight negative economic impact on the owners and operators of stationary emergency signaling devices who may have to move these devices in order to comply with this regulation. The devices that are subject to this regulation are those that (1) are not located on the premises of a fire station or other facility operated by a local fire department, first aid, rescue or emergency squad; and those that (2) have been placed into operation after July 16, 1992 and are located in municipalities with a population of greater than 25,000 persons and with a population density of less than 2,500 persons per square mile. If a municipality or fire company has installed a signaling device that meets the above criteria, it may have to expend financial resources to move the signaling device to an alternate location. If an owner or operator of a stationary emergency signaling device plans to install a new signaling device in a municipality that meets the above criteria, the Department does not expect that the owner or operator will have to spend additional money to install the device in a location that complies with the law and rule. The Department notes that because the Department is codifying a statutory restriction, the Department does not have the ability to avert any negative economic impacts that may or may have resulted from the passage of this legislation.

The proposed new rule establishing a grace period for violators who commit a minor violation, as defined in the proposed section, will allow violators to work diligently to achieve compliance rather than to pay monetary sanctions and associated litigation costs. Thus, there will be

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a positive economic impact on the minor violator. On the other hand, if the violator is unwilling to correct the minor violation or if the violation is not classified as minor, the authorized enforcement agency will seek to collect a penalty. By establishing criteria to distinguish between minor violations and other violations, the authorized enforcement agency will be able to seek to collect a penalty in cases where a penalty is warranted and refrain from seeking to collect a penalty in cases where a penalty is not warranted.

The proposal to make the use of certain noise measuring equipment optional will have a positive economic impact on those persons who conduct noise measuring activities because they will no longer be required to purchase and use tape measures, compasses and thermometers in order to measure sound levels properly.

The proposal to require that personnel conducting noise measurements complete, every two years, a noise course offered by Rutgers University should have neither a positive nor negative economic impact for the following reasons. Persons employed by local health agencies which are certified pursuant to the County Environmental Health Act to implement a noise control program are required to be re-certified in noise every two years pursuant to the County Environmental Health Standards of Administrative Procedure and Performance at N.J.A.C. 7:1H-3.2. Further, the Department currently recommends that persons employed by entities other than certified local health agencies complete the noise re-certification course every two years in order to be certified to perform noise measurements, and such persons have been complying with this recommendation.

Environmental Impact

The readoption of this chapter will have a positive environmental impact by providing the Department or the authorized enforcement agency with the continued authority to ensure that sound from facilities regulated by this chapter is in compliance with the standards prescribed by this chapter. This chapter provides the mechanism for the Department or authorized enforcement agency to order abatement of noise from facilities, thereby ultimately achieving the legislative purpose of protection of the environment.

The proposed definition and application of the term "agricultural activities" in N.J.A.C. 7:29-1.4(a)1 will have a beneficial impact on the environment. By including a definition of agricultural activities in the regulations, the Department is seeking to clarify the types of activities that the Department believes constitute agriculture, and as such, are exempted from compliance with the standards established in the rules. Without a definition in place, the term agriculture may be subject to broad interpretation. This may result in residents being unnecessarily subject to excessive noise emanating from activities inappropriately classified as agricultural.

The proposed amendments to allow outdoor venues to operate at the daytime noise levels until 11:00 P.M. may have a slight adverse environmental impact on residential communities located in close proximity to outdoor venues. The Department again notes that since the exception only applies for the time period beginning Memorial Day and through Labor Day, any environmental harm resulting from allowing these facilities to emit noise at the daytime levels until 11:00 P.M. will be limited to the summer months. Also, although the proposal states that the noise level cannot exceed 65 dBA, it is not likely that the level will continuously be at 65 dBA until 11:00 P.M.; therefore any environmental harm occurring between 10:00 P.M. and 11:00 P.M. should be sporadic rather than continuous.

The amendment requiring an exemption for handgun, rifle, shotgun, skeet shooting and trapshooting ranges may have a negative environmental impact on the residential communities located in close proximity to the firing ranges that qualify for the exemption outlined in the law and rule; the integrity of the environment in which residential communities are located may be adversely affected by the levels of sound emanating from firing ranges since the firing ranges do not have to comply with the standards in the noise control regulations. However, because the Department is codifying a statutory exemption, the Department does not have the ability to avert any negative environmental impacts that may or may have resulted from the passage of this legislation.

Because of the amendment which requires that certain signaling devices be located at least 250 feet from an elementary school or playground, the integrity of the environment in which elementary schools and playgrounds are located will be preserved. Therefore, the amendment may have a positive impact on the environment in which elementary schools and playgrounds are located.

Incorporating a section in the rules that contains provisions to allow grace periods for certain violations should have a positive environmental impact. The grace period provision at proposed N.J.A.C. 7:29-1.6 distinguishes between those violations that are minor and those that are not. A grace period will apply only to those violations that are deemed to be minor pursuant to proposed N.J.A.C. 7:29-1.6(h). Allowing a person to correct a minor violation before seeking to collect a penalty should encourage compliance because those who are committed to working diligently and cooperatively toward compliance will devote time and resources to measures that will lead to compliance rather than to litigation and the payment of penalties. Grace periods will not apply to those violations that are not deemed to be minor, thus a penalty may be imposed immediately upon identification of the violation. Similarly, the authorized enforcement agency may seek to collect a penalty from those violators who are not committed to achieving compliance in a reasonable period of time (the grace period).

The proposal to make the use of certain noise measuring equipment optional rather than mandatory should not have any positive or negative environmental impact; accurate sound level measurements can be taken and compliance can be determined without mandating the use of tape measures, compasses and thermometers.

The proposal to require that personnel conducting noise measurements complete a noise course, which is offered by Rutgers University, at least once every two years should have neither a positive nor negative environmental impact for the following reasons. Persons employed by local health agencies which are certified pursuant to the County Environmental Health Act to implement a noise control program are required to be re-certified in noise every two years pursuant to the County Environmental Health Standards of Administrative Procedure and Performance at N.J.A.C. 7:1H-3.2. Further, the Department currently recommends that persons employed by entities other than certified local health agencies complete the noise re-certification course every two years in order to be certified to perform noise measurements, and such persons have been complying with this recommendation.

Executive Order No. 27 Statement

Executive Order No. 27(1994), which became effective on January 2, 1995, was signed by Governor Whitman in order to prevent unnecessary State regulations in areas that are already regulated by the Federal government. In implementing Executive Order No. 27, administrative agencies which adopt, readopt or amend State regulations that exceed any Federal standards or requirements are required to include a comparison with Federal law.

The proposed readoption with amendments of N.J.A.C. 7:29 and the proposed new rule do not impose any standards or requirements which exceed the standards or requirements imposed by any applicable Federal law.

Regulatory Flexibility Analysis

The New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., states that the Department shall, when proposing a rule for adoption, utilize approaches which will accomplish the objectives of the applicable statutes while minimizing any adverse economic impact on small businesses. N.J.S.A. 52:14B-18. For the purposes of the Act, small businesses are defined as those which are resident in this State, independently owned and operated and not dominant in their field, and which employ fewer than 100 full-time employees.

The proposed readoption of this chapter would apply to all commercial, industrial, public service, and community service facilities as defined at N.J.A.C. 7:29-1.1. Some of these regulated groups may be classified as small businesses as defined by the New Jersey Regulatory Flexibility Act. This chapter does not impose any reporting or recordkeeping requirements on such businesses. However, this chapter does impose compliance requirements on both large and small facilities subject to this chapter. The readoption of this chapter will have little or no economic impact on persons complying with the sound level standards prescribed in this chapter. However, persons subject to this chapter who exceed the noise standards may have to evaluate their facilities to identify noise abatement strategies. As stated in the Economic Impact section above, the actual abatement measures could range from a simple noise barrier costing a few hundred dollars to a multi-phased abatement plan, depending on the number of individual sources of noise, the corresponding sound levels, the distance between the noise sources and the receiving properties, reflective and absorptive surfaces nearby, etc.

It has been the experience of the Department that small as well as large businesses have the potential to create noise in violation of this

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chapter. Therefore, it is not appropriate to exempt small businesses from the requirements of this chapter solely by virtue of their size, since these requirements were established to protect human health, welfare and the environment. However, when working with a facility to achieve compliance, the Department or authorized enforcement agency has the discretion to establish differing timetables for compliance that take into account the resources available to small businesses. Thus, it is possible to minimize any adverse economic impact on small businesses.

The Department believes that some of the facilities affected by the proposed amendments to this chapter may be small businesses pursuant to this definition. Specifically, farmers, outdoor venues and firing ranges may be small businesses. In addition, private companies who perform noise measurements may also be considered small businesses. All of these entities should experience a positive economic impact as a result of these proposed amendments to the noise control rules.

In proposing to include a definition of "agricultural activities" in the regulations, the Department is not imposing any new reporting, recordkeeping or other compliance requirements on farmers who use their farmland for agricultural purposes only. Rather, the Department is seeking to clarify the agricultural activities that would qualify for the exemption in N.J.A.C. 7:29-1.3(a)1. The Department has become aware of several small businesses that have mistakenly claimed an exemption under N.J.A.C. 7:29-1.4(a)1 for activities that did not constitute agriculture. While the Department recognizes that these entities may have to expend resources to comply with the noise regulations, these entities were never intended to be exempt in the first place. Therefore, the Department does not believe that it is possible to minimize the economic impact caused by this amendment on these small businesses.

Regarding stationary emergency signaling devices, the Department does not anticipate that the proposed amendments will impose any reporting, recordkeeping or compliance requirements on small businesses since these devices are generally owned and operated by municipalities or fire departments or districts.

Full text of the proposed readoption may be found in the New Jersey Administrative Code at N.J.A.C. 7:29.

Full text of the proposed amendments follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

7:29-1.1 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

"Agricultural activities" means those activities performed on farmlands in order to cultivate the soil, produce crops, or raise livestock. In addition, activities associated with the growing, producing, processing, or selling of farm-related products, as long as those activities are conducted on farmlands, would be considered agricultural activities.

"Authorized enforcement agency" means the Department, a local health agency certified pursuant to the County Environmental Health Act (N.J.S.A. 26:3A2-21 et seq.) to perform noise enforcement activities, a municipality with a Department approved noise control ordinance, or an employee of a county or municipal government who has received noise enforcement training and who is currently certified in noise enforcement.

"Emergency" means an unexpected occurrence or situation resulting from natural or unnatural causes which endangers or has the potential to endanger the health, safety or resources of citizens or a municipality, and as such, necessitates prompt action and response on the part of emergency services personnel.

. . .

"Emergency services personnel" means those people who are trained or designated to respond to an emergency, as defined in this section, or who participate in activities associated with a response to an emergency.

. . .

"Outdoor venue" means a stadium, arena, amphitheater, open air theater or other similar permanent facility, either unenclosed or partially enclosed, with seats around an arena, stage or central area which is utilized for the presentation of music, theater, sports, or other forms of entertainment.

. . .

"Stationary emergency signaling device" means any device, excluding those attached to motor vehicles, used to alert **local** persons engaged in **local** emergency operations. These include, but are not limited to, fire-fighters, first aid squad members, and law enforcement officers, whether paid or volunteer.

7:29-1.3 Stationary emergency signaling devices

(a)-(b) (No change.)

(c) Stationary emergency signaling devices shall be used only for testing in compliance with applicable provisions of these regulations and for emergency purposes where personnel and equipment are mobilized. **Since personnel and equipment are mobilized during a weather emergency, emergency signaling devices may be utilized to announce a school closing resulting from a weather emergency.**

(d) A stationary emergency signaling device used to alert firefighters, or other emergency services personnel of a fire or other emergency shall be located no closer than 250 feet from any elementary school or adjacent school yard or playground, except that this restriction shall not apply to any stationary emergency signaling device that is located on the premises of a fire station or other facility operated by a local fire department or force or first aid, rescue or emergency squad.

(e) The requirement of (d) above shall not apply to stationary emergency signaling devices placed in service before July 16, 1992 and located in municipalities with a population of less than 25,000 persons and with a population density of more than 2,500 persons per square mile, according to the latest Federal decennial census.

(f) Nothing in this section shall have the effect of restricting the use of a stationary emergency signaling device to alert the public of an emergency pursuant to the provisions of the emergency management act, P.L. 1942, c. 251 (N.J.S.A. App. A:9-33 et seq.), or any applicable Federal laws or regulations pertaining to emergency planning and preparedness. The requirements of this section do not apply to the use of stationary emergency signaling devices to warn the public or emergency personnel of a national or State emergency pursuant to the provisions of the emergency management act. This section only pertains to the use of stationary emergency signaling devices to alert local emergency services personnel and/or local citizens of a local emergency such as a fire. This section also does not apply when stationary emergency signaling devices are used or tested as part of the operations of the National Warning System, pursuant to the Federal Emergency Management Agency's Civil Preparedness Guide 1-16, or pursuant to the Federal Emergency Management Agency's Guide for the Evaluation of Alert and Notification Systems for Nuclear Power Plants, FEMA Rep. 10.

(g) A dual-purpose stationary emergency signaling device which is used to alert the public of a national or State emergency and which is also used to alert local emergency services personnel of local emergencies shall not be required to comply with N.J.A.C. 7:29-1.3(d), (e) and (f). If a dual purpose stationary emergency signaling device is used for local purposes, the device shall comply with all other provisions of this section.

(h) When operated or tested in accordance with the requirements of this section, stationary emergency signaling devices are not required to comply with the operational performance standards established at N.J.A.C. 7:29-1.2.

7:29-1.4 Exceptions

(a) The operational performance standards established [in this subchapter] **at N.J.A.C. 7:29-1.2** shall not apply to any of the following noise sources:

1. [Agriculture] **Agricultural activities;**

2.-11. (No change.)

12. Use of explosive devices: These are regulated by the New Jersey Department of Labor under the 1960 Explosive Act (N.J.S.A. 21:1A-1 to 21:1A-144)[.]**; or**

13. Normal operation of a handgun, rifle, shotgun, skeet shooting or trapshooting range which has been maintained continuously in the same location since January 24, 1972.

(b) The operational performance standards established at N.J.A.C. 7:29-1.2 shall be modified, as follows, when applied to sound from outdoor venues. Outdoor venues shall not be permitted

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to emit continuous airborne sound, when measured at any residential property line, in excess of the following:

1. 65 dBA from 7:00 A.M. to 11:00 P.M. during the period between Memorial Day and Labor Day, inclusive.

2. 50 dBA from 11:00 P.M. to 7:00 A.M. during the period between Memorial Day and Labor Day, inclusive.

3. During all other times of the year, outdoor venues shall comply with all operational performance standards in N.J.A.C. 7:29-1.2.

7:29-1.5 Performance test principle

For the purposes of measuring sound in accordance with the applicable provisions of these regulations, test equipment methods and procedures shall conform to the provisions of N.J.A.C. [7:29B-1] **7:29-2.**

7:29-1.6 Enforcement

(a) This section governs the initiation of enforcement actions and the imposition of civil penalties for violations of the Noise Control Act, N.J.S.A. 13:1G-1 et seq., and these rules.

(b) If any person violates any provision of the Noise Control Act, N.J.S.A. 13:1G-1 et seq., these rules, or an order issued pursuant thereto, the authorized enforcement agency may institute an action in a court of competent jurisdiction for injunctive relief to prohibit and prevent such violation or violations and the said court may proceed in the action in a summary manner.

(c) Any person who violates any provision of the Noise Control Act, N.J.S.A. 13:1G-1 et seq., these rules, or an order issued pursuant thereto shall be subject, upon order of a court, to a civil penalty of not more than $3,000 for each offense and each day during which the violation continues shall constitute an additional, separate and distinct offense.

(d) Upon identification of a violation of the Noise Control Act, N.J.S.A. 13:1G-1 et seq., these rules, or an order issued pursuant thereto, the authorized enforcement agency shall issue an enforcement document to the violator. The enforcement document shall be sent to the violator by certified mail, return receipt requested. The enforcement document shall:

1. Identify the condition or activity that constitutes the violation and the specific provision of the Act, rule or order that has been violated;

2. Indicate whether the violator has a period of time to correct the violation before a penalty is sought, as follows:

i. If the violation is deemed by the authorized enforcement agency to be a minor violation pursuant to (f) below, notify the violator that the activity or condition which constitutes the violation must be corrected and compliance achieved within 30 days or, at the discretion of the authorized enforcement agency, any other reasonable period of time, not to exceed 180 days, to be determined based upon the nature and extent of the violation and a reasonable estimate of the time needed to correct the violation. The violator may request, from the authorized enforcement agency, an extension of the compliance deadline in the enforcement action and the authorized enforcement agency shall approve any reasonable request for an extension if the violator can demonstrate that a good faith effort has been made to achieve compliance;

ii. If the violation is not deemed by the authorized enforcement agency to be a minor violation pursuant to (f) below, notify the violator that he or she will not be allowed a period of time to correct the violation before a penalty is sought.

3. Notify the violator that he or she may be liable to a civil penalty of no more than $3,000 for the violation that is the subject of the enforcement document; and

4. If the violation is deemed by the authorized enforcement agency to be a minor violation pursuant to (f) below, notify the violator that if he or she achieves compliance within the period of time specified in the enforcement document, the authorized enforcement agency shall not seek to collect a civil penalty from the violator for that violation.

(e) The authorized enforcement agency may seek injunctive relief and/or a penalty for a violation of the Act, these rules, or an order issued pursuant thereto:

1. If the violator does not correct the minor violation within the period of time specified in the enforcement document initiated pursuant to (d) above; or

2. If the violation is not considered a minor violation pursuant to (f) below.

(f) A violation shall be considered a minor violation if:

1. The violation is not the result of the purposeful, reckless or criminally negligent conduct of the violator; and

2. The activity or condition constituting the violation has not been the subject of an enforcement action by the authorized enforcement agency against the violator within the immediately preceding 12 months.

(g) Any claim for a civil penalty may be compromised and settled based on the following factors:

1. Mitigating or any other extenuating circumstances;

2. The timely implementation by the violator of measures which lead to compliance;

3. The conduct of the violator; and

4. The compliance history of the violator.

7:29-2.6 Equipment

(a) Requirements for equipment are as follows:

1.-2. (No change.)

3. Other equipment:

i.-ii. (No change.)

[iii. A tape measure or an optical distance indicator for determining distance.

iv. A compass for determining direction or, alternatively, a suitable map of the vicinity.

v. A thermometer for determining ambient temperature.]

[vi.]**iii.** Optional equipment including a flashlight or miner's lamp, a microphone extension cable, an extension pole with microphone holder, a headphone equipped with a plug to fit the sound level meter, **a tape measure or an optical distance indicator for determining distance, a compass for determining direction or, alternatively, a suitable map of the vicinity, and a thermometer for determining ambient temperature.**

7:29-2.11 Qualifications of investigative personnel

(a) For the purposes of this procedure, **a** [persons] **person** shall be considered qualified to make noise measurements [who have satisfactorily completed any of the following] **if such person**:

1. **Completes, at least once every two years, a noise re-certification course** ["Community noise-A Short Course"] **which is** offered by the Department of Environmental Sciences of Cook College, Rutgers, the State University; or

2. [A] **Completes a** program of tutoring and on-the-job training offered by the Office of Noise Control to its employees; or

3. [Education] **Has education** or experience or a combination thereof certified by the Department as equivalent to the provisions of (a)1 or (a)2 above.

(a)

LANDSCAPE IRRIGATION CONTRACTORS EXAMINATION BOARD

Landscape Irrigation Contractors
Definitions; Certification Generally; Fees; General Provisions

Proposed New Rules: N.J.A.C. 7:62

Authorized By: Landscape Irrigation Contractors Examination Board, Robert D. Dobson, Chairman.

Authority: N.J.S.A. 45:5AA-6(f) and (g).

DEP Docket Number: 07-95-02.

Proposal Number: PRN 1995-180.

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Submit comments by April 19, 1995 to:
Janis E. Hoagland, Esq.
Office of Legal Affairs
Attn: DEP Docket Number 07-95-02
New Jersey Department of Environmental Protection
CN 402
Trenton, New Jersey 08625-0402

The agency proposal follows:

Summary

Pursuant to the Landscape Irrigation Contractor Certification Act, N.J.S.A. 45:5AA-1 et seq., (Act) the Landscape Irrigation Contractors Examining Board is required to regulate persons who engage in the business of landscape irrigation contracting within the State of New Jersey and is authorized to promulgate rules to effectuate the purposes of the act. The proposed new rules are intended to implement the Act by establishing a procedure to be followed by the Board in carrying out its regulatory functions. They also set forth standards of certification conduct. The rules do not purport to set standards for water conservation. Landscape irrigation contractors will be required, however, to know water conservation technology and standards as a condition of certification.

Subchapter 1 contains general provisions, including definitions. Words and phrases pertaining to the occupation of landscape irrigation contracting are set forth and are operative throughout the chapter.

Subchapter 2 sets forth the requirements for certification as a landscape irrigation contractor, including the procedures to obtain and complete applications for certification, procedures to take an examination, notification of performance on examination, procedures for reexamination, and the requirements for certification renewal.

Subchapter 3 sets forth a fee schedule for certification, including application fees, examination fees, and renewal fees.

Subchapter 4 sets forth requirements regarding the identification of certificate holders; requires a certificate holder to purchase a pressure seal and sets forth the requirements for the use of the pressure seal; sets forth the requirements regarding supervision of work performed by a certificate holder's company and employees; requires a certificate holder to notify the Board within 10 days of any change of address, and sets forth the requirements for forming landscape irrigation joint ventures in New Jersey.

Social Impact

The proposed new rules will have a significant and salutary impact on both the consumer and the occupation of landscape irrigation contracting. The rules serve to benefit landscape irrigation contractors by informing them of the requirements for obtaining certification and of Board procedures.

The rules will have a favorable impact on the landscape irrigation contracting industry, as they set forth controlling standards for the industry. The rules will benefit the consumer, because it is to the consumer's benefit that a contractor understands the technological requirements of his work and the technology and standards relating to water conservation.

Economic Impact

The adoption of these rules will mean that landscape irrigation contractors will be required to pay fees to be certified by the Board. The proposed fees are necessary and reasonable to cover the administrative expenses of the Board. These fees might result in increased costs to the consumer. In addition, certificate holders are required to purchase a pressure seal. The Board anticipates that the increase in costs will be minimal, and will be more than offset by the assurance that the work will be competently and safely performed.

The Board anticipates that its certification requirements will result in the installation of irrigation systems which are more water efficient. Increased water efficiency will result in direct savings to consumers.

Executive Order No. 27 Statement

The proposed new rules do not impose any standards or requirements which exceed the standards or requirements imposed by any applicable Federal law.

Regulatory Flexibility Analysis

The proposed new rules directly impact upon a class of approximately 400 to 800 small businesses engaged in landscape irrigation contracting. The compliance requirements imposed by the rules in implementing the Board's enabling act call for landscape irrigation contractors to complete applications for certification; take an examination; and purchase a pressure seal. Small business certificate holders will not need any additional services to meet these requirements.

The initial compliance cost to all small businesses will include only the cost of the certification and examination fees. No appreciable increase of annual costs is anticipated. In order to effectively regulate landscape irrigation contracting, the rules need to operate evenly and uniformly throughout the entire regulated class, a vast majority of which is composed of small businesses. Therefore, no lesser requirements or exceptions are provided based on business size.

Full text of the proposed new rules follows:

CHAPTER 62
LANDSCAPE IRRIGATION CONTRACTORS

SUBCHAPTER 1. GENERAL PROVISONS

7:62-1.1 Scope

Unless otherwise provided by a rule or statute, this chapter shall constitute the rules of the Landscape Irrigation Contractors Examining Board. These rules are promulgated pursuant to N.J.S.A. 45:5AA-1 et seq.

7:62-1.2 Construction

These rules shall be liberally construed to permit the Landscape Irrigation Contractors Examining Board to discharge its statutory functions.

7:62-1.3 Practice where rules do not govern

(a) The Board may rescind, amend, or expand these rules from time to time in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

(b) The Board shall exercise its discretion with respect to any other matters not governed by these rules.

7:62-1.4 Definitions

The following words and terms, as used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

"Board" means the Landscape Irrigation Contractors Examining Board established pursuant to N.J.S.A. 45:5AA-5 et seq.

"Bureau" means the Bureau of Revenue within the Department of Environmental Protection.

"Candidate" means a person who is in the process of obtaining certification.

"Certificate" means the certificate issued by the Board pursuant to N.J.S.A. 45:5AA-6c et seq.

"Certificate holder" means the person to whom the Board has issued the certificate.

"Certified landscape irrigation contractor" means a person engaged in the construction, repair maintenance, improvement, and/or alteration of any portion of a landscape irrigation system who has successfully completed the requirements for certification pursuant to N.J.S.A. 45:5AA-4 et seq. and 45:5AA-5a et seq. and this chapter.

"Department" means the Department of Environmental Protection.

"Duly authorized representative" means a person or company retained by the Board to perform administrative and/or testing functions.

"Examination" means a comprehensive examination to evaluate the knowledge, ability, and fitness of an applicant to perform as a landscape irrigation contractor.

"Experience" means working with the construction, repair, maintenance, improvement, and alteration of a landscape irrigation system.

"Landscape irrigation contracting" means the construction, repair, maintenance, improvement and alteration of any portion of a landscape irrigation system or drip irrigation system, including required wiring within the system and connection to the required power supply and the installation and connection to a public or private water supply system under terms and conditions of a contract.

"Landscape irrigation system" means any assemblage of components, materials or special equipment which is designed, constructed

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and installed for controlled dispersion of water from any safe and suitable source, including properly treated wastewater, for the purpose of irrigating landscape vegetation or the control of dust and erosion on landscape areas, including drip irrigation systems, integral pumping systems or integral control systems for manual, semi-automatic or automatic control of the operation of these systems.

SUBCHAPTER 2. CERTIFICATION

7:62-2.1 Application for certification

(a) Upon request, each candidate shall be furnished with an application for certification by the Board or its duly authorized representative.

(b) In order to be considered by the Board or its duly authorized representative, an application must include the applicant's name, home address, social security number (optional), business address, business trade name, Federal employer identification number, New Jersey sales tax number, insurance company name and policy number for general liability/workmen's compensation insurance, a description of the applicant's experience, and the appropriate fee.

(c) If the Board or its duly authorized representative deems the application complete, it shall so notify the candidate.

(d) The Board or its duly authorized representative shall notify the candidate when his or her application has been deemed complete. Upon such notification, the candidate shall submit to the Board or its duly authorized representative a completed request to take examination form and the required examination fee.

(e) If the Board or its duly authorized representative deems the application incomplete or finds that the candidate does not meet the requirements set forth in the Landscape Irrigation Contractor Certification Act, N.J.S.A. 45:5AA-1 et seq., it shall reject the application and notify the candidate of the reasons for rejection. The application fee shall not be refundable.

(f) Each candidate has a period of two years from the date of his or her application to pass the examination. An application shall expire two years and one day from the date it is received by the Board or its duly authorized representative. A candidate shall be required to submit a new application and application fee once an application has expired.

7:62-2.2 Notification of pass-fail

To receive certification, a candidate is required to obtain a passing score on the examination. The passing score will be set by the Board or its duly authorized representative. The Board or its duly authorized representative shall notify all candidates whether they have passed the examination within 60 days of the date of examination.

7:62-2.3 Passed candidates

The Board or its duly authorized representative shall issue a certificate to each candidate who successfully passes the examination and otherwise meets the standards and qualifications set forth in the Landscape Irrigation Contractor Certification Act, N.J.S.A. 45:5AA-1 et seq. Each initial certificate issued pursuant to the act shall expire on January 31 of the second calendar year following issuance.

7:62-2.4 Failed candidates

A candidate who has failed the examination shall be sent a list of the next available examination dates and locations. The candidate shall also be notified of those subject areas in which a passing grade was not achieved.

7:62-2.5 Re-examination

A candidate who has failed the examination shall not be required to reapply for certification if said candidate's application has not expired. The candidate shall be allowed to retake the examination upon completing a request to take examination form and paying an examination re-take fee. The candidate shall wait a minimum of six months from the date he or she failed before he or she will be allowed to retake the examination.

7:62-2.6 Renewal

(a) The Board or its duly authorized representative shall issue a renewal of a certificate pursuant to N.J.S.A. 45:5AA-7c et seq.

(b) Each certificate holder shall renew his or her certification by submitting a complete renewal application and non-refundable bi-annual renewal fee to the Bureau. An application shall include any change in address, employment, or business or company name. The renewal application and renewal fee must be received 30 days prior to January 31 of the expiring year. Each renewed certificate shall remain valid for a period of two years and shall expire on January 31 of the second calendar year.

(c) If a renewal application and fee are not received, the certificate shall expire at 12:00 P.M. on January 31 of the expiring year. A person whose certificate has expired may renew his or her certificate within two years of its expiration date upon submittal of a renewal application and payment of a prorated fee. A new certificate shall be required of a person who fails to renew a certificate within two years of its expiration.

SUBCHAPTER 3. FEES

7:62-3.1 Fee schedule

(a) The fee schedule is as follows:

1. Application for certification	$ 45.00
2. Re-application for certification	45.00
3. Examination fee	150.00
4. Examination re-take fee	150.00
5. Certification fee (initial)	300.00
6. Certification renewal fee (bi-annual)	300.00

SUBCHAPTER 4. OTHER PROVISIONS

7:62-4.1 Identification of certificate holders

(a) The Board or its duly authorized representative shall issue to the certificate holder an identification card. The certificate holder shall carry the identification card in his or her possession at all times while performing landscape irrigation contracting.

(b) Any certificate holder who has failed to renew the certificate or who has had the certificate suspended or revoked for any reason, shall immediately return the identification card to the Board or its duly authorized representative.

7:62-4.2 Pressure seal

(a) Upon issuance of a certificate, the certificate holder is required to purchase a pressure seal.

(b) No person, other than the certificate holder to whom the seal has been issued, shall have the right to use aforesaid seal.

(c) The certificate holder shall emboss all construction permit applications, construction drawings, and construction contracts with the imprint of his or her seal.

7:62-4.3 Supervision of work

The certificate holder shall assume full responsibility for the inspection, compliance, and supervision of all landscape irrigation work performed by his or her company and/or employees.

7:62-4.4 Enforcement

Pursuant to N.J.S.A. 45:5AA-8 and 9, the Board may suspend or revoke a certificate and may assess civil penalties for violations of the Landscape Irrigation Contractor Certification Act. Those whose certificates have been suspended or revoked are entitled to a hearing in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

7:62-4.5 Change of address

Each certificate holder shall give notice to the Board or its duly authorized representative of any address change within 10 days of such change.

7:62-4.6 Joint ventures

(a) Where two or more persons form a joint venture for the purpose of contracting landscape irrigation work in New Jersey, each party to the joint venture shall hold a valid certificate to engage in landscape irrigation contracting in New Jersey.

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(b) The term "persons," as used in (a) above, is defined to mean individuals, corporations, partnerships or other business entities.

HUMAN SERVICES

(a)

JUVENILE MONITORING UNIT

Manual of Standards for Juvenile Detention Facilities Proposed Readoption and Recodification: N.J.A.C. 10A:32 to N.J.A.C. 10:19

Authorized By: William Waldman, Commissioner, Department of Human Services.

Authority: N.J.S.A. 30:1B-6, 30:1B-10 and 2A:4A-37(e).

Proposal Number: PRN 1995-194.

Submit comments by April 19, 1995 to:
Joseph DeJames, Director
Juvenile Monitoring Unit
Department of Human Services
CN 700
Trenton, New Jersey 08625

The agency proposal follows:

Summary

N.J.A.C. 10A:32, originally adopted January 11, 1980 and again in 1985 and 1990, is proposed for readoption and for recodification to N.J.A.C. 10:19. Juvenile detention facilities are county operated and provide for the temporary care of juveniles in physically restricting facilities pending court disposition. Currently there are 17 facilities in the State, housing approximately 800 youth per day. In a given year, approximately 11,000 to 12,000 youth are admitted to the facilities Statewide. The "Manual of Standards for Juvenile Detention Facilities" is a compendium of the physical facility and program standards for the detention facilities.

The regulatory jurisdiction for county operated juvenile detention facilities changed on July 1, 1993 from the Department of Corrections to the Department of Human Services. This jurisdiction was transferred pursuant to the Governor's Reorganization Plan No. 001-1993. Accordingly, while the New Jersey Code of Juvenile Justice (N.J.S.A. 2A:4A-20 et seq.) still refers to the Department of Corrections' responsibility with regard to juvenile detention facilities, this responsibility was legally transferred to the Department of Human Services by way of the Reorganization Plan. The readoption of the proposed rules incorporates the change in jurisdiction to the Department of Human Services.

This readoption also incorporates changes in statutory citations with necessary minor language adjustments, since the previous rules regarding juvenile detention contained citations from the former juvenile code. Other than addressing the jurisdictional change to the Department of Human Services and the changes in juvenile code citations, this readoption makes no other substantive changes.

The Department is viewing this readoption of the detention rules as the first step in a two-step process. During 1995, the Department intends to review the entire "Manual of Standards for Juvenile Detention Facilities" and make substantive changes where necessary. The process will involve input and review through public meetings with the New Jersey Juvenile Detention Association as well as appropriate community and governmental agencies.

The Manual of Standards is organized into 11 subchapters summarized as follows:

Subchapter 1. Introduction

This subchapter provides definitions, mainly from the juvenile code, as well as the objectives of juvenile detention.

Subchapter 2. Legal Provisions

This subchapter provides the legal authority of the Department of Human Services, statutory inspection provisions, enforcement issues, and other legal authority such as public health, safety, and fire codes.

Subchapter 3. Organization and Administration

This subchapter addresses the responsibilities of the County Board of Chosen Freeholders and the financial requirements for operating the detention facility.

Subchapter 4. Physical Standards

This subchapter provides the physical facility standards for existing and new juvenile detention facilities, including location and building approval, juvenile population capacity, building and grounds, fire protection, sleeping rooms, bathing and toilet facilities, kitchens, dining rooms, indoor and outdoor recreation, schoolrooms, offices, medical facilities, and storage areas.

Subchapter 5. Intake and Admission

This subchapter provides the statutory juvenile detention admission criteria as well as facility procedures for when juveniles are admitted into juvenile detention.

Subchapter 6. Records and Reports

This subchapter delineates the records and reports required by the facility, including intake information on juveniles, individual case records, a master log book, medication log, log for the temporary restriction of juveniles, and other reports as needed.

Subchapter 7. Control, Discipline and Grievance Procedure

This subchapter provides the standards on the need for facility rules and regulations, grievance procedures, rules regarding discipline, and rules regarding the temporary restriction of juveniles into their rooms.

Subchapter 8. Physical Care of Juveniles

This subchapter provides standards on food and nutrition, clothing, personal hygiene, and household duties and work.

Subchapter 9. Program Services

This subchapter delineates the program services which must be provided at juvenile detention facilities. These include medical, recreation, and educational services, community activities, social services, psychological and psychiatric services, religious services, and visiting, mail, and telephone privileges.

Subchapter 10. Staff; General Requirements

This subchapter provides the personnel requirements for the facility as well as staff coverage requirements, staff development requirements, and standards regarding volunteers.

Subchapter 11. Staff; Responsibilities

This subchapter provides the standards for the following positions at the juvenile detention facility: administrator, child care worker, social service worker, teacher, physician, clerical staff, food service staff, and maintenance and housekeeping staff.

In addition to the readoption of existing rules, the following changes have been made:

N.J.A.C. 10:19-1.1: The changes in the definition of delinquency reflect the definition contained in the current juvenile code (the controlling statutes).

N.J.A.C. 10:19-2.3(b): With regard to enforcement, the previous rule limited civil action to a county court or Superior Court. The proposed rule allows legal proceedings in any court, as may be necessary.

N.J.A.C. 10:19-4.2(a): The change in establishing a juvenile detention capacity corresponds with a change in the juvenile code.

N.J.A.C. 10:19-4.2(b)1: The Department's primary concern is with those facilities that are regularly over capacity. The change in language reflects this concern. In addition, counties are required to use neighboring county's detention facilities pursuant to the current juvenile code. This change in language reflects a similar change in the juvenile code.

N.J.A.C. 10:19-4.4(a) and (b): This change reflects the New Jersey Uniform Fire Safety Act, which assumed jurisdiction over all juvenile detention facilities in 1986.

N.J.A.C. 10:19-4.4(b): This rule change, requiring fire-resistant mattresses, incorporates a Departmental directive already applicable to juvenile detention facilities.

N.J.A.C. 10:19-5.2(b): This change allows the rule to conform to the text of the current juvenile code.

N.J.A.C. 10:19-5.2(g): There is no longer any need for this provision, since the current juvenile code provides statutory juvenile detention admission criteria for juveniles under the age of 12.

N.J.A.C. 10:19-7.3(c)1: The additional language incorporates a reference to the current statute, with regard to reporting institutional child abuse cases to DYFS.

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Social Impact

The rules proposed for readoption, and the amendments, will impact mainly upon the 800 or so juveniles held daily in the State's 17 juvenile detention facilities, since the rules address the minimum program and physical plant standards for these facilities. Since more juveniles are currently being detained than in previous years, there is more juvenile detention construction taking place than in the past several decades. The existence of the Manual of Standards insures a uniform approach to these construction projects, incorporating recognized standards of care.

Juvenile detention facilities are required to provide programming in the areas of education, social services, recreation, and medical services. The existence of the rules insures that minimum standards of care in these areas are being provided. Levels of staffing are also addressed in the Manual of Standards and again, the regulations assist facilities in providing appropriate staffing levels.

The proposed rules represent a readoption of existing rules, with amendments. Since the rules have been in existence since 1980, they are well established in the regulated facilities.

Economic Impact

The economic impact of the rules proposed for readoption is expected to be very minimal, since the readoption continues the rules currently in effect. The amendments neither increase or decrease costs. For informational purposes, it should be noted that juvenile detention facilities are operated and funded by counties. Currently, it is estimated that juvenile detention in New Jersey costs approximately $40 million per year. If the rules were not in place, the costs for detention perhaps would not decrease substantially, since the rules are for minimum compliance. Many facilities would inevitably continue the same level of service currently in place.

Executive Order No. 27 Statement

These rules are not subject to any Federal standards or requirements and a Federal Exceedance Analysis is not required for this rulemaking.

Regulatory Flexibility Analysis

There is no regulatory flexibility analysis associated with this proposed readoption, since the facilities impacted by the proposed rules are county-operated and are not small businesses as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 10A:32.

Full text of the proposed amendments follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

CHAPTER [32]**19**
MANUAL OF STANDARDS FOR JUVENILE DETENTION FACILITIES

[10A:32]**10:19**-1.1 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

"Delinquency" means the commission of an act by a juvenile which if committed by an adult would constitute:

[1. A homicide or act of treason;]

[2. A high misdemeanor or misdemeanor;]

[3. A disorderly persons offense; or]

[4. A violation of any other penal statute, ordinance, or regulation (N.J.S.A. 2A:4-44)]

1. A crime;

2. A disorderly persons offense or petty disorderly persons offense; or

3. A violation of any other penal statute, ordinance, or regulation, except that such violations concerning the regulation of vehicles, bicycles, and power vessels as specified in N.J.S.A. 2A:4A-23 shall not constitute delinquency. (N.J.S.A. 2A-4A-23).

"Department" means the New Jersey Department of [Corrections] **Human Services.**

"Detention" means the temporary care of juveniles in physically restricting facilities pending court disposition. (N.J.S.A. 2A:[4-43c] **4A-22c**).

. . .

"Juvenile" means an individual who is under the age of 18 years. (N.J.S.A. [2A:4-43a]**2A:4A-22a**).

. . .

[10A:32]**10:19**-1.2 (No change in text.)

[10A:32]**10:19**-2.1 Legal authority of Department

(a) N.J.S.A. [2A:4-57]**2A:4A-37** provides that the State Department of Corrections shall specify the place where a juvenile may be detained, and that no juvenile shall be placed in detention in any place other than that specified by the State Department of Corrections. **Pursuant to Reorganization Plan 001-93, this authority was transferred to the Department of Human Services, effective July 1, 1993.**

(b) (No change.)

[10A:32]**10:19**-2.2 Inspection provision

(a) As provided by N.J.S.A. **30:1B-10**, 30:1-14, and [N.J.S.A.] 30:1-15, the Department has the power of visitation and inspection of all juvenile detention facilities.

(b)-(c) (No change.)

[10A:32]**10:19**-2.3 Enforcement

(a) (No change.)

(b) The Department, in accordance with N.J.S.A. **30:1B-6 and** 30:1-16, has the authority to institute [a civil action in the appropriate county court or Superior Court] **such legal proceedings or processes as may be necessary** to remedy improper conditions in the detention facilities.

(c) (No change.)

Recodify existing 10A:32-2.3 through 3.2 as **10:19-2.3 through 3.2** (No change in text.)

[10A:32]**10:19**-4.1 Location and building approval

(a) No detention facility shall be part of, attached to, or in any way physically connected to a facility providing shelter care, as defined in N.J.S.A. [2A:4-43(d)]**2A:4A-22(d).**

(b)-(c) (No change.)

(d) Plans for new buildings, or renovations to existing buildings, shall be submitted to the Department for review, recommendations, and approval. To qualify for approval by the Department, plans and specifications must be in compliance with the appropriate provisions of the New Jersey Uniform Construction Code relating to institutions, the rules of the Department [of Corrections] and all other applicable provisions of state and local laws, ordinances, rules and regulations.

1.-2. (No change.)

[10A:32]**10:19**-4.2 Juvenile population capacity

(a) Each detention facility shall be inspected by the Department and, **in consultation with the appropriate county administrator of the county facility**, assigned a maximum population capacity [in accordance with] **based on** minimum standards established herein.

(b) The population of a detention facility shall not exceed the maximum population capacity as assigned by the Department.

1. The following options may be explored to reduce the population if a detention facility is [close to, or reaches] **regularly over** the maximum population capacity:

i. In conjunction with the [juvenile] **Family** Court judge, those juveniles who may be better served in their own homes, foster homes, or designated [JINS] shelters should be identified and released.

ii. The use of a neighboring county's detention facility is [encouraged] **required** in situations of [potential] overcrowding, **in accordance with N.J.S.A. 2A:4A-37.**

(c)-(e) (No change.)

[10A:32-4.3]**10:19-4.3** (No change in text.)

[10A:32]**10:19**-4.4 Fire protection

(a) Each detention facility shall be in compliance with [the Life Safety Code-No. 101 of the National Fire Protection Association (NFPA).] **all appropriate provisions of the New Jersey Uniform Fire Safety Act, including provision for fire suppression, smoke detection, and automatic alarm systems.**

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[(b) All detention facilities shall install a comprehensive automatic electrical fire alarm and detection system as delineated in section 5 of this subchapter no later than December 31, 1980.]

(b) Only fire-resistant mattresses, approved by the Department, shall be utilized in juvenile detention facilities.

(c)-(o) (No change.)

Recodify existing 10A:32-4.5 through 4.16 as **10:19-4.5 through 4.16** (No change in text.)

[10A:32]**10:19**-5.1 Pre-admission procedures

(a) In regard to taking a juvenile into custody, N.J.S.A. [2A:4-55(a)]**2A:4A-33(a)** states: "Any person taking a juvenile into custody shall immediately notify the parents, or the juvenile's guardian, if any, that the juvenile has been taken into custody."

(b) The code further states in N.J.S.A. [2A:4-56(a)]**2A:4A-34(a)**: "Where it will not adversely affect the health, safety, or welfare of a juvenile, [he or she] **the juvenile** shall be released pending the disposition of a case, [to one or both parents or guardian, if any] **if any, to any person or agency provided for in this section** upon assurance being received that such person or persons accept responsibility for the juvenile and will bring him before the court as ordered."

(c) The code also states in N.J.S.A. [2A:4-56(b)]**2A:4A-34(c)**: "A juvenile **charged with delinquency** may not be placed or retained in detention under this act prior to disposition, except as otherwise provided by law, unless:

1. Detention is necessary to secure the presence of the juvenile at the next hearing **as evidenced by a demonstrable record of recent willful failure to appear at juvenile court proceedings or to remain where placed by the court or the court intake service**; or

[2. The nature of the conduct charged is such that the physical safety of the community would be seriously threatened if the juvenile were not detained.]

2. The physical safety of persons or property of the community would be seriously threatened if the juvenile were not detained and the juvenile is charged with an offense which, if committed by an adult would constitute a crime; or

3. When the criteria for detention are met and the juvenile is charged with an offense which, if committed by an adult, would constitute a disorderly persons or petty disorderly persons offense, the juvenile may be placed in detention temporarily. Police and court intake personnel shall make all reasonable efforts to locate a parent or guardian to accept custody of the juvenile prior to requesting or approving the juvenile's placement in detention. If, after the initial detention hearing, continued detention is necessary, the juvenile shall not be detained in a secure facility but shall be transferred to a shelter or other non-secure placement.

(d) (No change.)

[10A:32]**10:19**-5.2 Eligibility for admission

(a) Only juveniles charged with delinquency and meeting the criteria for placement in detention as provided for in N.J.S.A. [2A:4-56(b)]**2A:4A-34(c)** (see [section 5.1 of this subchapter] **N.J.A.C. 10:19-5.1**, Pre-Admission Procedures) are eligible for admission.

(b) Juveniles alleged to be [juveniles in need of supervision] **in a juvenile-family crisis**, as defined in N.J.S.A. [2A:4-45]**2A:4A-22(g)**, shall not be admitted to any detention facility. [If a juvenile in need of supervision meets the criteria for placement in shelter care, as stated in N.J.S.A. 2A:4-56(c), the juvenile shall be referred to the appropriate shelter facility approved by the Department of Human Services.]

(c)-(f) (No change.)

[(g) Very few juveniles under twelve years of age require secure custody in detention. For juveniles in this category who require placement, every effort should be made to effectuate placement in a foster home or designated shelter approved by the Department of Human Services.]

[10A:32]**10:19**-5.3 Intake and admission procedures

(a) When it becomes necessary to place a juvenile in detention in accordance with the code's criteria for such placement as noted in **N.J.A.C. 10:19**-5.1 [of this subchapter], the following intake and admission procedures must be adhered to:

1. In accordance with R.[5:8-2(c)]**5:21-2(b)** of the Rules Governing the Courts of the State of New Jersey, [". . . the officer shall take the juvenile to a detention . . . facility, where as a condition to the juvenile's admission thereto, the officer shall complete a detention report, in the form prescribed by the Administrative Director of the Courts, which shall include the reason for the detention. . ., the nature of the conduct charged and the efforts made by him to notify an appropriate adult custodian."] **"At any time between the filing of the complaint and the disposition, the judge may order the release of the juvenile from detention . . . and fix the terms of such release pursuant to N.J.S.A. 2A:4A-34(d)."**

[2. "If the only reason for the holding is the unavailability of an appropriate adult custodian, and if, prior to any detention . . . hearing, an appropriate adult custodian requests the release of the juvenile upon his undertaking to assume responsibility for any court appearance which may thereafter be required of the juvenile, the detention . . . facility shall forthwith release the juvenile in the custody of such adult." (**R.**5:8-2(c))]

i. The detention facility shall maintain a written record of the efforts made to contact an appropriate adult custodian.

ii. Each detention facility shall have staff trained and authorized to make such contacts with appropriate adult custodians and effectuate release of juveniles to such persons on a 24-hour-per-day basis.

[3.]**2.** Upon admission, the detention staff (preferably a member of the social work staff) shall obtain from the juvenile, the law enforcement officers and the parents (if possible), pertinent factual and identifying information as outlined in N.J.A.C. [10A:32] **10:19**-6.1, Intake information.

Recodify 4-9 as **3-8** (No change in text.)

[10.]**9.** If a physician is not present at the time of the admission shower, the nurse or staff worker on duty shall examine the juvenile's body for lice, bruises or abrasions, unusual marks, and symptoms of any communicable diseases. The findings shall be recorded and brought to the attention of the physician as soon as possible.

i. In situations where a juvenile shows evidence of lacerations, bruises, or abrasions and alleges abuse or neglect by a parent, guardian, or relative, a staff member shall immediately contact the appropriate district office of the Division of Youth and Family Services or the emergency and night phone number of DYFS, **in accordance with N.J.S.A. 9:6-8.10.**

Recodify 11-12 as **10-11** (No change in text.)

SUBCHAPTER 6. RECORDS AND REPORTS

[10A:32]**10:19**-6.1 Intake information

(a) In accordance with N.J.A.C. [10A:32]**10:19**-5.3, Intake and admission procedures, upon admission, the detention staff (preferably a member of the social work staff) shall obtain from the juvenile, the law enforcement officers and the parents (if possible) pertinent factual and identifying information including:

1.-12. (No change.)

Recodify existing 10A:32-6.2 through 6.4 as **10:19-6.2 through 6.4** (No change in text.)

[10A:32]**10:19**-6.5 Log for the temporary restriction of juveniles

(a) In accordance with the provisions of N.J.A.C. [10A:32] **10:19**-7.4, Temporary restriction, whenever a juvenile is removed from the group or ongoing program and temporarily restricted to his or her sleeping room, or an isolation room, the following information shall be recorded in a log maintained for that purpose:

1.-6. (No change.)

SUBCHAPTER 7. CONTROL, DISCIPLINE AND GRIEVANCE PROCEDURE

[10A:32]**10:19**-7.1 Rules and regulations

(a) As provided for in N.J.A.C. [10A:32]**10:19**-5.3, rules and regulations shall be made available to all juveniles.

(b) (No change.)

[10A:32]**10:19**-7.2 Grievance procedure

(a) Each detention facility shall establish a written grievance procedure for juveniles which shall provide adequate due process

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safeguards. This grievance procedure shall be made to all juveniles as provided for in N.J.A.C. [10A:32]**10:19**-5.3.

(b)-(d) (No change.)

[10A:32]**10:19**-7.3 Discipline

(a)-(b) (No change.)

(c) The following disciplinary measures are prohibited:

1. The use of corporal punishment by any members of the staff. If any staff member is found to have utilized corporal punishment, this action shall constitute grounds for dismissal. **In addition, in accordance with N.J.S.A. 9:6-8.10, the incident shall be reported immediately to DYFS.**

i.-ii. (No change.)

2.-5. (No change.)

[10A:32]**10:19**-7.4 Temporary restriction

(a)-(c) (No change.)

(d) When a juvenile is temporarily restricted to quarters, the following procedures shall apply:

1.-2. (No change.)

3. After the juvenile is temporarily restricted to quarters, his/her name shall be recorded in the "Log for the Temporary Restriction of Juveniles" as provided for in N.J.A.C. [10A:32]**10:19**-6.5.

4.-9. (No change.)

Recodify existing 10A:32-8.1 through 8.4 as **10:19-8.1 through 8.4** (No change in text.)

SUBCHAPTER 9. PROGRAM SERVICES

[10A:32]**10:19**-9.1 Medical

(a)-(d) (No change.)

(e) In accordance with N.J.A.C. [10A:32]**10:19**-6.4, whenever a juvenile is administered medication, it must be recorded in the "Medication Log".

(f)-(j) (No change.)

Recodify existing 10A:32-9.2 through 10.2 as **10:19-9.2 through 10.2** (No change in text.)

[10A:32]**10:19**-10.3 Personnel qualifications

Each staff member shall meet the minimum qualifications for his/her position as established by the New Jersey Department of [Civil Service] **Personnel.**

Recodify existing 10A:32-10.4 through 10.8 as **10:19-10.4 through 10.8** (No change in text.)

[10A:32]**10:19**-11.1 Administrator

(a) (No change.)

(b) Aside from Civil Service qualifications which are required N.J.A.C. [10A:32]**10:19**-10.3, Personnel qualifications, the following qualifications are recommended:

1.-2. (No change.)

[10A:32]**10:19**-11.2 Child care workers

(a)-(b) (No change.)

(c) Aside from Civil Service qualifications which are required in N.J.A.C. [10A:32]**10:19**-10.3, the following qualifications are recommended:

1.-2. (No change.)

[10A:32]**10:19**-11.3 Social **service** worker

(a) At least one full-time social **service** worker, sometimes called a counselor or group worker, shall be employed in each detention facility with an average daily population of fifteen or more juveniles.

(b) (No change.)

(c) The social **service** worker shall be responsible for implementing the social services program provided for in N.J.A.C. [10A:32] **10:19**-9.5(b).

(d) Aside from Civil Service qualifications which are required in N.J.A.C. [10A:32]**10:19**-10.3, the following qualifications are recommended:

1.-2. (No change.)

[10A:32]**10:19**-11.4 Teacher

(a)-(c) (No change.)

(d) The teacher shall be responsible for implementing the education program provided for in N.J.A.C. [10A:32]**10:19**-9.3.

(e)-(f) (No change.)

Recodify existing 10A:32-11.5 through 11.8 as **10:19-11.5 through 11.8** (No change in text.)

(a)

MEDICAL ASSISTANCE AND HEALTH SERVICES

Pharmaceutical Services

Changes in Medicaid Policy Regarding Coverage of Non-Legend Drugs Provided to Pediatric and Adolescent Medicaid Recipients

Proposed Amendments: N.J.A.C. 10:51-1.11 and 1.12

Authorized By: William Waldman, Commissioner, Department of Human Services.

Authority: N.J.S.A. 30:4D-a(4)(b), 6(b)6, 7, 7a, b and c; 30:4D-12; 42 CFR 440.40, 120.

Agency Control Number: 94-P-50.

Proposal Number: PRN 1995-175.

Submit comments by April 19, 1995 to:

Henry W. Hardy, Esq.
Administrative Practice Officer
Division of Medical Assistance and Health Services
Mail Code #26
CN 712
Trenton, New Jersey 08625-0712

The agency proposal follows:

Summary

The proposed amendments change the New Jersey Division of Medical Assistance and Health Services' policy regarding coverage of non-legend drugs provided to pediatric and adolescent Medicaid recipients. The Medicaid program will provide additional non-legend drug coverage for recipients under the age of 21 in order to meet Federal requirements. The additional coverage is limited to certain specific therapeutic drug classes of non-legend drugs, including analgesics/antipyretics, antihistamines, cough and cold preparations, expectorants, iron supplements, laxatives and cathartics, topical anti-inflammatory preparations and certain vitamins.

Social Impact

The social impact of these amendments is positive and beneficial to Medicaid recipients under the age of 21 who will now receive coverage for additional prescribed non-legend drugs.

Economic Impact

The proposed amendments will require an estimated expenditure at $2,500,000 (State dollars) to provide this coverage for Medicaid-eligible children.

The amendments have an economic impact on providers of pharmaceutical services. The amendments may require some pharmacies to increase their current drug inventory levels to accommodate additional prescriptions for non-legend drugs covered for Medicaid pediatric recipients. The amendments may result in some pharmacies receiving Medicaid payment for additional classes of non-legend drugs covered for Medicaid pediatric recipients.

The additional non-legend drug coverage may benefit eligible recipients in that the cost of the covered drugs will be paid under Medicaid. In addition, coverage of these non-legend drugs will encourage prescribers not to prescribe more costly prescription drug alternatives to treatment.

Executive Order No. 27 Statement

The requirements do not exceed Federal standard related to the EPSDT program, which complies with Federal law (1905(r) of the Social Security Act; 42 U.S.C. 1396d(r)).

Regulatory Flexibility Statement

A regulatory flexibility analysis is not be required for the following reason. The providers affected by this amendment are small businesses, as defined in the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-16 et seq. The providers may have to increase their non-legend

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drug inventory to accommodate an increase in their dispensing of the drugs. No additional paperwork will be required by providers to comply with this amendment.

All Medicaid providers are required (see N.J.S.A. 30:4D-12) to record the name of the recipient to whom the service was rendered, the date of the service, the nature and extent of the service rendered, and any additional information as required by regulation. These proposed amendments do not change the responsibility of pharmaceutical service providers with regard to reporting, recordkeeping, or other compliance requirements.

Pharmacies will continue to submit claims for Medicaid in the specified time frame using the prescription claim form (MC-6). There will be no capital costs by providers associated with this proposal.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

10:51-1.11 Covered pharmaceutical services

(a) (No change.)

(b) Covered pharmaceutical services include:

1. Prescribed legend drugs (for their medically accepted indication) as defined in Section 1927(k)(6) of the Social Security Act. "Legend drugs" mean those drugs whose labels include the legend statement "Caution: Federal Law Prohibits Dispensing Without a Prescription."

2. Non-legend drugs, as follows, for which Federal Financial Participation (FFP) is available:

i.-vii. (No change.)

(3) In addition, coverage of non-legend drugs for beneficiaries under the age of 21 shall also include:

i. Analgesics, Salicylates;

ii. Analgesics/Antipyretics, Non-salicylate;

iii. Antidiarrheals;

iv. Anti-Emetics;

v. Antiflatulents;

vi. Antihistamines;

vii. Antipruritics;

viii. Antitussives, non-narcotic;

ix. Cathartics;

x. Cough and cold preparations;

xi. Emetics;

xii. Expectorants;

xiii. Hematinics;

xiv. Iron replacement supplements;

xv. Laxatives;

xvi. Multiple vitamin preparations;

xvii. Pediatric vitamin preparations;

xviii. Vitamins A, B, C, D, E, K, B1, B2, B6, B12 preparations;

xix. Polymixin and derivatives;

xx. Topical preparations, antibacterial;

xxi. Topical antibiotics; and

xxii. Topical anti-inflammatory preparations.

(c) (No change.)

10:51-1.12 Non-covered pharmaceutical services

(a) The following classes of prescription drugs or conditions are not covered under the New Jersey Medicaid program. For recipients in the Medically Needy component of the New Jersey Care ... Special Medicaid programs, pharmaceutical services are not available to the aged, blind nor the disabled. For information on how to identify a covered person, see N.J.A.C. 10:49, Administration.

1.-6. (No change.)

7. Non-legend drugs other than antacids; contraceptive devices and contraceptive supplies; diabetic testing materials; over-the-counter (OTC) family planning supplies; inhalation devices (pharmaceutical); insulin; and insulin needles and/or syringes;

i. Exception: Antihistamines, antacids, OTC analgesics, laxatives, anti-diarrheal medications, OTC dermatological preparations, cold and cough medications, insulin, diabetic testing materials, family planning supplies and protein replacement supplements are services covered by the Garden State Health Plan;

ii. Exception: Non-legend drugs described in N.J.A.C. 10:51-1.11, for recipients under 21 years of age.

8.-17. (No change.)

(b)-(c) (No change.)

(a)

DIVISION OF FAMILY DEVELOPMENT

General Assistance Program
General Nursing Facility Assistance

Proposed Amendments: N.J.A.C. 10:85-3.1, 3.2, 3.3, 3.5, 5.1 and 5.2
Proposed New Rule: N.J.A.C. 10:85-5.7

Authorized By: William Waldman, Commissioner, Department of Human Services.

Authority: N.J.S.A. 44:8-111(d).

Proposal Number: PRN 1995-182.

Submit comments by April 19, 1995 to:
Karen Highsmith, Acting Director
Division of Family Development
CN 716
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The proposed new rule at N.J.A.C. 10:85-5.7 sets forth comprehensive procedures for establishing financial and nonfinancial nursing facility eligibility in the General Assistance (GA) program. Although many of the provisions of the proposed new rule merely codify current practices for authorizing GA nursing facility assistance, other provisions being proposed align the GA program with the Medicaid program, since these two programs primarily serve the needs of the nursing home population in New Jersey.

Proposed amendments at N.J.A.C. 10:85-3.1(a)5iii; 3.2(f); 3.2(f)1i(2); 3.3(f)4iii; 3.5(b); and 5.2(b)1 are merely technical changes which change the term "long term care facility(ies)" to the more acceptable term "nursing facility(ies)".

Text at N.J.A.C. 10:85-5.1(f) is deleted in its entirety, since new GA nursing facility requirements are being proposed at N.J.A.C. 10:85-5.7.

The proposed new rule at N.J.A.C. 10:85-5.7(a) establishes that GA nursing facility benefits shall be authorized only for those individuals in Medicaid approved nursing facilities; however, an "exception" to that provision will continue to allow GA nursing facility assistance for those recipients who were authorized receipt of such benefits in non-Medicaid approved facilities prior to July 1, 1995.

The proposed new rule provisions at N.J.A.C. 10:85-5.7(a)1 through 4 set forth the parameters for MWD authorization GA nursing facility benefits and for the provision of a personal needs allowance (PNA) for those individuals in Medicaid approved nursing facilities.

N.J.A.C. 10:85-5.7(b)1 through 5 sets forth the components of the nonfinancial eligibility criteria for GA nursing facility benefits.

N.J.A.C. 10:85-5.7(c) identifies countable income as it relates to GA nursing facility benefits.

N.J.A.C. 10:85-5.7(d) sets forth the income exclusions specific to GA nursing facility cases which are deducted from the total gross income of the individual entering the nursing facility prior to applying such income toward the cost of the nursing facility payment. Such exclusions include the $35.00 personal needs allowance (PNA); Medicare Part B Premiums; private medical insurance premiums; guardian fees; and maintenance of the community spouse.

N.J.A.C. 10:85-5.7(d)5i through iii defines who shall be considered the community spouse for GA nursing facility cases and sets forth the necessary provisions to calculate and determine the amount that will be considered excludable for maintenance of the community spouse.

N.J.A.C. 10:85-5.7(e)i through iii sets forth provisions for determining what resources are to be considered exempt, available and potential for GA nursing facility cases.

N.J.A.C. 10:85-5.7(e)iv and v establishes the procedures for verifying the value of resources through appropriate and credible sources and the documentation of the verification activities in the case record.

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N.J.A.C. 10:85-5.7(f) sets forth the procedures concerning "transfer of resources." This subsection establishes a 36 month "look-back" period prior to the date of application for disposal of an available resource or abandonment of a potential resource, for less than adequate consideration, for the purpose of qualifying for assistance or for avoiding repayment of assistance. In addition, a 60 month look-back period prior to the date of application is also established for the transfer of resources into trusts.

N.J.A.C. 10:85-5.7(f)1 through 3 sets forth the rules concerning "transfer of resource" situations including provisions for calculating and determining the applicable "period of ineligibility" to be imposed.

N.J.A.C. 10:85-5.7(g)1 and 2 identifies the maximum fees payable under the nursing facility assistance portion of the GA program.

N.J.A.C. 10:85-5.7(g)2iii cites provisions at N.J.A.C. 10:85-5.6 and 6.8 to address the method and procedure for payments of pharmaceutical charges in nursing facility situations.

N.J.A.C. 10:85-5.7(h)1 and 2 sets forth provisions for authorizing payment for therapy which is not included as an integral part of the nursing facility per diem rate. These provisions include the conditions which must exist in order for the MWD to authorize payment for eligible therapy as well as the amount of payment allowable for such therapy.

N.J.A.C. 10:85-5.7(i) identifies the form that shall be used by the MWDs to determine and keep record of the amount of the MWD payment to the nursing facility. In addition, this subsection provides for determining the amount that shall be authorized by the MWD to pay the nursing facility each month as well as the stipulations for that payment.

N.J.A.C. 10:85-5.7(j) establishes that individuals who apply for or receive GA nursing facility assistance are entitled to a written notice of denial, reduction or termination and have the right to a local and a State fair hearing, as appropriate.

N.J.A.C. 10:85-5.7(k) establishes that legally responsible relatives' (LRRs') capacity to support shall be evaluated and periodically re-evaluated in GA nursing facility cases.

N.J.A.C. 10:85-5.7(l) provides that the MWD shall redetermine eligibility for nursing facility assistance on an annual basis.

Social Impact

Proposed new rule N.J.A.C. 10:85-5.7, which sets forth the requirements and procedures for determining eligibility for and authorizing payment of GA nursing facility assistance, is expected, for the most part, to be received favorably by all concerned individuals as well as by client advocacy entities. The provision which establishes that GA nursing facility benefits shall be authorized only to those individuals in Medicaid approved nursing facilities is not expected to have any significant impact on the client since an "exception" to that provision will allow those individuals who are currently residing in non-Medicaid nursing facilities to continue to receive GA nursing facility assistance. The provision which allows the client in a nursing facility to accumulate savings of up to 12 times the current personal needs allowance (PNA) will permit the client to purchase larger items of need not supplied by relatives or friends. The provisions which render the primary residence an excludable resource, as long as the community spouse is living in that home, and which provide specific rules for determining an amount for the maintenance of a community spouse that shall be considered exempt income, ensure that the needs of the community spouse are taken into consideration. In addition, a provision of the rule allows the client entering the nursing facility to purchase prepaid irrevocable funeral/burial insurance policies, annuities, and trusts at any time prior to application for GA nursing facility assistance without any penalty. The client, however, will be subject to a 36 month look back period prior to the time of application relating to "transfer of resources" and a 60 month look back period for resources transferred into trusts. These look back periods are specific for GA nursing facility case purposes and are established to align the GA program with the Medicaid program in an effort to establish parallel eligibility requirements in as many areas as possible so that the two assistance programs which serve the nursing facility population in New Jersey do not undermine the eligibility requirements of each other. It is expected that the impact of these look back provisions will only affect a small percentage of the nursing facility assistance population, that is, those who have larger sums of money and more resources and would, therefore, benefit from the transfer of such resources prior to applying for nursing facility asssistance. Due to the fact that a large portion of the verification process for GA nursing facility cases involves written correspondence and response, the proposed provision which allows the MWD a time frame of up to 60 days from the date of application for making an eligibility determination will enable the MWD to collect all the necessary information and render a more accurate eligibility determination.

The amendments have no social impact, as they simply change a term and add a cross-reference.

Economic Impact

Proposed new rule N.J.A.C. 10:85-5.7 addressing the GA nursing facility assistance portion of the GA program is not expected to have a significant impact on State expenditures in the long term. Although proposed N.J.A.C. 10:85-5.7(a) establishes that GA nursing facility benefits shall only be authorized for individuals in Medicaid approved facilities, this change is not expected to have a significant impact on the GA nursing facility client since only a small number of GA nursing facility recipients reside in non-Medicaid approved nursing facilities. In any event, an "exception" within that proposed provision will allow those individuals who are currently residing in non-Medicaid nursing facilities and receiving GA nursing facility benefits to continue to receive such benefits. Provisions at N.J.A.C. 10:85-5.7(d) identify income exclusions specific to GA nursing facility cases that will have some financial impact on State expenditures, that is, guardian fees and maintenance of the community spouse. Although it is not expected that the guardian fees will significantly increase State expenditures, the provisions concerning maintenance of the community spouse are expected to increase State expenditures. Because the amount determined for the maintenance of the community spouse will be deducted from the gross income of the client entering the nursing facility, a smaller portion of the client's income will be available for payment toward the nursing facility bill and; therefore, the State will be required to assume payment of the balance of the nursing facility bill earlier during the month, which will result in a larger State financial commitment for that nursing facility case. In the long term, however, such an expenditure should be offset by the fact that the community spouse will not likely become dependent on public assistance due to the loss of all income, which was not uncommon in the past. The provision which allows the client to accumulate savings of up to 12 times the current PNA will permit the client to purchase larger items of need not supplied by relatives or friends.

The amendments have no economic impact.

Executive Order No. 27 Statement

These rules are not subject to any Federal requirements or standards; therefore, a Federal exceedance analysis is not applicable to the rulemaking.

Regulatory Flexibility Statement

The proposed amendments and proposed new rule have been reviewed with regard to the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The amendments and the new rule impose no reporting, recordkeeping or other compliance requirements on small businesses; therefore, a regulatory flexibility analysis is not required. The rules govern a public assistance program designed to certify eligibility for the General Assistance program to a low-income population by a governmental agency, rather than a private business establishment.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

10:85-3.1 Persons eligible for General Assistance

(a) General Assistance shall be provided to all eligible needy persons who, while in the State, are entitled to receive such assistance. Entitlement does not extend to persons who have been found eligible for or are recipients of public assistance programs administered by the county welfare agency, or who have been found ineligible for such programs due to voluntary refusal to comply with progam requirements. (See also (c) and (d) below.)

1.-4. (No change.)

5. An "unemployable" person is any person who meets any of the unemployable criteria below:

i.-ii. (No change.)

iii. Persons who are residents in [long term care] **nursing** facilities;

iv.-x. (No change.)

(b)-(f) (No change.)

10:85-3.2 Application process

(a)-(e) (No change.)

(f) Resident defined: A resident of a municipality is a person who maintains a permanent customary home in the municipality, a person

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who is in the municipality with intention to remain, or a person who enters a New Jersey [long-term care] **nursing** facility from out-of-State and qualifies as a resident in accordance with (f)1i below. No time intervals are relevant so long as the home is not established for a temporary purpose such as for a visit or vacation. A resident may live in his or her own home, a rented home or apartment, the home of a friend or relative, in a boarding home or in a residential medical facility.

1. When the last municipality of residence was not in New Jersey and the person qualifies in accordance with (f)1i below, that person shall be considered a resident of the municipality in which the medical facility is located.

i. Whenever an individual enters this State in order to receive medical care, and applies for General Assistance to meet all or a portion of the costs of such care, the fact that the immediate purpose of the move was to secure medical care does not, in and of itself, have the effect of making the person ineligible for the General Assistance program. It is the responsibility of the MWD to evaluate all such cases and to make an eligibility determination, considering carefully all of the following criteria.

(1) (No change.)

(2) Whether the move is part of a carefully conceived social service plan which would serve to meet other requirements of the individual in addition to purely physical needs, for example, a person moves to a nursing [home] **facility** in order to be closer to relatives who are interested in the person's welfare;

(3)-(5) (No change.)

ii. (No change.)

2.-4. (No change.)

(g)-(i) (No change.)

10:85-3.3 Financial eligibility

(a)-(e) (No change.)

(f) Assistance allowance standards are as follows:

1.-3. (No change.)

4. Room and board living arrangements: When an individual is purchasing a room and board living arrangement, the following shall apply:

i.-ii. (No change.)

iii. [Long term care facilities: See N.J.A.C. 10:85-5.3(e) regarding care in skilled nursing home and intermediate care facilities.] **Nursing facilities: See N.J.A.C. 10:85-5.7 concerning provisions for the care of individuals in a nursing facility.**

iv.-v. (No change.)

5. (No change.)

(g) (No change.)

10:85-3.5 Continuing eligibility

(a) (No change.)

(b) Redetermination of eligibility: In order to continue granting assistance, the MWD shall make a complete redetermination for each case at least one every six months except that for [long term care] **nursing facility** clients, redetermination shall be completed annually.

1.-5. (No change.)

(c)-(d) (No change.)

10:85-5.1 Medical service payment

(a)-(e) (No change.)

[(f) Care of individuals in long term care facilities: The director of welfare shall authorize payments for patient care and allow for a personal needs allowance (PNA) in a skilled nursing home or intermediate care facility when a physician certifies that a client has a defect, disease, or impairment (other than psychosis) which necessitates such care, the client is not eligible for Medicaid, and there is no person available who will provide such care without cost to the client. In the event that a person who is determined ineligible for Medicaid Only benefits by the county welfare agency applies promptly, and is found eligible for GA, payment of eligible medical expenses shall be made retroactive to the date of application for Medicaid Only.

1. Physician certification (completion of GA-18): Physician certification shall be accomplished by means of Form GA-18, Certification of Need for Patient Care in Facility Other than Public or Private General Hospital. This form shall be completed in duplicate, by the attending, or staff physician and the operator or superintendent of the appropriate facility. One copy shall be submitted to the DFD/GAP Unit for level-of-care determination and subsequently, filed in the case record and the other copy shall be retained by the nursing home or institution.

2. Maximum fees: Payment to the facility shall not exceed the rates for such facility as established by Medicaid or, for non-Medicaid facilities, by the DFD/GAP Unit. The MWD shall contact the DFD/GAP Unit to obtain the per diem rate for room, board and nursing care. A personal needs allowance of $35.00 per month shall be allowed to the patient.

i. In determining the amount the MWD will be authorized to pay the facility for room, board and nursing care, the Medicaid rate times the number of days of care less the payment by or on behalf of the client shall be used. Each month the MWD will obtain a current bill for all services rendered during the previous month and will submit it to the DFD/GAP Unit for costing prior to payment.

(1) The MWD shall authorize per diem payments for periods of up to 10 days during which the client is temporarily absent from the facility for hospitalization or therapeutic visits.

ii. Prescription drugs, laboratory, X-ray, physician, dental, podiatry services and supplies are not included in the Medicaid per diem rate. Such services shall be paid directly to the provider. An order for lab, X-ray, pharmacy services, and so forth must be based on a written prescription from the attending physician (see N.J.A.C. 10:85-8.4(g)1i regarding the Pharamaceutical Assistance to the Aged and Disabled program).]

(f) See N.J.A.C. 10:85-5.7 for provisions concerning the authorization of GA nursing facility benefits.

(g)-(j) (No change.)

10:85-5.2 Procedure for payment of medical bills

(a) (No change.)

(b) Rules concerning determination of Medicaid rate are as follows:

1. MWD responsibility: The MWD shall submit bills received from providers of health services, or requests for authorized fee levels, to the DFD/GAP Unit. Such bills and/or requests should be submitted on official Medicaid vendor voucher forms which all providers servicing Medicaid recipients utilize. The forms shall contain the following: signature of the vendor and client, date, and description of the commodity delivered or service rendered with full Medicaid product and procedure codes. Exception: the signature of the client/designee is not required on bills for residential services such as [Long Term Care] **Nursing** Facilities (see (b)4 below for requirement for client/designee signature).

i.-iii. (No change.)

2.-4. (No change.)

10:85-5.7 [(Reserved)] **GA nursing facility assistance**

(a) The municipal welfare director (MWD) shall only authorize GA nursing facility benefits for patient care to those individuals in Medicaid approved nursing facilities and allow for the provision of a personal needs allowance (PNA) to such individuals. Exception: Those individuals who have been authorized GA nursing facility benefits in non-Medicaid approved facilities prior to July 1, 1995 shall continue to receive GA nursing facility benefits until they no longer require such assistance or are no longer eligible for reasons other than the fact that the facility is non-Medicaid approved. GA nursing facility benefits and the PNA shall be authorized when:

1. A physician in the nursing facility, hospital, or the community certifies that such care is necessary and appropriate documentation by such physician supports that certification.

i. "Physician" defined for purposes of the GA nursing facility provisions set forth in this section shall be a licensed medical doctor of the nursing facility, of a hospital, or in the community;

2. Form GA-18, Certification of Need for Patient Care in Facility Other than Public or Private General Hospital, is completed by the attending or staff physician. This form represents the required "physician certification" for GA nursing facility cases. One copy

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shall be submitted to the DFD/GAP Unit to determine the necessity of nursing facility care and provide the Medicaid per diem rate. The MWD shall file the approved form reflecting the established per diem rate in the case record and forward a copy to the nursing facility.

i. When it is determined by the DFD/GAP Unit that additional medical documentation is required to substantiate the need for placing the individual in a nursing facility, the MWD shall request such additional documentation from the physician;

3. The client's gross income exceeds the current Medicaid Cap amount. (See (i) below concerning use of Form GA-19A, Statement of Income Available for Long Term Care Facility Payment and Record of MWD Payment).

i. When an individual is determined financially ineligible for Medicaid Only benefits by a county welfare agency (CWA) and promptly applies for GA nursing facility benefits and is found eligible, the date of eligibility for such GA benefits shall be retroactive to the date of the Medicaid Only application; and

4. The client meets the nonfinancial GA eligibility criteria for nursing facility benefits as delineated in (b) below.

(b) The following components shall constitute the nonfinancial eligibility criteria for GA nursing facility benefits:

1. The individual shall be either a citizen of the United States or otherwise permanently residing in the United States under color of law. (See N.J.A.C. 10:85-3.1(a)2, 3.2(c)6 concerning verification and documentation of legal alien status and 3.4(b)1 concerning sponsorship.)

2. Every GA nursing facility applicant must have a Social Security number and the number shall be recorded on the application form and elsewhere in the case record as may be appropriate to the facts of the case. Any client who has a number and whose number is not disclosed and recorded shall not be eligible for GA nursing facility assistance.

3. An application for GA shall be completed for every GA nursing facility case and a determination shall be made by the MWD within 60 calendar days of the date of that application. The director of welfare or MWD caseworker is empowered to receive the oath and witness the applicant's signature or the signature of an authorized agent acting on behalf of the client (see N.J.A.C. 10:85-3.2(c)2 for those recognized as authorized agents in the GA program).

i. The application and affidavit shall be binding upon the individual(s) who signs the document. An authorized agent, or any person acting on behalf of the client, is obliged to complete the application to the best of his or her knowledge.

ii. The application shall be taken, when possible, at a personal interview with the client or an authorized agent who is acting on behalf of the client. The interview may occur at the welfare office; in the client's home; or at a hospital or other institution, if necessary.

(1) When it has been established that an individual will be placed in a particular nursing facility or the individual is already in a nursing facility, the MWD of the municipality where the nursing facility is located shall assume full responsibility for that case.

(A) If, however, the location of the nursing facility has not been established at time of application, the MWD in the municipality of client residence shall assume full case responsibility until the nursing facility location is established. (See N.J.A.C. 10:85-3.2(f) for resident defined.)

(B) When the client's last municipality of residence was not in New Jersey, and that individual enters a hospital in New Jersey (see out-of-State residency qualifications at N.J.A.C. 10:85-3.2(f)1), the MWD in the municipality where the hospital is located shall assume responsibility for the case until the nursing facility location is established. If, however, the out-of-State individual enters a nursing facility directly, the MWD in the municipality where the nursing facility is located shall assume full case responsibility.

4. All applicants, or those acting on behalf of the applicant, shall be required to sign Form GA-51 (Important Reminder of Your Obligation to Report Changes). The applicant shall be provided with a copy of the signed form and the original shall be filed in the case record. The MWD shall explain to the applicant, or to those acting on behalf of the applicant, that it is his or her obligation to promptly report changes in income, resources or other circumstances.

5. Form GA-197, Your Rights and Responsibilities in the General Assistance Program, shall be provided to all applicants at time of application.

(c) For purposes of determining eligibility for GA nursing facility benefits, income from any source, which is not specifically excluded under (d) below, shall be considered "countable income" and shall be taken into consideration when determining the amount of the GA nursing facility benefit.

1. Income is countable, for purposes of this subsection, when it is in cash or some other form that can be used toward payment for the nursing facility.

2. Anticipated income which is not identified as excludable shall not be taken into consideration until such income actually becomes available.

(d) The following income exclusions are specific for GA nursing facility cases only and shall be deducted from the total gross income of the individual entering the nursing facility prior to applying such income toward the cost of the nursing facility payment:

1. A $35.00 personal needs allowance;

2. Medicare Part B premium;

3. Private medical insurance premium;

4. Guardian fees; and

5. The amount determined necessary for the maintenance of the community spouse in accordance with the following provisions:

i. For purposes of this subsection only, the community spouse shall be defined as the individual who is, under the provisions of State law, legally married to the individual entering the nursing facility and who is not himself or herself institutionalized.

ii. In determining the amount that may be deducted for the maintenance of the community spouse, the amounts authorized by the provisions set forth at (d)5iii below shall be applied and then reduced by the total gross income of the community spouse, if any.

iii. The amount to be authorized for the maintenance of the community spouse shall not exceed the current GA Standard of Need for one person (see N.J.A.C. 10:85-4.1(d)), except in the following instances:

(1) When the community spouse's average monthly shelter expenses for his or her principal place of residence exceed $275.00, the maximum community spouse maintenance deduction amount shall be increased by the total of the amount in excess of $275.00. The shelter expenses are to be limited to rent or mortgage (including principal and interest), taxes and insurance, and a utility standard for the community spouse's utility expenses (in accordance with the utility stipulations below). If the principal residence is a condominium or cooperative, the required monthly maintenance charge shall also be applied.

(2) A utility allowance shall not be authorized unless the community spouse directly incurs charges for utilities. A community spouse who directly incurs charges for heating, (in accordance with food stamp regulations at N.J.A.C. 10:87-5.10(a)5iv) separate and apart from their rent or mortgage payments, shall be entitled to a utility allowance in the amount specified as the "Heating Utility Allowance" in the Food Stamp program at N.J.A.C. 10:87-12.1. If, however, the community spouse does not directly incur heating charges but does directly incur charges for a utility other than telephone, water, sewerage, or garbage collection, for example electric, a utility allowance in the amount specified as the "Standard Utility Allowance" at N.J.A.C. 10:87-12.1 shall be used. If the only direct utility charge incurred by the community spouse separate and apart from the rent or mortgage is the telephone, the amount specified as "Uniform Telephone Allowance" at N.J.A.C. 10:87-12.1 shall be used. (This telephone allowance shall not be used if either the heating or standard utility allowance is applied because those allowances include telephone charges.)

(3) The community spouse maintenance amount shall only be deducted when such income is actually made available to (or for

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the benefit of) the community spouse. No amount of the community spouse's maintenance deduction may be retained by the spouse in the nursing facility.

(4) The amount established as the community spouse maintenance amount, shall not be taken into consideration for legally responsible relative purposes.

(e) For purposes of this subsection only, any and all resources (unless otherwise specified as an exempt resource in this subsection) that are in the control of the individual applying for nursing facility assistance, or to which he or she may have a valid claim, shall be taken into consideration in determining eligibility for GA nursing facility assistance.

1. Resources must be reported in full to the agency and a determination shall be made as to the status of the resources as available, potential or exempt.

i. A resource shall be considered an "available" resource when the person entering the nursing facility (or his or her power of attorney or legal guardian) has the right, authority, or power to liquidate the real or personal property, or his or her share of it.

(1) Funds which are available to the applicant(s) upon demand, that is, signature authority, are to be considered fully available for purposes of this subsection. Funds held in a joint account(s) ("and"/"or") are to be treated as follows:

(A) Funds held in a joint account(s) with the community spouse shall be considered available to the GA nursing facility client on a pro-rata basis, regardless of the source of such funds. Funds withdrawn by the community spouse, during the 36 month period prior to the application for GA nursing facility assistance, which amount to more than the community spouse's pro-rata share, shall be considered a transfer of resource action, unless such withdrawals can be attributed to the payment(s) of normal living and/or care expenditures. If it is determined that the withdrawn amount(s) is a "transfer of resource" action in accordance with transfer of resource provisions at (f) below, then the amount in excess of the community spouse's pro-rata share shall be taken into consideration when determining the GA nursing facility assistance benefit.

(B) The total amount of the funds held in a joint account(s) with an individual(s) other than the community spouse shall be considered available to the client unless it can be demonstrated, through documentation, that actual ownership is in a different proportion.

ii. Potential resources are those resources which are neither currently available for expendable use nor exempt.

(1) Such resources shall be identified and plans for liquidation shall be immediately undertaken in accordance with the provisions set forth at N.J.A.C. 10:85-3.4(d) (potential resources).

iii. The following resources are the only resources that shall be considered "exempt" when determining eligibility for GA nursing facility benefits:

(1) Primary residence when the community spouse of the individual entering the nursing facility is living in the home;

(2) Life insurance policies;

(3) Prepaid irrevocably assigned funeral/burial arrangements:

(A) Prepaid irrevocable funeral/burial insurance policies;

(B) Prepaid irrevocable funeral/burial annuity policies;

(C) Prepaid irrevocable funeral/burial trust funds.

(4) Savings resulting from the accumulation of the PNA which does not exceed an amount more than 12 times the current PNA amount.

iv. The MWD shall verify the equity value of resources through appropriate and credible sources. Additionally, the MWD shall evaluate the applicant's past circumstances and present living standards in order to ascertain the existence of resources which may not have been reported. If the applicant's resource statements are questionable, or there is reason to believe the identification of resources is incomplete, the MWD shall verify the applicant's resource statements through one or more third parties.

(1) The MWD shall also verify the existence of any cash, savings or checking accounts, time or demand deposits, stocks, bonds, notes receivable, or any other financial instrument or interest by contacting at least two other financial institutions or by contacting financial institutions which have currently, or previously, provided services to the client.

v. All verification activities concerning the determination or evaluation of resources shall be fully documented in the case record.

(f) Periods of ineligibility shall be imposed for "transfer of resource" actions in accordance with (f)3 below. It shall be considered a transfer of resource action when individuals who, within a 36 month period prior to the date of application for nursing facility assistance, dispose of an available resource or abandon a potential resource, for less than adequate consideration, for the purpose of qualifying for assistance or for avoiding repayment of assistance. In addition, a period of ineligibility shall be imposed on those individuals who transfer resources into a trust within a 60 month period prior to the date of application for nursing facility assistance.

1. There shall be an initial presumption, rebuttable, that the "transfer of resource" action, that is, abandonment of any resource of value (exempt or otherwise) or the disposal of any resource (exempt or otherwise), for less than adequate consideration, or the transfer of a resource into a trust, was made for the purpose of qualifying for GA nursing facility assistance or for avoiding repayment of such assistance.

2. Any "transfer of resource" actions made for reasons other than to qualify for GA nursing facility assistance or to avoid repayment of such assistance shall be reviewed by the MWD to determine whether or not recovery can be effected. If so, the matter is subject to the provisions concerning potential resources in this subsection and those set forth at N.J.A.C. 10:85-3.4(d).

3. In instances concerning "transfer of resource" actions, the MWD shall determine the applicable "period of ineligibility" as follows:

i. The MWD shall use the monthly State average nursing facility room rate (for a semi-private room) and divide that monthly rate into the actual amount of the available resource that was disposed or the current market value of the potantial resource that was abandoned or the amount of the resources transferred into a trust. The resulting number shall represent the number of months that payment to the nursing facility would have been made had not the "transfer of resource" action taken place. This number shall be used in conjunction with the calculation step at (f)3iii below to determine the actual period of ineligibility for GA nursing facility assistance purposes.

(1) If, however, the nursing facility is providing a specialized service, such as respirator care, for an individual who has been specifically diagnosed as requiring that service, then the MWD shall use the actual monthly room rate charged by that nursing facility in the calculation described in (f)3i above instead of the monthly State-average room rate.

ii. The MWD shall determine the number of months that elapsed from the date the "transfer of resource" action occurred to the date of the application for GA nursing facility assistance.

iii. The actual "period of ineligibility" shall be determined by subtracting the result of (f)3ii above from the number of months calculated in (f)3i above. The resulting number from this calculation shall represent the number of months that will be imposed as the "period of ineligibility". The MWD shall impose this "period of ineligibility" commencing with the month in which the individual made application for GA nursing facility assistance.

(g) Payment to the facility shall not exceed the rate established by Medicaid for the facility. The MWD shall contact the DFD/GAP Unit to obtain the per diem rate for room, board and nursing care.

1. The MWD shall authorize per diem payments for periods of up to 10 days during which the client is temporarily absent from the facility for hospitalization or for up to 25 days in a calendar year for therapeutic visits.

2. Prescription drugs, laboratory, x-ray, physician, dental, podiatry services and supplies are not included in the Medicaid per diem rate for nursing facility cases. The MWD shall submit all such bills, except those for prescriptions, to the DFD/GAP Unit for approval prior to authorizing payment. Upon approval, the MWD shall issue payment for those services directly to the provider. An

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order for lab, x-ray, pharmacy services, and so forth must be based on a written prescription from the attending physician (see N.J.A.C. 10:85-8.4(f)1i regarding the Pharmaceutical Assistance to the Aged and Disabled program).

i. In instances when an individual is eligible for nursing facility payments through Medicare, the MWD shall forward a copy of the bill, reflecting the Medicare payment, to the DFD/GAP Unit. The DFD/GAP Unit shall determine what portion of the amount not covered by Medicare the MWD shall be responsible for paying the nursing facility.

ii. Medical bills shall be submitted to third party medical insurance providers prior to MWD payment authorization.

iii. Payments for pharmacy charges shall be processed in accordance with the provisions at N.J.A.C. 10:85-5.6 and 6.8 which set forth the procedures for pharmaceutical payments in the GA program.

(h) The director of welfare shall authorize payment for therapy, which is not included as an integral part of the nursing facility per diem rate, in accordance with the conditions and amounts indicated in (h)1 and 2 below.

1. Conditions for payment of therapy are as follows:

i. The therapy must be recommended in writing by a physician;

ii. The therapy must be part of a planned physical restoration program;

iii. The therapy must be performed by an appropriately qualified therapist under the direction and supervision of a physician;

iv. The therapy must be approved in advance by the DFD/GAP Unit. Form GA-18A, Certification of Need for Physical, Occupational, or Speech Therapy, is the form that shall be used to request DFD/GAP Unit approval for therapy. The MWD should also submit, along with Form GA-18A, any other documentation which is appropriate and available or is requested by the DFD/GAP Unit.

(1) Approvals by the DFD/GAP Unit will be made for a maximum of three months.

(2) Requests for approval for an additional three-month period shall be made prior to the beginning of the additional period. Such a request shall be made through the submission of a new Form GA-18A, if appropriate, or a written statement by the supervising physician indicating and justifying the need for continuing therapeutic treatment; and

v. The therapy is not available or cannot be provided without cost.

2. The amount of payment authorized by the MWD shall be at the rate established for the service by the Medicaid program. The DFD/GAP Unit will ascertain the rate and indicate it on the notice of approval. MWDs in need of rate information before submitting an approval request may communicate with the DFD/GAP Unit concerning such information.

(i) The MWD shall use Form GA-19A, Statement of Income Available for Long Term Care Facility Payment and Record of MWD, to determine and keep record of the amount of the MWD payment to the nursing facility.

1. When determining the amount the MWD shall be authorized to pay the facility for room, board and nursing care, the MWD shall use the current Medicaid rate times the number of days the client is eligible for GA nursing facility assistance for the month. Each month the MWD will obtain a current bill for all services rendered during the previous month in order to ensure that the payment authorized to the nursing facility is accurate.

i. The monthly amount determined as the MWD payment for the nursing facility shall be considered an all inclusive payment for GA purposes. Any other monthly amounts owed the nursing facility shall be reconciled between the nursing facility and the family.

(j) An individual who applies for or receives GA nursing facility assistance is entitled to a written notice of denial, reduction or termination of such assistance in accordance with the notice and hearing provisions in the GA program set forth at N.J.A.C. 10:85-7.

(k) The MWD shall evaluate and periodically reevaluate any legally responsible relative's (LRR's) capacity to support in accordance with the provisions set forth at N.J.A.C. 10:85-9.

(l) The MWD shall redetermine eligibility for nursing facility cases on an annual basis in accordance with the provisions set forth in this section.

(a)

DIVISION OF FAMILY DEVELOPMENT

Families First Program

Proposed New Rules: N.J.A.C. 10:88

Authorized By: William Waldman, Commissioner, Department of Human Services.

Authority: N.J.S.A. 30:4B-2 and 44:10-5.2, the Food Stamp Act of 1977 as amended (7 U.S.C. Sections 3 and 5), 7 CFR Part 274.12; and the Mickey Leland Memorial Domestic Hunger Relief Act (P.L. 101-624).

Proposal Number: PRN 1995-176.

Submit comments by April 19, 1995 to:
Karen Highsmith, Acting Director
Division of Family Development
CN 716
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The proposed new rules implement the Families First Program in New Jersey. The Families First Program is an alternate means of distributing Aid to Families with Dependent Children (AFDC) (N.J.A.C. 10:81) and Food Stamp Program (N.J.A.C. 10:87) benefits to eligible households. The Families First Program will not alter the means by which eligibility for those programs is determined. However, Families First will also be utilized to distribute child support rebate payments which are authorized by the Deficit Reduction Act of 1984 (P.L. 98-369).

The current paper-based method being used for benefit distribution, checks and Authorization-to-Purchase (ATP) cards, lent itself to problems for the State, the County Welfare Agencies (CWAs), the community, and recipients. These problems included high incidences of lost and stolen checks and ATPs from the mail; time consuming handling of checks and ATPs at the State and the CWA level; high costs associated with print time for check/ATP write; high costs of handling, mailing and postage; incidents of forgery, fraud and trafficking in food stamp coupons; a time consuming reconciliation process; congestion and long lines at banks and retailers during the first days of the month, and; frustration experienced by recipients due to waiting in long lines to negotiate checks and ATPs.

An Electronic Benefit Transfer (EBT) delivery system was chosen as the best alternative to reducing costs associated with handling and mailing paper benefits while at the same time providing a convenient means for recipients to obtain those benefits.

The program's name, Families First, is derived from the name of the Division of Family Development. It represents the priority which is placed on families by the Department of Human Services. Additionally, the Families First program will be, in many instances, a household's first exposure to EBT technology.

N.J.A.C. 10:88-1.1 provides a general description of the Families First Program. In Families First, each eligible household payee is issued a plastic debit card which the payee may use to access cash assistance and food stamp benefits.

N.J.A.C. 10:88-1.2 explains the benefits of the Families First Program. These are discussed in greater detail under "Social Impact".

N.J.A.C. 10:88-1.3 cites the Federal and State statutes and regulations which authorize the Families First Program.

N.J.A.C. 10:88-1.4 provides that if a local welfare agency (LWA) is participating in the Families First Program, then each household which is receiving public assistance from that jurisdiction must do so via Families First. Recipients who do not comply with the requirements to receive their benefits through the Families First Program will be issued benefits but will not be able to access them. Accessing benefits requires that the recipient has an active Families First Card and selects a Personal Identification Number (PIN) which is tied to the card through the use of a PIN selection device. Recipients who do not obtain a card and select a PIN will be unable to access their benefits, which will become subject to the aging process.

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N.J.A.C. 10:88-1.5 explains the properties of a household's Families First account. The Families First account is non-interest bearing; the household does not pay a fee for its use; and account balances may be carried forward. One account is established for cash benefits, and a second is established for food stamp benefits.

N.J.A.C. 10:88-1.6 provides a list of terms which are frequently used in the Families First Manual. Definitions of those terms are also provided.

N.J.A.C. 10:88-2.1 explains that training plays a vital role in ensuring that the household successfully uses the Families First account. It is acknowledged that a vital element of the Families First Program is ensuring that public assistance recipients are satisfactorily trained in the usage of their EBT cards. Without adequate training, recipients will not be able to perform transactions or obtain account balances.

N.J.A.C. 10:88-2.2 provides that the local agency will be primarily responsible for training households for Families First. If a local agency is implementing Families First, then a contractor may assume the training responsibility during the caseload conversion process.

N.J.A.C. 10:88-2.3 explains the process by which Families First cards are issued to eligible households. This section illustrates Families First account creation, training scheduling, training components, and Personal Identification Number (PIN) selection.

N.J.A.C. 10:88-3.1 explains how recipients utilize their Families First cards, and access their Families First accounts.

N.J.A.C. 10:88-3.1(a) explains that there are different methods by which a recipient may access his or her public assistance benefits, depending on whether the benefits are cash or food stamps.

N.J.A.C. 10:88-3.1(b) explains that public assistance cash benefits are primarily accessed at certain automated teller machine (ATM) locations.

N.J.A.C. 10:88-3.1(c) provides that food stamp benefits on Families First are obtained by making food purchases at retailers authorized by the Food and Consumer Service of the United States Department of Agriculture (USDA).

N.J.A.C. 10:88-3.1(d) provides that Families First cash benefits may be used to purchase food at authorized retailers. The proposed new rule at N.J.A.C. 10:88-3.1(e), however, notes that food stamp benefits cannot be converted into cash.

N.J.A.C. 10:88-3.1(f) provides that if a retailer is unable to access the Families First system to verify the balance in the recipient's Families First account, the recipient may make a maximum purchase of $40.00 that day. The recipient will be required to complete a manual voucher for the purchase. If it is later determined that, at the time of the transaction, there were insufficient funds in the recipient's account, the State will represent the transaction against a future month's benefit of the household.

N.J.A.C. 10:88-3.1(g) explains that each Families First transaction which is performed at an ATM or POS device will generate a receipt for the recipient. N.J.A.C. 10:88-3.2 establishes the number of alternate payees which each household may designate to utilize the household's Families First account.

N.J.A.C. 10:88-3.3 explains that under Families First, each household will have its monthly AFDC and/or food stamp benefits placed into its account during one of the first five days of the month. This "staggered issuance" method of disbursing monthly benefits minimizes excessive cash withdrawals at ATM locations, and long lines at food retailers during the initial days of the month. Recipients will receive training on the date of the month in which they may access their Families First account to obtain their AFDC and/or food stamp benefits.

N.J.A.C. 10:88-3.4 explains that certain "non-traditional" food merchants (for example, milk delivery services, roadside vegetable markets) may also participate in Families First by preparing a debit voucher which has the recipient's signature and amount of sale. This voucher is then forwarded to the State contractor responsible for administering the Families First system for reimbursement.

N.J.A.C. 10:88-3.5 addresses how residents of drug and alcoholic treatment centers, shelters for battered women, group living arrangements, and those purchasing meals from nonprofit homeless feeding sites will have access to their food stamp benefits. On November 21, 1994, USDA authorized New Jersey to operate a demonstration project to permit such meal providers in jurisdictions issuing benefits through Families First to directly deposit food stamp benefits into financial institutions. Thus, those authorized institutions will be provided with POS devices, and recipients purchasing meals from such institutions will be able to use their food stamp benefits to pay for their meals.

N.J.A.C. 10:88-3.6 describes how food stamp recipients may use their Families First card at communal dining facilities. Payment may be made by signing a manual voucher.

N.J.A.C. 10:88-3.7 describes how food stamp recipients may use their Families First card to purchase meals from Meals-on-Wheels. Payment may be made by signing a manual voucher.

N.J.A.C. 10:88-3.8 addresses the process known as "representation", which is consistent with 7 CFR 274.12(l). When a manual transaction occurs due to inaccessibility of the Families First system, and it is determined that insufficient funds existed at the time of the transaction, representation will be made by the State's Families First system contractor, after the LWA has approved the representation. Representation is only allowed when telephone access to the Families First system or Help Desk was unavailable, or when the Families First system was unavailable, but the Help Desk provided authorization for the transaction.

If representation is necessary, then the State contractor may deduct from the household's next monthly food stamp benefit the amount of the insufficient transaction, up to $50.00. If the monthly allotment is less than $50.00, the State contractor may deduct $10.00. If a representation amount still exists after the first month, then the State contractor may deduct the greater of $10.00 or 10 percent of each following month's food stamp allotment.

Representation cannot begin until the household has been provided notice of the representation. The notice shall advise of the amount of the allotment reduction.

Retailers must provide notices to households at the time of the manual transaction. These notices must forewarn the households that representation will be executed if insufficient funds were in the household's Families First food stamp account at the time of the manual transaction.

N.J.A.C. 10:88-4.1 explains the system which is used to assure that recipients are using their Families First benefits regularly. This Families First system, which is called Aging, monitors household account activity and identifies those accounts which have not be accessed in the past month. N.J.A.C. 10:88-4 is consistent with Federal regulations at 7 CFR 274.12(f)(7), and was approved as a waiver by USDA on June 21, 1993.

N.J.A.C. 10:88-4.2 explains the Aging process that is applied to food stamp accounts on Families First. N.J.A.C. 10:88-4.2(a)1 states that each food stamp household which has not accessed its Families First account in the past month will receive a notice which advises the household that unless it uses its Families First account, its Families First benefits will be purged off the Families First system, and its food stamp case will be closed. The notice is similar to the Notice of Expiration cited at N.J.A.C. 10:87-9.1.

N.J.A.C. 10:88-4.2(a)2 provides that if the household still does not access the food stamp benefits on its Families First account, a final warning notice will be issued to the household. The notice advises that the household's food stamp case is going to be terminated, and the household's food stamp benefits in the Families First system will be purged.

N.J.A.C. 10:88-4.2(a)3 and 4 provide that the food stamp case of the subject household will be closed effective with the first day of the month after the two notices were issued, and that the household's Families First food stamp benefits will be purged on the 13th day of that month.

N.J.A.C. 10:88-4.3 explains the Aging process that is applied to AFDC benefit accounts on Families First. N.J.A.C. 10:88-4.3(a)1 states that each AFDC recipient household which has not accessed its Families First account in the past month will receive a notice which advises the household that unless it uses its Families First account, its Families First AFDC benefits will be purged off the Families First system, and its AFDC case will be closed.

N.J.A.C. 10:88-4.3(a)2 provides that if the household still does not access the AFDC benefits on its Families First account, a final adverse action warning notice will be issued to the household. The notice advises that the household's AFDC case is going to be terminated, and the household's AFDC benefits in the Families First system will be purged.

N.J.A.C. 10:88-4.3(a)3 and 4 provide that the AFDC case of the subject household will be closed effective with the first day of the month after the two notices were issued, and that the household's Families First AFDC benefits will be purged on the 13th day of that month.

N.J.A.C. 10:88-4.4 provides that if the household whose Families First account is subject to Aging contacts the local agency, and explains why the account has not been accessed, then the local agency shall void the Aging process of that account, as well as the impending closing of that public assistance case.

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N.J.A.C. 10:88-4.5 provides that a household is entitled to receive any Aged food stamp benefits for a period of one year from the date those benefits were Aged. If the household does not request replacement of those Aged benefits during that period of time, then the Aged benefits are reported to USDA as expunged.

The following is an example of how the Aging process works each month.

On May 13, the Families First system identifies those AFDC and food stamp accounts which were not accessed in the past month. The Families First system generates warning notices for the AFDC and food stamp cases. Both notices are sent via courier to the CWA for mailing. The notices are mailed to payees no later than May 29.

On June 13, the Families First system re-examines the AFDC and food stamp Families First accounts it selected on May 13. If any of those accounts still have not been accessed, then the Families First system takes action to close the related AFDC and/or food stamp cases, effective July 1. A Notice of Adverse Action is generated for the AFDC case, and a second warning notice for the FS case, which must be mailed by the CWA. Those notices must be received by the household no later than June 20. The AFDC and or food stamp cases are closed, effective July 1.

On July 13, the Families First AFDC and/or food stamp accounts are closed. The household forfeits entitlement to the Aged AFDC benefits. Families First food stamp benefits are no longer available to the household.

On July 13 of the following year, the food stamp benefits which were Aged are no longer available to the household. They are reported back to the USDA as being expunged.

N.J.A.C. 10:88-5.1 provides an overview of benefit conversion. Benefit conversion is generally applicable when a food stamp household wishes to move from a jurisdiction administering Families First to a jurisdiction which is not administering an EBT-type public assistance issuance program. Since a Families First card and account cannot be used in a non-Families First jurisdiction, the food stamp benefits must be converted into food stamp coupons which the household can use in the new jurisdiction. N.J.A.C. 10:88-5 is consistent with Federal regulations at 7 CFR 274.12(f)(6).

N.J.A.C. 10:88-5.2 provides that if a food stamp household moves from a non-Families First jurisdiction to a Families First jurisdiction, the household may use any food stamp coupons which it received in the previous jurisdiction at retailers authorized to accept food stamps.

N.J.A.C. 10:88-5.3(a) explains the process which is to be applied when a Families First household advises the local agency that it is moving from the jurisdiction of the local agency. N.J.A.C. 10:88-5.3(b) states that cash Families First benefits will still be accessible throughout New Jersey, so benefit conversion will not be necessary unless the family moves out of New Jersey. In that case, the Families First cash account will be converted into a cash payment.

N.J.A.C. 10:88-5.3(c) provides that, for food stamp purposes, the local agency must convert the household's Families First food stamp benefit balance into an Authorization to Participate (ATP) document within either one or three business days of the date that the household notifies the local agency of the impending change in residence. N.J.A.C. 10:88-5.3(d) requires that the household have an accessible means to convert the ATP into coupons. The conversion timeframe is dependent on whether the local agency stores food stamps on site.

N.J.A.C. 10:88-5.4 provides that the household does not have the option to convert Families First benefits into food stamp coupons as a matter of convenience.

N.J.A.C. 10:88-6 addresses replacement of lost Families First cards, and public assistance benefits which are in Families First accounts.

N.J.A.C. 10:88-6.1 provides that a household's cash and food stamp benefits will not be replaced once they are posted into the household's Families First account.

N.J.A.C. 10:88-6.2 provides that Families First card replacement shall be made within two business days of the reported loss. This is consistent with 7 CFR 274.12(f)(5)(ii).

N.J.A.C. 10:88-6.3 provides that households who forget their PINs are not required to obtain replacement Families First cards, because the household can obtain a new PIN without having to receive a new card.

N.J.A.C. 10:88-7 provides the rules which will be applied to the special Regulation E demonstration project which will be conducted only in Hudson County, N.J. Regulation E (12 CFR 205) implemented the Electronic Fund Transfer Act (EFTA) (15 U.S.C. §1693). The act and regulation cover any electronic fund transfer initiated through an automated teller machine (ATM) or point-of-sale (POS) device. The regulation sets rules for the issuances of ATM cards and other access devices; disclosure of terms and conditions of an EFT service; documentation of electronic fund transfers by means of terminal receipts and account statements; limitations on consumer liability for unauthorized transfers; procedures for error resolution; and certain rights related to preauthorized transfers. The Federal Reserve System's Board of Governors made a preliminary determination in 1994 (see 59 FR 10678, dated March 7, 1994) that Regulation E is applicable to public assistance EBT systems such as Families First. The Governors, however, also delayed mandatory compliance with Regulation E until March 1997.

N.J.A.C. 10:88-7.1 explains that New Jersey has entered into a cooperative agreement with the Federal government to conduct a one-year demonstration of full compliance with Regulation E in Hudson County, New Jersey. The demonstration is being funded by the Federal government, and is intended to gather statistics regarding the effect of Regulation E upon public assistance recipients who receive their benefits through EBT-type systems.

N.J.A.C. 10:88-7.2 provides that the Regulation E demonstration will commence on March 1, 1995, and end on February 29, 1996.

N.J.A.C. 10:88-7.3 provides an overview of what the demonstration will encompass, and which other rules under N.J.A.C. 10:88 will be invalidated during the demonstration.

N.J.A.C. 10:88-7.4 notes that training will be required to familiarize Families First participants in Hudson County with the Regulation E policies and procedures. N.J.A.C. 10:88-7.5 describes the Disclosure which must be provided to Families First participants in Hudson County. Such Disclosure is required under 12 CFR 205.7. The Disclosure spells out the recipient's rights and responsibilities, as delineated elsewhere in this chapter, in the event that a problem arises with the recipient's Families First account. The Disclosure also spells out recipient liability with regard to Families First accounts. The Disclosure is contained in the chapter Appendix.

N.J.A.C. 10:88-7.6 specifies that the recipient may request, without payment of a fee, a statement which provides a history of the transactions which have occurred on the recipient's Families First account in the previous 60 days. This is required under 12 CFR 205.9(b).

N.J.A.C. 10:88-7.7 defines an unauthorized transaction. If a recipient is forced to perform a Families First transaction while under duress, then the transaction would be considered unauthorized. If the recipient negligently lost his or her Families First card along with the recipient's PIN, and the card and PIN were then used by a third party to access the recipient's Families First account, then that transaction would still be considered unauthorized. If the recipient, however, gave the Families First card and PIN to a relative who withdrew all of the recipient's cash from the Families First account, then that transaction would be considered authorized.

N.J.A.C. 10:88-7.8 establishes the recipient's liability for benefits which are lost due to unauthorized transactions. N.J.A.C. 10:88-7.8(b) provides that the recipient should report the loss of a Families First card immediately to limit the recipient's liability.

N.J.A.C. 10:88-7.8(b)1 through 3 provide that if the recipient reports a lost card within two business days, the recipient's liability is limited to $50.00. If the recipient reports the loss after two business days, the maximum total liability is $500.00. Liability is unlimited if the recipient reports the loss after 60 days. This is consistent with 12 CFR 205.6(b).

N.J.A.C. 10:88-7.8(c)1 and 2 provide that if the recipient discovers an error in his or her Families First account from a receipt, inquiry, or account statement, liability is limited to $50.00 within 60 days of the date the unauthorized transaction would have become apparent to the recipient. After 60 days, the maximum total liability is unlimited. This is consistent with 12 CFR 205.6(b).

N.J.A.C. 10:88-7.8(d) provides that the various types of recipient liabilities can be combined, dependent upon the individual circumstances of the loss. This is consistent with 12 CFR 205.6(b)(3).

N.J.A.C. 10:88-7.8(e) provides that extenuating individual circumstances, such as travel or illness, shall be valid reasons for extending the liability timeframes. This is consistent with 12 CFR 205.6(b)(4).

N.J.A.C. 10:88-7.8(f) provides that the recipient is not penalized for Families First system or issuance related problems.

N.J.A.C. 10:88-7.9 provides that recipients should report any lost or stolen Families First card, or other Families First problem, as soon as possible.

N.J.A.C. 10:88-7.10 describes the methods by which recipients may report Families First card or benefit losses. The Families First Help Desk

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is the primary contact for reporting Families First problems. For losses attributable to unauthorized transactions, the recipient is required to submit a claim of loss in writing. The claim must include the recipient name, case number, a description of the loss, date of discovery, amount of loss, and recipient's signature.

N.J.A.C. 10:88-7.11 requires the recipient to cooperate with authorities during the investigation of the loss. The CWA will assist the recipient, if necessary, in providing the police report or affidavit.

N.J.A.C. 10:88-7.12 establishes that the CWA shall take immediate action upon receiving a written report that a recipient's Families First benefits have been lost.

N.J.A.C. 10:88-7.13 describes the actions which the CWA must take when the loss is attributable to an ATM transaction. The CWA shall require, within 10 working days of the oral claim, a written statement from the recipient attesting to the loss, as well as submission of a police report. The CWA shall attempt to complete its investigation within 10 business days of the date the written claim is received. During the investigation, the CWA shall ascertain whether the facts related to the claim are consistent with the client's affidavit of loss. If the initial investigation determines that the recipient's claim of loss is not valid, then the CWA shall deny the claim. The CWA shall provide written notification of claim denial to the recipient within three business days of the date of denial.

N.J.A.C. 10:88-7.13(a)4 provides that if the CWA cannot complete its investigation during the 10 business day initial period, the CWA may credit the recipient's Families First account with the amount of the claim, less the amount (if any) of any liability to which the household would be subject. The recipient must receive written notification of the amount of the provisional credit.

N.J.A.C. 10:88-7.13(a)5 provides that if the CWA investigation confirms that an error occurred, then the CWA shall inform the household in writing of this within one business day of the finding.

N.J.A.C. 10:88-7.14 describes the actions which the CWA must take when the loss is attributable to an POS transaction. The CWA shall require, within 10 working days of the oral claim, a written statement from the recipient attesting to the loss, as well as submission of a police report. The CWA shall attempt to complete its investigation within 20 business days of the date the written claim is received. During the investigation, the CWA shall ascertain whether the facts related to the claim are consistent with the client's affidavit of loss. If the initial investigation determines that the recipient's claim of loss is not valid, then the CWA shall deny the claim. The CWA shall provide written notification of claim denial to the recipient within three business days of the date of denial.

N.J.A.C. 10:88-7.14(a)4 provides that if the CWA cannot complete its investigation during the 20 business day initial period, the CWA may credit the recipient's Families First account with the amount of the claim, less the amount (if any) of any liability to which the household would be subject. The recipient must receive written notification of the amount of the provisional credit.

N.J.A.C. 10:88-7.14(a)5 provides that if the CWA investigation confirms that an error occurred, then the CWA shall inform the household in writing of this within one business day of the finding.

N.J.A.C. 10:88-7.15 provides that a household is entitled to a fair hearing if it disagrees with the findings of the CWA investigation. The recipient may submit an oral request if it later desires to cancel the fair hearing. The fair hearing shall be requested within 10 days of the date of the CWA's investigation decision.

N.J.A.C. 10:88-7.16 provides that while a CWA claim investigation is in progress, the household is entitled to full use of any benefit which is credited to its Families First account. If the claim is subsequently denied, the CWA will recoup the amount of the credit from the household in accordance with the rules governing the AFDC or Food Stamp Programs (N.J.A.C. 10:82-2.19(a) and N.J.A.C. 10:87-11.26 and 11.29, respectively).

N.J.A.C. 10:88-7.17 provides that households which submit a Families First loss claim shall be subject to certain restrictions. Cash benefits will be available only through POS devices and, if "at risk", the household's shelter costs will be paid through the AFDC Voluntary Restricted Payment Program (N.J.A.C. 10:81-4.5(c)). Designation of a protective payee may be required. Adequate advance notice must be provided to the household before it is placed on such restrictions.

N.J.A.C. 10:88-8.1 provides that Families First card replacement fees which the local agencies collect shall be reported to the State as a refund. N.J.A.C. 10:88-8.2 provides that food stamp recipients may repay overissuance claims with Families First food stamp benefits, and is in accordance with Food and Consumer Service Administrative Notice No. 6-95, dated November 22, 1994.

N.J.A.C. 10:88-8.3 provides that Families First benefits which are Aged shall be noted on CWA fiscal reports.

N.J.A.C. 10:88 Appendix provides the specific language which shall be contained in the Disclosure cited at N.J.A.C. 10:88-7.5.

Social Impact

It is anticipated that the proposed new rules will have a beneficial impact upon individuals who are receiving AFDC and food stamp benefits. Those individuals will no longer be required to visit banks to cash their public assistance checks, and will no longer have to visit food stamp vendors in order to convert their ATPs into food stamp coupons. In addition, the elimination of checks and food stamp coupons will lessen the "welfare stigma" associated with their use.

For government agencies, the Families First Program is beneficial because it eliminates the printing, mailing, and other administrative costs associated with checks and ATPs. It also reduces the likelihood that those benefits are used for purposes other than that which is intended.

Food retailers will gain benefit from the Families First Program because they no longer will have to batch food stamp coupons, and remit them to the Federal government for payment. Under the Families First Program, reimbursement is provided within a 24-hour period.

Economic Impact

It is anticipated that once the Families First Program is implemented throughout New Jersey, annual savings will be approximately $16 million. $7.7 million will be saved by the Federal government, $7.2 million by the State, and $1.1 million by the counties. In addition, food retailers will realize some savings due to reduced handling costs associated with food stamp coupon processing.

Executive Order No. 27 Statement

These rules contain standards which are the same as those imposed by Federal law.

Regulatory Flexibility Statement

The proposed new rules have been reviewed with regard to the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The new rules impose no reporting, recordkeeping or other compliance requirements on small businesses; therefore, a regulatory flexibility analysis is not required. The rules govern a program designed to deliver public assistance benefits to households certified as eligible by a governmental agency rather than a private business establishment.

Full text of the proposed new rules follows:

CHAPTER 88
FAMILIES FIRST PROGRAM

SUBCHAPTER 1. GENERAL PROVISIONS

10:88-1.1 Purpose and Scope

(a) The Families First Program is an alternate method of distributing Aid to Families with Dependent Children (AFDC) cash benefits, Food Stamp Program (FS) benefits, and Deficit Reduction Act (DEFRA) child support bonus payments to eligible households. Families First eliminates the need for the issuance of cash benefit checks and food stamp Authorization to Participate (ATP) documents by the local welfare agencies (LWAs). Families First utilizes a technology called Electronic Benefit Transfer (EBT). In EBT, each payee is issued a magnetic-stripe plastic card which the payee uses to access his or her benefits. This card is called a Families First card.

(b) Throughout this manual, the AFDC and Food Stamp Programs shall be referred to as "public assistance".

(c) Food stamp benefits are accessible at retailers authorized to accept food stamp coupons by the Food and Consumer Service (FCS) of the United States Department of Agriculture (USDA). Those retailers are equipped with Point of Sale (POS) devices which allow each payee to debit his or her Families First food stamp account by the amount of the food purchase.

(d) Cash benefits are accessible at MAC™ automated teller machines (ATMs), and at other State-approved businesses equipped to conduct Families First transactions.

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10:88-1.2 Benefits of Families First

(a) EBT, as applied to public assistance programs, has several benefits.

1. EBT eliminates the need to print checks, ATPs, and food stamp coupons.

2. EBT minimizes fraudulent activities related to the trafficking of food stamps, as well as mail losses.

3. EBT provides for a better accountability in the reconciliation of payments.

4. EBT facilitates the recipient's access to his or her benefits.

5. EBT lessens the stigma associated with the utilization of food stamp coupons.

10:88-1.3 Authority

(a) The operation of a public assistance EBT system is authorized by both Federal regulation, and State statute.

(b) The operation of the Families First Program in New Jersey has been approved by both the USDA, and the United States Department of Health and Human Services (USDHHS).

(c) Section 1729 of the Mickey Leland Memorial Domestic Hunger Relief Act (P.L. 101-624) established regulatory guidelines under which state agencies must operate EBT systems in the Food Stamp Program. That law is reflected in Federal regulations at 7 CFR 274.12 (issued in Federal Register No. 57, Vol. 63, dated April 1, 1992).

(d) The USDHHS Administration for Children and Families (ACF) Transmittal No. ACF-AT-91-28 (issued on September 6, 1991) established guidelines under which a state agency must operate an EBT system with its AFDC Program.

(e) The Families First Program is authorized in New Jersey Statute by N.J.S.A. 44:10-5.2.

10:88-1.4 Mandatory participation

The public assistance recipient receiving benefits from a LWA participating in Families First is required to receive benefits through the Families First Program. A recipient who does not comply with the requirements to receive his or her benefits through the Families First Program will be issued benefits, but will not be able to access them. Accessing benefits requires that the recipient has an active Families First Card.

10:88-1.5 Properties of Families First accounts

(a) Each Families First account has the following properties:

1. If otherwise entitled, each case shall have one account for cash benefits, and one account for food stamp benefits.

2. A Families First account shall be non-interest bearing.

3. The recipient shall not pay any fees or penalties for use of the account, nor shall retailers impose a minimum purchase amount to use a Families First card.

4. Account balances which are not used by a recipient in the month of issuance shall be carried forward into the following month. The accounts shall be accessed periodically, however, in order to avoid account Aging, as described at N.J.A.C. 10:88-4.

5. Account amounts shall include both dollars and cents.

6. A recipient shall not use the account to "borrow" against a future month's benefit.

10:88-1.6 Definitions

The following words and terms, when used in N.J.A.C. 10:88, shall have the following meanings, unless the context clearly indicates otherwise.

"AFDC" (Aid to families with Dependent Children) means the Federal program which provides cash payments to families with children, based on certain eligibility criteria.

"Aging" means the procedure of terminating a household's Families First account, and closing the household's public assistance case, when the household has not accessed the Families First account for at least 45 days.

"ACF" (Administration for Children and Families) means the organization within USDHHS which is directly responsible for the administration of the AFDC Program.

"ATM" (Automated teller machine) means a machine installed by a bank, which reads a financial transaction card and permits the cardholder to make banking transactions.

"ATP" (Authorization to Participate) means the paper document which is provided to eligible food stamp households each month, which those households may negotiate to receive food stamp coupons.

"Business day" means Monday through Friday between 8:30 A.M. and 4:30 P.M., but does not include State and County holidays.

"Contractor" means the organization which has contracted with the State to administer the day-to-day operations of the Families First system.

"EBT" (Electronic Benefit Transfer) means the a system which uses electronic funds transfer and point-of-sale technologies for the payment of benefits.

"Families First", as well as the "Families First Program", means the method by which public assistance benefits are disbursed in New Jersey through utilization of Electronic Benefit Transfer technology.

"FCS" (Food and Consumer Service) means the organization within USDA which is directly responsible for the administration of the Food Stamp Program.

"Help Desk" means the Families First system operation which assists recipients and retailers in the resolution of problems associated with Families First. The Help Desk is accessed via toll-free telephone numbers.

"LWA" (Local Welfare Agency) means the agency within each political jurisdiction in New Jersey which is responsible for determining eligibility for public assistance programs. In most cases, the LWA will be the county welfare agency ("CWA").

"POS device" (Point of Sale device) means an electronic magnetic-card swipe reader generally used to make debit or credit card purchases.

"Representation" means the procedure of collecting repayment of a household's insufficient account balance purchase with the household's subsequent month's food stamp allotment.

"USDA" (United States Department of Agriculture) means the Federal department which is responsible for the Food Stamp Program.

"USDHHS" (United States Department of Health and Human Services) means the Federal department which is responsible for the AFDC Program.

SUBCHAPTER 2. RECIPIENT TRAINING

10:88-2.1 Purpose of recipient training

The purpose of recipient training is to enable recipients to personally perform Families First transactions, and to obtain account balances.

10:88-2.2 Training responsibilities

(a) The LWA which provides benefits to the recipient shall be primarily responsible for training the recipient on EBT card usage and procedures.

(b) During a LWA's initial conversion of its public assistance caseload to the Families First Program, the State's contractor that is administering the Families First Program's automated account network shall conduct recipient training. After caseload conversion, the LWA shall assume full responsibility for Families First recipient training.

(c) EBT training for each payee shall be performed before the recipient is issued a Families First card.

10:88-2.3 Card issuance

(a) At the time that a LWA certifies an individual's eligibility to receive a public assistance benefit, the State's automated casefile and issuance system (Family Assistance Management Information System—FAMIS) shall create a Families First account for that individual on the Families First automated account network.

(b) The LWA shall either mail an appointment letter to the recipient, or contact the recipient directly to schedule the training session for Families First.

(c) The payee shall receive training on the following items:

1. What Families First is;

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2. The day of the month when benefits shall become available on Families First for the recipient's use;
3. How the card shall be used to obtain food stamp and cash benefits;
4. How to obtain account balances;
5. How to care for the Families First card;
6. Where the card may be used;
7. How to maintain the security of the recipient's Personal Identification Number (PIN); and
8. How to contact the Families First Help Desk via a toll-free telephone number if there is any problem.

(d) Each payee shall be required to select a four-digit PIN. The PIN serves as the payee's electronic signature when performing Families First transactions. The LWA shall emphasize that the payee needs to maintain the security of the PIN.

(e) In no event shall Families First cards be mailed to payees.

SUBCHAPTER 3. CARD UTILIZATION

10:88-3.1 Obtaining benefits

(a) In Families First, each household shall receive its public assistance benefits by using its Families First card at a location authorized to perform Families First transactions. The method by which the payee obtains benefits varies, dependent on whether the benefits are cash or food stamps. While public assistance benefits are accessed with one Families First card, food stamp and cash benefits are maintained within separate accounts in the Families First automated system.

(b) Cash benefits shall be obtained at MAC™ ATMs in New Jersey, and at other State-approved businesses and organizations equipped to conduct Families First transactions. In both situations, the payee shall use his or her PIN in order to obtain cash benefits.

(c) Food stamp benefits shall be accessed at food retailers authorized to accept food stamps by the FCS of the USDA. Those retailers are equipped with POS devices which allow each payee to debit his or her Families First FS account by the amount of the food purchase. The payee shall be required to use his or her PIN in order to make a food stamp purchase, unless the retailer's access to validate the transaction is temporarily disrupted. In that case, the retailer shall call the Families First system to obtain an authorization to allow the manual voucher transaction to occur.

(d) Families First cash benefits may be used to purchase food at FCS-authorized retailers who have agreed to accept Families First cash transactions. The amount of cash which can be withdrawn during one transaction, as well as the number of cash withdrawals allowed each month, shall be dependent upon the individual retailer's contract with the State.

(e) Food stamp benefits shall not be converted into cash benefits.

(f) In the event that a retailer cannot access the Families First system to determine whether a household has sufficient funds in the household's Families First account to make a purchase, the household shall be allowed to make a $40.00 maximum purchase per day. In the event that the household had insufficient funds in the account to make that purchase, the retailer shall be reimbursed, and the State's Families First contractor will be allowed to represent the transaction against the household (see N.J.A.C. 10:88-3.8).

(g) Families First transactions which are performed at ATMs or POS devices shall generate receipts containing the date and location of the transaction, the amount of the transaction, and any remaining account balance. Households shall retain each receipt for a minimum of a month from the date of the transaction.

10:88-3.2 Authorized representatives and payees

Each recipient household shall be allowed to designate a maximum of two payees to access cash benefits, and two payees to access food stamp benefits. The household may designate the same individual(s) to access both the household's cash and food stamp benefits. A Families First card shall be issued to each payee, each with its own PIN.

10:88-3.3 Staggered issuance

(a) Public assistance which represent a household's normal monthly assistance shall become available from the Families First account during the first five days of the month. The specific date of availability shall be dependent upon the household's case number, and the individual LWA's staggered issuance procedures. During Families First training, each recipient shall be advised of the day of the month in which each month's benefits shall be available.

(b) While staggered issuance is a method to disburse benefits over the first five days in the month, the establishment of AFDC and food stamp eligibility shall continue to be based upon a calendar month.

10:88-3.4 Non-traditional food retailers

Food stamp recipients shall be able to utilize their Families First card at authorized retailers who are not equipped with POS devices. These types of transactions shall be performed by having the recipient sign a manual debit voucher for the amount of the purchase, which authorizes the retailer to submit the voucher for payment to the Families First Program. The recipient shall receive a copy of the voucher for the recipient's records.

10:88-3.5 Authorized institutions

(a) Drug or alcoholic treatment centers, shelters for battered women, group living arrangements, and non-profit homeless feeding sites that are authorized by USDA to accept food stamps shall be provided with a POS device. Each food stamp household qualified under N.J.A.C. 10:87-3.12 shall be issued its own Families First card that shall be used to purchase meals from the meal provider, with drug or alcoholic treatment centers and group living arrangements acting as authorized representatives.

(b) When a household leaves an authorized institution which acted as an authorized representative, the facility shall immediately notify the LWA. The LWA shall then immediately inactivate the Families First card. The household shall visit the LWA to have any remaining benefits restored, including the issuance and training on the use of a Families First card if the household is still residing in a Families First jurisdiction.

10:88-3.6 Communal dining facilities

Recipients qualified under N.J.A.C. 10:87-3.12 may utilize their Families First food stamp benefits to purchase meals at communal dining facilities. These transactions are performed by having the recipient sign a debit voucher which authorizes the communal dining facility to submit the voucher for payment to the Families First Program. The recipient shall receive a copy of the voucher for the recipient's records.

10:88-3.7 Meals-on-Wheels

Recipients qualified under N.J.A.C. 10:87-3.12 may utilize their Families First food stamp benefits to purchase meals from Meals-on-Wheels. These transactions are performed by having the recipient sign a debit voucher which authorizes Meals-on-Wheels to submit the voucher for payment to the Families First Program. The recipient shall receive a copy of the voucher for the recipient's records.

10:88-3.8 Representation

(a) When there are insufficient funds in the EBT account to cover a manual Families First transaction, representation of the manual voucher amount shall be permitted under the following circumstances:

1. The manual transaction occurred because the Families First system was inaccessible, and the retailer obtained authorization for the transaction; or
2. The manual transaction occurred because telephone lines were down.

(b) Representation of manual vouchers is not to be permitted when the Families First card or POS device fails, and telephone lines are operational. Manual transactions shall not be utilized to extend credit to a household when the household's account balance is insufficient to cover the planned purchase.

(c) The State shall debit the benefit allotment of a household during the first month following the insufficient funds transaction in the amount of $50.00. If the household's monthly allotment is less than $50.00, the State shall debit the account for $10.00. For

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each subsequent month, the deduction from the monthly allotment shall be the greater of $10.00 and 10 percent until the representation is completely repaid.

(d) The State, the State's Families First system contractor, and the LWAs shall identify those households which are subject to representation. The LWAs shall establish the validity of each representation within their jurisdiction, and shall report this to the State's Families First system contractor. The State's Families First system contractor shall then issue representation notices to those households who will be subject to representation, and shall then perform the representation with the next month's benefits.

(e) The State shall ensure that retailers provide notice to households at the time of the manual transaction that representation may occur if there are insufficient benefits in the account to cover the transaction. The statement shall be printed on the paper voucher or on a separate sheet of paper. The State shall also provide notice to the household prior to the month when a benefit allotment is reduced when a representation is necessary. Notice shall be provided to the household for each insufficient transaction that is to be represented in a future month. The notice shall be provided prior to the month it occurs and shall state the amount of the reduction in the benefit allotment.

SUBCHAPTER 4. INACTIVE ACCOUNTS (AGING)

10:88-4.1 Overview

The Families First system shall terminate those Families First cash and food stamp accounts, as well as close AFDC and/or food stamp cases on FAMIS, which have not been accessed for at least 45 days. This process is called Aging. The Aging process is generally the same for AFDC and food stamp cases, with certain specific differences.

10:88-4.2 Aging of food stamp cases

(a) On or about the 13th day of each month, the Families First system shall identify those food stamp Families First accounts that have not been accessed by payees for more than one month.

1. The FSP-907A F-1 or F-1S (English and Spanish versions, respectively), Notices of Expiration of Certification Period, shall be mailed, forewarning the payee that his or her food stamp case shall have its certification period shortened unless the payee either uses his or her Families First food stamp benefits, or contacts the LWA to explain why the household has not used those benefits. The FSP-907A F-1/F-1S shall be received by the household at least 30 days prior to the end of the certification period.

2. If, after two consecutive months, the payee has not accessed his or her food stamp benefits, the LWA shall send a F-2 or F-2S (English and Spanish versions, respectively) final warning notice to the payee, reminding the payee that all Families First food stamp benefits shall be cancelled unless the payee either contacts the LWA, or accesses the Families First FS benefits.

3. The food stamp case shall be closed effective the first day of the following month.

4. Food stamp benefits shall be Aged from the Families First system on or about the 13th day after the food stamp certification period expires.

10:88-4.3 Aging of AFDC cases

(a) On or about the 13th day of each month, the Families First system shall identify those AFDC Families First accounts that have not been accessed by payees for more than one month.

1. A F-3 or F-3S (English and Spanish versions, respectively) warning notice shall be mailed, forewarning the payee that his or her AFDC case shall close unless the payee uses his or her Families First AFDC benefits.

2. If, after two consecutive months, the payee has not accessed his or her AFDC benefits, LWA shall issue a PA-15/PA-15S Adverse Action Notice to the payee, advising that all Families First AFDC benefits shall be removed if the payee does not access the Families First AFDC benefits.

3. The AFDC case shall be closed effective the first day of the following month.

4. The payee shall not be entitled to receive any Aged AFDC benefits once the AFDC case is closed due to Aging, which occurs on or about the 13th day after the AFDC case is closed.

10:88-4.4 Cancellation of the Aging process

Prior to the effective date of FAMIS case closure, if a payee contacts the LWA after receiving one of the notices at N.J.A.C. 10:88-4.2 or 4.3, the worker shall determine whether or not the closing of the public assistance case, as well as the Families First account, should be voided. If the termination actions are voided, the LWA shall take action to cancel the Aging process.

10:88-4.5 Obtaining Aged food stamp benefits

The household shall be entitled to receive Aged food stamp benefits for up to one year from the date the benefits were Aged (see N.J.A.C. 10:88-4.2(a)4). If the payee does not request replacement of those food stamp benefits within one year after the benefits were Aged, the benefits shall be expunged and reported back to FCS.

SUBCHAPOTER5. BENEFIT CONVERSION

10:88-5.1 Overview

Food stamp benefit conversion shall be limited to situations where the household is moving out of a county participating in the Families First Program to a non-Families First jurisdiction.

10:88-5.2 Moving into EBT jurisdiction

If a food stamp household moves from a non-Families First jurisdiction to a Families First jurisdiction, the household shall use any remaining food stamp coupons which were received in the previous jurisdiction at retailers in the Families First county.

10:88-5.3 Moving out Of EBT jurisdiction

(a) When a household moves out of a jurisdiction participating in Families First, the household's food stamp benefits shall be converted into benefits which shall be negotiable in the household's new place of residence.

(b) Cash benefits remaining in Families First accounts shall be accessible throughout New Jersey via MACtm ATMs, and thus will not require conversion to cash unless the family moves out-of-state. If the family is moving out of New Jersey, the LWA shall convert the family's Families First cash account balance into a cash payment.

(c) Within one business day of the date of notification to the LWA that a household is moving from a Families First county, the LWA shall cancel the household's Families First account using the client's Families First card, and convert any balance in the household's Families First food stamp account to an ATP, provided that the LWA maintains a coupon inventory on site. For LWAs which do not maintain coupon inventories on location, the conversion timeframe shall be three business days.

(d) CWAs shall ensure that a recipient has access to a location which shall transact the ATP into food stamp coupons.

10:88-5.4 Conversion restrictions

The payee shall not have the option of converting its Families First food stamp account to paper-based benefits merely to accommodate the household's convenience.

SUBCHAPTER 6. REPLACEMENT OF BENEFITS AND CARDS

10:88-6.1 Replacement of benefits

Cash and food stamp benefits shall not be replaced once they are posted to a household's Families First account. Benefits shall be replaced, however, if an ATM does not give the correct amount of cash, or a retailer overcharges the payee.

10:88-6.2 Replacement of lost/stolen EBT cards

Replacement Families First cards shall be made available no later than two business days from the date that the loss is reported to the LWA. Since payees, as part of the card replacement procedure, must visit the LWA's Card Issuance Site (CIS) in order to select a new PIN, it is critical that payees be referred to CIS in an expeditious manner.

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10:88-6.3 Forgotten PINs

Payees who forget their PINs shall not be required to obtain replacement cards, provided they possess their original cards. Such payees, however, shall be referred to the CIS within two business days to select new PINs.

SUBCHAPTER 7. REGULATION E DEMONSTRATION (HUDSON COUNTY ONLY)

10:88-7.1 Overview

The New Jersey Department of Human Services has entered into a cooperative agreement with the USDA and USDHHS whereby the Department of Agriculture shall conduct a demonstration program in Hudson County, New Jersey to evaluate the replacement of Families First public assistance benefits under the conditions of Regulation E (12 CFR 205) of the United States Federal Reserve System.

10:88-7.2 Demonstration timeframes

The Regulation E demonstration project shall be effective from March 1, 1995 to February 29, 1996. It is applicable to all Hudson County public assistance recipients who have a Families First account.

10:88-7.3 Purpose and scope

The Federal Reserve System's Board of Governors has determined that the protections which are afforded to individuals who possess and utilize electronic debit cards under the Federal Reserve System's Regulation E (Electronic Funds Transfer) are equally applicable to individuals who use EBT cards to access their public assistance benefits. For this demonstration only, the rules in this Subchapter supersede those which govern replacement of Families First benefits under N.J.A.C. 10:88-6.1. The procedures shall vary dependent upon whether the lost benefit is claimed to have occurred at a POS device (primarily food stamp, with some cash benefit transactions), or an ATM (cash benefits only).

10:88-7.4 Training

The Hudson County Division of Welfare (CWA) shall provide each recipient with important information about the care, use, and protection of the Families First card, including a specific Disclosure which outlines the recipient's liability for unauthorized transactions, as well as procedures for reporting unauthorized transactions.

10:88-7.5 Disclosure

Each household shall receive the Disclosure (see Appendix incorporated herein by reference) which identifies the household's rights and responsibilities related to the Families First Program, and unauthorized Families First transactions, including the applicable liabilities cited at N.J.A.C. 10:88-7.7.

10:88-7.6 Account statement

The recipient may request, at no cost and at any time, a statement which details the recipient's Families First account balances and transactions for the preceding 60 days. The recipient may obtain this statement by contacting the CWA or the Families First Help Desk.

10:88-7.7 Unauthorized transactions

A Families First transaction is unauthorized when it is conducted by a third party without "actual authority" from the recipient. This includes instances where the recipient was forced against the household's will to perform a transaction, or situations where a recipient relinquishes a Families First card while under duress. Unauthorized transactions do not include instances of fraud where the recipient acts alone or in concert with others. If a recipient is unwilling to prosecute an alleged offender, this and other factors may weigh against the recipient, causing the CWA to conclude that the transaction in question was actually authorized.

10:88-7.8 Recipient liability

(a) N.J.A.C. 10:88-7.8(b) through (f) establish the criteria for determining a recipient's liability for unauthorized Families First transactions committed by a third party using the recipient's valid card and PIN, but without permission from the recipient.

(b) When a recipient becomes aware that his or her Families First card is lost or stolen, or that an unauthorized transaction has occurred, the recipient is obligated to notify the Hudson CWA Investigative Unit or the Families First Help Desk immediately in order to limit liability.

1. If the recipient reports the lost/stolen Families First card within two business days of the date of the unauthorized transaction, liability is limited to actual transaction(s), but no more than $50.00. In other words, there is a $50.00 maximum liability in this situation.

2. If the recipient reports the loss or theft of his or her Families First card more than two, but less than 61 business days after the unauthorized transaction, the liability is limited to actual transaction(s), not exceeding $50.00 for the first two days and an additional $450.00 liability for errors reported anytime between day three through 60 after discovery. The total liability can be no greater than $500.00.

3. If the recipient reports the lost/stolen Families First card more than 60 business days of the date of the unauthorized transaction, liability is unlimited.

(c) If the recipient is unaware that his or her Families First card is lost or stolen or that an unauthorized transaction has occurred, and discovers an error from a terminal receipt, telephone inquiry or account statement, the recipient's liability is as follows:

1. Up to $50.00 within the first 60 days after transmittal of the account statement where the unauthorized transaction would have been apparent to the recipient. The amount of liability is limited to the lesser of actual transactions or $50.00 (within 60 days).

2. Liability is unlimited for transactions after the 60th day.

(d) Recipient liability can be limited ($50.00 or $500.00) or unlimited, or it can be both limited and unlimited. The type and amount of liability depend on factors related to discovery, error notification, and whether recipient had knowledge that his or her Families First card was lost or stolen.

(e) The 60-day time period shall be extended due to extenuating circumstances like illness or family emergencies.

(f) The recipient is not liable for system or misdispense-type errors.

10:88-7.9 Reporting of account losses

Recipients shall report any lost/stolen Families First card, or discrepancy in the recipient's Families First account to the Families First Help Desk as soon as the recipient becomes aware of it. The recipient shall ask for, and receive, a claim number which provides proof that the recipient contacted the Help Desk.

10:88-7.10 Methods of reporting loss

(a) Notification by the recipient should be provided by telephone to the Families First Help Desk. As an alternative, notification may be provided in person, by telephone, or in writing to the Hudson CWA Investigative Unit. However, for instances involving unauthorized use, the recipient is required to submit its claim in writing, and must complete a signed affidavit at the Hudson CWA within 10 business days of the loss. The written claim shall include the following:

1. Name, account or case number;
2. Belief that an error has occurred and the reason(s) for that belief, including date of discovery;
3. If a Families First card was lost or stolen, date this discovery took place;
4. Type(s) and amount(s) of error transaction;
5. Pertinent documentation to support the claim; and
6. The recipient's signature.

10:88-7.11 Recipient cooperation

(a) The recipient is required to cooperate with the CWA's investigation of the account loss. This includes submission of a written affidavit explaining the loss, cooperation in filing a police report related to the loss, and cooperation in other activities relevant to the investigation.

(b) When necessary, CWAs shall provide assistance to those recipients who may have difficulty in supplying either the written notice of loss, the affidavit, or the police report.

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10:88-7.12 CWA action on reported loss

The CWA's investigation time shall begin immediately upon the receipt of a claim of loss. Any claim of error which is reported by the recipient shall be investigated.

10:88-7.13 Action on claims from ATMs

(a) The CWA shall take the following action on claims arising from lost benefits from ATMs.

1. If the recipient reports a claim involving lost or stolen benefits orally, the CWA shall require a written verification of the claim, including a signed affidavit, within 10 working days after the oral claim is made. The filing of a police report shall also be required, but shall not otherwise impact the 10 business day initial investigation timeframe cited at (a)2 below. If the recipient fails to provide written verification within 10 business days of the date that the original request was filed, then the provisional credit may not be granted.

2. The CWA shall initiate, and attempt to complete, its investigation within 10 business days of the date that the recipient files his or her claim, which includes transmitting written investigation findings within 10 days.

3. During the initial investigation, the CWA shall review Families First transaction data, as well as other information, in order to ascertain whether consistency exists between the client's oral and/or written statements of loss, and Families First transaction records. If the initial investigation concludes that the recipient was aware that the Families First transaction was indeed authorized, then the CWA may deny the claim at that point. Written notification of claim denial shall be mailed to the recipient within three business days of the date of claim denial.

4. If additional time beyond the 10 days is needed to investigate the Families First claim, the recipient's cash account may be provisionally credited with the amount of the reported loss. After the initial 10 business days, the investigation shall not exceed 45 days.

i. The $50.00 or $500.00 minimum liability amount shall be deducted from the provisional credit if the claim involves a transaction by an unauthorized individual, as described at N.J.A.C. 10:88-7.7.

ii. Within two business days of posting a provisional credit to the recipient's account, written notification must be transmitted to the recipient advising of the provisional credit, and the ongoing investigation.

5. If it is determined that an error has occurred, the CWA shall take necessary corrective action within one business day, including sending the findings to the household.

10:88-7.14 Action on claims from POS devices

(a) The CWA shall take the following action on claims arising from lost benefits from POS devices.

1. If the recipient reports a claim involving lost or stolen benefits orally, the CWA shall request a written verification of the claim, including a signed affidavit, within 10 working days after the oral claim is made. The filing of a police report shall also be required, but shall not otherwise impact the 10 business day initial investigation timeframe cited at (a)2 below. If the recipient fails to provide written verification within 10 business days of the date that the request for a written claim is mailed to the recipient, then the claim shall be dismissed.

2. The CWA shall initiate, and attempt to complete, its investigation within 20 business days of the date that the recipient provides a signed affidavit, which includes transmitting written investigation findings within 20 days.

3. During the investigation, the CWA shall review Families First transaction data, as well as other information, in order to ascertain whether consistency exists between the client's oral and/or written statements of loss and Families First transaction records. If the investigation concludes that the recipient was aware that the Families First transaction was indeed authorized, then the CWA may deny the claim at that point. Written notification of claim denial shall be mailed to the recipient within three business days of the date of claim denial.

4. If additional time beyond the 20 days is needed to investigate the Families First claim, the recipient's cash or food stamp account, as appropriate, may be provisionally credited with the amount of the reported loss. After the initial 20 business days, the investigation shall not exceed 90 days.

i. The $50.00 or $500.00 minimum liability amount shall be deducted from the provisional credit if the claim involves a transaction by an unauthorized individual, as described at N.J.A.C. 10:88-7.7.

ii. Within two business days of posting a provisional credit to the recipient's account, written notification must be transmitted to the recipient advising of the provisional credit, and the ongoing investigation.

5. If it is determined that an error has occurred, it shall be corrected within one business day, including sending findings to the household.

10:88-7.15 Fair hearing on investigation finding

(a) A recipient who does not agree with a final claim loss investigation decision is entitled to request a fair hearing on the matter. All CWA correspondence with the recipient regarding the investigation decision shall describe how the recipient may request a fair hearing. This information shall be consistent with that used for fair hearings in the AFDC and Food Stamp Programs (N.J.A.C. 10:81-6 and N.J.A.C. 10:87-8, respectively). The fair hearing shall be requested within 10 days of the mailing date of the CWA's investigation decision.

(b) A recipient need not submit a written request to cancel a fair hearing involving a claim investigation finding. An oral request is satisfactory.

10:88-7.16 Provisional credits

While a claim error resolution is in progress, the recipient has full use of funds which are provisionally credited in accordance with N.J.A.C. 10:88-7.13(a)4 and 7.14(a)4. However, if the claim is subsequently denied, the recipient's account shall be subject to either AFDC or food stamp overissuance recoupment procedures (N.J.A.C. 10:82-2.19(a), or N.J.A.C. 10:87-11.26 and 11.29, respectively).

10:88-7.17 Recipient restrictions

(a) If a household files more than one loss claim involving ATM facilities within a 12-month period, the recipient's access to cash benefits shall be limited to POS devices which require personal contact, and those claims indicate that the household is having difficulty in transacting benefits, then the LWA shall determine whether designation of a representative payee is appropriate.

(b) If a loss claim is filed, and those claims indicate that the household is having difficulty in transacting benefits, then the CWA shall determine whether designation of a representative payee is appropriate.

(c) If a household's difficulty with performing Families First transactions places the household "at risk" because eviction or utility shutoff are imminent, the CWA shall have housing and other shelter costs paid through Restricted Payments (N.J.A.C. 10:81-4.5(c)).

(d) Households subject to restrictions shall received 21-day advance notice before being placed on such restrictions.

SUBCHAPTER 8. FISCAL PROCEDURES

10:88-8.1 Food stamp card replacement fees

Collected Families First card replacement fees are to be reported as a refund to the Administrative Account, specifically the Food Stamp Program.

10:88-8.2 Food stamp claims

(a) Households shall be allowed to repay recipient claims using Families First benefits as they are currently able to do with paper food coupons.

(b) Any payments made using Families First benefits should be reported on line 15 of the FNS-209, Status of Claims Against Households report.

(c) CWAs shall ensure that involuntary claims repayments are not deducted from Families First accounts.

(d) The CWA must secure and retain an FNS-135, Affidavit of Return or Exchange of Food Coupons, signed by the household.

(e) CWAs may offset Families First benefits which are about to be expunged against outstanding claims if the CWA is able to secure

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the household's written permission prior to expunging the benefits from the account. This collection would then be reported on line 15 of the FNS-209 report.

10:88-8.3 Aged Families First cash benefits

Aged Families First cash benefits shall be credited on the CWA's fiscal reports.

APPENDIX

HUDSON COUNTY FAMILIES FIRST DISCLOSURE

INTRODUCTION:

You live in an area that no longer delivers paper welfare checks or food stamp coupons. Instead, your monthly benefits are available electronically using a special plastic card that looks like a regular bank or credit card, and a secret code number called a PIN (Personal Identification Number). Plans are underway to begin using this type of system for delivering government benefits throughout the country. The general name for the type of benefit delivery system your area is using is Families First.

Using your card and PIN allows you to pay for food purchases in grocery stores without having to use food stamp coupons or pay cash, as long as you have funds remaining in your food stamp account. You can also use your card to pay for purchases or make withdrawals from your AFDC allowance using Point of Sale (POS) devices in certain stores or Automated Teller Machines (ATMs) operated by banks.

Additionally, your county has been chosen as a site to test out a system that provides you with some important new rights that were not available before.

This Families First Disclosure shall:

Provide you with information which explains these rights to you;

Discuss your responsibility to report problems or errors; and

Discuss lost benefits and how much certain kinds of losses might cost you.

In addition to this disclosure, you shall receive separate information which explains about how to use ATMs and POS terminals and shall provide you with safety and security measures when using the Families First system. All the information you receive is important. You should take the necessary time to read it and keep it in a safe place so that you can refer back to it later if a problem comes up and you don't remember what you are supposed to do.

The rights and responsibilities outlined in this Disclosure are effective in Hudson County March 1, 1995 through February 29, 1996.

DISCLOSURE CONTENTS:

This Disclosure contains important information about the care, use and protection of your Families First card. In particular, this Disclosure discusses:

PROTECTING YOUR FAMILIES FIRST CARD AND PIN:

Caring of your Families First card
Keeping your PIN a secret
Giving your card and PIN to others
Withdrawing your permission to use your card and PIN
Reporting a lost or stolen card immediately

YOUR RIGHTS IN THE FAMILIES FIRST SYSTEM:

Choosing your own PIN
Finding out your account balance
Requesting a written transaction history
Obtaining benefits without being charged a fee
Using the card without being charged/certain cash-back limitations
Using the card throughout the month
Obtaining a replacement card or PIN
Moving out of an Families First project area

REPORTING A LOST OR STOLEN CARD OR PIN:

When your card is lost or stolen
Reporting by phone
Reporting in writing
Getting a claim number
Filing a police report, assisting with prosecution

REPORTING OTHER KINDS OF ERRORS:

Problems with your Families First account
Reporting errors by phone
Reporting errors in writing

ACTIONS WE SHALL TAKE WHEN YOU REPORT A LOSS OR FILE A CLAIM:

Errors which are our fault
ATM errors/Temporary Credit
POS errors/Temporary Credit
Letting you know if your claim is denied
Letting you know if your claim is approved
Getting additional information about our procedures

WHEN WE MIGHT DISCLOSE INFORMATION ABOUT YOUR FAMILIES FIRST ACCOUNT:

Circumstances where we may provide information about your account to others

Throughout this disclosure we will often refer to "business day". When you see this, it means Monday through Friday between 8:30 A.M. and 4:30 P.M. but does not include State and County holidays.

PROTECTING YOUR FAMILIES FIRST CARD AND PIN

CARE OF YOUR FAMILIES FIRST CARD:

Always keep your card in a safe place. Do not let it come into contact with other bank or credit cards, electronic equipment like TV's or microwaves, or direct sunlight. Any of these things can damage the black magnetic strip on the back of the card so that it will no longer be "readable" by the POS or ATM device. If the magnetic strip does become damaged, you will need to request a new card.

KEEP YOUR PIN A SECRET:

Your Families First card shall only work with the personal identification number (PIN) that you chose. Your PIN is your own secret code and helps to prevent anyone else from getting your benefits, even if your Families First card is lost or stolen. Do not give your PIN to anyone, including your caseworker, a store employee, a bank employee, anyone you call to report a problem with your Families First account, or a family member (unless you want that person to be able to spend your benefits).

Try to memorize your PIN so that you won't need to write it down anywhere. If you do have to write it down, keep your card and PIN in separate locations. Do not write your PIN on the Families First card, or on the protective sleeve you keep the card in, or on anything else you keep near your card.

GIVING YOUR CARD AND PIN TO ANOTHER PERSON, FRIEND OR RELATIVE:

If you willingly give someone else both your card and your PIN and they take some or all of your benefits without your permission, we shall not replace any of the benefits that were taken. This means, for example, that if you provide your card and PIN to a neighbor to purchase some groceries for you and the neighbor not only buys the items you requested but also pays for his or her own purchases with your card, we shall not replace the benefits you lost because of your neighbor's action.

WITHDRAWING YOUR PERMISSION TO USE YOUR CARD AND PIN:

If there is someone in your household who moves or if you no longer want someone to be able to use your card, you should call the Customer Service Help Desk immediately at 1-800-264-6589. Once you call, we will place a hold on your Families First account so that no one else can withdraw your benefits. We will also make arrangements to get you a new PIN within two business days so you will be able to get your benefits. If we fail to act when you tell us that a friend or relative no longer has permission to use your card and, if benefits are taken without your permission, we will replace any benefits that are lost.

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REPORTING A LOST OR STOLEN CARD IMMEDIATELY:

Even though your Families First card cannot be used without your PIN, you should report a lost or stolen card as soon as you discover the loss. To report that your card is missing, call the Customer Service Help Desk immediately at 1-800-264-6589. Only by calling this number can we place an immediate hold on your account so that no one else can try to get to your benefits.

YOUR RIGHTS IN THE FAMILIES FIRST SYSTEM

YOU HAVE THE RIGHT TO CHOOSE YOUR OWN PIN:

Your PIN is your own secret code for using your Families First card. You have the right to pick out whatever set of four numbers you want to have as your PIN.

YOU HAVE THE RIGHT TO FIND OUT YOUR ACCOUNT BALANCE:

If you want to find out how many benefits are left in your Families First account (your "account balance"), you can call the Balance Hotline at 1-800-997-3333. Your receipt, which is provided after you conduct a transaction, may also provide you with a balance. See your training material for an explanation on other ways to obtain your balance.

YOU HAVE THE RIGHT TO RECEIVE A RECEIPT WHENEVER YOU USE YOUR FAMILIES FIRST CARD:

You should receive a printed receipt each time you use your Families First card at an ATM or a POS machine. The receipt should include the following information:

The date of the transaction;

Some identification of where the transaction took place; and

The type and amount of the transaction.

The receipt may also show the balance left in your account after the transaction.

Keep your receipts for at least a month. This will help you to keep track of your remaining balance and may also tell you if an error has occurred.

YOU HAVE THE RIGHT TO REQUEST A WRITTEN TRANSACTION HISTORY:

If you need a more complete record about your Families First account, or if you think there may be an error, you can call the Customer Service Help Desk number (1-800-264-6589) and ask for a transaction history for your account. This is a written record of all the activity on your Families First account for the last 60 days. The transaction history will show the dates and amounts of each deposit we made into your account during this period. It will also provide a complete record of each withdrawal, including the date, amount, type of transaction (cash or food stamps), and a location of where each transaction was made.

YOU HAVE THE RIGHT TO USE THE FAMILIES FIRST SYSTEM WITHOUT BEING CHARGED ANY FEES/CERTAIN CASH-BACK LIMITATIONS AT POS:

This means you can use your card to get cash from any participating ATM or POS device for free. You can also use your card at a POS machine to pay for food purchases in a participating grocery store. If you want to make a cash withdrawal using a POS device, the store has to pay you the full amount you request in cash and you cannot be required to take a store credit or coupon for part of the amount you want. If a store violates these rights, you should contact us at 1-800-264-6589 so that we can take appropriate steps to correct the problem.

Stores are permitted to set limits on whether they will let you make cash withdrawals using their POS device. They can also limit the amount of cash they will let you withdraw at one time and the number of cash withdrawals they will let you make in a month. You should have received a list of the stores in your area that allow cash withdrawals and any limits that apply.

YOU HAVE THE RIGHT TO USE YOUR FAMILIES FIRST CARD THROUGHOUT THE MONTH:

You have the right to use your Families First card as many times as you want to get cash from an ATM or a POS device or to pay for food purchases using your card. This means that you do not have to spend all your food stamp benefits or withdraw all your cash benefits at the beginning of the month. You can decide when to withdraw your benefits and you can spread your withdrawals out over the whole month. You can even choose to leave some of your benefits in your account from month to month.

When using your food stamp benefits, stores cannot require you to purchase any minimum amount of items in order to use your Families First card. They also cannot limit the number of food stamp purchases you can make in a month with your Families First card. But, you cannot make a purchase which is greater than your available food stamp balance.

YOU HAVE THE RIGHT TO GET A REPLACEMENT CARD OR PIN WITHIN TWO BUSINESS DAYS:

If you report to us that your card has been lost, stolen, or damaged, we will place a hold on your account so that no one else can withdraw your benefits.

In addition, we will refer you to the card issuance site so you can obtain a new card within two business days of receiving your report.

If your card is lost or stolen we will not charge you a fee to replace it.

If you report to us that you cannot remember your PIN or need to change your PIN for any reason, we will explain how to choose a new PIN.

YOU HAVE THE RIGHT TO CHANGE YOUR FOOD STAMP FAMILIES FIRST BENEFITS TO FOOD STAMP COUPONS IF YOU ARE LEAVING THE FAMILIES FIRST PROJECT AREA:

If you move out of Hudson County into a county which does not now use the Families First SYSTEM to provide benefits, you must contact your Hudson County caseworker to request that any remaining Food Stamp benefits be changed to the paper system. This will allow you to use your Food Stamp benefits in the county where you will be living. Your Families First Food Stamp account will be closed and your Food Stamp benefits changed within three days of the date you notified your caseworker. Your Families First AFDC account will not be changed since you can use ATMs throughout New Jersey to get your benefits.

REPORTING A LOST OR STOLEN CARD OR PIN:

If your Families First card is lost or stolen, you should report the loss or theft immediately by calling the Customer Service Help Desk at 1-800-264-6589 so that we can cancel your card. Contacting us quickly can reduce the chances of someone using your card and getting to your benefits. The Help Desk is open seven days a week, 24 hours a day. Make sure you report a lost or stolen card right away.

If we do cancel your card, we will tell you how to get a replacement card within two business days. If any benefits are taken from your account after you have reported the loss or theft of your card to us, we will replace them.

WHEN YOU KNOW THAT YOUR CARD OR PIN IS LOST OR STOLEN:

If you report the loss or theft of your card or PIN within two business days, we may replace all the benefits taken from your account before you reported the problem, except for the first $50.00. This means you would not lose more than $50.00, even if more than $50.00 in benefits were taken from your Families First account. It also means that if the loss is less than $50.00, we will not replace any of the lost benefits.

If you wait more than two business days to tell us about the loss or theft, and we can show you could have stopped someone from using your Card and/or PIN if you had notified us, you could lose

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up to a maximum of $500.00 in benefits. This means that if all your benefits were stolen before you reported the problem to us, we would not replace the first $500.00 lost.

Remember, it is very important to report the loss or theft of your Card or PIN right away. If you wait and tell us after 60 days, no benefits will be replaced.

WHEN YOU BELIEVE YOUR CARD/PIN IS SAFE:

If it seems that your card/PIN is safe, but you discover that benefits are missing from your account when you check your balance, look at a transaction receipt, or review a written account history, you must report the loss to us within 60 days of discovering it. If you do not report the error to us within 60 days, and we can show that you should have been aware of the error, we may not replace any of the missing benefits.

If you report the loss to us within 60 days, we may replace:

All of the benefits that you lost, or

All benefits except for the first $50.00 if we can show that your card and/or your PIN was used and your permission has never been granted. If you are liable for the first $50.00, it means that if the loss is less than $50.00, we will not replace any of the lost benefits.

If you report the error within 60 days and we find that the use of your card and/or your PIN was involved without your knowledge and your permission has never been granted, you may be asked to file a police report and assist us in prosecuting the person who took your benefits. Failing to file a police report and/or assist with the prosecution of the person who took your benefits, could affect your claim.

The time periods for reporting errors may be extended if you need more time due to illness or some other emergency.

REPORTING A LOST OR STOLEN CARD OR STOLEN BENEFITS BY PHONE:

Call the Customer Service Help Desk at 1-800-264-6589. The Help Desk is open seven days a week, 24 hours a day. When you report errors by telephone, you will receive a claim number and will be advised that you must provide a written claim to us within 10 business days. You will be asked to report to the Investigative Unit, located at the Hudson County Division of Welfare, 100 Newkirk Street, Room 205, Jersey City where an Investigator will obtain some information from you and assist you with the written statement.

REPORTING LOST OR STOLEN CARD OR LOST BENEFITS IN WRITING:

The Customer Service Help Desk is the easiest and fastest way to contact us and protect any remaining benefits in your account. However, if you are unable to call the Help Desk, you must still provide us with a written statement within 10 business days. The statement must be mailed to:

Investigative Unit
Hudson County Division of Welfare
Newkirk Street
Room 205
Jersey City, New Jersey 07306

Your written report should include:

Your name, address and case number;

Why you think there is an error and if you think it is because of lost or stolen benefits;

When (the date) you found out about the error and how you found out about it (by receipt, balance inquiry, lost card, and so forth);

Where did the problem occur (at an ATM or POS); and

How many benefits you think are missing from your account or if you need more information to figure out how many benefits are missing.

You should ask us for help in preparing a written statement if you need assistance. If you need to speak with someone in the Investigative Unit, the telephone number is (201) 420-3219.

REMEMBER: A LOST OR STOLEN CARD AND/OR LOST BENEFITS MUST BE REPORTED TO US WITHIN 60 DAYS FROM THE DATE YOU DISCOVER THE LOST OR STOLEN CARD AND/OR LOST BENEFITS.

But remember, if your card needs to be cancelled, please call the Customer Service Help Desk immediately at 1-800-264-6589 and if necessary, follow any additional instructions to have your card cancelled.

GETTING A CLAIM NUMBER:

When you report a lost or stolen card/benefits to a Customer Service Help Desk operator or you provide your report in person, be sure that we provide you with a claim number. Getting a claim number is very important as this is your proof that you filed a report. For greater protection, it is a good idea to ask for and keep our operator's name when you file your claim.

FILING A POLICE REPORT AND ASSISTING WITH PROSECUTION:

If your benefits have been stolen, you will be expected to file a police report and help us with the prosecution of the person who took your benefits even if this person happens to be a friend, relative or stranger.

If benefits have been stolen, a written claim must be filed and you will be expected to visit one of the investigators in the Hudson County Investigative Unit in order to complete your claim. The Investigator will assist you in preparing a written statement.

REPORTING OTHER KINDS OF ERRORS

WHAT TO DO IF THERE ARE PROBLEMS WITH YOUR FAMILIES FIRST ACCOUNT:

Problems (also known as errors) can happen for different reasons. For example: After making a purchase, you may later discover that a merchant accidentally overcharged you; or

We could make a mistake and cause you to lose benefits; or

An ATM may not give you the correct amount of cash.

REPORTING ERRORS BY PHONE:

If you determine that an error has been made, call the Customer Service Help Desk at 1-800-264-6589. The Help Desk is open seven days a week, 24 hours a day.

REPORTING ERRORS IN WRITING:

The Customer Service Help Desk is the easiest and fastest way to contact us and protect any remaining benefits in your account. However, if you are unable to call the Help Desk, you must still provide us with a written statement within 10 business days. The statement must be mailed to:

Investigative Unit
Hudson County Division of Welfare
Newkirk Street
Room 205
Jersey City, New Jersey 07306

Your written statement should include:

Your name, address and case number;

Why you think there is an error and if you think it is because of lost or stolen benefits;

When (the date) you found out about the error and how you found out about it (by receipt, balance inquiry, lost card, and so forth);

Where did the problem occur (at an ATM or POS); and

How many benefits you think are missing from your account or if you need more information to figure out how many benefits are missing.

If you need assistance in preparing a written statement, call the Hudson County Investigative Unit at (201) 420-3219.

ERRORS MUST BE REPORTED TO US WITHIN 60 DAYS FROM THE DATE YOU DISCOVER THE ERROR.

ACTIONS WE WILL TAKE WHEN YOU REPORT AN ERROR OR FILE A CLAIM

If you report that benefits are missing from your account, here are some actions that we may take including providing you with a temporary credit, letting you know if your claim was approved or denied, and our deadlines for acting on and deciding your claim.

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ERRORS WHICH ARE CAUSED BY US:

If we fail to make a payment into your account or your benefits are not made available on the scheduled date, you will not be charged or penalized in any way. You should contact the Customer Service Help Desk immediately at 1-800-264-6589 to report the mistake. If we find that the error is our mistake, we will put the benefits you are owed into your account within one business day. If we find that payment to your account has not yet been authorized, we will advise you to contact your caseworker at the Hudson County Division of Welfare.

ATM ERRORS:

We will usually take no more than 10 business days to finish our investigation and make any necessary adjustments to your account. If our investigation takes longer we will give you a temporary credit if you have cooperated and you have provided us with a written report of your claim. This means we will pay into your account all benefits which are missing or all benefits except for the first $50.00. After 10 business days, our investigation cannot take more than 45 days.

POS ERRORS:

We will usually take no more than 20 business days to finish our investigation. If our investigation takes longer we will give you a temporary credit if you have cooperated and you have provided us with a written report of your claim. This means we will pay into your account all benefits which are missing or all benefits except for the first $50.00. After 20 business days, our investigation cannot take more than 90 days.

LETTING YOU KNOW WHEN YOUR CLAIM IS DENIED:

If we turn down or deny your claim, we will contact you or mail our results to you within three business days after we complete our investigation. If we gave you a temporary credit and your claim is denied, we will treat the temporary credit as an overpayment and will take steps to get back the funds we paid into your account to which you are not entitled. If you disagree with our final decision, you may request a fair hearing.

YOU HAVE THE RIGHT TO RECEIVE INFORMATION THAT WE USE TO INVESTIGATE ANY CLAIM OF A LOST OR STOLEN CARD AND/OR LOST OR STOLEN BENEFITS THAT YOU FILE:

By making your request through the Hudson County Investigative Unit copies of records used to investigate your claim will be provided to you.

YOU HAVE THE RIGHT TO APPEAL OUR DECISION IF WE DENY YOUR ERROR CLAIM:

If you file a claim and we deny your claim, you have the right to request a fair hearing. You can request a hearing by writing to either the:

Hudson County Welfare Agency
Fair Hearing Unit
Newkirk Street—7th Floor
Jersey City, New Jersey 07306
or
New Jersey Division of Family Development
CN 716
Trenton, New Jersey 08625

You may also call the County Welfare Agency at (201) 420-3129 to request a fair hearing.

You must request a fair hearing within 10 days of the mailing date of our final decision. If you need more information about the way we investigate errors, you can call the Hudson County Investigative Unit at (201) 420-3219.

LETTING YOU KNOW WHEN YOUR CLAIM IS APPROVED:

If we find that your claim is correct, we will contact you or mail our results to you and fix the error within one business day after we finish our investigation. If we gave you a temporary credit and we agree with your claim, the credit will become final.

PROVIDING YOU WITH ADDITIONAL INFORMATION ABOUT OUR INVESTIGATION PROCEDURES:

If you need more information about our error claim procedures, you can call us at the Hudson County Investigative Unit at (201) 420-3219.

WHEN WE MIGHT DISCLOSE INFORMATION ABOUT YOUR FAMILIES FIRST ACCOUNT TO OTHERS:

In general, information about your Families First account is kept secret or confidential. Only under special circumstances will we provide information about your account to persons not directly involved in handling the account. The types of circumstances under which information would be released include:

When the information is necessary for completing your purchase or withdrawal;

When the information is necessary to prove to a merchant that your account is real and active;

When we are required by Federal, State, or local law to provide it for investigative or review purposes;

When we are required by court order to provide it;

When the information is needed to help resolve an error claim; or

When you give us written permission to release the information.

(a)

DIVISION OF YOUTH AND FAMILY SERVICES

Adoptions

Proposed Readoption: N.J.A.C. 10:121

Authorized By: William Waldman, Commissioner, Department of Human Services.

Authority: N.J.S.A. 30:4C-45 through 49, 30:4C-31 and 9:23-5, and P.L. 96-272.

Proposal Number: PRN 1995-183.

Submit written comments by April 19, 1995 to:

Mary Lou Sweeney
Central Office Adoption Unit
Division of Youth and Family Services
CN 717
Trenton, New Jersey 08625

The agency proposal follows:

Summary

These rules are due to expire pursuant to Executive Order No. 66 (1978) on July 16, 1995. The New Jersey Division of Youth and Family Services proposes readoption without amendment of these rules in order for them to remain in effect. The Division has reviewed the rules and has found them appropriate for the purpose for which they were originally promulgated.

N.J.A.C. 10:121-1 continues to allow the Division of Youth and Family Services to require the out-of-State adoption agencies with which they deal to meet minimum basic standards of practice, and also retain responsibility for any child placed in New Jersey, until the adoption is finalized or the child is removed from New Jersey. Approval of an out-of-State agency under these rules permits that agency to place a child for adoption in New Jersey through the cooperative services of an agency licensed under the laws of this State to practice in New Jersey. It also permits such out-of-State agency to consent to the adoption in a New Jersey court. Such approval does not empower the out-of-State agency to provide direct adoption services in New Jersey. With the enactment of N.J.S.A. 9:23-5, on January 12, 1990, New Jersey became a member of the Interstate Compact on the Placement of Children. This statute does not require any changes to be made to the existing criteria or practices already in place governing the placement of out-of-State children for adoption in New Jersey.

N.J.A.C. 10:121-2 enables the Division to continue supporting the opportunity to achieve adoption for its most difficult to place children. The New Jersey Subsidized Adoption Law (N.J.S.A. 30:4C-45 through 49) became effective on June 13, 1973. The purpose of the law is to encourage the adoption of hard-to-place children, who might otherwise remain within the foster care system. The subsidy program offers a

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number of benefits to families adopting eligible children. These include a monthly maintenance payment, medical coverage for the child through the Medicaid program, payment of legal fees to finalize the adoption and the provision of agreed upon special services needed by the child. On January 17, 1984, Governor Thomas H. Kean signed into law amendments to the Subsidy statute which liberalized the program. N.J.A.C. 10:121-2 was amended to implement the statutory changes and this is continued under the proposed readoption.

N.J.A.C. 121-3 contains the fee schedules used to charge prospective adoptive applicants when the Division is appointed by a court of appropriate jurisdiction to conduct adoption complaint investigations.

N.J.A.C. 121-4 deals with the release of criminal history record information in cases of suspected child abuse or neglect.

N.J.A.C. 121-5 gives the availability of medical information forms.

Social Impact

The rules proposed for readoption will continue to protect adoptive children placed into New Jersey from being placed in inappropriate situations and/or ones in which no person or organization has clear legal responsibility for his or her care or maintenance.

The Division's primary goal for all children who cannot return to their biological parents due to the inability of these people to properly parent them is to secure permanent families for them. Most frequently this is accomplished through adoption. The adoption subsidy program assists in achieving this desirable goal by providing financial and medical assistance to children who would be unlikely to achieve adoption without such help. During calendar year 1993, 596 children were placed for adoption with subsidy.

Economic Impact

No economic impact is anticipated from N.J.A.C. 10:121-1, as financial responsibility remains with out-of-State agency and there currently is an office within the Department of Human Services, Division of Youth and Family Services, which administers activities involved in placement of dependent children across state lines.

The Adoption Subsidy Program results in a cost savings to the Division. Although payments to adoptive parents through subsidy continue in the same amount as the payments that were made for the child while in foster care, administrative costs of supervising the child are ended once the adoption is finalized.

N.J.A.C. 10:121-3.2 contains the fees to be charged to prospective adoptive parents when adoption complaint investigations are performed by the Division. Payment schedules and adjustments to the fees are made by the Division in those instances where there is financial hardship.

Executive Order No. 27 Analysis

The Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272, established a program of Federal Financial Participation to encourage adoptions of children with special needs, and encourage support for the family. Under this program, Federal Financial Participation is available for a child with "special needs" who is eligible for SSI or AFDC under Title IV-E. The Division has administered a State subsidy program since June 13, 1973, when the New Jersey Legislature enacted N.J.S.A. 30:4C-45 through 49. Following the passage of P.L. 96-272, the Division adjusted its existing program as necessary in order to comply with the regulations implementing P.L. 96-272, so as to qualify for reimbursement from the Federal government for those children who are Title IV-E eligible. The Division continues its totally State-funded subsidy program for those children meeting the hard-to-place criteria, who are not Title IV-E eligible. This carries out the mandate of N.J.S.A. 30:4C-45 through 49 and insures that all special needs children have the potential to benefit from a permanent adoptive family regardless of their Title IV-E status. If the State-funded subsidy program were not available, the majority of these children would remain in the foster care system, to the detriment of their emotional well-being and at an increased expense to the State. Not only would all of the direct costs paid through subsidy be incurred by the Division while the children are in foster care, but the administrative costs which arise from the supervision of these children in their foster homes would have to be assumed by the State as well. In addition, most children who are adopted are provided with a familial support system which assists them emotionally and financially after they reach 18 and are no longer eligible for subsidy. In contrast, most children with special needs, who age out of the foster care system, seek out assistance from the public service delivery system at an additional expense to the State. The provision of the State subsidy program is neither administratively or financially onerous, as it utilizes the same technology as the Federal Title IV-E program.

Regulatory Flexibility Analysis

Adoption subsidy is available for the hard-to-place child under the care of New Jersey private agencies certified to practice adoption pursuant to State adoption law (N.J.S.A. 9:3-37). In order to be certified by the Division's Bureau of Licensing, these agencies must meet the requirements for certification as contained in N.J.A.C. 120:121A. There are currently 38 such agencies located in New Jersey.

No additional compliance requirements are imposed on these agencies through the adoption subsidy program. The private agency must, however, process the necessary paperwork with the adoptive parents who will receive an adoption subsidy for the private agency child. The forms required by the Division include the Application for Subsidized Adoption Payments (DYFS 14-182), Determination of Eligibility for Subsidy (DYFS 14-183) and the Agreement Between the New Jersey Division of Youth and Family Services and Adoptive Parents Regarding Subsidy Payments (DYFS 14-184).

The adoption subsidy program does not result in any adverse economic impact on the private sector. In fact, it impacts on the agencies positively, by having the Division assume some of the costs for servicing the hard-to-place child.

Full text of the proposed readoption may be found in the New Jersey Administrative Code at N.J.A.C. 10:121.

(a)

DIVISION OF YOUTH AND FAMILY SERVICES

Social Services Program for Individuals and Families

Proposed Readoption: N.J.A.C. 10:123

Authorized By: William Waldman, Commissioner, Department of Human Services.

Authority: N.J.S.A. 30:1-12.

Proposal Number: PRN 1995-184.

Submit written comments by April 19, 1995 to:

Steve Valli
Supervisor, Standards and Procedures
Office of Intergovernmental Affairs
50 East State Street
CN 717
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The Division of Youth and Family Services proposes the readoption of N.J.A.C. 10:123 pursuant to Executive Order No. 66(1978). Unless readopted, the chapter will expire July 13, 1995.

The rules proposed for readoption delineate the policy for receipt of Social Services Block Grant (SSBG) funds and direct the county welfare agencies to provide social services to Supplemental Security Income (SSI) recipients and other aged, blind or disabled persons residing in licensed sheltered boarding homes and rooming and boarding houses. These social services include, but are not limited to, complaint investigation, coordination and follow-up and the provision of information. The rules proposed for readoption also provide for the allocation and distribution of the personal needs allowance for eligible residents of residential health care facilities and boarding homes, and also state the eligibility schedule for social services provided to individuals and families by the county welfare agencies.

The rules proposed for readoption also reestablish policy and procedures for the Division of Youth and Family Services and the county welfare agencies to follow in the ongoing implementation of the Rooming and Boarding House Act (Act) of 1979, P.L. 1979, c.496 (N.J.S.A. 30:1A and 30:11A). In this Act, the Division of Youth and Family Services is responsible for maintaining a Central Registry of abuse, exploitation, unsafe conditions and unsanitary conditions in rooming houses, boarding houses and residential health care facilities and providing statistical data based on Central Registry cases and follow-up on these cases to assure that remedial action has been taken. The Division is also responsible for setting standards, policy and procedures for services to residents and monitoring services provided by county welfare agencies to eligible residents. The Division is assigned responsibility for maintaining a 24-hour toll-free hotline to receive complaints of abuse and exploitation and for referring these reports to the county welfare offices for investigation and

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follow-up. In order to implement this Act, the Division is charged with publicizing the services available through the county welfare agencies.

Also in this Act, the county welfare agencies are assigned various responsibilities, including, but not limited to, the investigation of complaints involving residents, the provision of services to eligible residents, the coordination of services provided by various state and local agencies, and assisting and visiting facilities on a regular basis. Standards for these responsibilities are included in N.J.A.C. 10:123, which restates the county welfare agency's right to full and free access to all facilities (rooming house, boarding house, and residential health care facilities) as authorized by the Rooming and Boarding House Act. Also included in these rules is an immunity from liability provision for persons making complaints about facilities and a statement that such complaints are confidential.

The Rooming and Boarding House Act gives responsibility to the Department of Community Affairs to establish standards governing safety, security, recordkeeping, living conditions and services in training and boarding houses, issuing and revoking licenses, inspecting facilities and enforcing these standards. Also under the Act, the Department of Health has the responsibility to adopt, promulgate and enforce similar standards for residential health care facilities. The responsibilities of the Division of Youth and Family Services and the county welfare agencies under these rules proposed for readoption are limited to the areas of service provision and abuse and exploitation investigations.

Further, this chapter contains the provisions governing the personal needs allowance, to be reserved by owners and operators of residential health care facilities and boarding homes, for the use of Supplemental Social Security Income (SSI) or General Public Assistance recipient residents. The personal needs allowance is adjusted yearly through public notice in the New Jersey Register, based on the total annual Federal cost of living increase in the Supplemental Security Income rate. Currently, the personal needs allowance for 1995 is $68.50.

Lastly, this chapter gives the financial eligibility standards for invididuals and families for social services provided by the county welfare agencies and funded through the Social Services Block Grant Program.

Subchapter 1 details the purpose, scope and the agreement of the Department of Human Services to comply with the Social Services Block Grant (SSBG) provisions.

Subchapter 2 describes the responsibility of the Division of Youth and Family Services and the county welfare agencies regarding boarding homes.

Subchapter 3 sets forth the standards for the personal needs allowances for certain residents of residential health care facilities and boarding homes.

Subchapter 4 includes the income eligibility schedule for social services for individuals and families.

Social Impact

Subchapter 1 of the rules proposed for readoption states the availability of the Social Services Block Grant Annual Pre-Expenditure Report from the Department of Human Services.

The Social Services Block Grant Pre-Expenditure Report, which is submitted annually to the Federal government, sets general goals for a wide variety of human services, particularly supportive social services, in a number of areas including boarding homes. The report also identifies target populations for Social Service Block Grant services. Such target populations as they apply to rooming house, boarding home and residential health care facility residents currently fall into three categories: residents needing protection and/or information and referral services which are available without regard to income, Supplemental Security Income recipients and single individuals with an annual income of $15,000 or less. The availability of this report and the Division's compliance will benefit the clients by allowing them continued receipt of Federal funds for programs which benefit them.

The readoption of N.J.A.C. 10:123-2 will continue to assure the offering of social services to vulnerable adults living in rooming houses, boarding houses, and residential health care facilities, including the prompt investigation of complaints concerning the treatment and well being of residents in these faciliteis.

The readoption of the personal needs allowance, N.J.A.C. 10:123-3, will have a beneficial impact on residents in that it allows residents who rely on Supplemental Security Income or General Public Assistance to maintain their spending power in equilibrium with the cost of living. The personal needs allowance will continue to be used at the residents' discretion to purchase clothing and incidentals which the residential health care faclities and boarding homes do not provide. Many residents of boarding home and residential health care facilities are frail, elderly or disabled and often lack the knowledge or the means to seek out needed services. The outreach to the clients by the county welfare agencies and the provision of information and referral, case management, transportation, recreation and other services funded under Social Service Block Grant monies and other services assure the health and well being of vulnerable residents. No negative social effects upon the public are anticipated from this proposed readoption. To the contrary, residents, family members and facility operators and concerned individuals usually feel that there is a positive social effect achieved when residents are receiving needed services.

The use of the financial schedule in subchapter 4 for individuals and families assures that services such as homemaker or transportation are available on an equitable basis to financially needy individuals even when they are not supported by Aid to Families with Dependent Children or Supplemental Security Income.

Provision of such services will allow individuals who are employed to maintain their employment while their social service needs are met through Social Services Block Grant funding.

Economic Impact

In State fiscal year 1995 (July 1, 1994 through June 30, 1995), New Jersey plans to expend $85,680,152 in Federal funds under its total SSBG program.

Of the total sum, approximately $23,539,298 in SSBG funds goes to the county welfare boards for family preservation, adult services and boarding home social services programs.

These rules proposed for readoption impose no economic impact on rooming houses, boarding homes and residential health care facilities. Facilities are primarily required to provide access to and cooperate with county welfare agency staff who offer services and investigate complaints of abuse and exploitation and to disburse the personal needs allowance.

The economic impact on the residents, their families and concerned citizens will be positive, in the receipt of services and in the receipt of the personal needs allowance.

During the last five years, the Federal Supplemental Security Income (SSI) has increased in accordance with Federal cost of living adjustments (COLA). The personal needs allowance has also increased each year in keeping with the Federal increase in the SSI. The New Jersey supplement to the SSI for boarding homes ($31.25) and for residential health care facilities ($150.05) has remained constant throughout this period.

Executive Order No. 27 Statement

The proposed rules are not subject to Federal standards or requirements, and a Federal exceedance analysis is not applicable to the rulemaking.

Regulatory Flexibility Statement

Although more than 90 percent of the over 1,700 residential health care facility and rooming and boarding home operators are small businesses, as such are defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the recordkeeping and reporting responsibilities imposed by these rules fall on the Division or on the county welfare agencies, and the Regulatory Flexibility Act does not apply in these instances.

The proposed readoption does not, in and of itself, impose any recordkeeping, reporting or compliance requirements on boarding home and residential health care facility operators or require any capital expenditures or professional services. However, the approximately 700 boarding home and residential health care facility operators will have to continue to disburse the personal needs allowance to eligible residents in compliance with rules of the Department of Community Affairs, N.J.A.C. 5:27-11.3 through 11.5, and the rules of the Department of Health, N.J.A.C. 8:43-4.7 and 4.13.

It is also within the purview of the Departments of Community Affairs and Health and local inspectors to set staffing levels, recordkeeping standards and fire and safety requirements and to require construction modifications for residential health care facilities, rooming houses and boarding homes.

Full text of the proposed readoption may be found in the New Jersey Administrative Code at N.J.A.C. 10:123.

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(a)

DIVISION OF YOUTH AND FAMILY SERVICES

Child Abuse and Neglect Cases

Proposed Readoption with Amendments: N.J.A.C. 10:129

Authorized By: William Waldman, Commissioner, Department of Human Services.

Authority: N.J.S.A. 9:6-8.36(a), 9:6-8.10a, 9:6-8.15, 30:1-12, 30:4C-4, 9:6-1, 9:6-8.9, 9:6-8.21, 42 U.S.C.A. §5101 et seq., and 45 CFR 1340 et seq.

Proposal Number: PRN 1995-185.

Submit written comments by April 19, 1995 to:
Barbara Kraeger
Operational Policy and Manual Unit
Division of Youth and Family Services
CN 717
Trenton, New Jersey 08625

The agency proposal follows:

Summary

Pursuant to Executive Order No. 66(1978), N.J.A.C. 10:129 will expire July 13, 1995. These rules serve the purpose of implementing and complying with State law, Federal law and Federal regulations.

Subchapter 1, Policy Concerning the Referral and Investigation of Child Abuse and Neglect Cases, implements N.J.S.A. 9:6-8.36a pertaining to the Division of Youth and Family Services reporting suspected child abuse and neglect cases to the county prosecutor as soon as a child is identified as a victim of suspected child abuse or neglect. Subchapter 1 was developed with the county prosecutors in 1979 and adopted October 9, 1979. The rules have not been changed since that time. The Division proposes two technical changes to Subchapter 1.

While Subchapter 1 imposes duties only on the Division and the county prosecutor's office, it informs the public of when the Division refers cases to the county prosecutor for initial investigation and possible criminal prosecution. The readoption of Subchapter 1 insures that the Division makes referrals to the county prosecutor in an appropriate and timely manner.

Subchapter 2 contains rules necessary for the Division to remain in compliance with 42 U.S.C.A. 5106a(b)(4).

The Division proposes to remove "of 1974" from the title of Subchapter 2 as the act is now known as the Child Abuse Prevention and Treatment Act.

N.J.A.C. 10:129-2.1 states the Division's policy on confidentiality of the Division's child abuse and neglect records. These rules are based on and explicate N.J.S.A. 9:6-8.10a. The Division proposes amending the rules to include the recent statutory amendment to N.J.S.A. 9:6-8.10a, to permit release of certain records and reports to a family day care sponsoring organization. No amendments have been made since the rules were originally adopted June 21, 1985.

In addition, the Division proposes several technical changes to N.J.A.C. 10:129-2.1(c). These changes make this subsection an exact match with N.J.S.A. 9:6-8.10a(b).

These rules continue to be necessary to assure the public that the Division operates with strict standards of confidentiality in compliance with State and Federal laws.

N.J.S.A. 10:129-2.2 defines the terms "sexual abuse" and "child." These definitions are necessary to explain the terms as used in Title 9 of the New Jersey Statutes and to keep New Jersey's definitions in accordance with Section 102(3) of P.L. 98-457 and 45 CFR 1340.14(b). The definition of sexual abuse is similar to the one contained in 42 U.S.C.A. §5106g(7). N.J.A.C. 10:129-2.2 was adopted December 24, 1985 and has not been amended since adoption. Readoption is necessary to keep the Division in compliance with Federal statutes and to clarify for the public and the courts what sexual abuse is.

Social Impact

The readoption of this chapter assures the public that cases of suspected child abuse and neglect are referred in a timely manner to the county prosecutor for possible criminal prosecution. In addition, these rules inform the public of the Division's confidentiality policy related to reports of and findings of child abuse and neglect and of the definition of sexual abuse.

Readoption keeps the Division in compliance with the current State statute and Federal statutes and regulations.

Those affected are the Division's employees who report to the county prosecutors, employees of the county prosecutor's office who receive and respond to the reports, Division clients about whom the Division receives reports of child abuse and neglect, those who report allegations of child abuse and neglect to the Division and those authorized to receive information from the Division's records of child abuse and neglect.

During calendar year 1992, the Division received 50,043 reports of child abuse and neglect and substantiated child abuse or neglect 17,499 times. All such children, families and referral sources are affected by these rules.

The history of the past proposals and readoptions shows that no one has ever commented on this chapter.

Economic Impact

The readoption of the rules has no economic impact on any member of the public.

The only economic impact is that these rules enable New Jersey to remain in compliance with Federal requirements to receive Federal funds through the National Center on Child Abuse and Neglect (NCCAN). In Federal Fiscal Year 1994 the Division received $633,991. In addition, the Governor's Task Force on Child Abuse and Neglect received $285,377 from the Children's Justice Act, which is dependent on New Jersey being in compliance with the Child Abuse Prevention and Treatment Act. Noncompliance with the Child Abuse Prevention and Treatment Act would also jeopardize New Jersey's continued receipt of Title IV-B of the Social Security Act funds.

Executive Order No. 27 Statement

The requirements of the proposed readoption do not exceed those imposed by Federal law, 42 U.S.C.A. §5101 et seq., and Federal regulations, 45 CFR 1340 et seq.

Regulatory Flexibility Statement

Neither the Division, the county prosecutors nor the clients of the Division, are considered a small business under the terms of N.J.S.A. 52:14B-16 et seq., the Regulatory Flexibility Act. The proposed readoption does not impose reporting, recordkeeping or compliance requirements on small businesses. Therefore, a regulatory flexibility analysis is not necessary. The proposed readoption states the Division's policy on referring child abuse and neglect reports to the county prosecutor, confidential reporting and releasing requirements and definitions of sexual abuse and child abuse.

Full text of the proposed readoption may be found in the New Jersey Administrative Code at N.J.A.C. 10:129.

Full text of the proposed amendments follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

10:129-1.3 Referral of cases to prosecutor

(a) (No change.)

(b) While several of the criteria set forth above are based solely upon the objective condition of the child, there should also be some reason to believe that the injury or condition was not [accidently] **accidentally** caused. For purposes of these guidelines, an injury is not accidental if an intentional act produces an unintended result. Thus, a parent, caretaker or any other person who physically disciplines a child may have committed child abuse even though the resulting injury was not intended.

(c)-(d) (No change.)

(e) Prompt referrals of child abuse and neglect cases are important, and in some cases essential. Hence, written referrals on [form] DYFS **Form** 9-7, or other Division of Youth and Family Services form which contains a narrative description of the essential facts, shall be sent to the prosecutor as soon as the caseworker determines that referral is required by this policy. In cases where there is serious or repeated harm, the referral shall be made as soon as possible by telephone, with written confirmation being sent with 48 hours thereafter. The Division will establish consistent with this policy, specific procedures for making referrals which will include participation of supervisory personnel in identifying cases that this policy requires to be referred and designation of a person in each district office to act as a liaison to the prosecutor. Copies of such procedures will be furnished to all county prosecutors.

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SUBCHAPTER 2. CHILD ABUSE PREVENTION AND TREATMENT ACT [OF 1974] REQUIREMENTS

10:129-2.1 Confidential reporting and releasing requirements

(a) (No change.)

(b) The [division] **Division** may release the records and reports referred to in [subsection] (a) **above**, or part thereof, to:

1.-8. (No change.)

9. Any person engaged in a bona fide research purpose, provided, however, that no names or other information identifying persons named in the report shall be made available to the researcher unless it is absolutely essential to the research purpose and provided further that the prior written approval of the director of the Division of Youth and Family Services shall first have been obtained, and the child through his[/] **or** her representative gives permission to release the information[.]**;**

10. A family day care sponsoring organization for the purpose of providing information on child abuse or neglect allegations involving prospective or current providers or household members pursuant to P.L. 1993, c.350 (N.J.S.A. 30:5B-25.1 et al.) and as necessary for use in administrative appeals related to information obtained through a central registry search.

(c) Any individual agency, court, grand jury or legislative committee which receives from the [division of] **Division the** records[,] and reports referred to in [subsection] (a) **above** shall keep such records and reports, or parts thereof, confidential.

(d) Whenever information is disclosed pursuant to any of the exceptions enumerated in (b)[(1) through (9)] **1 through 10** above, the identity of the referrant and any other person shall be protected and not disclosed by the [division] **Division** where the disclosure of such information would be likely to endanger the life or safety of the referrant or other person, or where such disclosure would be likely to result in the discharge or discrimination against the referrant with respect to his[/] **or** her employment.

1.-2. (No change.)

(a)

DIVISION OF YOUTH AND FAMILY SERVICES

Standards for Shelters for Victims of Domestic Violence

Proposed Readoption: N.J.A.C. 10:130

Authorized By: William Waldman, Commissioner, Department of Human Services.

Authority: N.J.S.A. 30:14-1 et seq., specifically N.J.S.A. 30:14-5 and N.J.S.A. 37:1-12.1 et seq., specifically 37:1-12.3.

Proposal Number: PRN 1995-186.

Submit written comments by April 19, 1995 to:

Karen Beckmeyer
Office of Statewide Operations
Division of Youth and Family Services
CN 717
Trenton, N.J. 08625-0717

The agency proposal follows:

Summary

The Shelters for Victims of Domestic Violence Act, N.J.S.A. 30:14-1 et seq., became effective in 1980. Under this Act, the Department of Human Services was directed to establish standards to be met by shelters to assure the availability of necessary specialized personnel, resources and equipment. Subsequently, the enactment in 1981 of N.J.S.A. 37:1-12.1 et seq. provided funds for the development and maintenance of such shelters from an additional $5.00 fee for marriage licenses. At N.J.S.A. 37:1-12.3, the Commissioner of Human Services was directed to adopt rules to implement the Act. Accordingly, in 1982, the Department adopted rules establishing standards for shelters for domestic violence victims, and in 1983, established funding priorities for such shelters that sought funds collected from marriage license fees.

In 1989, the New Jersey Department of Community Affairs (DCA) was given statutory authority (N.J.S.A. 55:13C-1 et seq.) for licensing emergency shelters for the homeless, which include shelters for victims of domestic violence. On May 1, 1989, DCA adopted official licensing rules at N.J.A.C. 5:15, pursuant to N.J.S.A. 55:13C-1 et seq. Discussions involving DCA, the Division of Youth and Family Services (Division) and the Attorney General's Office resulted in the determination that the standards previously promulgated by the Division and allowed to expire on September 19, 1988, by operation of Executive Order Number 66(1978), were still necessary and should be promulgated to reflect the Division's continuing role in implementing the Shelters for Victims of Domestic Violence Act and the marriage license fee fund distribution. The rules were subsequently adopted in 1990.

1993 amendments to N.J.S.A. 37:1-12.1 et seq. increased the fee charged for marriage licenses from $5.00 to $25.00. The legislative amendments also expanded the use of trust fund monies to include grants to non-residential agencies that provide services to victims of domestic violence in counties that do not have emergency shelters. Additionally, non-profit coalitions, such as the New Jersey Coalition for Battered Women, became eligible to receive grants from the trust fund in which the fees are deposited.

The Division has re-evaluated these rules in accordance with Executive Order No. 66(1978). The readoption of these rules is necessary for the Division of Youth and Family Services to continue its administrative function in the distribution of these fees. Unless readopted, these rules will expire July 2, 1995.

Subchapter 1 details the purpose, scope and legal authority for shelters for victims of domestic violence.

Subchapter 2 outlines the standards for shelters including 24-hour access, site, physical plant and staff requirements, and service provision. This subchapter prohibits the release of a minor to anyone other than the custodial parent, requires the identity and location of a service recipient to be kept confidential, and requires all staff and job applicants to disclose any criminal convictions.

Subchapter 3 provides the legal basis, scope and purpose of the rules governing the use of marriage license fee monies, sets funding priorities and requirements for existing and new programs, and provides for program fiscal responsibility.

Social Impact

These rules provide standards under which shelters for victims of domestic violence will continue to receive funding through the trust fund established pursuant to N.J.S.A. 37:1-12.2. This will continue the process of distribution of the marriage license fee monies dedicated to maintaining and establishing shelters for victims of domestic violence. Besides residential services, these shelters also provide 24-hour hot-line and non-residential counseling services for victims of domestic violence.

Economic Impact

Statewide program statistics indicate that 4,832 women and children received temporary safe refuge in emergency shelters for victims of domestic violence in 1993. In addition, more than 20,000 individuals received non-residential counseling and support services. These statistics also indicate that New Jersey's domestic violence programs received 111,945 hot-line calls in 1993.

The Division currently distributes an annual amount of almost $6.6 million in Federal and State funds to offset the operational costs of maintaining New Jersey's domestic violence programs. Each year, $1.4 million in Marriage License Tax funds are distributed to 22 battered women's shelters throughout the State. The New Jersey Coalition for Battered Women also receives an annual grant from funds generated by these fees.

Executive Order No. 27 Statement

The rules proposed for readoption are not subject to Federal standards or requirements, and a Federal exceedance analysis is not applicable to the rulemaking.

Regulatory Flexibility Analysis

The rules establish reporting, recordkeeping and program requirements for shelters for victims of domestic violence in the State of New Jersey. The rules also affect New Jersey shelters for victims of domestic violence that receive funds from the trust fund established pursuant to N.J.S.A. 37:1-12.2, into which is deposited an additional fee of $25.00 for each marriage license issued in New Jersey. All of these shelters fall within the definition of a small business, as defined by the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. It is not appropriate or necessary to establish different standards that would apply to larger

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or smaller shelters, as all regulated entities are small businesses or governmental entities. The providers are required to submit quarterly expenditure and level of service reports on DYFS-supplied forms. Payment is then made based on the information supplied. Also, a final yearly expenditure report summarizing the year's activities, again prepared on a DYFS-supplied form, is required. No other additional recordkeeping is required.

Full text of the proposed readoption can be found at N.J.A.C. 10:130.

INSURANCE

(a)

NEW JERSEY INDIVIDUAL HEALTH COVERAGE PROGRAM BOARD

Individual Health Coverage Program
Standard Benefit Levels and Policy Forms; Benefits Provided
Proposed Amendment: N.J.A.C. 11:20-3.1

Authorized By: New Jersey Individual Health Coverage Program Board, Kevin O'Leary, Executive Director.
Authority: N.J.S.A. 17B:27A-2 et seq.
Proposal Number: PRN 1995-158.

Submit written comments by April 19, 1995 to:
Kevin O'Leary
Executive Director
New Jersey Individual Health Coverage Program
20 West State Street
CN 325
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The Board proposes amending N.J.A.C. 11:20-3.1 to provide that when health benefits plans B through E, set forth in Exhibits B through E of the Appendix to N.J.A.C. 11:20, are offered through or in conjunction with a managed care network, the policyholder coinsurance may not be greater than 40 percent. Stated conversely, the proposed amendment means that carrier coinsurance must not be set below 60 percent.

The Board proposes this change recognizing that coinsurance levels for policyholders greater than 40 percent are, in effect, an illusory benefit. The Board believes that policyholder coinsurance levels greater than 40 percent provide consumers with little true choices in determining whether to receive benefits from a network or out-of-network provider. The proposed amendment, with the current requirements in N.J.A.C. 11:20-3.1(d)1 that the in-network and out-network benefit differential may not exceed 30 percent, should help to ensure that consumers are provided a true choice in determining whether to receive in-network or out-network services.

Social Impact

The proposed amendment will have the effect of protecting consumers by prohibiting carriers from offering out-network benefits with policyholder coinsurance levels greater than 40 percent. Policyholder coinsurance levels for out-network benefits provide consumers with no true choice to obtain out-network benefits.

Economic Impact

The Board does not expect the proposed amendment to have a significant economic impact. The proposed amendment would have the impact of prohibiting a carrier from offering a health benefit plan through managed care network with policyholder coinsurance levels greater than 40 percent.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because this amendment limiting the permissible coinsurance levels is to implement the requirements of N.J.S.A. 17B:27A-17 et seq., and is not subject to any Federal requirements or standards.

Regulatory Flexibility Statement

A regulatory flexibility analysis is not required because the proposed new rules do not impose reporting, recordkeeping, or other compliance requirements on small businesses, as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The IHC Board believes that all carriers subject to the amended rule have in excess of 100 employees or are located outside of the State of New Jersey. Therefore, a regulatory flexibility analysis is not required pursuant to N.J.S.A. 52:14B-16 et seq.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

11:20-3.1 Benefits provided

(a)-(c) (No change.)

(d) Each of the standard health benefits plans may be offered through or in conjunction with a managed care network, and shall be subject to the following:

1. The in-network and out-network benefit level differential shall not exceed 30 percent;

2. With respect to Plans B through E set forth in Exhibits B through E of the Appendix, and notwithstanding (d)1 above, in no event shall policyholder coinsurance be greater than 40 percent;

[2.]**3.** The coinsurance maximum specified for the standard health benefits plan being offered through or in conjunction with a managed care network, as set forth in Exhibits A through E in the Appendix, shall be the coinsurance maximum for the in-network and out-network benefits combined; [and]

[3.]**4.** The HMO Plan standard copayment level ($15.00) may be substituted for deductible applicable to in-network benefits[.]**; and**

[4.]**5.** Notwithstanding (d)1, 2, 3 and [3]4 above, a carrier may submit to the Board for approval an alternative managed care delivery system which reconciles its delivery system with the standard health benefits plans.

(e) (No change.)

(b)

NEW JERSEY SMALL EMPLOYER HEALTH BENEFITS PROGRAM

SEH Program Premium Comparison Survey
Proposed New Rules: N.J.A.C. 11:21-19 and 11:21 Appendix Exhibit EE

Authorized By: Andrew J. Karpinski, Commissioner, Department of Insurance.
Authority: N.J.S.A. 17:1-8.1, 17:1C-6(e), and 17B:27A-33.
Proposal Number: PRN 1995-160.

Submit comments by April 19, 1995 to:
Donald Bryan, Assistant Commissioner
Regulatory Affairs
New Jersey Department of Insurance
20 West State Street
CN-325
Trenton, NJ 08625-0325

The agency proposal follows:

Summary

These proposed new rules implement provisions of N.J.S.A. 17B:27A-17 et seq. ("the Act"), which establishes the Small Employer Health Benefits Program (SEH Program). All carriers issuing small employer health benefits plans in this State are members of the SEH Program. The Act substantially revises the requirements governing the provision of health benefits plans to small employers in this State. The Act requires that all insurers, health service corporations, hospital service corporations, medical service corporations and health maintenance organizations authorized to transact business in this State and offering health benefits plans to "small employers" (an employer with at least two, but not more than 49 employees) (collectively, "small employer carriers") issue such plans in accordance with the provisions of the Act. Specifically, pursuant to N.J.S.A. 17B:27A-19 and N.J.A.C. 11:21-3.1, small employer carriers are required to offer the five health benefits plans established by the SEH Program Board ("standard health benefits

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plans"), except that a State approved or Federally qualified health maintenance organization ("HMO") as set forth in N.J.S.A. 17B:27A-26c and N.J.A.C. 11:21-3.1(c) may offer an HMO plan as set forth in N.J.A.C. 11:21-3.1 in lieu of the five standard plans established by the Board. Moreover, N.J.S.A. 17B:27A-19j (effective April 4, 1994) provides that the carrier, at the option of the small employer, may continue, renew or reinstate a health benefits plan which is not one of the five "standard" plans which had been provided to that small employer prior to January 1, 1994. Such a health benefits plan (hereafter referred to as a "non-standard health benefits plan") may be renewed at the option of the small employer for the two successive 12-month anniversary dates of the policy or contract occurring on or after February 28, 1994. Further, N.J.S.A. 17B:27A-19i (also effective April 4, 1994) provides that every carrier may offer any number of riders which revised the coverage offered by the five standard health benefits plans subject to approval by the Commissioner of Insurance ("Commissioner") and filing with the SEH Benefits Program Board, as set forth in that statute.

In addition, N.J.S.A. 17B:27A-33g requires that the Department of Insurance ("Department") publish annually a list of the premiums charged for the five small employer health benefits plans and for any rider package by all small employer carriers writing such plans pursuant to N.J.S.A. 17B:27A-17 et seq., and in addition publish the toll-free telephone number of each such carrier. On December 30, 1993, the Commissioner issued Order No. A93-236, which required every small employer carrier to file information regarding premiums to be charged for each of the five standard small employer health benefits plans, the HMO plan, and for any rider package as described in the Appendix to the Order, as well as other specified information, in the format set forth in the Appendix to the Order. The Department is proposing these new rules to codify the procedures and format for the filing of the annual SEH Program Premium Comparison Survey to enable the Department to publish the list of premiums charged for the standard health benefit plans, the HMO plan, and standard rider packages, as well as the toll-free telephone number of each carrier, as required pursuant to N.J.S.A. 17B:27A-33g. The information to be submitted relates solely to the standard health benefits plans, the HMO plan, and standard riders. The Department believes that this is reasonable and appropriate in that it would not be feasible to generate a survey reflecting the rates for all riders since there may now be an indefinite number of "non-standard" riders. Also, the carriers may continue to provide "non-standard" health benefits plans only for a limited time, which must be identical to the plans previously provided by that carrier to that specific small employer. Accordingly, the Department believes that a survey which reflects only the standard plans and standard riders provides a uniform basis for comparisons between carriers, and thus implements the intent of the Legislature as set forth in N.J.S.A. 17B:27A-33g.

Proposed N.J.A.C. 11:21-19.1 sets forth the purpose and scope of the subchapter.

Proposed N.J.A.C. 11:21-19.2 sets forth the definitions of the terms as used throughout the subchapter.

Proposed N.J.A.C. 11:21-19.3 provides that every small employer carrier shall prepare and file with the Department a premium survey, which contains the information specified and is completed in accordance with the instructions set forth in an Exhibit in the Appendix to N.J.A.C. 11:21. For the initial submission pursuant to these rules, completed surveys shall be submitted no later than July 1, 1995 reflecting premiums charged as of that date. Annually thereafter, completed surveys shall be submitted no later than September 1 of each year and shall reflect premiums to be charged as of January 1 of the following year. The first such annual survey shall be due September 1, 1995, reflecting premiums to be charged as of January 1, 1996.

Proposed N.J.A.C. 11:21-19.4 sets forth penalties for violations of this subchapter.

Social Impact

These proposed rules implement N.J.S.A. 17B:27A-33g by codifying the filing and format requirements for the submission of premium data by small employer carriers to enable the Department to publish an annual list of the premiums charged by such carriers for each of the five standard health benefits plans, the HMO plan, and any standard rider packages offered by such carriers. Through publication of the list of premiums charged by small employer carriers for such coverage, small employers will be provided a general comparison of the premiums charged a sample small employer by all small employer carriers writing such coverage in this State. While actual premiums paid by a small employer for coverage for a particular carrier may vary from that set forth in the survey based on the particular characteristics of that small employer (for example, location, age and gender of employees), the comparison survey should provide an additional aid to small employers seeking to obtain health benefits coverage.

Economic Impact

The Department does not anticipate any adverse economic impact will result from these proposed rules. These proposed rules merely set forth the format of information to be submitted regarding the premiums charged by each small employer carrier for standard health benefits plans, the HMO plan and standard rider packages, for a "sample" employer located in this State. While insurers will be required to compile and submit the required information in the format set forth in these rules, the Department believes that such information should be readily available. Moreover, as noted in the Social Impact statement above, through publication of the list of premiums charged by small employer carriers, small employers will be provided a general comparison by which to evaluate the costs of obtaining health coverage from a particular carrier. Publication of the premium survey may also help foster price competition among small employer carriers. This, in turn, will benefit small employers and the market generally.

The Department will experience an economic impact in that it will be required to review the information submitted and compiled, and publish a list of the premiums charged by small employer carriers.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because these rules set forth filing and format requirements for the submission of premium data by small employer carriers to implement N.J.S.A. 17:27A-33g, and are not subject to any Federal requirements or standards.

Regulatory Flexibility Analysis

The proposed new rules apply to all insurers, health service corporations, hospital service corporations, medical service corporations and health maintenance organizations authorized to issue health benefits plans in this State and subject to N.J.S.A. 17B:27A-17 et seq. Some of these entities may be "small businesses" as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. These proposed rules impose specified reporting requirements regarding premiums charged by such entities for the five standard health benefits plans, the HMO plan, and any standard rider packages so that the Department may publish a list of the annual premiums charged for such coverage as required pursuant to N.J.S.A. 17B:27A-33g. Small employer carriers which are small businesss will be required to bear any costs associated with compiling and filing the information required pursuant to these new rules. To the extent that the proposed new rules apply to small businesses, they may impose a greater impact on small businesses in that they may be required to devote proportionately more staff and financial resources to comply with these rules. The Department believes, however, that any additional costs will not pose an undue burden, and does not anticipate that additional professional services will be needed to comply. The information required should be readily available in that the information relates to the premiums actually charged by such entities for specified coverages.

The proposed new rules provide no different compliance requirements based on business size. As noted previously, these proposed rules set forth information and procedural requirements for the submission of premium information by small employer carriers so that the Department may publish a list of the premiums charged by such carriers as required pursuant to N.J.S.A. 17B:27A-33g. This statute provides no different compliance requirements based on business size. Accordingly, and to ensure consistency and uniformity in the information submitted, the proposed new rules provide no differentiation in compliance requirements based on business size.

Full text of the proposed new rules follows:

SUBCHAPTER 19. SEH PROGRAM PREMIUM COMPARISON SURVEY

11:21-19.1 Purpose and scope

(a) This subchapter requires the annual submission of data by small employer carriers to the Department, and establishes the format for the submission of such data, regarding premiums charged for the five standard health benefits plans, the HMO plan, and any standard rider packages established by the Board, so that the Depart-

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ment may develop and publish an annual SEH Program Premium Comparison Survey, pursuant to N.J.S.A. 17B:27A-33g.

(b) This subchapter shall apply to all small employer carriers.

11:21-19.2 Definitions

The following words and terms, when used in this subchapter, shall have the meanings as defined at N.J.S.A. 17B:27A-17 and N.J.A.C. 11:21-1.2, unless defined below or the context clearly indicates otherwise.

"Standard health benefits plan" means a health benefits plan promulgated by the SEH Board subject to review and approval by the Commissioner.

"Standard rider" means a rider promulgated by the SEH Board to be offered with one or more of the standard health benefits plans.

11:21-19.3 SEH Program premium comparison survey

(a) Every small employer carrier shall prepare and file with the Department a premium survey reflecting premiums charged for each of the five standard small employer health benefits plans, the HMO plan, and for any standard rider packages, as set forth in Exhibit EE of the Appendix to this chapter, incorporated herein by reference.

(b) Every small employer carrier shall complete the survey in the format set forth in Exhibit EE in accordance with the instructions set forth therein, and shall not vary the information solicited in Exhibit EE.

(c) Completed survey forms shall be filed no later than September 1 of each year, and shall reflect the monthly premiums to be charged for each of the five standard health benefits plans, the HMO plan, and any standard rider packages as of January 1 of the year immediately following. The initial survey shall be due September 1, 1995 reflecting premiums as of January 1, 1996.

(d) In addition to the requirements in (c) above, every small employer carrier shall complete and submit a survey in the format set forth in Exhibit EE no later than July 1, 1995, which shall reflect the monthly premiums charged as of that date for each of the five standard health benefits plans, the HMO plan, and any standard rider packages, with appropriate modification of the dates set forth in Exhibit EE.

(e) All filings shall be accompanied by the following certification signed by the person who completed the survey: "I _____ certify that the information set forth in the attached SEH Program Premium Comparison Survey is true and accurate, and hereby further certify that I am authorized to execute this certification on behalf of the carrier named in the survey."

(f) Completed survey forms and signed certification shall be filed with the Department pursuant to this subchapter at the following address:

SEH Program Premium Comparison Survey
Division of Public Affairs
New Jersey Department of Insurance
20 West State Street
CN 325
Trenton, New Jersey 08625

11:21-19.4 Penalties

Failure to comply with the requirements of this subchapter may result in the imposition of penalties as authorized by law, including, but not limited to, penalties set forth in N.J.S.A. 17B:27A-17 et seq.

APPENDIX
EXHIBIT EE
SEH PROGRAM PREMIUM COMPARISON SURVEY

Submit this completed survey in duplicate no later than September 1 of each year to: SEH Program Premium Comparison Survey, Division of Public Affairs, New Jersey Department of Insurance, 20 West State Street, CN 325, Trenton, New Jersey 08625.

Part 1
COMPANY AND RESPONDENT INFORMATION

Company Name: _____ NAIC #: _____

Respondent's Name: _____

Respondent's Title: _____

Respondent's Address: _____

_____

Respondent's Telephone #: _____

Respondent's Facsimile #: _____

Part 2
TOLL-FREE INFORMATION

Company's Toll-Free Telephone number where an applicant may obtain a premium quote: _____

Please indicate if a switchboard or message recording is reached by the toll-free number and the respective period of service:

Switchboard Service Times: _____

Message Recording Service Times: _____

Part 3
DIRECTIONS FOR COMPLETING THE PREMIUM SURVEY

A. Specify the monthly premium, rounded to the nearest whole dollar, that will be charged for a standard policy issued on the next January 1 to an employer as set forth in paragraph C below, for each policy form and rider in the categories listed in the survey for each plan in accordance with paragraph D below. In showing the rider premium, list only the additional premium for a rider, not the total premium for a plan including the rider. The following abbreviations apply:

SCA = Selective Contracting Arrangement (that is, an arrangement for the payment of predetermined fees or reimbursement levels for covered services by the carrier to preferred providers or preferred provider organizations (see N.J.A.C. 11:4-37.2)).

NR = The plan is offered or purchased without any standard riders.

PC = The prescription card rider (Exhibit H or J, Part 2 of the Appendix to N.J.A.C. 11:21).

PM = The prescription mail order rider (Exhibit H or J, Part 3 of the Appendix to N.J.A.C. 11:21).

PMC = The prescription card and mail order rider (Exhibit H or J, Part 1 of the Appendix to N.J.A.C. 11:21).

MH = The mental/nervous and substance abuse rider (Exhibit I of the Appendix to N.J.A.C. 11:21).

B. Use "NA" to indicate when any rider or plan variation is not being offered.

C. For purposes of completing the survey, assume the following policyholder:

Three small employers, one of each employer being located in the following counties: Camden, Middlesex, and Bergen, and each with six employees as follows:

1. Single Female—age 27
2. Single Male—age 37
3. Female Parent—age 47, with two children
4. Male Employee and Spouse—both age 57
5. Male Employee—age 27
   Spouse—age 24
   Two children—both under age 18
6. Female Employee—age 47
   Spouse—age 50
   Two children—both under age 18

D. For purposes of completing the survey, show the premium for only **one** delivery system option as described on the form, and indicate by checking the appropriate space if other delivery systems for the plan are available.

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Part 4
PREMIUM SURVEY

PLAN A

Carrier: _____

SEH PROGRAM PREMIUM COMPARISON SURVEY—
PLAN A PREMIUM 1/1/19____

Camden

	NR
$250	$_____

Middlesex

$250	$_____

Bergen

$250	$_____

Premium Rate Guarantee Period (if any): _____

Above Premiums
Based on (check one):

Traditional _____

SCA—No Gatekeeper _____

SCA—Gatekeeper _____

Other Delivery Systems Available: Yes _____ No _____

Note: Coinsurance percentages for Plan A are established by rule - - no variations are permitted. See Exhibit A of Appendix to N.J.A.C. 11:21.

PLAN B

Carrier: _____

SEH PROGRAM PREMIUM COMPARISON SURVEY—
PLAN B PREMIUM 1/1/19____

Camden

	NR	PC	PM	PMC	MH
$250	$_____	$_____	$_____	$_____	$_____
$500	$_____	$_____	$_____	$_____	$_____
$1,000	$_____	$_____	$_____	$_____	$_____

Middlesex

	NR	PC	PM	PMC	MH
$250	$_____	$_____	$_____	$_____	$_____
$500	$_____	$_____	$_____	$_____	$_____
$1,000	$_____	$_____	$_____	$_____	$_____

Bergen

	NR	PC	PM	PMC	MH
$250	$_____	$_____	$_____	$_____	$_____
$500	$_____	$_____	$_____	$_____	$_____
$1,000	$_____	$_____	$_____	$_____	$_____

Premium Rate Guarantee Period (if any): _____

Above Premiums
Based on (check one):

Traditional _____

SCA—No Gatekeeper _____
Coinsurance Percentage:
In-Network _____ Copay (if any) $_____
Out-of-Network _____

SCA—Gatekeeper _____
Coinsurance Percentage:
In-Network _____ Copay (if any) $_____
Out-of-Network _____

Other Delivery Systems Available: Yes _____ No _____

PLAN C

Carrier: _____

SEH PROGRAM PREMIUM COMPARISON SURVEY—
PLAN C PREMIUM 1/1/19____

Camden

	NR	PC	PM	PMC	MH
$250	$_____	$_____	$_____	$_____	$_____
$500	$_____	$_____	$_____	$_____	$_____
$1,000	$_____	$_____	$_____	$_____	$_____

Middlesex

	NR	PC	PM	PMC	MH
$250	$_____	$_____	$_____	$_____	$_____
$500	$_____	$_____	$_____	$_____	$_____
$1,000	$_____	$_____	$_____	$_____	$_____

Bergen

	NR	PC	PM	PMC	MH
$250	$_____	$_____	$_____	$_____	$_____
$500	$_____	$_____	$_____	$_____	$_____
$1,000	$_____	$_____	$_____	$_____	$_____

Premium Rate Guarantee Period (if any): _____

Above Premiums
Based on (check one):

Traditional _____

SCA—No Gatekeeper _____
Coinsurance Percentage:
In-Network _____ Copay (if any) $_____
Out-of-Network _____

SCA—Gatekeeper _____
Coinsurance Percentage:
In-Network _____ Copay (if any) $_____
Out-of-Network _____

Other Delivery Systems Available: Yes _____ No _____

PLAN D

Carrier: _____

SEH PROGRAM PREMIUM COMPARISON SURVEY—
PLAN D PREMIUM 1/1/19____

Camden

	NR	PC	PM	PMC	MH
$250	$_____	$_____	$_____	$_____	$_____
$500	$_____	$_____	$_____	$_____	$_____
$1,000	$_____	$_____	$_____	$_____	$_____

Middlesex

	NR	PC	PM	PMC	MH
$250	$_____	$_____	$_____	$_____	$_____
$500	$_____	$_____	$_____	$_____	$_____
$1,000	$_____	$_____	$_____	$_____	$_____

Bergen

	NR	PC	PM	PMC	MH
$250	$_____	$_____	$_____	$_____	$_____
$500	$_____	$_____	$_____	$_____	$_____
$1,000	$_____	$_____	$_____	$_____	$_____

Premium Rate Guarantee Period (if any): _____

Above Premiums
Based on (check one):

Traditional _____

SCA—No Gatekeeper _____
Coinsurance Percentage:
In-Network _____ Copay (if any) $_____
Out-of-Network _____

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SCA—Gatekeeper _____
Coinsurance Percentage:
In-Network _____ Copay (if any) $_____
Out-of-Network _____

Other Delivery Systems Available: Yes _____ No _____

PLAN E

Carrier: _____

SEH PROGRAM PREMIUM COMPARISON SURVEY—
PLAN E PREMIUM 1/1/19_____

Camden

	NR	PC	PM	PMC	MH
$150	$_____	$_____	$_____	$_____	$_____

Middlesex

	NR	PC	PM	PMC	MH
$150	$_____	$_____	$_____	$_____	$_____

Bergen

	NR	PC	PM	PMC	MH
$150	$_____	$_____	$_____	$_____	$_____

Premium Rate Guarantee Period (if any): _____

Above Premiums
Based on (check one):

Traditional _____

SCA—No Gatekeeper _____
Coinsurance Percentage:
In-Network _____ Copay (if any) $_____
Out-of-Network _____

SCA—Gatekeeper _____
Coinsurance Percentage:
In-Network _____ Copay (if any) $_____
Out-of-Network _____

Other Delivery Systems Available: Yes _____ No _____

HMO PLAN

Carrier: _____

SEH PROGRAM PREMIUM COMPARISON SURVEY—
HMO PLAN PREMIUM 1/1/19_____

Camden

	NR	PC	PM	PMC
$5	$_____	$_____	$_____	$_____
$10	$_____	$_____	$_____	$_____
$15	$_____	$_____	$_____	$_____
$20	$_____	$_____	$_____	$_____

Middlesex

	NR	PC	PM	PMC
$5	$_____	$_____	$_____	$_____
$10	$_____	$_____	$_____	$_____
$15	$_____	$_____	$_____	$_____
$20	$_____	$_____	$_____	$_____

Bergen

	NR	PC	PM	PMC
$5	$_____	$_____	$_____	$_____
$10	$_____	$_____	$_____	$_____
$15	$_____	$_____	$_____	$_____
$20	$_____	$_____	$_____	$_____

Premium Rate Guarantee Period (if any): _____

LABOR

(a)

STATE EMPLOYMENT AND TRAINING COMMISSION

Workforce Development Partnership Program Reporting Requirements for the Assessment of Employment and Training Programs

Proposed New Rules: N.J.A.C. 12:23-8

Authorized By: Peter J. Calderone, Commissioner, Department of Labor and State Employment and Training Commission, John Heldrich, Chairperson.

Authority: N.J.S.A. 34:1-20, 34:1A-3(e), 34:15B-40(c), 34:15C-6(h), 34:15C-13, 34:15D-8(d) and 34:15D-11.

Proposal Number: PRN 1995-177.

A **public hearing** on the proposed new rules will be held on the following date at the following location:

Tuesday, April 11, 1995
10:00 A.M. to 12:00 Noon
New Jersey Department of Labor
John Fitch Plaza
13th Floor Auditorium
Trenton, New Jersey 08625-0110

Please call the Office of Regulatory Services at (609) 292-7375 if you wish to be included on the list of speakers.

Submit written comments by April 19, 1995 to:

Deirdre L. Webster, Regulatory Officer
Office of Regulatory Services
Department of Labor
CN 110
Trenton, New Jersey 08625-0110

If you need this document in braille, large print or audio cassette, please contact the Office of Communications at (609) 292-3221 or NJ Relay (TTY) 1-800-852-7899.

The agency proposal follows:

Summary

The proposed new rules at N.J.A.C. 12:23-8 set requirements for reporting student outcome and licensing information including individual social security numbers to the New Jersey Occupational Information Coordinating Committee (NJOICC). NJOICC is collecting this information from government agencies responsible for the oversight of occupational education and training and licensing, registration or certification of individuals. The information will be used by the State Employment and Training Commission (SETC) in carrying out its legislative mandates. Specifically, the NJOICC will use this information to prepare the labor demand list for the Workforce Development Partnership Program. The SETC will use this list to establish standards for training and job placement and to evaluate the effectiveness of programs and services under the State's workforce readiness system as required by the Federal Job Training Partnership Act, 29 U.S.C. Section 1501 et seq., the State Employment and Training Commission Act, N.J.S.A. 34:15C-1 et seq., and the New Jersey Employment and Workforce Development Act, N.J.S.A. 34:15D-1 et seq.

It should be noted that there is no Federal law or regulation that permits the NJOICC or SETC to require disclosure of student outcome and licensing information including individual social security numbers. However, Federal law does permit the NJOICC or SETC to request voluntary disclosure of this information. In addition, under State employment and training laws, N.J.S.A. 34:15B-40 and 34:15D-8, the Commissioner of Labor may require other State or local agencies funding or administering a job or vocational training program or any non-public provider of employment and training services receiving State or Federal funds to ask their students to voluntarily provide their social security numbers. Any request for voluntary disclosure of social security numbers must be made in accordance with the Privacy Act, 5 U.S.C. Section 552a (note) (b).

N.J.A.C. 12:23-8.1 sets forth the purpose of this subchapter.
N.J.A.C. 12:23-8.2 explains the entities to which the subchapter applies.
N.J.A.C. 12:23-8.3 defines the words and terms used in the subchapter.
N.J.A.C. 12:23-8.4 sets forth the reporting requirements.

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N.J.A.C. 12:23-8.5 provides limitations on the disclosure of information collected under this subchapter.

Social Impact

The proposed new rules will have a positive social impact by enhancing the public's ability to make informed education and training career decisions. The rules will also improve the quality of information utilized by the NJOICC for the preparation of a labor demand list for the Workforce Development Partnership Program. This information will enable the State's workforce readiness system to more accurately determine which occupational training is required to match skill demands. In addition, the rules will provide the NJOICC with information on the supply of workers qualified by education and licensing to fill future job openings.

Economic Impact

The proposed new rules may have some economic impact. Government agencies required to report student outcome and licensing information to the NJOICC will bear administrative costs. In addition, training providers, such as private schools, which do not currently collect social security numbers from students will have to establish recordkeeping and reporting systems so that they can report this information to the appropriate government agency.

Regulatory Flexibility Analysis

The proposed new rules may have some impact in terms of imposing additional reporting, recordkeeping or compliance requirements on small businesses as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Training providers, such as private schools, which do not currently collect social security numbers from students will have to establish recordkeeping and reporting systems to report this information to the appropriate government agency, and incur the administrative costs to do so. It is also noted that government agencies responsible for the oversight of occupational education and training and licensing, registration or certification of individuals will bear administrative costs. Lesser reporting requirements would not be sufficient to enable the SETC and NJOICC to carry out their legislative mandates of preparing a labor demand list, establishing standards for training and job placement and evaluating the effectiveness of programs and services under the State's workforce readiness system. In addition, any costs incurred by training providers and government agencies in complying with these rules are outweighed by the need for an effective and efficient workforce readiness system. It should also be noted that no professional services will be needed to comply with the reporting requirements.

Executive Order No. 27 Statement

The proposed new rules do not exceed standards or requirements imposed by Federal law. The reporting requirements set forth in these rules are authorized by the Job Training Partnership Act, 29 U.S.C. Section 1501 et seq. which mandates that the State Job Training Coordinating Council, in this case the SETC, establish standards for training and job placement and evaluate employment and training programs. The proposed new rules make it possible for the SETC to more effectively accomplish this mandate.

Full text of the proposed new rules follows:

SUBCHAPTER 8. REPORTING REQUIREMENTS FOR ASSESSMENT OF EMPLOYMENT AND TRAINING PROGRAMS

12:23-8.1 Purpose

(a) The purpose of this subchapter is to collect student outcome and licensing information including individual social security number for use in:

1. Developing the labor demand list for the Workforce Development Partnership Program and other employment and training programs;

2. Establishing standards for training and job placement; and

3. Evaluating the effectiveness of programs and services under the State's workforce readiness system.

12:23-8.2 Scope

This subchapter shall apply to qualified agencies which oversee occupational and directly related education and training at a qualified school or issue an occupational license.

12:23-8.3 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

"New Jersey Occupational Information Coordinating Committee or NJOICC" means the agency of State government responsible for developing, managing and overseeing the Statewide comprehensive occupational information system including analysis of labor market supply and demand.

"Occupational license" means a license, registration or certificate which, when issued by an authorized entity of government, enables an individual to work within a recognized occupation in the State of New Jersey.

"Qualifying agency" means any executive agency of State government, including, but not limited to, the Departments of Education, Human Services, Labor, and Law and Public Safety, and the Commission on Higher Education, that oversees the operation of, or collects and/or disseminates information from any qualifying school, or issues an occupational license.

"Qualifying school" means a government unit, person, firm, corporation, private organization, or business entity doing business and maintaining facilities within the State which:

1. Operates for profit or not for profit;

2. Offers or maintains a course of instruction or instructional program to prepare individuals for entry level employment or provides supplemental instruction in a recognized occupational area;

3. Offers occupational instruction through classroom, shop or laboratory experience, or correspondence or both;

4. Offers occupational instruction to the general public or in conjunction with "Job Training Partnership Act" (JTPA) providers; or

5. Charges tuition or other fees or costs for the delivery of any of the above.

"State Employment and Training Commission" or "SETC" means the agency of State government designated to assist and develop the State employment and training policy and to oversee the operation of the entire New Jersey workforce readiness system.

"Student outcome information" means information pertaining to individual enrollment and participation in any occupationally specific education and/or training program designed to provide entry level occupational skills or provide supplemental education and/or training in a recognized occupation. This information shall include any relevant data items as specified by the SETC or the NJOICC, including participant's social security number, demographic characteristics, date of enrollment, date of completion, date of termination, date of application for a license, licensing examination result, and date of issue of a license.

12:23-8.4 Reporting requirements

(a) A qualifying agency shall report student outcome and licensing information, including social security numbers, to the State Employment and Training Commission through the New Jersey Occupational Information Coordinating Committee.

(b) Any entity which reports student outcome or licensing information to a qualifying agency shall request that its students or licensees voluntarily provide their social security numbers. Such request shall state that:

1. The disclosure of the social security number is voluntary;

2. The social security numbers will be used by the NJOICC and SETC to prepare a labor demand list, to establish standards for training and job placement and, to evaluate the effectiveness of programs and services under the State's workforce readiness system; and

3. The NJOICC and SETC are authorized to access the files and records of other State agencies which administer or fund employment and training programs by N.J.S.A. 34:15C-6(h) and may request the voluntary disclosure of social security numbers through the Commissioner of Labor's authority under N.J.S.A. 34:15B-40 and 34:15D-8, provided such request is made in accordance with the Privacy Act, 5 U.S.C. Section 552(a)(note)(b).

(c) Any executive agency of State government which is precluded from reporting information on specific individuals by Federal statute

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may report student outcome and licensing information through statistical summary only.

(d) The information required by (a) and (c) above shall be provided annually to the NJOICC at the following address by August 31st for the preceding State fiscal year ending June 30th:

NJOICC
CN 056
Trenton, New Jersey 08625-0056

12:23-8.5 Disclosure of information

(a) Information collected by the NJOICC from qualifying agencies will only be utilized for authorized governmental purposes. The NJOICC will only use aggregate statistical summaries of individual data in assessing or evaluating any program at a qualifying school.

(b) The SETC and NJOICC will not publish or otherwise release to the public information which could identify any person.

(c) The SETC and NJOICC may deny access to any correspondence, documents or date information where non-disclosure is necessary to protect the public interest.

(a)

DIVISION OF WAGE AND HOUR COMPLIANCE

Seasonal Farm Workers
Field Sanitation
Proposed Readoption with Amendment: N.J.A.C. 12:102

Authorized By: Peter J. Calderone, Commissioner, Department of Labor.

Authority: N.J.S.A. 34:1-20, 34:1A-3(e), 34:9A-37 et seq., specifically 34:9A-39.

Proposal Number: PRN 1995-178.

A **public hearing** on the proposed readoption with amendment will be held on the following date at the following location:

Wednesday, April 12, 1995
10:00 A.M. to 12:00 Noon
New Jersey Department of Labor
John Fitch Plaza
13th Floor Auditorium
Trenton, New Jersey 08625-0110

Please call the Office of Regulatory Services at (609) 292-7375 if you wish to be included on the list of speakers.

Submit written comments by April 19, 1995 to:

Deirdre L. Webster, Regulatory Officer
Office of Regulatory Services
Department of Labor
CN 110
Trenton, New Jersey 08625

If you need this document in braille, large print or audio cassette, please contact the Office of Communications at (609) 292-3221 or NJ Relay (TTY) 1-800-852-7899.

The agency proposal follows:

Summary

N.J.A.C. 12:102-1 et seq. provides rules governing field sanitation for seasonal farm workers when there are fewer than 10 workers in the field. Specifically, the rules provide reasonable operating and maintenance standards for drinking, toilet and handwashing facilities. Pursuant to Executive Order No. 66(1978), these rules expire on May 21, 1995. The New Jersey Department of Labor has reviewed the rules and, with the exception of a proposed amendment described below, has determined them to be necessary, reasonable and proper for the purposes for which they were originally promulgated and is, therefore, proposing them for readoption at this time.

A summary of the subchapters of N.J.A.C. 12:102 follows:

N.J.A.C. 12:102-1.1 sets forth the purpose and scope of the subchapter.

N.J.A.C. 12:102-1.2 defines the words and terms used throughout the subchapter.

N.J.A.C. 12:102-1.3 addresses the availability of water to field workers.

N.J.A.C. 12:102-1.4 sets forth standards concerning water containers.

N.J.A.C. 12:102-1.5 lists the requirements for toilet facilities, and provides a table with specifications for the number of seat-type facilities which must be provided.

N.J.A.C. 12:102-1.6 discusses handwashing facilities.

N.J.A.C. 12:102-1.7 provides penalties for the failure to comply with the provisions of the subchapter.

N.J.A.C. 12:102-1.8 provides for exceptions to the requirements of the subchapter.

To provide consistency with the Occupational Safety and Health Act (OSHA) regulations governing field sanitation at 29 C.F.R. 1928.110, the Department is proposing an amendment to N.J.A.C. 12:102-1.4. Specifically, it is amending subsection (d) of that rule to allow water to be dispensed in single-use drinking cups or by fountains. The Department is also amending this rule to prohibit the use of common drinking dippers in addition to drinking cups.

Social Impact

The proposed readoption with amendment benefits seasonal farm workers in that it ensures that farm operators who employ 10 or fewer farm workers provide sanitary drinking, toilet and handwashing facilities established for their use. The field sanitation standards proposed for readoption with amendment promote cleaner, more convenient facilities for seasonal farm workers, making the seasonal farm worker's workplace more comfortable. The proposed amendment would clarify that farm operators are required to provide separate drinking cups or fountains to dispense water to farm workers. This amendment is consistent with OSHA standards found at 29 C.F.R. 1928.110 and protects the health, safety and welfare of farm workers by preventing the transmission of communicable diseases. The proposed readoption with amendment also benefits farm operators by reducing the amount of complaints filed against them for not providing sanitary facilities.

Economic Impact

The proposed readoption with amendment will have minimal, if any, economic impact on the farm operators governed by these rules, since the majority of them have already established facilities which comply with both State and Federal requirements for field sanitation. There will be no additional costs to current farm operators other than the costs of providing separate drinking cups or fountains to dispense water as required by the proposed amendment. However, new farm operators will incur the costs of installing water containers and establishing toilet and handwashing facilities required to comply with these standards. In addition, the Department will not incur any additional costs as a result of the proposed readoption with amendment.

Executive Order No. 27 Statement

The proposed readoption with amendment does not exceed standards or requirements imposed by Federal law. The rules set forth at N.J.A.C. 12:102 provide field sanitation standards for seasonal farm workers when there are fewer than 10 workers in the field. Although Federal OSHA standards found at 29 C.F.R. 1928.110 do not cover these employees, it is noted that the State standards proposed for readoption with amendment are consistent with those imposed by Federal law. In addition, State law codified at N.J.S.A. 34:9A-37 et seq. requires that these standards be established to protect the health, safety and welfare of all farm workers. Furthermore, it is noted that farm operators who employ less than 10 workers will not incur any additional costs by being required to comply with these standards since the majority of them have already established facilities which meet these requirements.

Regulatory Flexibility Analysis

The proposed readoption with amendment will not impose any additional compliance requirements on small businesses as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The rules proposed for readoption continue established field sanitation standards for farm operators who employ 10 or fewer farm workers. Since current farm operators have already established facilities which comply with both State and Federal requirements for field sanitation, the costs of their complying with these rules is limited to providing separate drinking cups or fountains as required by the proposed amendment. Farm operators seeking to commence operations in the State will incur the costs of installing water containers and establishing toilet and handwashing facilities as required by these rules. However, any costs incurred in complying with these rules are outweighed by the need to provide a healthy and safe working environment for farm workers. No professional services will be required to comply with the field sanitation standards.

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Full text of the proposed readoption may be found in the New Jersey Administrative Code at N.J.A.C. 12:102.

Full text of the proposed amendment follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

CHAPTER 102
SEASONAL FARM [MEMBERS] **WORKERS**

12:102-1.4 Water containers
(a)-(c) (No change.)
(d) [A] **The water shall be dispensed in single-use drinking cups or by fountains. The use of** common drinking cups **or dippers** [shall be] **is** prohibited.
(e) (No change.)

LAW AND PUBLIC SAFETY

(a)

DIVISION OF CONSUMER AFFAIRS STATE BOARD OF ACCOUNTANCY

Board of Accountancy Rules

Proposed Readoption with Amendments: N.J.A.C. 13:29

Authorized By: State Board of Accountancy, Jay J. Church, Executive Director.
Authority: N.J.S.A. 45:2B-6(g) and 45:2B-17.
Proposal Number: PRN 1995-156.

Submit comments by April 19, 1995 to:
Jay J. Church, Executive Director
State Board of Accountancy
Post Office Box 45000
Newark, New Jersey 07101

The agency proposal follows:

Summary

Pursuant to Executive Order No. 66(1978), N.J.A.C. 13:29 is scheduled to expire on May 23, 1995. The Board of Accountancy has reviewed the current rules and with the following exceptions, has found them to be necessary and effective for the purposes for which they were originally promulgated. The current rules proposed for readoption have had an advantageous impact on the regulation of the accounting profession by enabling the Board to have in place procedures which maintain high standards of practice, thus serving and protecting the public's best interest.

This chapter contains six subchapters. Subchapter 1, entitled General Rules and Regulations, sets forth rules regarding Board meetings; applications for examination, reexamination and certificate by endorsement; change of address requirements; acceptance of chartered accounting experience; examinations; license renewal requirements; Public School Accountant's license requirements; fees; and reporting requirements upon conviction of any crime.

The amendments to N.J.A.C. 13:29-1.6 expand and clarify the manner in which an applicant, who has passed all parts of the examination, can furnish evidence of diversified experience in public accounting. Consistent with the statutory provisions of N.J.S.A. 45:2B-8e(1), N.J.A.C. 13:29-1.6(c) will allow an applicant to furnish evidence of diversified experience in public accounting through employment in the office or firm of a Public Accountant. Additionally, the Board's proposed amendment will allow it to consider part time experience in the office or firm of a Certified Public Accountant or Public Accountant equivalent to two years full time experience, if the part time experience is acquired within four consecutive years and in no less than the same amount of hours required for full time experience. The Board also is promulgating a regulation reflecting its current practice requiring that 25% of the experience requirement must be acquired in the area of audit, review and compilation.

The amendment to N.J.A.C. 13:29-1.6(e) is consistent with the Board's statutory authority under N.J.S.A. 45:2B-8e(4) which allows the Board to accept four years of experience in comparable accounting activity in achieving the diversified experience required by N.J.A.C. 13:29-1.6(c). This amended provision further stipulates that comparable accounting activity shall include no less than 12 months experience in the area of auditing and accounting.

The amendment to N.J.A.C. 13:29-1.10(a) reduces the time period of examinations from three to two days. The Board utilizes the Uniform Certified Public Accountants National Exam which has been reduced to a two day examination.

The amendment to N.J.A.C. 13:29-1.10(e), adjusting the storage procedure for examination papers, is consistent with current Board procedures for safeguarding examination papers.

The amendments to N.J.A.C. 13:29-1.13(a) reflect the ability of limited liability companies and limited liability partnerships to be registered as accounting firms (see N.J.S.A. 45:2B-3). Additional revisions are stylistic changes or eliminate redundant language.

Under N.J.A.C. 13:29-1.13(b), the time period for the charging of fees to Sponsors of Continuing Professional Education has been altered to the first business day of July of each odd numbered year. This change reflects current Board practice since 1991.

Subchapter 2 lists application, examination and licensure requirements for a Registered Municipal Accountant's license.

N.J.A.C. 13:29-2.2(a) extends the application deadline for the Registered Municipal Accountant examination from September 1 until November 1 of each year. The annual examination is held on the third Saturday in November and the earlier deadline is no longer necessary.

N.J.A.C. 13:29-2.2(g) is amended to reflect the Board's current examination provisions which have eliminated questions on the Registered Municipal Accountant examination relating to public school accounting.

Subchapter 3 sets forth rules of professional conduct.

There are no substantive changes to the rules in this subchapter, with the exception of the amendment to N.J.A.C. 13:29-3.14 which adds a limited liability company and a limited liability partnership as a form of practice covered by the Board's rules. The requirement for this change has been discussed above.

Subchapter 4 does not contain any current rules and is reserved for future use.

There are no changes to this subchapter.

Subchapter 5 establishes and describes procedures governing the Quality Enhancement Program, a program which reviews reports of selected sole practitioners or firms in order to improve the quality of financial reporting and to promote the fairness of presentation and the dependability of information on which the public relies for guidance in financial transactions.

N.J.A.C. 13:29-5.2 has been amended to change the definition of the word "report." The proposed definition is more specific and more consistent with the practices of the Quality Enhancement Program.

The amendments to N.J.A.C. 13:29-5.7 and 5.8 create a new category for the evaluation of financial reports by the Quality Enhancement Committee: seriously substandard reports. The proposed classification reflects the Board's desire to more accurately portray, if discovered, the poor quality of a licensee's accounting performance and professional work.

Subchapter 6 lists continuing education requirements.

The amendment to N.J.A.C. 13:29-6.2(a) deletes provisions regarding continuing professional education credit hour requirements which expired in 1991.

The amendment to N.J.A.C. 13:29-6.2(c) changes the word retired to inactive to more accurately reflect the type of licensees covered under the provisions of this subsection.

Social Impact

The rules proposed for readoption with amendments will have a positive effect on the consumer; the rules will enable the Board to have in place various procedures for the orderly operation of the Board and the conduct of examinations in order to ensure that truly qualified individuals are licensed to practice accounting. The Board of Accountancy endeavors to maintain the highest possible level of professionalism for the benefit and protection of the public. To that end, the Quality Enhancement Program and the Continuing Professional Education requirements will continue to benefit the public and the accounting profession by improving the quality of financial reporting.

Economic Impact

There will be no increased adverse economic impact on the public or on candidates or licensees as a result of the rule proposed for readoption with amendments. While compliance with this chapter does entail certain costs for candidates and licensees, such as examination,

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continuing education and licensure fees, such costs are reasonable and necessary to preserve and promote the public welfare. Because funding of the Board's operation is fully attained by the fee structure, these rules will have a positive economic impact on the Board; failure to readopt would place such operation in jeopardy.

Executive Order No. 27 Statement

Executive Order No. 27 Statement and Analysis is not required because the rules being proposed do not involve any Federal standard or regulation.

Regulatory Flexibility Analysis

The Board of Accountancy currently licenses 19,767 Certified Public Accountants, 1,121 public accountants, 291 registered municipal accountants, 951 public school accountants, 937 continuing professional education sponsors and 1,015 accounting entities. It is estimated that the majority of the accounting entities are small businesses under the criteria of the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The rules proposed for readoption do contain reporting, recordkeeping and compliance requirements relating to licensure and practice which may affect licensees who practice as small businesses. The costs of compliance are discussed in the Economic Impact above; no need for professional services is anticipated. However, because these rules seek to promote and protect the public welfare through sound financial reporting, they must be uniformly and consistently applied; no differential treatment can be accorded to small businesses.

Full text of the proposed readoption may be found in the New Jersey Administrative Code at N.J.A.C. 13:29.

Full text of the proposed amendments follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

13:29-1.6 Applications for original examination

(a)-(b) (No change.)

(c) An applicant who has passed all parts of the examination shall furnish evidence of two years' diversified experience in public accounting in the office of a Certified Public Accountant, **or Public Accountant,** or firm of which one member is a Certified Public Accountant**, or Public Accountant**. Experience shall be obtained in full-time regular employment based on a seven-hour day and a five-day work week. **Part time experience will be considered equivalent if acquired within four consecutive years and in no less than the same amount of hours required for full time experience. Twenty-five percent of full or part time experience must be acquired in the area of Audit, Review and Compilation.** Such evidence shall take the form of a notarized affidavit on the employer's letterhead indicating in detail the nature of the [two-year] diversified experience in public accounting.

(d) In lieu of the [two years'] experience required in (c) above, the Board may accept four years or more experience obtained as an Internal Revenue agent employed in the Field Division of the Internal Revenue Service, in a classification grade level acceptable to the Board. Any part of a period of [two years'] experience obtained in the employment of a Certified Public Accountant **or Public Accountant** may be considered as part of the four years' experience with the Internal Revenue Service.

(e) [In lieu of the two years' experience required in (c) above, the Board may accept four years' or more experience obtained in the office of a Public Accountant or firm, of which one member is a Public Accountant.] **In lieu of the experience in (c) above the Board may accept four years of experience in a comparable accounting activity which shall include no less than 12 months in the areas of auditing and accounting.**

(f) In lieu of the [two years'] experience required in (c) above, the Board may accept four years' or more accounting experience obtained in the employment of some state or any political subdivision of the United States.

(g) (No change.)

(h) The Board may, in its discretion, evaluate any and all accounting and auditing experience obtained by any applicant and give appropriate credit for said experience toward the [two years'] experience required in this section.

13:29-1.9 Chartered accountant

A chartered accountant may sit for the State of New Jersey examinations, and if [he] **the candidate** passes, the Board may, in its discretion, accept chartered accounting experience. A certificate by endorsement shall not be issued to a chartered accountant.

13:29-1.10 Examinations

(a) Examinations will be held on [three] **two** consecutive days, in May and November of each year, at a place designated by the Board.

(b)-(d) (No change.)

(e) Examination papers shall remain in the [office of the Executive Secretary] **possession of the Board or its designee** for a period of six months after each examination. During the six months an applicant may arrange to review [his] **his or her** examination papers.

(f)-(h) (No change.)

13:29-1.13 Fees

(a) Fees for original applications, examinations, reexaminations and renewals, for [certified public accountants, public accountants] **Certified Public Accountants, Public Accountants,** [corporations,] partnerships, professional corporations, **limited liability companies, or limited liability partnerships** and for [certified public accountants] **Certified Public Accountants'** license by endorsement are as follows:

1. (No change.)

2. Examination fee, [certified public accountant] **Certified Public Accountant**: $125.00;

3. Reexamination fee, all subjects repeated, [certified public accountant] **Certified Public Accountant**: $125.00;

4. Reexamination fee for any one, two, or three subjects, [certified public accountant] **Certified Public Accountant**: $100.00;

5. Examination fee, [registered municipal accountant] **Registered Municipal Accountant**: $100.00;

6. Reexamination fee, [registered municipal accountant] **Registered Municipal Accountant**: $100.00;

7. Endorsement as [certified public accountant] **Certified Public Accountant**: $100.00 plus the application fee as set forth in (a)1 above;

8. Initial license fee for [certified public accountant] **Certified Public Accountant**, [municipal accountant] **Registered Municipal Accountant**, [corporations,] partnerships, professional corporations, **limited liability companies, limited liability partnerships**:

i.-ii. (No change.)

9. Biennial registration for [certified public accountant] **Certified Public Accountant**, [public accountant] **Public Accountant**, [municipal accountant] **Registered Municipal Accountant**, [corporations,] partnerships, professional corporations**, limited liability companies, limited liability partnerships**: $80.00;

10.-12. (No change.)

(b) Entities filing an application to become Sponsors of Continuing Professional Education shall pay a fee of $100.00 for administrative costs and evaluation of programs submitted.

1. Sponsor fees shall be charged on a biennial basis on the first business day **of July** of each [even] **odd** numbered year.

13:29-2.1 Applications; requirements

Every applicant for the [registered municipal accountant's] **Registered Municipal Accountant's** examination shall submit to the Board a written application on a form to be provided by the Board and a photograph (two inches by two inches in size, bust picture, front view, without a hat, taken within 30 days prior to application), provided that the applicant must hold in good standing a New Jersey license as a [certified public accountant] **Certified Public Accountant**.

13:29-2.2 Examinations

(a) Examinations shall be held in November of each year, at a place designated by the Board. Applications shall be filed by [September] **November** 1 for November examination.

(b)-(d) (No change.)

(e) Examination papers shall remain in the [office of the Executive Secretary] **possession of the Board or its designee** for a

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period of six months after each examination, and during the six months, any applicant may make arrangement to review the examination papers.

(f) (No change.)

(g) Examinations shall include questions on the following;

i. Theory of municipal [and public school] accounting and problems in municipal [and public school] accounting;

ii. Municipal [and public school] law and finance;

iii.-iv. (No change.)

(h) (No change.)

13:29-3.1 Independence

(a) A licensee or a firm of which he **or she** is a partner**, member** or a shareholder shall not express an opinion on financial statements of an enterprise in such a manner as to imply that he **or she** is acting as an independent [Public Accountant] **public accountant** with respect thereto unless he **or she** or his **or her** firm is independent with respect to such enterprise. Independence will be considered to be impaired if, for example:

1. During the period covered by the financial statements, during the period of the professional engagement, or at the time of expressing an opinion, the licensee or his **or her** firm:

i.-ii. (No change.)

[3.]**2.** During the period of this professional engagement, or at the time of expressing his **or her** opinion, [he or his] **the partner, member or** firm:

i.-iv. (No change.)

13:29-3.14 Form of practice

A licensee or his **or her** firm may practice public accountancy only in a proprietorship, a partnership, **a limited liability company, a limited liability partnership** or a professional corporation, organized **and or registered** in accordance with applicable New Jersey law.

13:29-5.2 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise:

. . .

"Report" [includes financial statement and accountants' reports, compilation, review or audit] **means an opinion, report, or other form of language that states or implies assurances as to the reliability of any financial statements, and that also includes or is accompanied by any statement or implication that the person or firm issuing it has special knowledge or competence in accounting or auditing.**

13:29-5.3 Quality Enhancement Committee; members; duties; compensation

(a) The Director of the Division of Consumer Affairs shall annually appoint a Standing Committee to be known as the Quality Enhancement Committee (Committee) to assist the Board in the implementation and administration of the Program:

1.-2. (No change.)

3. At least one member of the Committee shall be a Certified Public Accountant, at least one shall be a [Licensed] Public Accountant, and at least one shall be a Registered Municipal Accountant. At least two committee members will also be members of the State Board of Accountancy.

(b)-(c) (No change.)

13:29-5.7 Review and evaluation of submitted reports

(a) The Committee shall determine, with respect to each report that it reviews:

1.-2. (No change.)

3. Any recommendations the Committee may have concerning possible improvement of the quality of the report, and it shall report its determinations and recommendations to the Board. Reports shall be classified as: acceptable, marginal, [or] substandard**, or seriously substandard**.

i.-iii. (No change.)

iv. Seriously substandard reports are materially inaccurate or misleading and the deficiencies noted are so egregious that there is evidence that the licensee is performing work that he or she is not qualified to perform.

13:29-5.8 Committee action on reviewed reports

(a)-(d) (No change.)

(e) The State Board of Accountancy reserves the right to take any action it deems necessary if it appears that the professional conduct reflected in the substandard **or seriously substandard** report is so serious as to warrant consideration of possible disciplinary action.

13:29-6.2 Credit-hour requirements

(a) Each applicant for a biennial license renewal is required to complete, during the preceding biennial period, 48 hours of continuing education. The types of continuing education programs and other sources of continuing education for which credit hours may be obtained are set forth in N.J.A.C. 13:29-6.5. The 48 hours of continuing education shall include at least 16 credit hours in the areas of auditing, review and compilation for persons who are engaged in the practice of public accounting or are involved with the attest function in issuing audit, review or compilation reports. [This subsection is applicable to licensees seeking to renew their licenses for the next biennial renewal period.

1. For Certified Public Accountants (CPA's) the following requirements apply:

i. Eighteen credit hours (including, where applicable, at least six credit hours in the area of auditing, including, but not limited to, review, compilation and attest standards) must be taken for the biennial registration on October 1, 1989. Such credits must be taken between the period beginning October 1, 1988 and ending September 30, 1989, and reported to the Board, on official reporting forms, in a manner and at a time to be prescribed by the Board.

ii. Forty-eight credit hours (including, where applicable, at least 16 credit hours in the area of auditing, including, but not limited to, review, compilation and attest standards) must be taken for the biennial registration on October 1, 1991 (and subsequent biennial registrations). Such credit must be taken between October 1, 1989 and June 30, 1991 (and subsequent biennial periods beginning on July 1, 1991) and reported to the Board, on official reporting forms, in a manner and at a time prescribed by the Board.

2. For Public Accountants, the following requirements apply:

i. Forty-eight hours (including, where applicable, at least 16 credit hours in the area of auditing, including, but not limited to, review, compilation and attest standards) must be taken for the biennial registration on October 1, 1990. Such credits shall be taken between October 1, 1988 and June 30, 1990 and reported to the Board, on official reporting forms, in a manner and at a time to be prescribed by the Board.

ii. Forty-eight credit hours (including, where applicable, at least 16 credit hours in the area of auditing, including, but not limited to, review, compilation and attest standards) must be taken for the biennial registration on October 1, 1992 (and subsequent biennal registrations). Such credits shall be taken between July 1, 1990 and June 30, 1992 (and subsequent biennial periods) and reported to the Board, on official reporting forms in a manner and at a time to be prescribed by the Board.

3. For Registered Municipal Accounts (RMA's), the following requirements apply:

i. Forty-eight hours (including, where applicable, at least 16 credit hours in the area of auditing, including, but not limited to, review, compilation and attest standards) must be taken for the biennial registration on September 1, 1990. Such credits shall be taken between October 1, 1988 and June 30, 1990 and reported to the Board, on official reporting forms, in a manner and at a time to be prescribed by the Board.

ii. Forty-eight hours (including, where applicable, at least 16 credit hours in the area of auditing, including, but not limited to, review, compilation and attest standards) must be taken for the biennial registration on September 1, 1992 (and subsequent biennial registrations). Such credits shall be taken between July 1, 1990 and June

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30, 1992 (and subsequent biennial periods) and reported to the Board, on official reporting forms, in a manner and at a time to be prescribed by the Board.]

(b) (No change.)

(c) The Board may, in its discretion, waive requirements for continuing professional education on an individual basis for reasons of hardship such as health, military service, or other due cause. [Retired] **Inactive** accountants shall be exempt from continuing professional education requirements. [Retired] **Inactive** licensees are those who do not practice accounting (public or private) or hold themselves out to the public as practicing accountants in any professional capacity. Any licensee who returns to the practice of accounting must notify the Board prior to reentry and shall meet the continuing education requirements by completing 48 credit hours of continuing professional education requirements prescribed by this subchapter within the two year period prior to reentry. Licensees [retired] **inactive** for one year or less will satisfy the requirements by completing at least 24 credit hours of continuing professional education in the year prior to reentry.

(d) (No change.)

(a)

DIVISION OF CONSUMER AFFAIRS STATE BOARD OF VETERINARY MEDICAL EXAMINERS

Fees

Proposed Amendment: N.J.A.C. 13:44-5.1

Authorized By: State Board of Veterinary Medical Examiners, Marianne Kehoe, Executive Director.

Authority: N.J.S.A. 45:16-3, 45:16-9.4 and 45:1-3.2.

Proposal Number: PRN 1995-187.

Submit comments by April 19, 1995, to:
Marianne Kehoe, Executive Director
State Board of Veterinary Medical Examiners
124 Halsey Street
Post Office Box 45020
Newark, New Jersey 07101

The agency proposal follows:

Summary

In order to cover increased investigative, administrative and program costs, the Board of Veterinary Medical Examiners is proposing to increase initial license fees, active and non-active registration fees, reistatement fees and duplicate license registration fees in its fee schedule N.J.A.C. 13:44-5.1. Two additional fees that have been added to the fee schedule include one for licensees who transfer from inactive to active status, and one for duplicate wall certificates.

Pursuant to N.J.S.A. 45:1-3.2, all professional and occupational licensing boards must fund their operating costs through the assessment of licensing and other fees. The statute further requires the fees to be set at a level that will raise sufficient funds to meet, but not exceed, the amount needed to cover costs. The proposed new fee schedule complies with these statutory requirements.

In 1995, the Board has incurred costs beyond those projected, for which there is not adequate funding at the present time. Prior to fiscal year 1995, fringe benefit costs such as health benefits, pension contributions and worker's compensation for the enforcement unit employees had been incorporated in the fringe costs for the entire Division and thereby supported by the State. Due to tightening budgets, beginning in fiscal year 1995, these charges have been segregated and appropriately charged against each Board. Fringe costs as calculated by the Department of Treasury are charged at 24.25 percent of base salaries.

Another cost the Board has incurred includes a projected Statewide negotiated salary increase for all State employees, including those employed by the professional boards, which could be up to seven percent each year for the next two years.

This fee increase will also cover the cost incurred to automate Board office operations so that the business and objectives of the Board will be performed more quickly and efficiently.

It is important to note that this fee increase is not being proposed in order to subsidize new services that will be provided by the Board. Instead, it is being proposed out of necessity, so that the same level of service that has been provided in past years can be maintained.

Social Impact

The proposed amendment will affect all initial licensees, all active and non-active registrants, all licensees who transfer from inactive to active status, all licensees who fail to pay the registration fee on time (who then must pay a reinstatement fee to have their license reinstated), all licensees actively registered who may practice at any place other than the address for which his/her active registration certificate is issued, (this type of licensee must obtain a duplicate license registration certificate to be displayed at the branch office), and licensees who need to purchase duplicate wall certificates.

The fee increases will enable the Board to continue to meet its operating expenses incurred in fulfilling its statutory obligations to evaluate applicants for licensure, investigative complaints, initiate appropriate disciplinary and enforcement actions and regulate the practice of veterinary medicine. The new fee schedule will continue to ensure proper healthcare for animals by maintaining high professional standards and competence within the practice of veterinary medicine.

Economic Impact

The proposed new fee schedule will have an economic impact on all initial licensees, all active and non-active registrants, all licensees who transfer from inactive to active status, all licensees who seek to be registered but fail to register on time, licensees who may practice at any place other than the address where they are actively registered, and licensees who need duplicate wall certificates. The Board believes the economic impact upon the licensee will be outweighed by the benefits these rules provide in maintaining professional practice standards that serve to ensure responsible medical care for animals.

The proposed initial license fee increase for veterinarians is from $150.00 to $250.00 for fees paid during the first year of a biennial renewal period, and from $75.00 to $125.00 for fees paid during the second year of a biennial renewal period.

The proposed fee increase for biennial active registration is from $150.00 to $250.00. For those licensees who are non-active, the proposed biennial non-active registration fee increase is from $125.00 to $150.00.

The proposed fee increase for licensees who fail to pay the registration fee on time, and then seek reinstatement and must pay a reinstatement fee, is from $150.00 to $250.00.

The proposed fee increase for a duplicate license registration certificate is from $50.00 to $80.00.

An additional fee provision has been created for licensees who transfer from non-active to active status. Another additional fee provision has been created for a duplicate wall certificate.

The proposed fee increases and new fees will generate sufficient revenues to enable the Board to continue to comply with N.J.S.A. 45:1-3.2, which requires all professional and occupational licensing Boards within the scope of subtitle 1 of chapter 45 to raise funds to cover Board operating costs. In compliance with the statute, the sums to be raised are estimated not to exceed the amount required to fund the Board's operations. The proposed amendment will not have a direct economic impact on the public.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the rulemaking requirements pertaining to a fee increase are governed by N.J.S.A. 45:16-3, 45:16-9.4 and 45:1-3.2 and are not subject to any Federal requirements or standards.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., requires the Board to give a description of the types and an estimate of the number of small businesses to which the proposed amendment will apply. The proposed amendments will apply to initial licensees, all active and non-active registrants, non-active licensees who transfer to active status, all licensees who fail to pay the registration fee on time and all licensees actively registered who may practice at any place other than the address for which his or her active registration certificate is issued and licensees who purchase duplicate wall certificates. If for the purposes of the Regulatory Flexibility Act, the above mentioned professionals, who total approximately 1,800 persons, are deemed to be "small businesses," the following analysis applies.

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Compliance requirements consist of paying an increased initial licensing fee, an increased registration fee, a transfer fee for those licensees who transfer from inactive to active status, an increased reinstatement fee and an increased duplicate license registration fee in a timely manner. In addition, the licensee who needs a duplicate wall certificate will be required to pay $50.00. The compliance costs are set out in the Economic Impact statement. There are no capital costs associated with compliance.

There are no reporting or recordkeeping requirements and no professional services are needed to comply. The fee increases are necessary to enable the Board to avoid operating at a loss. Since the initial fees, registration fees, reinstatement fees and duplicate license registration fees have been set at the lowest amount that will cover the Board's operating expenses, the intent of the Regulatory Flexibility Act to minimize economic impact has been implemented.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

13:44-5.1 General provisions

(a) The following fees shall be charged by the board:

1. Application fee $75.00
2. Initial license fee:

i. During the first year of a biennial renewal period ..... [$150.00] **$250.00**

ii. During the second year of a biennial renewal period ..... [$ 75.00] **$125.00**

3. Practical examination $125.00
4. New Jersey Jurisprudence Examination $125.00
5. Temporary Permit $100.00
6. Active registration fee [(biennial)] ..... [$150.00] **$250.00**
7. Non-active registration fee [(biennial)] ..... [$125.00] **$150.00**

8. Transfer fee non-active to active:

i. During the first year of a biennial renewal period $100.00

ii. During the second year of a biennial renewal period ..... $ 50.00

[8.]**9.** Late renewal fee $100.00

[9.]**10.** Reinstatement fee ..... [$150.00] **$250.00** plus initial license fee

[10.]**11.** Duplicate license registration [(biennial)] **(branch office)** ..... [$ 50.00] **$ 80.00**

[11.]**12.** Verification of licensure ..... $ 25.00

13. Duplicate wall certificate $50.00

(a)

STATE ATHLETIC CONTROL BOARD

Rules Governing Boxing, Wrestling and Sparring Exhibitions and Performances

Proposed Amendments: N.J.A.C. 13:46-1.1, 4.1, 4.16, 4.21, 8.25, 9.12 and 10.1

Authorized By: State Athletic Control Board, Gerard Gormley, Chairman; Gary Shaw, Member; Al Daniels, Member; Larry Hazzard, Sr. Commissioner.

Authority: N.J.S.A. 5:2A-1, 2, 4 and 7.

Proposal Number: PRN 1995-139.

Submit written comments by April 19, 1995 to:

Charles F. Kimmel, Counsel
State Athletic Control Board
CN 180
140 East Front Street
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The proposed amendments clarify that the State Athletic Control Board asserts jurisdiction over all combative sports and not only boxing, wrestling, and kick boxing. N.J.S.A. 5:2A-4. The amendments also delete certain references to the former State Athletic Commission. The amendments provide definitions of "recognized boxing association," "championship boxing match," "Board" and "Commissioner," and make clear that associations may be recognized by the Commissioner with the consent of the Board. The amendments also define a "special event" as a nationally televised, pay-per-view, or subscription television event or other event designated by the Commissioner. In a separate proposal regarding fees published elsewhere in this issue of the New Jersey Register, designation of an event as a "special event" would allow the Commissioner to assign additional inspectors to regulate that event. These amendments recognize that certain events have a greater significance on combative sports in New Jersey than other events. The amendments would also permit the Commissioner and the Board to recognize a regional boxing organization.

In addition, the proposal clarifies that the Commissioner and Board have sole authority to grant and deny licensure. This is not a substantive change, but the current regulation's reference to recommendations by nationally recognized boxing associations has caused confusion. The SACB has heard anecdotal evidence of people believing that boxing sanctioning bodies have the authority to grant licenses. This has never been true, but the SACB has decided to alleviate any possible confusion by deleting entirely any reference to licensure recommendations by nationally recognized boxing associations.

Social Impact

There is no significant social impact anticipated from these amendments. The amendments affect all of those involved in professional combative sports in this State. The amendments would allow the Commissioner to recognize that some combative sports events have a greater significance that other such events. Accordingly, the Commissioner should have a method, codified by regulation, that enables him or her to make such recognition. The deletion of any reference to licensure recommedations by nationally recognized boxing associations should alleviate confusion and reassure the general public that the SACB and its Commissioner are the sole combative sports licensing authority in this State. The State Athletic Control Board does not anticipate any negative reaction to the amendments and its social impact should be minimal.

Economic Impact

By permitting the Commissioner with the consent of the Board to designate an event as a "special event," these amendments, in conjunction with another proposed amendment relating to fee increases, would impose additional costs of promoters of such events. However, it should be noted that a nationally televised subscription television, or pay-per-view, event is very likely to involve sufficient talent to permit these fee increases to have a minimal financial impact on the promoters of such events. The other proposed amendments do not have any economic impact.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the rulemaking requirements of the State Athletic Control Board are dictated by the statute which established the SACB, N.J.S.A. 5:2A-1 et seq., and are not subject to any Federal requirement or standard.

Regulatory Flexibility Statement

A regulatory flexibility analysis is not required because the proposed amendments do not impose reporting, recordkeeping or other compliance requirements on small businesses. The amendments define special events for purposes of boxing, wrestling and other combative sports and clarifies the definition of a recognized boxing association. No additional requirements on small businesses are imposed. It should be noted, however, that promoters of "special events" as defined herein may incur additional costs if the Commissioner decides to assign additional inspectors to such an event, under a proposal published elsewhere in this issue of the New Jersey Register.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

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13:46-1.1 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

"Board" means the State Athletic Control Board.

"Championship boxing match" means any boxing match in which the championship of a recognized boxing association is at stake.

. . .

["Commission" means the State Athletic Commission of New Jersey].

"Commissioner" means the person appointed by the Attorney General with the concurrence of the Board to serve as the Chief Executive Officer of the Board.

"Licensee" means any person, club, corporation, organization or association licensed by [this Commission] **the Board.**

. . .

"Recognized boxing association" means an organization recognized by the Commissioner with the concurrence of the Board whose voting membership is composed of representatives of governmental agencies regulating boxing, including, but not limited to, the World Boxing Association, the World Boxing Council, the International Boxing Federation, the North American Boxing Federation, and the United States Boxing Association. The Commissioner may, with the concurrence of the Board, designate any regional, national, or international boxing organization pursuant to this definition.

"Special event" means a boxing card, boxing show, or any other combative sports event which has among its contests a championship elimination match, a pay-per-view or subscription television match, a nationally televised match, or any other match of significance to combative sports in this State as designated by the Commissioner with the concurrence of the Board.

13:46-4.1 General licensing requirement

No person, club, corporation or association shall hold, conduct or participate in boxing bouts [or], wrestling exhibitions [or], sparring exhibitions, **or any other combative sports competition or exhibition** in the State of New Jersey without first having obtained a license from the [State Athletic Commissioner] **Board**. [The Commissioner, in the exercise of the discretion to grant or deny a license, may consider any determinations, standards or recommendations made by a nationally recognized boxing association whose voting membership is composed of representatives of governmental agencies regulating boxing. Any such determinations, standards or recommendations made by a nationally recognized boxing association whose voting membership is composed of representatives of governmental agencies regulating boxing. Any such determinations, standards or recommendations made may include, but not be limited to, any concerning the moral character of the applicant. A nationally recognized boxing association shall include, but not be limited to, the World Boxing Association, the World Boxing Council, the North American Boxing Federation and the United States Boxing Association. Nevertheless, the Commissioner shall retain full authority to grant or deny a license irrespective of a determination of recommendations by such an association.]

13:46-4.16 Forms provided

Blank application forms for licenses shall be provided by the [State Athletic Commission] **Commissioner**.

13:46-4.21 Application for permit

(a)-(b) (No change.)

(c) No permit shall be issued unless the promoter shall have submitted to the Commissioner signed contracts of [boxers] **contestants or participants** and [manage] **managers** in those matches described in (b) above. The contracts shall have the bona fide addresses of the contestants.

(d) (No change.)

13:46-8.25 Compensation for boxing referees and judges

(a)-(b) (No change.)

(c) The compensation schedule set forth in (a) above shall not apply in a sanctioned championship bout. The Commission shall set the compensation to be paid to boxing referees and judges officiating at sanctioned championship bouts. In making this determination, the Commissioner may consider any determinations, standards or recommendations made by a [nationally] recognized boxing association [whose voting membership is composed of representatives of governmental agencies regulating boxing. A nationally recognized boxing association shall include, but not be limited to, the World Boxing Association, the World Boxing Council, the North American Boxing Federation and the United States Boxing Association]. Nevertheless, the Commissioner shall retain full authority to set the compensation schedule for boxing referees and judges in championship bouts irrespective of a determination or a recommendation by such an association.

13:46-9.12 Special reports on injuries

If any [boxer] **participant in any combative sport** is injured [which] **and** requires hospital attention, the inspectors must notify the [Commission] **Commissioner's** office at once and then shall submit a special report on a form supplied by the [Commission] **Commissioner**. The same shall include all details and subsequent follow-up reports on the condition of the injured contestant.

13:46-10.1 Designation; approval; license

Announcers for [boxing or wrestling] **combative sports** in New Jersey may be designated by the promoters with the approval of the Commissioner and must be licensed by the [Commission] **Board**.

(a)

STATE ATHLETIC CONTROL BOARD

Taxes and Fees

Proposed Amendments: N.J.A.C. 13:46-4.10, 4.25, 4.26, 4.29, 9.6, 9.17, 13.1, 15.2, 15.5 and 15.13

Proposed Repeal: N.J.A.C. 13:46-4.6

Authorized By: State Athletic Control Board, Gerard Gormley, Chairman; Gary Shaw, Member; Al Daniels, Member; Larry Hazzard, Sr., Commissioner.

Authority: N.J.S.A. 5:2A-4, 7(c), 7(d), 7(e), 14(c), 14.1, and 28.

Proposal Number: PRN 1995-140.

Submit written comments by April 19, 1995 to:

Charles F. Kimmel, Counsel
State Athletic Control Board
CN 180
140 East Front Street
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The proposed amendments contain fee increases for the issuance of combative sports licenses. The new fees are necessary to help insure that the cost of regulating combative sports is borne by the participants and not the taxpayers of New Jersey. The new fees will remain modest. Seconds, timekeepers, managers, announcers, doorman, and box office employees would still pay only $25.00 for a one year license. The highest fee is $300.00 for a boxing promoter's license, which entitles the holder to promote Statewide. Fees for competitors such as boxers and wrestlers would not increase.

The amendments effect an additional indirect fee increase upon promoters. Promoters are currently required to pay the cost of referees, judges, timekeepers, physicians, and inspectors. The amendments would permit the Commissioner to assign two additional inspectors to each boxing show and would allow up to 12 inspectors to be assigned to certain championship matches. The amendments would also permit up to six inspectors to be assigned to combative sports events other than boxing matches, at the discretion of the Commissioner. The additional inspectors are necessary to insure compliance with regulations. It is also important for the public to be aware that combative sports, particularly championship boxing matches, are closely-regulated in New Jersey. Current practice is to assign one inspector to wrestling matches and two inspectors to non-championship boxing matches. The Athletic Control Board be-

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lieves that public confidence would be furthered by permitting the Commissioner the discretion to assign additional inspectors as necessary, while still maintaining a cap on promoters' costs by providing an outer limit to the number of inspectors who can be assigned to each show.

The amendments also correct references to ticket tax and television tax by citing the current statutory provision and deleting references to a repealed statutory provision, N.J.S.A. 5:2-12. See N.J.S.A. 5:2A-20.

Finally, the proposal clarifies that a promoter who fails to remit tax payments as required can be disciplined by the Commissioner. Current regulations also permit discipline by the Commissioner. In an additional proposal published elsewhere in this issue of the New Jersey Register, the SACB has proposed a specific regulation regarding discipline of licensees by the Commissioner. The proposed amendment to N.J.A.C. 13:46-15.13(a) cross references the proposed discipline regulation. It is not a substantive change.

Social Impact

While the proposed amendments increase licensure fees for participants in combative sports, the proposed new fees remain modest. Fees for contestants are not increased. The State Athletic Control Board does not believe that the new fees will deter anyone who had planned to enter into combative sports from doing so. Moreover, the amendments will allow the Commissioner to appoint additional inspectors and physicians to matches, increasing the level of safety for all participants. While the State Athletic Control Board anticipates some negative reaction from those subject to fee increases, the Board believes that the increases are necessary and will not have a negative impact on professional combative sports.

Economic Impact

The proposed amendments would raise the licensure fees for some participants in combative sports such as boxing, wrestling, or kick boxing. The current fees of $5.00 for seconds and $15.00 for managers and matchmakers are inadequate to offset the operating expenses of the State Athletic Control Board. The current fees have also not been raised in numerous years. The State Athletic Control Board was informed that operating expenses exceeded revenues from fees and taxes by approximately $200,000 in the last fiscal year. That deficit is borne by the taxpayers of New Jersey. The fee increases are therefore necessary to ensure that the cost of regulation is borne by the participants in combative sports. It is also probable that the fee increases will result in slightly higher ticket prices for combative sports events. However, it is more appropriate for the cost of regulation to be borne by those who attend such events rather than the tax paying public. The State Athletic control Board did not believe that it was appropriate to raise the fees for actual competitors, and those fees will remain at current levels.

Inspectors are currently paid $70.00 per show, an amount payable by the promoter. Thus, the amendments will increase the promoter's cost by $140.00 for a regular boxing show, and up to $700.00 for a special event if 12 inspectors are assigned instead of the current two. Other combative sports events currently have one inspector assigned. The amendments would allow up to six inspectors, for a maximum possible additional cost of $350.00 for the promoter.

The additional cost to the agency to implement these amendments is minimal. The only additional expense is the cost of drafting and processing checks for the additional inspectors permitted by these amendments. The cost for such additional inspectors would be borne by promoters; the only additional cost to the agency is for processing the payments to the additional inspectors.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the rulemaking requirements of the State Athletic Control Board are dictated by the statute which establishes the SACB, N.J.S.A. 5:2A-1 et seq., and are not subject to any Federal requirement or standard.

Regulatory Flexibility Analysis

The proposed amendments do not impose additional reporting or recordkeeping requirements on small businesses, as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. While some boxing promoters and wrestling promoters may constitute small businesses, the only compliance requirements imposed are for the payment of additional and increased fees. As these fees are necessary for the Board's expenses in maintaining the integrity of combative sports in New Jersey, which expenses are not related to the size of the promoting entity, no lesser fees or exemptions are provided based on business size.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

13:46-4.6 [Fees] **(Reserved)**

[(a) The fee for promoter license is $100.00.

(b) The fee for wrestling license is $50.00.

(c) The fee for a single show permit wrestling license is $25.00.]

13:46-4.10 Matchmaker

Each licensed promoter shall designate a matchmaker who must be licensed by the [Commissioner pursuant to N.J.A.C. 13:46-9.1] **Board**. [The fee for a matchmaker license shall be $25.00.]

13:46-4.25 License fees

(a) License fees for wrestlers, managers, seconds, referees, timekeepers, announcers, doormen [and], box office employees, **promoters, co-promoters, and judges** shall be on a fiscal year basis (July 1 through the following June 30) [and the]. **All licenses shall be issued on a Statewide basis. The** fee for each license shall be as follows:

1. Wrestling [Booking Agency] **promoter**	[$50.00]	**$100.00**
2. Wrestling [Booking Agent] **co-promoter**	[$15.00]	**$75.00**
3. Referee	[15.00]	**$75.00**
4. Manager	[15.00]	**$25.00**
5. Wrestler		$5.00
6. Second	[5.00]	**$25.00**
7. Timekeeper	[5.00]	**$25.00**
8. Announcer	[5.00]	**$25.00**
9. Doorman	[5.00]	**$25.00**
10. Box office employee	[5.00]	**$25.00**
11. Matchmaker	[25.00]	**$100.00**
12. Judge		**$75.00**
13. Boxing promoter		**$300.00**
14. Boxing co-promoter		**$200.00**

(b) (No change.)

13:46-4.26 Lost license; duplicate

If a license is lost, its owner may obtain a duplicate for [$1.00] **$5.00** by written application to the Trenton Office of the [State Athletic] Commissioner.

13:46-4.29 Co-promoter; **fees**

Any co-promoter of a boxing or wrestling promotion [must obtain a $100.00 permit license] associating himself with a licensed promoter **for a single promotion shall obtain a permit**. [Such a license is valid for a single show.] **The fee for a boxing co-promoter permit is $200.00. The fee for a wrestling co-promoter permit is $75.00.**

13:46-9.6 Payment of referees, judges, timekeepers, announcers, and physicians

Promoters shall be liable for the compensation of all referees, judges, timekeepers, announcers, and physicians. Promoters shall not make any payments of compensation and/or expenses directly to referees, judges, timekeepers, announcers or physicians. The promoter shall write a check to the State of New Jersey in an amount authorized and determined by the chief inspector. **The number of referees, judges, timekeepers, announcers, and physicians appointed to any combative sport show shall be determined by the Commissioner.** The check shall be given to the chief inspector at the fight and should be given to the Commissioner by the chief inspector. The funds will be disbursed by the [Commission] **Board** to the referees, judges, timekeepers, announcers or physicians.

13:46-9.17 Compensation for inspectors

(a) [Two] **Four** inspectors shall be assigned by the Commissioner to each boxing show.

(b)-(c) (No change.)

(d) Notwithstanding (a) above, the Commissioner shall have the discretion to appoint up to a maximum of 12 inspectors to any boxing show which has among its matches a championship match or a special event.

(e) The number of inspectors assigned to any combative sports event other than a boxing match shall be determined by the Com-

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missioner; however, in no event shall more than six inspectors be assigned to any event other than a boxing show as permitted in (d) above.

13:46-13.1 Tax

(a) Every person who shall hold any boxing, wrestling or sparring exhibition or performance shall pay to the Commissioner, in addition to [10 percent of the gross receipts] **the gross receipts tax imposed by N.J.S.A. 5:2A-20(c)(1)**, a tax [of five percent of any monies received by reason of] **on the gross receipts derived from** the lease or sale of television, moving picture or radio rights in connection with any such exhibition or performance. **The rate of tax shall be in accordance with N.J.S.A. 5:2A-20(c)(2).**

(b) (No change.)

13:46-15.2 Printer's license

(a)-(b) (No change.)

(c) A printer's license fee shall be [$15.00] **$50.00** for a period of one year.

13:46-15.5 Format of tickets according to price and complimentary tickets

(a) (No change.)

(b) A promoter may issue complimentary tickets without charge to those receiving them. The promoter shall pay to the Commissioner the [10 percent] tax required by N.J.S.A. [5:2-12] **5:2A-20(c)(1)** on all complimentary tickets issued, with the tax being calculated upon the price which would have been paid for each ticket if it had been sold. The tax shall not be paid, however, upon tickets issued without charge to:

1.-3. (No change.)

13:46-15.13 Irregularities

(a) In all cases where it is reported by an inspector that a promoter has made an incorrect statement of its gate receipts, or has used tickets not appearing on the statement required by the rules of the [Commission] **Board**, or by any mistake or subterfuge as to reduce the amount of tax **due** under the law, the promoter shall [be called before the Commission and upon the failure to] make a prompt and satisfactory explanation [and adjustment the promoter's license shall be revoked] **to the Commissioner. The promoter shall promptly remit any additional tax which may be due. Any promoter who fails to give a satisfactory explanation for any discrepancy may be disciplined by the Commissioner pursuant to N.J.A.C. 13:46-22.1.**

(b) (No change.)

(a)

STATE ATHLETIC CONTROL BOARD

Hearing Procedures

Proposed Amendments: N.J.A.C. 13:46-5.15, 5.31, 7.7, 8.1, 8.18, 9.1, 11.1, 11.10, 18.2, 18.8, 19.3, 19.6, 22.1 and 22.3

Proposed New Rule: 13:46-4.14

Authorized By: State Athletic Control Board, Gerard Gormley, Chairman; Gary Shaw, Member; Al Daniels, Member; Larry Hazzard, Sr., Commissioner.

Authority: N.J.S.A. 5:2A-2, 4, 5(b), 7, 9, 11, 14, 14.1, 15 and 17.

Proposal Number: PRN 1995-141.

Submit written comments by April 19, 1995 to:
Charles F. Kimmel, Counsel
State Athletic Control Board
CN 180
140 East Front Street
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The proposed amendments and new rule are in general a codification of current procedures. Proposed new rule N.J.A.C. 13:46-5.14 sets forth the procedure that will be followed once a license application has been filed. Under the rule, the application is reviewed by the Commissioner. If the applicant is qualified, the Commissioner grants the license. If the Commissioner finds the applicant unqualified, the Commissioner will deny the applicant. An applicant who is denied has fifteen days to request a hearing from the three member Board. If no hearing is requested, the Commissioner's denial is final. If a hearing is requested, the Board may hear the matter directly or may transmit the matter to the Office of Administrative Law as a contested case.

If an existing license is revoked by the Commissioner, the same procedure will be applicable. That is, the person whose license is revoked will have 15 days to request a hearing from the Board.

The proposal sets forth procedures for disciplinary hearings and for hearings in cases when a boxer is believed to have failed to have given a satisfactory performance. Under the proposed amendment to N.J.A.C. 13:46-5.15, the Commissioner shall investigate reports that a boxer failed to give a satisfactory performance. Within 15 days after the match, the Commissioner may either find that no discipline is warranted or may impose any fine up to the amount of the purse which the boxer would have received. Where the Commissioner imposes a fine, the boxer has fifteen days after the Commissioner's action to request review of the Board. If review is requested, the Board may uphold the Commissioner, impose a greater or lesser fine, or overrule the Commissioner and hold that no discipline is appropriate.

Under the proposed amendment to N.J.A.C. 13:46-22.1, the Commissioner may impose a fine of up to $10,000 or the amount of a purse for any violation of the regulations. The Commissioner can also impose a license suspension. If the Commissioner disciplines a licensee for a violation of the rules, the licensee has fifteen days to request that the Board review the matter. If Board review is requested, the Board may uphold the Commissioner, impose a greater or lesser fine, subject to the same limits as the Commissioner, or overrule the Commissioner and find that no discipline is warranted.

The proposed amendments also clarify current procedure with regard to judges, referees, inspectors and timekeepers. These persons are currently considered at will employees whose licenses may be denied or revoked without a hearing. The amendments merely codify current practice.

The proposed amendments do contain two significant changes. Current practice is that a boxer who fails a urinalysis exam for illegal drugs is disciplined by the Commissioner. Under this proposed amendment, the penalties for the first, second and third failure of a drug test would be codified. The amendment calls for a 30-day license suspension for a first offense, and a 45-day to one year suspension for a second offense, with in-patient treatment required as a condition of reinstatement. A third offense would result in license revocation, with reinstatement possible after two years. The penalties are similar to those imposed under current practice, but the Board believes that the penalties for drug use by boxers should be clearly codified.

The second significant change concerns the status of judges and referees recommended for appointment by a sanctioning body for a championship or other significant boxing match. As used here, "other significant boxing match" refers to an event designated by the Commissioner as a special event. The Board has proposed a definition for special events which would include pay-per-view television events, nationally televised events, whether on cable, free, or subscription television, and any other match of significance to combative sports in New Jersey to be so designated by the Commissioner.

Current practice requires that such persons be licensed by the Commissioner prior to judging or refereeing a match. This amendment would permit the Commissioner to issue a three day permit to such individuals, thereby recognizing that such officials are not part of the roster of licensed New Jersey boxing judges or referees. New Jersey officials are permitted to offer their services to other boxing jurisdictions. Licensure as a New Jersey official implies that a person has attended certain training seminars. In the case of an official recommended by a sanctioning body for a championship match, such person may be qualified for licensure but may lack the additional training over and above the licensure standard that New Jersey provides to its local judges and referees. Thus, the issuance of a permit, rather than a full license, in such situations would be appropriate.

Social Impact

There is no significant social impact made by the proposed new rule and amendments. The new rule and amendments affect those involved in professional combative sports in this State. Contestants who fail or

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test positive for certain prohibited substances will have their punishment delineated by regulation rather than left to the discretion of the Commissioner. Persons recommended as officials will not be licensed as is current practice but will receive a limited permit. This will distinguish such persons from New Jersey based officials who work both championship and non-championship events. Officials who are currently at will employees will be specifically delineated as such. The State Athletic Control Board does not anticipate a negative reaction to the new rule and amendments because of its minimal impact.

Economic Impact

The Board believes that there is no significant economic impact to these amendments and new rule. Current regulations already permit the procedures delineated by the amendments and rule. The amendments and new rule merely codify with more specificity the procedures already in place as permitted under the generalized language of the current regulations. Accordingly, there should be no economic impact from the proposed procedures.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the rulemaking requirements of the State Athletic Control Board are dictated by the statute which establishes the SACB, N.J.S.A. 5:2A-1 et seq., and are not subject to any Federal requirement or standard.

Regulatory Flexibility Statement

A regulatory flexibility analysis is not required because the proposed new rule and amendments do not impose reporting, recordkeeping, or other compliance requirements on small businesses as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., except to the extent that small business licensees or license applicants electing to appeal adverse decisions must comply with the appeal notification time frame. In the interest of procedural fairness, no differentiation in the time frame is provided for such entities. The other proposed requirements relate to individuals.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

13:46-4.14 [(Reserved)] **Procedures for licensure**

(a) The Commissioner shall review each applicant's qualifications for licensure. If the Commissioner determines that an applicant is qualified pursuant to this chapter, he or she shall issue the appropriate license.

(b) The Commissioner shall deny the application of any person he or she finds to be unqualified. The Commissioner shall notify the applicant and the Board of the reasons for his or her denial of the application.

(c) Any person whose application has been denied or whose license has been revoked by the Commissioner may, within 15 days of notification of the Commissioner's action, request that the Board review the application. If a person whose application has been denied does not request a review by the Board, the Commissioner's denial shall be final.

(d) If review by the Board is requested, the Board may:

1. Hear the matter directly; or

2. Transmit the matter as a contested case to the Office of Administrative Law pursuant to the provisions of the Administrative Procedure Act, N.J.S.A. 52:14B-16 et seq., and the regulations promulgated thereunder.

13:46-5.15 Failure to give satisfactory performance

(a) If a boxer, in the judgment of the referee, inspector or other [Commission] **Board** official, fails to give a satisfactory performance, his purse shall be forwarded to the Commissioner.

(b) (No change.)

(c) [All parties concerned shall be summoned to a hearing and the disposition of the purse shall be decided by the Commissioner. If the Commissioner agrees that the boxer failed to give a satisfactory performance he may fine the boxer and the amount of the fine shall be deducted from the purse.] **The Commissioner shall investigate the matter and shall conduct such interviews as he deems appropriate. Within 15 days of the match, the Commissioner shall:**

1. Find that no discipline is appropriate; or

2. Find that a boxer has failed to give a satisfactory performance and impose such fine as he or she believes appropriate, up to the amount of the purse.

(d) Following the finding by the Commissioner under (c) above, the amount of the purse, minus any fine, shall be forwarded to the boxer.

(e) Within 15 days after the finding of the Commissioner, a boxer who has been fined pursuant to (c) above may request review by the Board. If review is requested, the Board shall hear the matter directly. The Board may take testimony and cross examination will be permitted. The Board may:

1. Adopt the findings of the Commissioner;

2. Impose a higher or lower fine than imposed by the Commissioner, up to the amount of the purse; or

3. Find that no discipline is warranted.

(f) If the Board finds that no discipline is warranted, any amount previously deducted from the purse shall be forwarded to the boxer.

13:46-5.31 Grounds for suspension of license

[A license of any boxer shall be suspended for an arrest for or revoked on a conviction of any offense in this or any other jurisdiction which would under New Jersey law a crime of moral turpitude or any other offense which indicates that licensure would be inimical to the conduct of the sport of boxing in this State. An application for a license or renewal thereof shall be denied by the Commission for the same reasons.]

(a) A boxer may be disciplined by the Commissioner pursuant to N.J.A.C. 13:46-22.1 for any violation of the rules of the Board.

(b) In addition to any other discipline which may be imposed by the Commissioner, the following suspensions shall be imposed upon any boxer who fails a drug test required pursuant to N.J.A.C. 13:46-12.4:

1. Upon the first failure of such drug test, a 30 day suspension shall be imposed;

2. Upon the second failure of such drug test, a minimum suspension of 45 days shall be imposed by the Commissioner. Such suspension may, in the discretion of the Board, be increased to a maximum of one year. Any boxer suspended pursuant to this subsection shall be required to obtain in-patient drug rehabilitation treatment and must demonstrate successful completion of such treatment prior to licensure reinstatement;

3. Upon the third failure of such drug test, the boxer's license shall be revoked. No boxer whose license is revoked pursuant to this regulation shall be eligible to reapply for licensure until the Board has, upon petition from the boxer, granted permission for such reapplication. No such petition will be considered by the Board until a period of two years has elapsed from the date of the drug test which resulted in the revocation.

SUBCHAPTER 7. SECONDS

13:46-7.7 Penalties for violations

(a) Any second who violates any of the regulations [under this Subchapter] **of the Board** shall be [subject to license revocation, license suspension and/or fine at the discretion of the Commissioner] **disciplined by the Commissioner pursuant to N.J.A.C. 13:46-22.1.**

[(b) Any second holding a license may be suspended for arrest or conviction on a charge involving turpitude or for unbecoming conduct at any time or place reflecting discredit to boxing. Under similar circumstances, application for a license or a renewal thereof may be summarily rejected.]

Recodify existing (c) and (d) as **(b) and (c)** (No change in text.)

SUBCHAPTER 8. BOXING REFEREES AND JUDGES

13:46-8.1 Selection and assignment

(a) Referees and judges for boxing exhibitions shall be selected, licensed, and assigned by the Commissioner. **Referees and judges are at-will employees of the Board and, notwithstanding the procedure enumerated in N.J.A.C. 13:46-4.14, may have their licenses revoked or their renewal applications denied without the benefit of a hearing before the Board.**

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(b) To be licensed as a referee or as a judge an individual must have officiated previously in amateur competition or in other states or jurisdictions. The Commissioner will review the applicant's previous performance and will consider any other training including attendance at seminars conducted by the [State Athletic] Commissioner. Judges must be conversant with the rules and regulations of the [Commissioner] **Board**.

(c) An individual who is appointed to be a judge or referee in a championship match or in a match in a special event and who does not hold a valid referee or judge license must apply to the Commissioner for a special judge or referee permit not later than 30 days prior to the date of the match. The Commissioner may grant the application if he or she finds that the permit applicant meets the qualification for a referee or judge established under this chapter. Such permit shall allow an individual to perform as a judge or referee in not more than two combative sports shows held within the same 72 hour period. The fee for such permit shall be $50.00.

13:46-8.18 Failure to compete

(a)-(d) (No change.)

(e) [The Commissioner may fine the boxer or boxers and the amount of the fine shall be deducted from the purse and deposited with the State Treasurer.] **The Commissioner shall then proceed under the procedures prescribed in N.J.A.C. 13:46-5.15.**

SUBCHAPTER 9. INSPECTORS

13:46-9.1 Qualification and duties

(a) In order to be appointed and licensed as an inspector, an individual must indicate to the satisfaction of the Commissioner that he is capable of determining the appropriate amount of taxes and insurance premiums to be paid by a promoter for an event. Inspectors must be able to compose a payroll of ring officials and must be conversant with the rules and regulations of the [Commission] **Board**.

(b) (No change.)

(c) Inspectors are at-will employees of the Board and, notwithstanding the procedure enumerated in N.J.A.C. 13:46-4.14, may have their licenses revoked or their renewal application denied without the benefit of a hearing before the Board.

13:46-11.1 Appointment and license

Timekeepers for [boxing or wrestling] **combative sports** in New Jersey shall be appointed and licensed by the Commissioner. **Timekeepers are at-will employees of the Board and, notwithstanding the procedure enumerated at N.J.A.C. 13:46-4.14, may have their licenses revoked or their renewal applications denied without the benefit of a hearing before the Board.**

13:46-11.10 Compensation for [boxing] **combative sports timekeepers**

(a) (No change.)

(b) The compensation set forth in (a) above shall not apply in a sanctioned championship boxing bout **or special event**. The Commissioner shall set the compensation to be paid to timekeepers officiating at sanctioned championship boxing bouts **and special events**. In making this determination, the Commissioner may consider any determinations, standards or recommendations made by a [nationally] recognized boxing association [whose voting membership is composed of representatives of governmental agencies regulating boxing. A nationally recognized boxing association shall include, but not be limited to, the World Boxing Association, the World Boxing Council, the North American Boxing Federation and the United States Boxing Association]. Nevertheless, the Commissioner shall retain full authority to set the compensation schedule for timekeepers in championship boxing bouts **and special events** irrespective of a determination or a recommendation by such an assocation.

SUBCHAPTER 18. PROMOTERS

13:46-18.2 Dealings with unlicensed managers

Any boxing promoter who deals with an unlicensed manager may [have his license revoked or suspended and he may be subject to such fine as the Commissioner may determine] **be disciplined by the Commissioner pursuant to N.J.A.C. 13:46-22.1.**

13:46-18.8 [Grounds for suspension of license] **Suspension**

[A license of any promoter shall be suspended for an arrest for or revoked on a conviction of any offense in this or any other jurisdiction which would be under New Jersey law a crime of moral turpitude or any other offenses which indicates that licensure would be inimical to the conduct of the sport of boxing in this State. An application for a license or renewal thereof shall be denied by the Commissioner for the same reasons.]

A promoter may be disciplined by the Commissioner pursuant to N.J.A.C. 13:46-22.1 for any violation of the rules of the Board.

SUBCHAPTER 19. MATCHMAKERS

13:46-19.3 Dealings with unlicensed manager

Any matchmaker who deals with an unlicensed manager may [have his license revoked or suspended and he may be subject to such fine as the Commissioner may determine] **be disciplined by the Commissioner pursuant to N.J.A.C. 13:46-22.1.**

13:46-19.6 [Grounds for suspension of license] **Suspension**

[A license of any matchmaker shall be suspended for an arrest for or revoked on a conviction of any offense in this or any other jurisdiction which would be under New Jersey law a crime of moral turpitude or any other offense which indicates that licensure would be inimical to the conduct of the sport of boxing in this State. An application for a license or renewal thereof shall be denied by the Commission for the same reasons.]

A matchmaker may be disciplined by the Commissioner pursuant to N.J.A.C. 13:46-22.1 for any violation of the rules and regulations of the Board.

13:46-22.1 Investigations and hearings held by the Commissioner; **discipline**

(a)-(c) (No change.)

(d) If the Commissioner finds that a violation of the rules of the Board has occurred, the Commissioner may impose a disciplinary fine up to a maximum of the greater of $10,000 or the amount of the purse in the bout in which the violation occurred and, in addition to any fine, may suspend or revoke any license.

(e) Within 15 days after the imposition of a fine and/or suspension or revocation by the Commissioner, a licensee may request review by the Board. If review is requested, the Board shall hear the matter directly or refer the matter to the Office of Administrative Law pursuant to N.J.A.C. 13:46-4.14. The Board may take testimony and cross examination will be permitted. The Board may:

1. Adopt the decision of the Commissioner;

2. Impose a greater or lesser penalty than imposed by the Commissioner, except that the maximum fine shall be the greater of $10,000 or the amount of the purse in the bout in which the violation occurred; or

3. Find that no discipline is warranted.

13:46-22.3 Functions of Commissioner

(a) (No change.)

(b) The Commissioner [may] **shall** [make and] enforce such rules and regulations **of the Board** as shall be necessary or proper for the holding of boxing matches or wrestling or sparring exhibitions.

(c) It is the Commissioner's power to prescribe and enforce penalties for any violations, **subject to the review of the Board as set forth in N.J.A.C. 13:46-22.1.**

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(a)

LAW AND PUBLIC SAFETY
STATE ATHLETIC CONTROL BOARD
Rules of Boxing Competition
Three Knockdown Rule; Tie Rounds
Proposed Amendments: N.J.A.C. 13:46-8.14 and 8.19

Authorized By: State Athletic Control Board, Gerard Gormley, Chairman; Gary Shaw, Member; Al Daniels, Member; Larry Hazzard, Sr., Commissioner.
Authority: N.J.S.A. 5:2A-2, 4, 7(g) and 26.
Proposal Number: PRN 1995-142.

Submit written comments by April 19, 1995 to:
Charles F. Kimmel, Counsel
State Athletic Control Board
CN 180
140 East Front Street
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The proposed deletion of N.J.A.C. 13:46-8.14(c) would eliminate the "three knockdown rule." Currently, if a boxer suffers three knockdowns in the same round, the contest must be stopped. The proposed repeal would grant to the referee and the ringside physician the authority to stop a fight or to allow it to continue, regardless of the number of knockdowns in one round.

The proposed amendment to N.J.A.C. 13:46-8.19(b) would eliminate the discretion of officials scoring a boxing match to judge a round as a tie. Currently, judges are permitted to call any round a tie round. The amendment would require judges to pick a winner for each round and award 10 points to the winner and nine or less points to the loser of the round. A tie round would be permitted only when both fighters suffer a knockdown in the round, or when one fighter clearly dominates a round but then is himself knocked down. In all other circumstances, a judge must select a winner for the round. The State Athletic Control Board believes that this would product results which are more in line with the observations of boxing spectators. The Board has also noticed that while rounds are frequently judged as tie rounds, it is rare for all three judges to agree that a round is tied. One judge, at least, will usually select a winner for the round. This amendment should thus produce a more accurate overall score for a match.

Social Impact

The groups most impacted by these amendments include boxers, referees, judges, ringside physicians, and boxing spectators. The virtual elimination of tie rounds should create results which more closely mirror spectators' perceptions of the match, thus increasing fan satisfaction. In addition, the elimination of the three knockdown rule will eliminate fan frustration at seeing a match automatically stopped at a time when it may appear that a fighter, despite being repeatedly knocked down, is able to continue to fight. Referees and physicians will be required to exercise greater discretion in determining whether to stop a fight. The SACB believes that the training received by referees and physicians is sufficient to permit them to exercise this discretion. Judges will be impacted by these amendments as they will no longer be able to declare a round to be a tie except in very limited circumstances. Again, the SACB believes that the training judges undergo will allow proper enforcement of the amendment if it is ultimately adopted.

Economic Impact

The only economic impact is the minimal cost of educating the pool of judges, referees, and participants to these amendments. The cost should be minimal.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the rulemaking requirements of the State Athletic Control Board are dictated by the statute which establishes the SACB, N.J.S.A. 5:2A-1 et seq., and are not subject to any Federal requirement or standard.

Regulatory Flexibility Statement

A regulatory flexibility analysis is not required because the proposal does not impose reporting, recordkeeping, or other compliance requirements on small businesses, as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The amendments change the rules of competition for boxing. Only the results of boxing matches are affected by the amendments.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

13:46-8.14 Mandatory eight count; [three knockdowns in one round;] stopping a bout

(a)-(b) (No change.)

[(c) The referee shall stop the contest;

1. Immediately upon the occurrence of three knockdowns of a boxer in any one round; and

2. Immediately when a boxer has received three standing eight counts in any one round; and

3. Immediately when a boxer has received any combination of knockdowns and standing eight counts totalling three in any one round.

4. Upon stopping the bout pursuant to (c)1, 2, or 3 above, the referee shall award the decision to the boxer's opponent by a technical knockout.

5. A "knockdown" will be deemed to have occurred whenever any part of a boxer's body, other than the bottom of his feet touches the canvas as the result of a legal blow, as distinguished from a slip or fall from being off balance.

6. A boxer's condition may also justify the referee or the ringside physician stopping a contest after less than three knockdowns.]

[(d)](c) (No change in text.)

13:46-8.19 Point system scoring

(a) (No change.)

(b) The judges must mark their scorecards in ink or in indelible pencil at the end of each round, with the winner of a round receiving 10 points in the boxer's column, and the loser receiving nine points or less in his column. [An even round shall be indicated by scoring 10 points for each boxer] **Except as permitted by (b)4 below, a round cannot be judged even; 10 points must be awarded to one boxer and nine points or less awarded to the other boxer.**

1.-3. (No change.)

4. [If neither boxer can be judged the winner of a round, 10 points must be scored for each boxer.] **A round may be judged even with 10 points awarded to each boxer only if: a boxer who suffers a knockdown but for that knockdown would have won the round decisively; or both boxers suffer a knockdown. In all other circumstances, one boxer must be judged the winner of the round and awarded 10 points with the other boxer awarded 9 points or less. Nothing in this section shall prohibit a tie round as the result of a referee's point deduction pursuant to (c) below.**

(c)-(g) (No change.)

(b)

BOAT REGULATION COMMISSION
Mandatory Wearing of Personal Flotation Devices on Round Valley Reservoir
Proposed New Rule: N.J.A.C. 13:82-3.18

Authorized By: New Jersey Boat Regulation Commission, George F. Williams, Acting Chairman, with the approval of Deborah T. Poritz, Attorney General.
Authority: N.J.S.A. 12:7-34.49(c).
Proposal Number: PRN 1995-188.

Submit written comments by April 19, 1995 to:
Captain William J. Gronikowski
Division of State Police
Marine Law Enforcement Bureau
River Road
PO Box 7068
West Trenton, New Jersey 08628-0068

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The agency proposal follows:

Summary

Round Valley Reservoir, being a recreational lake, presents unique and unusual problems. The public uses the facility all year including winter months. This coupled with the exceptional depth of the Reservoir and the phenomenon of high velocity winds occuring in a matter of minutes, manifests several problems to boaters. Capsizing, hypothermia and drownings are constant threats.

Since 1971, 20 deaths have occurred on Round Valley Reservoir due to drowning and/or hypothermia. Every boating death involved an inflatable, a canoe or a boat under 14 feet.

For these reasons, the Boat Regulations Commission proposes a new rule requiring mandatory wearing of a Type I, II, III or V Hybrid—United States Coast Guard Approved Personal Flotation Device (PFD) by all persons on board when underway in a canoe, an inflatable, windsurfer or vessel under 14 feet regardless of whether or not it is mechanically powered while on Round Valley Reservoir.

The wearing of PFDs by these individuals would greatly increase their chances for survival. In most cases, if a boat capsizes there is little or no time to don a PFD. Also, many drowning victims have never been recovered because of the depth of the Reservoir and its cold water temperatures. The non-recovery of these bodies has resulted in extreme hardships for the families of the victims, both emotionally and financially because of required litigation.

Social Impact

The proposed new rule will have a positive social impact by promoting water safety and protecting the personal health of persons on Round Valley Reservoir.

Economic Impact

The proposed new rule will have little or no economic impact on persons utilizing the Round Valley Reservoir. Persons who do not already own an approved PFD would be required to purchase or rent one for use while on Round Valley Reservoir in order to comply with the proposed rule. The cost of a PFD ranges from $30.00 to $60.00. No additional officers or equipment would be required for enforcement. It will have a positive economic impact to the public by saving lives and preventing the need for litigation when a drowning victim is not recovered. The State would recognize a positive economic benefit since the need for prolonged searches would be virtually eliminated.

Executive Order No. 27 Statement

N.J.S.A. 12:7-34.49(c) requires that rules and regulations promulgated by the Boat Regulation Commission be in conformity with regulations issued by the agency or agencies of the United States having jurisdiction with respect to power vessels on the waters of the State. Round Valley Reservoir is a self-contained body of water wholly within a State park and is not navigable water of the United States and therefore is not under the jurisdiction of the United States Coast Guard. In addition, the Coast Guard promulgated a new rule, effective September 3, 1993, which removed the Federal preemption of regulations on personal flotation devices (PFDs) and allowed states to require the wearing of PFDs by children on any vessel and persons operating a canoe, kayak, sailboard or personal watercraft in response to local conditions. 33 C.F.R., section 175.5. The proposed new rule also requires that PFDs be of a type approved by the United States Coast Guard. The proposed new rule is consistent with Federal regulation and does not exceed any applicable Federal standard. Therefore, a cost/benefit analysis and certification are not required.

Regulatory Flexibility Statement

A regulatory flexibility analysis is not required because the proposed new rule does not impose any reporting, recordkeeping or other compliance requirements on small businesses, as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Requirements are imposed on individuals.

Full text of the proposed new rule follows:

13:82-3.18 Mandatory wearing of personal flotation device (PFD) on Round Valley Reservoir

All persons on board vessels under 14 feet in length or a canoe, kayak, inflatable, or windsurfer, regardless of power, while on Round Valley Reservoir will wear a serviceable United States Coast Guard Approved Type I, II, III or V Hybrid Personal Flotation Device (PFD).

(a)

OFFICE OF HIGHWAY TRAFFIC SAFETY
Motorcycle Safety Education Program
Proposed New Rules: N.J.A.C. 13:85

Authorized By: Col. Peter J. O'Hagan, Director, Office of Highway Traffic Safety in consultation with the Motorcyle Safety Education Advisory Committee.

Authority: N.J.S.A. 27:5F-40.

Proposal Number: PRN 1995-157.

Submit written comments by April 19, 1995 to:
Col. Peter J. O'Hagan, Director
Office of Highway Traffic Safety
CN 048
Trenton, NJ 08625

The agency proposal follows:

Summary

The Motorcycle Safety Education Act (N.J.S.A. 27:5F-36 et seq.) went into effect on July 1, 1992. Its purpose is to establish a voluntary motorcycle safety education program to consist of a course of instruction and training designed to develop and instill the knowledge, skills, attitude and habits necessary for the safe operation and riding of a motorcycle. The course shall meet or exceed the standards and requirements of the riders' course developed by the Motorcycle Safety Foundation, a national organization, incorporated herein by reference, available by contacting the Office of Highway Traffic Safety, CN 048, Trenton, NJ 08625. The Motorcycle Safety Education Advisory Committee has evaluated the course and believes that it is sufficient to meet the needs of motorcycle riders in New Jersey. The Motorcycle Safety Foundation (MSF) course has been adopted for use in the motorcycle safety education program. Over 40 states are also using the MSF course. The program will be implemented through tuition reimbursements to providers from a $5.00 fee collected by the Director of the Division of Motor Vehicles for each motorcycle license or endorsement, along with any other monies that may become available for motorcycle safety education and deposited into the Motorcycle Safety Education Fund. The Director of the Office of Highway Traffic Safety may impose a registration fee if monies deposited in the Fund are not sufficient to cover the cost of the program. Actual courses are conducted by providers.

Subchapter 1 describes the purpose and scope of the rules and contains definitions. Subchapters 2 and 3 describe the requirements and eligibility of participants, providers and instructors for this program. Subchapter 4 describes the requirements for the facilities and equipment used for motorcycle training sites. Subchapter 5 describes the insurance protection for the State and the students, instructors and providers under this program. Subchapter 6 describes the mechanism of program reporting by the providers to the administrator.

This course has been established by the Director of the Office of Highway Traffic Safety in the Department of Law and Public Safety after consultation with a Motorcycle Safety Education Committee appointed by the Governor, consisting of nine members, including the Director of the Office of Highway Traffic Safety, a representative of the New Jersey State Association of Chiefs of Police, a representative designated by the Driving School Association of New Jersey, a representative designated by the New Jersey Police Traffic Officers Association, the director of the Division of Motor Vehicles and four public members including a motorcycle dealer, a certified motorcycle safety education instructor and two representatives of the American Bikers Aim To Educate. The Committee meets at the discretion of the Director of the Office of Highway Traffic Safety.

Social Impact

The proposed voluntary motorcycle education program, which is conducted in a controlled environment, will have a positive social impact on the citizens of New Jersey. The course is designed and intended to produce a more skilled rider on the roadways of the State. This will serve to reduce the incidence of accidents involving motorcycles and the resulting fatalities, injuries, property damage and the societal costs involved. This would benefit the entire population.

Cyclists face distinct problems because they do not have the protection a car or truck provides and therefore are more vulnerable. During 1992 in New Jersey, 45 drivers and passengers died in motorcycle accidents; 43 died in 1991; and 59 during 1990. Motorcycle riders need more skills

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than drivers of other vehicles because motorcycles are less visible to other motorists. The popularity of motorcycling has increased in recent years. Currently there are 193,700 motorcycle operators in New Jersey. The available courses will sharpen lifesaving skills needed to share the roadway. It is anticipated that for economic, environmental and energy saving reasons, the use of motorcycles for transportation and recreation will increase substantially within the next two years.

Economic Impact

The proposed new rules will not have direct economic impact upon the public or the State because the program is voluntary. There is established a Motorcycle Safety Education Fund in the Office of Highway Traffic Safety. Five dollars of the fee collected by the Director of the Division of Motor Vehicles for each motorcycle license or endorsement issued under N.J.S.A. 39:3-10, and any other monies which may become available for motorcycle safety education, are deposited in the Fund. The monies in the Fund are used exclusively by the Office of Highway Traffic Safety to defray the costs of the motorcycle safety education program. In addition, monies in the Fund may be used to provide for a full or part time motorcycle coordinator. Students enrolling in the motorcycle safety education course will be charged a fee by the provider. However, a New Jersey resident attending the novice, intermediate and/or experienced rider course is eligible for a tuition rebate. In future years the Director of the Office of Highway Traffic Safety will set the rate for student reimbursement in an amount to be established annually by the Administrator, dependent upon course enrollment and the funds collected in the Motorcycle Safety Education Fund. Providers should apply rebate directly to student tuition or they can return to each student after receiving rebate monies.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis and certification are not required because there are no Federal standards or regulations on motorcycle safety education courses. Rulemaking requirements are dictated by N.J.S.A. 27:5F-36 et seq.

Regulatory Flexibility Analysis

The proposed new rules impose certain reporting and recordkeeping requirements on providers, some of whom may qualify as a small business pursuant to the Regulatory Flexibility Act N.J.S.A. 52:14B-16 et seq. Current commercial driving schools which offer motorcycle training are regulated by the Division of Motor Vehicles. These proposed new rules do not apply to them, unless they are approved as providers under this program.

Providers shall submit to the Administrator rosters of participants, class schedules and any official reports by other public or private agencies or individuals as a result of any accident involving bodily injury or property damage that occurs while conducting a MRC/RSS, IRC or ERC class. Providers shall also be required to maintain records of all documents generated through normal operations within the program. The cost of compliance will thus be administrative in nature; no professional services need to be employed. These requirements must be uniform for all providers in order to ensure adherence to the standards of the Motorcycle Safety Foundation and the Office of Highway Traffic Safety.

Full text of the proposed new rules follows:

CHAPTER 85
MOTORCYCLE SAFETY EDUCATION PROGRAM

SUBCHAPTER 1. PURPOSE, SCOPE AND DEFINITIONS

13:85-1.1 Purpose and scope

The rules contained in this chapter implement the provisions of N.J.S.A. 27:5F-40 and regulate the administration of a motorcycle rider education course in the State of New Jersey.

13:85-1.2 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

"Administrator" means a person in the Office of Highway Traffic Safety designated by the director to oversee the program.

"Class" means a group of people enrolled for training as participants under the program.

"Coordinator" means a person designated by a provider to fulfill certain administrative responsibilities and meet recordkeeping and reporting requirements for the particular service or function being provided.

"Course section" means the complete, scheduled set of training modules presented to a class in order to provide them with the specified curriculum activities necessary for satisfactory completion of the course in question.

"Director" means the Director of the Office of Highway Traffic Safety.

"Instructor" means a person certified by the Director to act as an instructor in a motorcycle rider education course.

"Motorcycle rider education" means education for motorcyle riders in safe motorcycle riding techniques and practices.

"MRC:ERC" means Motorcycle Rider Course/Experienced Rider Course—a motorcycle rider education course developed by the Motorcycle Safety Foundation intended for experienced motorcycle riders.

"MRC:IRC" means Motorcycle Rider Course/Intermediate Rider Course—a motorcycle rider education course developed by the Motorcycle Safety Foundation for motorcycle riders who have not ridden for a long period of time and wish to renew previously learned skills.

"MRC:RSS" means Motorcycle Rider Course/Riding and Street Skills—a motorcycle rider education course developed by the Motorcycle Safety Foundation to train novice, beginner or potential riders.

"Participant" means a person enrolled in a motorcycle rider education course approved by the Director.

"Program" means the New Jersey Motorcycle Rider Education Program using the most current curriculum prescribed by the Motorcycle Safety Foundation and adopted by the Office of Highway Traffic Safety pursuant to N.J.S.A. 27:5F-36.

"Provider" means a public or private educational institution approved by the director to offer the motorcycle rider safety education course.

"Range" means an area set aside for the operation of motorcycles as part of a course curriculum specified by the Motorcycle Safety Foundation and approved by the Director.

"Student tuition" means the tuition paid by an enrolled participant directly to the provider.

13:85-1.3 Adoption of program

Pursuant to authority granted under N.J.S.A. 27:5F-36, the Director hereby adopts and incorporates herein by reference the Motorcycle Safety Foundation rider's course, including all subsequent revisions and amendments thereto, as the program to be administered under these rules. The program would be delivered by providers to participants for a tuition approved by the Director. Copies of the program requirements may be obtained from the Administrator, Motorcycle Education Program, Office of Highway Traffic Safety, CN048, Trenton, NJ 08625-0048.

SUBCHAPTER 2. QUALIFICATIONS

13:85-2.1 Participants

(a) Persons enrolling in a MRC:RSS (Rider and Street Skills) shall:

1. Possess a valid motorcycle license or an endorsement issued by any state or a motorcycle operator learners permit;

2. Have the physical ability to operate a motorcycle;

3. Have the ability to balance a two-wheeled vehicle;

4. Have written, witnessed parental permission if under age 18; and

5. Wear the protective clothing specified in the course curriculum.

(b) Persons enrolling in a MRC:ERC (Experienced Rider Course) or MRC:IRC (Intermediate Rider Course) shall:

1. Possess a current, valid motorcycle license or endorsement issued by any state, or a motorcycle operator learner's permit and have successfully completed the MRC/RSS course;

2. Have possessed such a license or endorsement for a minimum of six months for riding experience;

3. Submit written, witnessed parental permission if under age 18 and have completed the MRC:RSS;

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4. Have access to a street legal motorcycle and submit proof of ownership and insurance or owner's written permission to use said motorcycle in the course; and

5. Wear the protective clothing as specified in the course curriculum.

13:85-2.2 Providers

(a) Providers which desire to participate in the program shall submit to the Administrator an application on a form supplied by the Division to be approved by the Director, including any additional pertinent information when requested to do so by the Administrator. The application shall contain the address and a description of the location where the course(s) will be provided, including a diagram of the driving range; the name of the coordinator, instructors and other individuals involved in the provider's program; a brief description of the provider's history and interest in motorcycle rider education and safety; and a brief description of how the provider will implement the program. The provider's qualifications will be reviewed periodically and certification can be revoked for non-compliance with these rules or other good cause.

(b) Registration of students will be the responsibility of the provider who shall collect student tuition approved by the Director. The Administrator will reimburse the provider a specified amount from the Motorcycle Safety Education Fund for each participant who attends the course and possesses a New Jersey license or endorsement or a New Jersey learner permit. Eligibility for reimbursement will be dependent upon a properly completed reimbursement coupon for each participant which shall include a driver's license or permit number on the face. Reimbursements will be limited to one per year per participant. Providers will not receive a reimbursement for a participant repeating the same level of instruction within the same year.

SUBCHAPTER 3. INSTRUCTORS

13:85-3.1 Qualifications

(a) Any person seeking to qualify for certification as an instructor shall apply in writing to the Director and shall:

1. Be the holder of a valid motorcycle operator's license or endorsement issued by any state for a minimum of two years;

2. Be the holder of a current Motorcycle Safety Foundation Certification as a motorcycle instructor;

3. Complete a New Jersey Criminal History Review Form and State and Federal Fingerprint Cards, together with a cashiers check, certified check or money order payable to the Division of State Police—SBI—in the amount specified in N.J.A.C. 13:59, and have no convictions for sexual assault, endangering the welfare of children or incompetent persons, arson, armed robbery, aggravated assault, kidnapping, murder, manslaughter or, within the past 10 years, violations of the Controlled Dangerous Substances Act;

4. Have no suspensions or revocations of driving privileges during the past two years;

5. Have no convictions for violating the provisions of N.J.S.A. 39:4-50 or comparable statutes from other jurisdictions during the past five years;

6. Have accumulated no more than four points assessed for motor vehicle offenses during the past two years;

7. Have at least two years of motorcycle riding experience; and

8. Within 90 days of hiring, obtain at applicant's own expense, a certification from a current accredited program for first aid and adult CPR.

(b) No certification fee shall be charged by the Director. A certification so issued shall be renewed in January of each year and will be valid during such period as the instructor continues to meet the requirements of (a)1 through 8 above.

SUBCHAPTER 4. FACILITIES AND EQUIPMENT

13:85-4.1 Facilities and equipment

(a) The facilities and equipment must conform to current course requirements set by the present Motorcycle Safety Foundation as well as meet all applicable local and state zoning, building, fire, health and safety regulations including a working telephone or two-way radio.

(b) The provider shall supply all materials, supplies and equipment as required by the MSF and any additional material, equipment as determined by the New Jersey Motorcyle Safety Program and/or local authorities.

(c) The provider is responsible for security and maintenance of all materials, records, supplies and equipment and for loss or damage not covered under N.J.A.C. 13:85-5.

SUBCHAPTER 5. INSURANCE

13:85-5.1 Provider coverage

Upon approval, each provider is covered as an additional insured under a blanket liability policy administered by a designee appointed by the Director.

13:85-5.2 Policy effect; release

(a) Insurance is in effect as long as an approved course is in session. The blanket policy protects both the state and the provider and all primary and assistant instructors, range aides and students participating in any provider sponsored MRC:RSS, MRC:IRC or MRC:ERC course conducted under the program.

(b) Providers shall require each participant to complete a Release, Waiver and Indemnification Statement, supplied by the Office of Highway Traffic Safety, which releases the State from any and all liability, loss, costs, claim and/or damage arising out of participation in any course conducted under the program.

SUBCHAPTER 6. PROGRAM REPORTING

13:85-6.1 Reporting

(a) Providers shall submit the following items to the Administrator:

1. Copies of all MRC:RSS/IRC/ERC rosters of participants, a class schedule and accident forms for each class section, 10 working days after the completion of any course; and

2. The Provider shall be responsible for completing and recording of any official reports required by other public or private agencies or any individuals as a result of any accident involving bodily injury or property damage that occurs while conducting an RSS, IRC or ERC class. The Provider shall submit a copy of these reports to the Director immediately.

SUBCHAPTER 7. TUITION

13:85-7.1 Tuition

From 1995, tuition is set at novice—$200.00; intermediate—$100.00; and advanced—$50.00. Thereafter, providers will have the opportunity to meet with the advisory committee, not more than once per year, for the purpose of establising a uniform tuition. Tuition will be established by January 1st for the following season. Tuition will remain constant for each training season. Notice of agreed upon tuition will be published in the New Jersey Register.

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PUBLIC UTILITIES

(a)

DIVISION OF ENERGY PLANNING AND CONSERVATION

Electric Utility Integrated Resource Planning

Proposed New Rules: N.J.A.C. 14:13

Authorized By: Board of Public Utilities, Herbert H. Tate, President, and Carmen J. Armenti and Dr. Edward H. Salmon, Commissioners.

Authority: N.J.S.A. 48:2-13.

BPU Docket Number: EX94050160.

Proposal Number: PRN 1995-136.

Submit comments by April 21, 1995 to:
Michael Ambrosio, Director
Division of Energy Planning and Conservation
Board of Public Utilities
Two Gateway Center
Newark, New Jersey 07102

The Board of Public Utilities will hold **a public hearing** with regard to this proposal in order that interested members of the public may attend and make statements for the record. Said hearing will be scheduled as follows:

Monday, April 10, 1995, at 10:30 A.M.
Board of Public Utilities
First Floor Hearing Room
44 South Clinton Avenue
Trenton, New Jersey

The agency proposal follows:

Summary

Integrated Resources Planning (IRP) is a process for determining the appropriate mix of demand-side and supply-side resources which are expected to provide long-term, reliable service to electric utility customers at the lowest reasonable cost, and which otherwise maximize benefits to the State. The development, evaluation and approval of integrated resource plans are not based solely on financial or cost consideration. The objective is to maximize the general welfare of the State of New Jersey and its citizens. This will require consideration of the impacts of the various resource options on electricity prices, system reliability, financial stability of the affected electric utilities, environmental quality, economic development, fuel efficiency and diversity and other important societal goals. The IRP process should identify and assess the various demand and supply-side options available to the utilities and present a flexible plan for fulfilling capacity and energy needs.

Electric utility planning involves two major functions: (1) load and energy forecasts to determine the levels of generating capacity and energy production required to meet demand; and (2) capacity and energy plans to ensure that supply meets the forecasted demand, plus a required reserve margin.

Six primary options exist for matching supply with demand. Utilities can:

1. Construct new capacity;
2. Purchase capacity and/or energy from other utilities;
3. Purchase capacity and/or energy from non-utility generators such as cogenerators or small power producers, which are Public Utility Regulatory Policy Act Qualifying Facilities (PURPA QFs), and from independent power producers (IPPs) or Exempt Wholesale Generators (EWGs);
4. Implement energy conservation or Demand Side Management (DSM) programs;
5. Purchase DSM implemented by third parties; or
6. Rehabilitate or upgrade existing utility facilities; or any combination of the above.

Each of these options will have different impacts on rates, revenue requirements, and the financial health of the affected utilities and each will expose ratepayers and shareholders to different levels of risks. Also, factors such as environmental impacts, system reliability, economic development, fuel supply and technology diversity must be considered when determining which mix of supply and demand-side options best serves the needs of customers, utility shareholders and the State.

Currently, New Jersey statutes, rules and policies provide for different standards and processes for reviewing each of the supply and demand-side options. This existing patchwork of governing rules has evolved in response to specific public concerns which have emerged as a result of changing industry conditions and the emergence of new technologies and markets. While each statute, rule and/or policy represented appropriate public policy when enacted, there is now a need to develop a more fully integrated process so that the various resource options are evaluated on a more comparable and comprehensive basis and in a more efficient manner.

The primary purpose of the proposed new rules is to achieve this goal. That is, the rules are intended to put in place a fully integrated process which evaluates the various resource options on a comparable and comprehensive basis.

The rules are also intended to streamline the regulatory review process and increase regulatory efficiency by initiating a comprehensive integrated review process. This will result in a streamlined review of specific projects to the extent that such projects are consistent with an approved integrated resource plan. Further, issues which are reviewed and resolved by the Board of Public Utilities (Board) by virtue of its approval of an integrated resource plan will be considered pre-approved in the review of specific projects to the extent that the specific projects are consistent with the approved plan and that assumptions used in developing the plan are still valid in light of current conditions.

The Board is also developing, on a parallel path, competitive supply-side procurement procedures which will outline the method for selection and approval of particular supply projects. The integrated resource planning process as provided for in these proposed rules will identify specific utility supply needs, both energy and capacity, and will determine the appropriate amount of supply-side and demand-side resources which will be procured to meet these needs. In addition to identifying the size of the block of supply to be procured, the IRP can be used as a tool for evaluating items such as a preferences for specific fuels or technologies or for evaluating risk profiles associated with supply portfolios consisting of different mixes of short, medium and long term resources. The supply-side process will outline procedures for subsequently fulfilling those supply-side needs identified in the integrated resource plan. The supply-side procedures will incorporate, to the maximum extent practical, competitive procurement to fill identified supply needs.

The proposed integrated resource planning rules, combined with a competitive supply-side procurement process, are intended to offer a more efficient alternative to the existing patchwork of regulatory review processes. These processes include the Certificate of Need process as set out in the Electric Facility Need Assessment Act. N.J.S.A. 48:7-16 et seq. Accordingly, the Board may, in the future, propose legislation which would redesign the existing Certificate of Need requirements to be more consistent with integrated resource planning rules and supply-side procedures. It is the intent of the Board to implement a supply-side procurement procedure which may be subsequently established in conjunction with these proposed new rules pertaining to integrated resource planning.

With the exception of the specific information required, the rules are intended to provide electric utilities or other parties with the flexibility to propose specific issues which will be reviewed as part of utility integrated resource plans or alternatively, will be considered in subsequent proceedings in which specific projects are examined. For example, if a utility were to include a proposed request for proposals (RFP) or form of contract as part of its IRP filing, the RFP or contract, once approved by the Board within the context of the IRP, would be considered pre-approved and not subject to further review. In sum, this proposed chapter, combined with a competitive supply-side procurement process, is intended, to the maximum extent possible, to serve as a replacement for Certificate of Need requirements, prudency reviews of power purchase agreements and determinations of the amount of DSM to be targeted for procurement via the DSM rules. N.J.A.C. 14:12.

Subchapter 1 identifies the purpose and scope of the proposed rules and provides definitions for frequently used terms.

Subchapter 2 sets out the requirements for the filing of integrated resource plans including the necessary documentation, the distribution of the plans and requests for confidentiality.

Subchapter 3 pertains to electric energy and demand forecasts. It includes the requirements of the forecasts, which shall be on a 20 year basis; the impact of demand side management on forecasted peak demands and energy sales; the use of modeling to take into account high-growth and low-growth scenarios; the detail of the data expected in the

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forecasts; the inclusion of historic data covering the five year period immediately preceding the year in which a plan is considered; and a description and justification of the data, assumptions, models and other inputs on which the utility relied in developing its peak demand and energy sales forecasts.

Subchapter 4 requires the preparation of a 20 year plan indicating the utility owned generating capacity and the capacity and energy purchases to or from other sources. The results from this plan would then be combined with the forecasts required in subchapter 3 in order to quantify anticipated incremental resource needs under base or high and low-load growth scenarios.

Subchapter 5 requires each utility to investigate supply-side resources reasonably available to it for inclusion in its IRP filing as a means of meeting its resource needs. In addition, each utility must conduct an assessment of the technical, economic and market potentials for future demand-side measures as a guide for developing comprehensive demand-side programs. Included in these efforts will be the identification of environmental and other externalities and the provision of projected capacity and energy impacts of existing or proposed load building, load retention and fuel switching programs as well as their impacts on incremental electric resource needs, electric rates and other identified IRP criteria.

Subchapter 6 sets out the requirements for the development and justification of integrated resource plans.

Subchapter 7 provides for the establishment, composition, purpose and duties of IRP Working Groups which are to be formed upon the filing of a request to initiate an IRP proceeding.

Subchapter 8 pertains to the pre-filing and filing requirements for IRP proceedings, as well as to the review of the filing for completeness, pre-hearing conferences, intervention, hearings and Board approval.

Subchapter 9 provides a utility with an opportunity to file an application for a waiver or variance from a provision or provisions of this chapter.

Social Impact

The proposed new rules will help to achieve a major goal of the New Jersey Energy Master Plan which is to increase competition in the wholesale power market. The proposed rules will ensure that electric utilities develop only those facilities which are needed to serve their service territories. This will help to reduce costs to utility customers and maximize benefits to the State. The proposal is also intended to streamline the regulatory review process by implementing, to the maximum extent possible, a single, integrated review process.

Economic Impact

The affected utilities presently engage in integrated resource planning for the assessment of internal resources and available company options. At times, these plans are presented to the Board within the context of significant formal proceedings such as base rate cases. These studies, however, are not consistent in either form or substance. The purpose of the proposed rules is not only to require utilities to file integrated resource plan information, but also to ensure that such filings will be uniform and consistent. As the utilities are presently preparing integrated resource plans or other similar plans for internal use, additional costs, if any, in complying with the proposed rules will be minimal. Accordingly, while all reasonable additional levels of costs associated with the filing of these plans will be considered to be business expenses that may eventually be included in rates to customers, any economic impact to ratepayers will be *de minimus*. These administrative costs are expected to be more than offset by reduced operating costs which result from the IRP approval process. The proposed new rules will have no cost effect on the Board's operations.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required in that the proposed new rules are not subject to any Federal requirements or standards.

Regulatory Flexibility Statement

The proposed new rules do not impose any additional reporting, recordkeeping or other compliance requirements on small businesses as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Each regulated electric utility that would be affected by the proposed new rules employ more than 100 people.

Full text of the proposed new rules follows:

CHAPTER 13
ELECTRIC UTILITY INTEGRATED
RESOURCE PLANNING

SUBCHAPTER 1. GENERAL PROVISIONS

14:13-1.1 Purpose and scope

The rules in this chapter establish a process for the review and consideration of integrated resource plans developed by New Jersey investor owned electric utilities subject to the jurisdiction of the Board of Public Utilities pursuant to N.J.S.A. 48:2-13. Integrated Resource Planning (IRP) is a process for determining the appropriate mix of demand-side and supply side resources which are expected to provide long-term, reliable service to utility customers at the lowest reasonable cost. However, the development, evaluation and consideration of integrated resource plans are not based solely on financial or cost consideration. The objective is to maximize the overall welfare of the citizens of this State. This requires consideration of the impacts of the various resource options on electricity prices, system reliability, financial stability of the affected electric utilities, environmental quality, economic development, fuel efficiency and diversity and other societal goals. The IRP process will identify and assess the various demand and supply-side options available to the utilities and outline a flexible plan for fulfilling capacity and energy needs.

14:13-1.2 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

"Board" means the New Jersey Board of Public Utilities, or its successor.

"Capacity factor" means the ratio of the net energy produced by a generating facility to the amount of energy that could have been produced if the facility operated continuously at full capacity year-round.

"Cogeneration" means the simultaneous or sequential generation of electricity and used and useful thermal energy from a common fuel source, resulting in enhanced thermal efficiency.

"Committed supply" means a supply or demand resource that has been approved by the Board and for which a contractual or financial obligation to purchase or construct exists.

"Cost-effectiveness tests" means formulae used to assess the economic attractiveness of demand side management (DSM) technologies and programs. These tests reflect the perspectives of participating customers, non-participating customers, all customers, the utility, and society as whole.

"Cream skimming" means DSM programs in which only the most cost-effective or least expensive measures are implemented at a customer's facility, thereby making it uneconomical to return at a later date to that facility to obtain additional cost effective demand-side resources.

"Customer" means any entity purchasing energy or capacity from a utility on a franchised retail basis.

"Demand side management (DSM)" means the management of a public utility's existing and/or future capacity and/or energy needs through the implementation of cost-effective energy efficiency technologies, including, but not limited to, installed conservation, load management and energy efficiency measures in the residential, commercial, industrial, institutional and governmental premises and facilities in the State.

"Demand-side measure" means any hardware, equipment, device, or practice that is installed or instituted resulting in increased energy efficiency, reduced electric demand, or increased load factor at a customer facility.

"Demand-side program" means a utility program, or a program of a third-party implemented pursuant to a utility program, utility bid or utility DSM Standard Offer, to install or institute demand-side measures.

"DEP" means the New Jersey Department of Environmetnal Protection, or its successor.

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"DSM market potential" means the amount of capacity and energy savings that can be expected to be delivered by suppliers and purchased by consumers in the marketplace, as a result of prevailing prices, available equipment operating and design characteristics and related factors. The assessment of DSM market potential should identify market and institutional barriers to the acquisition of cost effective DSM.

"Economic potential" means the amount of electric capacity and energy that could be obtained from full implementation of all technically feasible demand-side programs which pass the societal cost test.

"End-use" means the light, heat, cooling, refrigeration, motor drive, or other useful output produced by equipment or appliances that use electricity or its substitutes.

"Energy efficiency" means the provision of energy services using appliances, equipment or procedures to provide the full service with reduced energy use.

"Energy efficiency program" means a program designed for the purpose of encouraging an incrase in energy efficiency, measured as a decrease in electricity or gas requirement of participating customers during any selected time period, with end-use service held constant.

"Energy services" means the heat, light, motor drive, and other services for which customers of a utility purchase energy from that utility. If equivalent amenity levels or productivity levels are maintained, then energy service is considered constant.

"Equivalent availability factor" means the percentage of time a generating facility is available to provide service adjusted for any partial availability of the unit on an annual basis.

"Externalities" means those environmental and other costs (or benefits) that result from the generation, transmission, distribution, or change in the efficiency or pattern of electricity usage, unpaid or otherwise not reflected in the economic transaction between the utility supplier and the wholesale (distribution utility) or retail (ratepayer) customer. That is, externalities are those impacts that are not directly reflected in the prices paid by customers or would otherwise not be directly reflected in the prices paid by customers if not incorporated in this chapter.

"Free riders" means those customers who paticipate in a DSM program and would have implemented the demand-side measure in the same quantity and quality and within the same time period in the absence of the utility demand-side program.

"Full technical potential" means the amount of capacity and energy savings that could be obtained by the installation and use of the most efficient equipment and technology commercially available for use in each customer facility, without regard for budgetary limitations, cost effectiveness or market barriers.

"Life-cycle costs" means all of the costs, including both direct and societal, associated with the construction, operation, maintenance, fueling, waste disposal, and decommissioning of a supply or demand-side resource.

"Lost opportunities" means situations where cost-effective demand-side measures could have been installed, but were not, and subsequent modifications to the installation site render later installation not cost-effective.

"Planning period" means the future period for which the utility assesses its future resource needs and develops its integrated resource plan.

"Qualifying facility" means a qualifying cogeneration or small power production facility as defined by the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. Sec. 824a3 et seq.

"Resource" means any facility, project, contract, or other mechanism a utility can use to provide energy services to its customers, including incremental investments in existing resources.

"Societal costs (or benefits)" means the total of the economic, environmental, and other externality costs (or benefits) of resources used to meet the demand for energy services.

"Societal cost test" means an analytical test that is used to identify resources that provide net benefits considering all societal factors. A resource option is cost-effective under this test when the present value of life-cycle societal benefits exceed the present value of life-cycle societal costs.

"Supply-side resource" means a resource option that can provide electrical energy or capacity. Supply resources include utility-owned generating facilities; firm contractual electricity purchases from other utilities, or independent third parties; and the life extension or upgrading of existing facilities of the utility through technological improvements, including fuel switching, to more efficiently produce and deliver electricity as well as transmission and distribution facilities required to deliver power.

SUBCHAPTER 2. FILING REQUIREMENTS

14:13-2.1 Plan filing

Every three years, each electric utility subject to the jurisdiction of the Board pursuant to the provisions of N.J.S.A. 48:2-13 with annual revenues in excess of $500 million, shall file an original and 15 copies of a long term integrated resource plan (plan) with the Board and an application requesting Board approval of the plan. The Board shall establish a schedule to provide for staggered dates for individual utility filings.

14:13-2.2 Required documentation

(a) The IRP filing shall consist of the following documents:

1. An Executive Summary, separately bound and suitable for distribution to the public, which shall be a non-technical description of the proposed preferred plan and specific contingency plans to address the major key uncertainties, and the proposed short term action plan as set out in N.J.A.C. 14:13-6.

2. A technical volume or volumes setting forth in detail, the elements of the preferred plan, the various contingency plans, and the action plan. This volume or volumes shall also include the utility's load forecasts, assessments of supply and demand resource alternatives, assessment of alternative resource portfolios, the supporting data, assumptions, and models used to develop the plans, a three-year action plan, and a detailed report setting forth the utility's progress in implementing the last plan approved by the Board; and

3. Technical appendices containing information enabling the Board and intervening parties to understand how the preferred plan was developed and to verify the accuracy and consistency of the information used and assumptions made in developing the preferred plan. Technical appendices shall also include documentation and explanation of the data, assumptions, models, and outputs used in the development of the preferred and contingency plans, outputs from such models, the results of uncertainty analyses, and citations to all significant sources of information used in the development of the preferred plan. All analyses shall be fully explained.

(b) The IRP filing will be followed by subsequent Annual Progress Reports, submitted one and two years after the approval of an integrated resource plan, to inform the Board and interested parties of the progress made in implementing the approved short-term action plan defined in N.J.A.C. 14:13-6.3 and of any changes in circumstances that affect plan implementation. Furthermore, to the extent any changes in assumptions or modeling have occurred, they shall be included in these progress reports.

14:13-2.3 Distribution of the plan

(a) Copies of the IRP filing submitted to the Board shall be provided to the DEP, the Division of Ratepayer Advocate, the New Jersey Department of Commerce and Economic Development and to parties that obtain intervenor or party status in the IRP proceeding. Copies shall also be made available for review by the public at the offices of the Board and at utility bill payment centers.

(b) Copies of the Executive Summary shall be provided by the utility to the public upon request.

14:13-2.4 Confidential information

(a) Any party or person may agree to treat materials submitted within the context of an IRP filing as confidential pending the filing with the Board of a motion for protective order. When such an agreement is made, the party or person seeking confidentiality shall within 30 days make a motion to the Board for a protective order.

(b) Any motion seeking a protective order shall be supported by affidavit and shall clearly set forth the facts upon which the motion

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is based. Any documents which are the subject of a motion for a protective order shall be deemed confidential pending the Board's determination on the motion.

(c) A party or person seeking a protective order shall have the burden of proving good cause by a preponderance of the evidence.

(d) In considering a request for the issuance of a protective order, the Board may require that the subject documents be available to it for *in camera* inspection.

(e) Grounds for issuing a protective order may include, but shall not be limited to, the following:

1. The documents sought to be protected constitute the trade secrets or other proprietary or confidential research, development or commercial information of a party or person; and/or

2. The documents sought to be protected contain information which if disclosed, would cause a party or person deprivation of privacy or undue burden or expense.

(f) Documents under protective order shall not be deemed to be public records subject to the Right to Know Law, N.J.S.A. 47:1A-1, and may be disclosed only to the extent specifically permitted in the protective order. Disclosure beyond that authorized in the protective order may not occur without the approval of the Board upon motion and notice to all parties. Said motion shall be supported by affidavits and shall set forth with particularity the identity of the movant, the reasons for the request for disclosure and the harm to the movant, if any, if the documents are not released.

SUBCHAPTER 3. ELECTRIC ENERGY AND DEMAND FORECASTS

14:13-3.1 Forecast requirements

(a) A utility shall prepare 20 year energy and demand forecasts including the following:

1. Annual jurisdictional sales of electricity and winter and summer coincident peak demands for the utility system;

2. Annual energy (MWH) sales, and estimates of the winter and summer coincident peak demands (MW) for each major customer class;

3. Annual wholesale sales to other utilities or any other sales not subject to Board jurisdiction, including municipal utilities, not included in the committed supply plan pursuant to N.J.A.C. 14:13-4.1;

4. Annual intra-utility use; and

5. Annual system losses and the allocation of such losses to the transmission and distribution components of the system.

14:13-3.2 Impact on demand side management

The energy and demand forecast prepared pursuant to N.J.A.C. 14:13-3.1 shall indicate the annual forecasted peak demands and energy sales both on an unrestricted basis and after the inclusion of the effects of committed curtailable load customers and known or committed demand side management effects, programs or contracts have been factored in. The forecast of DSM shall be provided for each affected customer class.

14:13-3.3 Modeling for uncertainty

(a) A utility shall develop a range of forecasts of peak demand and energy sales which its system may reasonably be required to serve during the forecast period. The range shall include at least three levels of expected growth in peak demand and energy sales, based on alternative, internally consistent assumptions about the determinants of peak demand and energy sales, as follows:

1. A base case senario, which incorporates assumptions that the utility determines to be most likely;

2. A high-growth scenario; and

3. A low-growth scenario.

14:13-3.4 Required detail

(a) To the extent available data permits, forecast sales for the residential and commercial classes shall be disaggregated to provide estimates for the major end-use categories.

(b) To the extent available data permits, forecast sales for the industrial class shall be disaggregated to provide estimates for the major Standard Industrial Classification (SIC) codes. This information shall be submitted in a format which protects confidential customer information.

(c) For each sales forecast category listed in (a) and (b) above, the utility shall discuss how the forecasts are affected by changes in energy efficiencies due to government standards, market forces, and other relevant external factors, occurring independently of utility DSM programs.

14:13-3.5 Historic data

(a) For each of the five years immediately preceding the year in which a plan under consideration has been filed, each utility shall:

1. Set forth the forecast of summer and winter peak demand and annual energy sales made by the utility as well as the actual summer and winter peak demand and annual energy sales experienced by the utility in that year; and

2. Explain, if applicable, why the peak demand and energy sales were different than those that had been forecasted by the utility.

14:13-3.6 Description and justification

Each utility shall fully explain, justify, and document the data, assumptions, methodologies, models, and other inputs on which it relied to develop its peak demand and energy sales forecasts pursuant to this subchapter as well as the forecasts themselves.

SUBCHAPTER 4. COMMITTED SUPPLY RESOURCES AND ANTICIPATED RESOURCES NEEDS

14:13-4.1 Committed supply plan

Each utility shall prepare a 20 year plan indicating, for the current year, the existing owned electric generating capacity and capacity and energy purchases (sales) from (to) other utilities or third party generators and, for each of the subsequent years of the plan, indicate and identify the committed additions or subtractions from these subcategories including utility plant retirements as well as the aggregate total supply resources.

14:13-4.2 Identified resource needs

Each utility shall combine the result of its committed supply plan filed pursuant to N.J.A.C. 14:13-4.1 with the results of its base, high and low-load energy and demand growth forecasts filed pursuant to N.J.A.C. 14:13-3.1 to quantify for each year of the plan its anticipated incremental resource needs under a base, high and low-load growth scenario. A utility may provide the information required pursuant to this section as well as N.J.A.C. 14:13-4.1 and 3.1 in a combined format.

SUBCHAPTER 5. ASSESSMENT OF RESOURCES

14:13-5.1 Objective

Each utility shall make a thorough and consistent assessment of all known and reasonably feasible resources for potential inclusion in its IRP filing as a means of meeting the resource needs identified in N.J.A.C. 14:13-4.2.

14:13-5.2 Supply-side resource assessment

(a) To provide a basis for conducting the assessment required in N.J.A.C. 14:13-5.1, each utility shall investigate supply-side resources reasonably available to it within the 20 year planning period. This investigation shall include the reasonable consideration of a wide range of fuel types including renewables, as well as technologies, and ownership arrangements. Such investigation shall include an analysis of any transmission system modifications or additions required to deliver the resource. The types of resources that a utility shall investigate include, but are not limited to:

1. Potential changes to existing resources, including, but not limited to, efficiency improvements, repowering, fuel switching, life extensions, mothballing, retirement of power plants, loss reduction in transmission and distribution systems, and regional dispatch of power plants;

2. New utility-owned generating stations;

3. Non-conventional and renewable resoures, including, but not limited to, hydroelectric, solar thermal, photovoltaic, biomass, wind,

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and energy storage systems. Such analysis shall include both an assessment of the technical potential and cost effectiveness;

4. Purchases from other utilities and other power pools and purchases from non-utility generators such as independent power producers, qualifying facilities, and exempt wholesale generators, including purchases obtainable through competitive procurements, if any, approved by the Board.

5. Customer generation to the extent customers provide necessary information;

6. Resources developed through pooling, wheeling, coordination arrangements, or through other mechanisms not otherwise covered in this section; and

7. Short term firm purchases which may defer the need for long term commitments or otherwise fill short-term needs as identified by the data submitted pursuant to N.J.A.C. 14:13-5.3

14:13-5.3 Information on supply-side resources

(a) Each utility shall develop and include in its IRP filing that information with respect to supply-side resources that it assesses to demonstrate that the IRP reflects and is consistent with the utility's plans for complying with the provisions of the 1990 Clean air Act as well as with other Federal and state environmental rules and regulations which impact the costs and operation of supply-side resources.

(b) For all existing utility-owned, supply-side resources, the utility shall submit sufficient information for the identification and description of such resources including:

1. The name and location;

2. The rate capacity and net dependable capability;

3. Both historic and forecasted equivalent availability factors and capacity factors;

4. Applicable heat rates for full and partial loads;

5. Specification and description of fuel types, including, with respect to resources using coal, description of the quality of the coal(s) available and used, and the means of transportation available;

6. The expected remaining useful life of major components and a description of the role of existing utility-owned resources as future resources, including the potential costs of, and schedules for, capital improvements, operation and maintenance costs efficiency improvements, repowering, fuel switching, life extension, mothballing, and retirement;

7. A range of projected fuel prices, including at least high, base, and low estimates, and justification thereof;

8. The fixed and variable costs of producing energy;

9. To the extent such estimates are available, emission rates, expressed in pounds emitted per kilowatt-hour generated, of the following substances: oxides of sulphur; oxides of nitrogen and nitrous oxides; carbon dioxide; carbon monoxide; non-methane volatile organic compounds; particulates; methane; chlorofluorocarbons and other ozone-depleting substances and air toxics, as defined in Title III of the Clean Air Act; and

10. A description of the impacts on land, including solid-waste disposal, and water resources.

(c) For existing supply-side resources not owned by the utility, the utility shall submit sufficient information for the identification and description of these resources including name, fuel type, contract capacity, remaining life of the contract, cost per megawatt and per megawatt-hour and, where feasible, emission of substances specified in (b)9 above and land and water impacts as specified in (b)10 above.

(d) For potential new generation resources, the utility shall submit sufficient information for the identification and description of options for meeting load during the planning period, including:

1. For any new supply-side resource project that a utility has already identified that is not intended to be competitively bid, the utility shall provide information for such project as specified in (b) above as well as construction costs, construction schedule, proposed method of cost recovery, and expected in-service date; and

2. For other new supply-side resources, the utility shall describe the potential for development of these options by technology and fuel type, addressing the likely costs of construction and production (including a range of projected fuel prices), transmission and distribution system impacts, environmental impacts, and availability of these options during the 20 year planning period. The utility shall identify a preference, if any, for specific fuels or technologies.

(e) For improvements in the efficiency of supply of electricity, the utility shall submit sufficient information for the identification and description of the potential costs of, and schedules for, such improvements in the 20 year planning period.

(f) The utility shall submit sufficient information for the identification and description of the resource potential and costs of additional power pooling and other forms of coordination with other utilities and non-utility generators.

(g) A utility may request confidentiality of competitive cost or other information subject to the procedures set forth in N.J.A.C. 14:13-2.4. However, such information shall be provided to Board Staff, the Division of Ratepayer Advocate and other entities not representing potential competitors which are granted intervenor status, pursuant to a reasonable protective agreement.

14:13-5.4 Demand-side resource assessment

(a) A utility shall conduct an assessment of the full technical potential, economic potential and market potential for future demand-side measures as a guide for developing comprehensive demand-side programs. To the extent practicable, this assessment shall result in an aggregate DSM supply curve which identifies the amount of DSM available at various costs to the utility. The technical and economic studies shall identify market or institutional barriers that affect the availability of savings opportunities.

(b) A utility shall estimate the demand-side resources available for use in developing an integrated resource plan. In the development of such estimates, a utility shall be guided by the following principles:

1. All cost-effective DSM programs, as defined in N.J.A.C. 14:12 shall be acquired by the utility and reflected into the forecast during the planning period, subject to a review and consideration of market constraints, rate impacts, and the other important IRP factors identified in N.J.A.C. 14:13-6.1(b)5;

2. DSM programs shall contain monitoring and evaluation components consistent with the Measurement and Verification Protocol approved by the Board pursuant to N.J.A.C. 14:12-3.6;

3. A utility shall strive to develop a diverse set of DSM programs that encompasses all customer classes, including low-income customers; and

4. A utility shall strive to discourage free riders, to minimize lost opportunities, and to avoid cream skimming. Specific methods to address such concerns shall be established pursuant to N.J.A.C. 14:12.

(c) A utility shall provide estimates of participation rates, costs (including program administration, incentives to the utility, and measurement costs), and net and total energy and load impacts over the 20-year analysis period for each DSM program.

(d) A utility shall provide aggregate estimates of DSM program costs and effects, including estimates of lost revenues, for each major rate class.

14:13-5.5 Load building, load retention and fuel switching programs

(a) The utility shall provide the projected capacity and energy impacts of each existing or proposed load building, load retention, and fuel switching program as well as an evaluation of the impacts of these programs on incremental electric resource needs, electric rates, and the other IRP criteria identified in N.J.A.C. 14:13-6.1(b)5. Nothing in this chapter shall be construed to create a requirement for a utility to implement a fuel switching program.

(b) The purpose of this subchapter is neither to review or approve load building, load retention or fuel switching programs nor to review the specific costs or implementation of such programs. Conversely, the information required is limited to that necessary to assess the impacts of such programs on resource needs.

14:13-5.6 Electricity pricing

The utility shall describe the projected rate impacts of the proposed IRP filing. In addition, the utility shall compare the avoided costs calculated pursuant to N.J.A.C. 14:13-6.5 to the rates for each major customer class and discuss whether current rates support or hinder achieving the IRP goals as specified in N.J.A.C.

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14:13-6.1(b)5. Based upon that discussion, the utility may propose changes in rate designs for consideration in a future rate case proceeding.

14:13-5.7 Externalities

For each resource considered for inclusion in the utility's resource portfolio, the utility shall identify environmental and other externalities. The Board shall quantify and monetize, where appropriate, specific values to be utilized by utilities. Any such quantified externality values shall then be used in assessing individual resources and alternative resource portfolios. Where it is determined that quantification is not appropriate, the utility shall identify the environmental and other externalities and show how qualitative consideration of these factors affected utility decisions on inclusion or exclusion of the resource in the preferred portfolio.

14:13-5.8 Description and justification

Each utility shall fully explain, justify, and document the data, assumptions, methodologies, models, determinants, and any other inputs on which it relied to develop the information required by this subchapter. Also, each service shall fully explain, justify and document the way in which the criteria set forth in N.J.A.C. 14:13-6 were applied to each resource assessed.

SUBCHAPTER 6. INTEGRATED RESOURCE PLANS

14:13-6.1 Development of integrated resource plans

(a) Each utility shall develop integrated resource plans including a supporting explanation, justification, and documentation for submission to the Board. In developing a plan, a utility shall treat all demand and supply-side resources consistently and equitably.

(b) The following principles shall guide the development of alternative IRP strategies for evaluation:

1. Using the resources assessed pursuant to N.J.A.C. 14:13-5, a utility shall develop a preferred plan and specific contingency plans to meet the need for energy and capacity for each of the demand forecasts established in N.J.A.C. 14:13-3.3. The preferred plan shall be tested for resiliency against alternative future scenarios, including possible delays in the in-service date or retirement date of committed resources as identified in the committed supply plan filed pursuant to N.J.A.C. 14:13-4.1;

2. The utility shall develop the plans required by (b)1 above so as to minimize societal costs. In developing such plans, the utility shall use the quantified externality values, if any, developed pursuant to N.J.A.C. 14:13-5.11. For those externalities that have not been quantified, the utility shall show how these externalities have been considered in developing such plans. The utility shall explain, justify, and document the manner in which these plans were developed, including all financial, regulatory, and other significant assumptions.

3. The utility shall develop such plans designed to meet different objectives that it deems appropriate;

4. The utility shall conduct analyses to assess the risks and uncertainties associated with meeting the energy service needs in each forecast developed pursuant to N.J.A.C. 14:13-3.3. Items of risk and uncertainty to be assessed include, but are not limited to:

i. Fuel prices for electricity production and for customer end uses;
ii. In-service dates of supply and demand resources;
iii. Unit availability;
iv. Market penetration rates for, and the cost-effectiveness of, demand-side programs;
v. Inflation in plant construction costs and the cost of capital;
vi. Use of risk-adjusted discount rates;
vii. Availability and cost of purchased power;
viii. Possible Federal or State legislation, rules or regulation;
ix. New technological developments;
x. Unit decommissioning or dismantlement costs;
xi. Alternative cost recovery/contractual arrangements; and
xii. Alternative mixes of short, medium and long term resources; and

5. The Utility shall report the results on each of the plans it developed for the following criteria:

i. Capital and operating costs and utility revenue requirements;
ii. Electricity prices and typical customer bills;
iii. Environmental effects, including environmental externalities;
iv. Fuel and technology diversity and other factors affecting the plan's ability to respond to unforeseen changes;
v. Reliability of the system;
vi. Utility financial condition;
vii. The State and local economies;
viii. Use of renewable resources;
ix. Flexibility; and
x. Risk profiles to customers and the utility.

14:14-6.2 Preferred plan

Each utility shall develop its preferred plan for submission to the Board on the basis of the analysis required in N.J.A.C. 14:13-6.1. The utility shall fully explain, justify and document the manner in which it developed this preferred plan. If the utility's preferred plan differs from the plan that maximizes benefits to the State, the utility shall explain fully the reasons for its choice of a different resource plan. The preferred plan shall identify both the supply and demand side resources that will be developed to meet identified resource needs.

14:13-6.3 Short-term action plan

Each utility shall file a short-term action plan that sets forth the steps that it will take to implement the preferred plan and to implement contingency plans including proposed budgets, schedules, accomplishments, and an explanation of the need to take such steps. The action plan shall also present the data collection and analysis activities the utility plans to conduct to improve its resource-planning capabilities. The short-term action plan shall cover each of the three years beginning with the year subsequent to the anticipated approval date of the plan.

14:13-6.4 Description and justification

Each utility shall fully explain, justify, and document the data, assumptions, methodologies, models, and any other inputs on which it relied to develop the information required by this subchapter.

14:13-6.5 Avoided cost

(a) Each utility shall submit time and seasonally differentiated avoided costs which result from its IRP filing. Avoided costs shall include both avoided energy and capacity costs and shall include avoided generating capacity costs, avoided transmission and distribution costs and avoided operating, fuel and maintenance costs.

(b) The utility shall calculate its avoided cost pursuant to the differential revenue requirement methodology. The IRP Working Group, set out in N.J.A.C. 14:13-7, shall attempt to resolve specific issues related to the implementation of the differential revenue requirement methodology. Nothing herein shall prevent a utility from proposing an alternative methodology for calculating avoided costs subject to approval of the Board.

SUBCHAPTER 7. IRP WORKING GROUP

14:13-7.1 Establishment, participation, purpose, summaries

(a) Upon the filing of a request to initiate an IRP proceeding pursuant to N.J.A.C. 14:13-8.1(a), the utility shall establish an IRP Working Group. Representatives of the utility, the Board, the DEP, the Division of Ratepayer Advocate, and the New Jersey Department of Commerce and Economic Development shall be members of the IRP Working Group.

(b) All persons filing a request for participation within 30 days of the public notice issued pursuant to N.J.A.C. 14:13-8.1(b) shall be permitted to participate in the IRP Working Group. However, in order to insure a manageable process, the Board may require that persons with similar interests designate a single representative to the IRP Working Group. If the persons requesting participation are unable to agree upon a reasonable number of representatives as determined by the Board, the Board shall select representatives pursuant to (c) through (f) below.

(c) In addition to the members identified in (a) above, IRP Working Group representatives shall also be selected from:

1. The DSM industry;
2. The non-utility generation industry;

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3. Environmental groups;
4. Residential customers;
5. Commercial customers;
6. Industrial customers; and
7. Other appropriate State agencies.

(d) Persons wishing to represent an interest group included in N.J.A.C. 14:13-8.2(c) are required to file Requests for Participation within 30 days of the public notice issued pursuant to N.J.A.C. 14:13-9.1(b).

(e) If more than one person files a Request for Participation to represent any of the interest groups identified in (c) above, the Board shall provide notice and request that those persons convene to select a representative. If said persons are unable to select a representative, the Board shall choose a representative. If only one person files a notice to represent any of the interest groups identified in (c) above, that person shall be included in the IRP Working Group.

(f) The Board may select up to two additional persons that file a Request for Participation for inclusion in the IRP Working Group. The two additional persons are not required to be representatives of any of the interest groups identified in (c) above.

(g) Board staff shall chair the IRP Working Group, schedule meetings, and develop agendas for these meetings.

(h) IRP Working Group meetings shall be scheduled on a periodic or on an as needed basis. The purpose of the IRP Working Group is, prior to the formal IRP filing by the utility:

1. To facilitate, on an informal basis, an exchange of information and ideas with respect to the development of the utility's IRP, including assumptions, models, and results;
2. To keep the members apprised of the status of the utility's plan development; and
3. To attempt to achieve areas of consensus and identify possible areas of conflict.

(i) Topics to be discussed by the IRP Working Group include, but are not limited to:

1. The utility's progress in implementing its latest IRP;
2. Key assumptions and data used in the planning process;
3. The models and other analytical techniques used by the utility;
4. The results of the plan; and
5. The topics covered in N.J.A.C. 14:13-3, 4, 5 and 6. In addition, the utility shall run its computer models to develop alternative resource plans based on reasonable requests for inputs and assumptions from the IRP Working Group.

(j) While the New Jersey Energy Master Plan provides guidelines on the broad energy policies of the State, said guidelines are typically not specific enough to provide utilities with sufficient direction to develop an IRP filing. The IRP Working Group shall attempt to achieve areas of consensus and identify possible areas of conflict related to the development of more specific energy policy guidelines to be used by utilities in developing an IRP filing. Although such guidelines shall include consideration of the quanitification and monetization of externalities, nothing herein requires quanitification of monetization of externalities.

(k) The utility, subject to review and approval by the members of the IRP Working Group, shall prepare a summary of the agendas and discussions held during the IRP Working Group meetings. The summaries as well as the utility's responses to the inputs from the IRP Working Group shall be included in the utility's IRP filing.

SUBCHAPTER 8. FILING PROCEDURES AND BOARD REVIEW

14:13-8.1 Pre-IRP filing procedures

(a) At least 90 days prior to submitting its IRP filing pursuant to N.J.A.C. 14:13-2.2, a utility shall file with the Board a request to open a docket for the purpose of resolving integrated resource planning issues for that utility.

(b) Upon filing a request to open a docket for the purpose of resolving integrated resource planning issues, the utility shall provide public notice of such filing in newspapers which cover its service territory. The form and distribution of such notice shall be submitted for review by Board staff prior to publication. The notice shall include instructions on filing a Request for Participation.

(c) A utility shall create opportunities for informal discussions among the IRP Working Group throughout the preparation of its plan, as discussed in N.J.A.C. 14:13-7.2. At a minimum, a utility shall prepare and provide to the IRP Working Group a Preliminary Plan, including at least a preferred plan, a short-term action plan, and various alternative plans at least 90 days prior to submitting an IRP filing pursuant to N.J.A.C. 14:13-2.2. This Preliminary Plan shall be comprised of the same documents, in draft, as are required by N.J.A.C. 14:13-2.2.

(d) Any IRP Working Group member may conduct informal discovery of the utility with respect to the Preliminary Plan. Utilities shall respond to discovery in a timely fashion.

(e) Utilities shall be reasonably required, as determined by the Board, to run the models it uses to develop plans with assumptions specified by IRP Working Group members. The utility shall have an opportunity to schedule any such activities, and to coordinate and limit such requests, so as to manage the burden imposed by this requirement.

(f) Ongoing or unresolved IRP Working Group discussions may not be utilized as justification for a request by a working group member for a delay in the formal submission of the IRP filing, without the consent of the utility.

14:13-8.2 Board review of the IRP; initial review, pre-hearing conference, public hearing; intervention; approval

(a) A utility shall submit an IRP filing that is complete. The Board staff shall conduct an initial review of the plan that is filed pursuant to this chapter. After this initial review, the Board staff shall determine whether the utility plan is complete and has complied with the requirements of this chapter and report to the Board. If, upon the advice of the Board staff, the Board determines that the IRP filing is not complete, it shall identify the deficient areas, reject the IRP filing and require that the utility submit a new IRP filing within 90 days of such rejection.

(b) Upon receipt of an IRP filing and determination that it is complete, the Board or its representative shall conduct a pre-hearing conference to establish an evidentiary and public hearing schedule. Consistent with the requirements of N.J.A.C. 14:13-7.1(g), the utility will run its computer models to develop alternate resource plans based on reasonable requests from those parties granted intervenor status.

(c) The utility shall provide at least 20 days prior notice of the date, time and location of the public hearing. Such notice shall be provided in newspapers of general circulation in the area served by the utility and include the name of a person who may be contacted for information on obtaining the Executive Summary or the full filing.

(d) Parties wishing to request intervention in the IRP review may do so pursuant to N.J.A.C. 1:1-16.

(e) Based upon the evidence presented at the hearing(s), the Board shall render a decision either approving the plan in its entirety, approving it subject to stated conditions, approving it in part and rejecting it in part, or rejecting it. In making its findings, the Board shall consider whether the plan was developed in conformance with the policies and procedures contained in this chapter and is in the public interest. The Board shall establish a schedule which is expected to result in the rendering of a final decision within six months of a pre-hearing conference.

14:13-8.3 Nature and content of Board approval

(a) In approving a utility IRP filing, the Board shall:

1. Approve a base, high and low load forecast;
2. Make a specific finding as to utility capacity and energy needs over the planning horizon;
3. Approve an avoided cost methodology and benchmark;
4. Specify a discrete split of supply-side and demand-side resources to meet identified needs; and
5. Approve a short-term action plan as defined in N.J.A.C. 14:13-6.3 to meet the identified base need.

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(b) The approved short-term action plan will be consistent with the supply or demand-side procurement rules in effect at the time of approval. The approved plan will exhibit flexibility by identifying alternatives for meeting needs under the range of variances from the base forecasts analyzed in the IRP process.

14:13-8.4 Effect of Board approval of a utility's plan

(a) The Board will consider the utility's approved plan in all proceedings that concern the acquisition of resources as defined herein. In all such proceedings, a utility shall state whether any such action for which approval is being sought is consistent or inconsistent with the approved plan.

(b) If a utility contends that such an action is consistent with the approved plan, the following shall apply:

1. The utility shall present evidence to establish the consistency of the action with the approved plan;

2. Any party or intervenor may present evidence that the utility's action is inconsistent with the approved plan or that, due to changed circumstances, outside the bandwidth of sensitivity analysis used to develop the approved plan the utility's action is not in the public interest.

(c) If the utility acknowledges that the action is inconsistent with the approved plan, the following shall apply:

1. The utility shall present evidence on the effect of such action on the approved plan and the basis for variance from the plan;

2. Any party or intervenor may present evidence that the utility should obtain an amendment to its approved plan prior to the Board considering whether to approve the filing; and

3. The Board shall determine whether an amendment to an approved plan is required.

(d) The approval of a utility's plan shall not constitute approval of a specific project unless that project is reviewed and approved within the context of the plan and is not subject to supply-side procurement procedures. Such plan approval shall not constitute approval of any specific costs.

(e) To the extent a utility's actions are found to be consistent with its approved short-term action plan, such actions shall be considered reasonable by the Board in proceedings for the approval of specific projects which result from implementing the short-term actions plans. The prudency and reasonableness of the actual costs incurred as a result of such actions, however, remain subject to Board review and approval and are not determined within the context of the IRP filing. A utility shall indicate which actions it desires to have reviewed and approved as part of its IRP filing and which specific actions it prefers to be subject to future review in subsequent proceedings.

(f) The approval of a utility's plan shall not constitute specific approval or disapproval of load building, load retention and fuel switching programs reviewed pursuant to N.J.A.C. 14:13-5.5 or of the costs associated with such programs. Alternatively, review of such programs shall be limited to determining the consistency of such programs with the IRP filing.

14:13-8.5 Amendment to approved plan

A utility may, at any time, file an application to amend an approved plan. The application shall contain a demonstration of why the utility seeks to amend the approved plan. For good cause shown, specifically that conditions have changed to an extent not addressed in the most recently-approved short-term action plan, in the contingency plan, or in the alternatives for meeting needs as described in N.J.A.C 14:13-9.3, the Board shall institute appropriate procedures to determine whether the utility's approved plan should be amended. The utility shall publish notice of the procedures and shall give reasonable time for interested parties to prepare for them. The text of such notice shall be subject to review and approval by the Board Staff prior to publication. The Board shall hold a hearing on the proposed amendment and shall render, within 90 days of the hearing, a decision either approving the amended plan, approving it subject to stated conditions, approving it in part and rejecting it in part, or rejecting it. The utility shall bear the burden of proof of demonstrating the need for the amendments.

SUBCHAPTER 9. WAIVERS

14:13-9.1 Application; good cause

A utility may file an application for a waiver or variance from a provision or provisions of this chapter. Any such application shall demonstrate the basis for the utility's contention that it should be granted a waiver or variance, including documentation regarding the costs and benefits of compliance. For good cause shown and if not contrary to law, and on a provision-by-provision basis, the Board may grant a waiver or variance from a provision if the Board finds that compliance with such provision is impracticable or unreasonable, provided that the plan that the utility will file is likely to be consistent with the purpose of this chapter. Prior to rendering a decision, the Board shall provide reasonable opportunity for input from interested persons concerning a utility's application for a waiver or variance.

TRANSPORTATION

(a)

DIVISION OF ROADWAY DESIGN BUREAU OF UTILITIES AND RAILROAD ENGINEERING

Railroads

Proposed Recodification with Amendment: N.J.A.C. 14:8 as 16:23

Authorized By: W. Dennis Keck, Acting Assistant Commissioner for Planning.

Authority: N.J.S.A. 27:1A-5, 27:1A-6 and 48:2-1 et seq.

Proposal Number: PRN 1995-171.

Submit comments by April 19, 1995 to:

Renee Rapciewicz
Deputy Administrative Practice Officer
New Jersey Department of Transportation
Bureau of Policy and Legislative Analysis
1035 Parkway Avenue
CN 600
Trenton, New Jersey 08625
FAX (609) 530-5719

The agency proposal follows:

Summary

On January 1, 1979, pursuant to a reorganization plan, the functions, powers, and duties of the Board of Public Utilities (BPU) as they apply to autobuses, charter and special bus operations, railroads, street railways, traction railways and subways, were transferred to the New Jersey Department of Transportation. The reorganization plan did not affect the rules and regulations heretofore made or promulgated by the BPU, and the regulations continued with full force and affect.

In accordance with the "sunset" and other provisions of Executive Order No. 66(1978), N.J.A.C. 14:8, Railroads, did not have an expiration date because they were filed and became effective prior to September 1, 1969. These rules were intended to protect and promote the public health, safety and welfare with regard to railroads. Subchapter 1 sets forth trash safety regulations and subchapter 2 contains service requirements.

These rules have been reviewed and analyzed by the Department's staff of the Bureau of Utilities and Railroad Engineering and New Jersey Transit, and were found to be necessary, reasonable, and proper for the purpose for which they were originally promulgated. However, the Department is now proposing to recodify the rules currently at N.J.A.C. 14:8 to N.J.A.C. 16:23 and to make an amendment. In addition, N.J.A.C. 14:8-1.1, Enumeration, is proposed to be deleted from the Department of Transportation's recodification because this reference has nothing to do with the Railroad regulations under the authority of the Department of Transportation but pertains to regulations under the authority of the Board of Public Utilities.

Current rule N.J.A.C. 14:8-2.9, Knowledge of physical characteristics of road, requires that locomotive engineers who operate trains in New Jersey and who have not operated over a portion of the railroad in six

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months to be re-qualified before they perform service over that portion of the railroad. The proposed amendment would only require re-qualification after one year.

All other states except New Jersey have a one year requirement. The current rule limits New Jersey Transit's and other railroad's ability to shift engineers to different lines or assignments during emergencies and service disruptions. It also requires the railroad to incur unnecessary costs caused by excessive and unnecessary reexaminations.

Social Impact

The proposed recodification with amendment will have no significant social impact because it simply extends the period of time for which a locomotive engineer is qualified to operate on a railroad in New Jersey.

Economic Impact

New Jersey Transit and other railroads operating in New Jersey will save money as a result of the proposed amendment. Currently when an engineer is not qualified on a particular part of the system, he or she must be re-examined and the railroad must incur the additional cost of paying the person who is operating the train while the engineer is being re-examined. The railroad will also incur less costs in administering reexaminations.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the requirements of this rulemaking are dictated by State statutes and are not subject to any Federal requirements or standards.

Regulatory Flexibility Statement

The proposed recodification with amendment does not place any reporting, recordkeeping, or compliance requirements on small businesses as the term is defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The rule primarily affects engineers and railroads, neither of which are small businesses.

Full text of the rules proposed for recodification can be found at N.J.A.C. 14:8.

Full text of the proposed amendment follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

CHAPTER [8] **23**
RAILROADS

SUBCHAPTER 1. [APPLICABLE REGULATIONS] TRACK SAFETY

[14:8-1.1 Enumeration

In addition to the regulations contained in this chapter, the regulations listed in this section are applicable:

N.J.A.C. 14:3-2.1
N.J.A.C. 14:3-2.2
N.J.A.C. 14:3-2.3
N.J.A.C. 14:3-2.4
N.J.A.C. 14:3-2.5
N.J.A.C. 14:3-2.6
N.J.A.C. 14:3-2.7
N.J.A.C. 14:3-2.8
N.J.A.C. 14:3-3.1
N.J.A.C. 14:3-3.3
N.J.A.C. 14:3-5.1
N.J.A.C. 14:3-5.2
N.J.A.C. 14:3-6.1
N.J.A.C. 14:3-6.2
N.J.A.C. 14:3-6.4
N.J.A.C. 14:3-9.1
N.J.A.C. 14:3-9.2
N.J.A.C. 14:3-9.3
N.J.A.C. 14:3-9.4
N.J.A.C. 14:3-9.5
N.J.A.C. 14:4-3.1]

Recodify existing N.J.A.C. 14:8-1.2 as **16:23-1.1** (No change in text.)

SUBCHAPTER 2. SERVICE

Recodify existing N.J.A.C. 14:8-2.1 through 2.8 as **16:23-2.1 through 2.8** (No change in text.)

[14:8-2.9]**16:23-2.9** Knowledge of physical characteristics of road

Enginemen in road service, on resuming duties after an absence of [six months] **one year** or more from the portion of the railroad over which they are expected to operate, shall be examined to ascertain whether they are qualified on the physical characteristics of the road over which they will operate. When the rules of a railroad permit firemen to operate engines under the supervision and responsibility of an engineman or otherwise, a fireman, before being allowed to operate an engine in road service, shall be qualified on the physical characteristics of the road over which they will operate and shall be subject to requalification after an absence of [six months] **one year** or more from the portion of the railroad over which he **or she** may be expected to operate an engine.

[14:8-2.10]**16:23-2.10** (No change in text.)

(a)

DIVISION OF TRAFFIC ENGINEERING AND LOCAL AID

BUREAU OF TRAFFIC ENGINEERING AND SAFETY PROGRAMS

Lane Usage
Route U.S. 206
Lawrence Township, Mercer County
Proposed New Rule: N.J.A.C. 16:30-3.16

Authorized By: Richard C. Dube, Director, Division of Traffic Engineering and Local Aid.

Authority: N.J.S.A. 27:1A-5, 27:1A-6, 39:4-123, 39:4-124, 39:4-125, 39:4-183.6, 39:4-198 and 39:4-199.1.

Proposal Number: PRN 1995-169.

Submit comments by April 19, 1995 to:
William E. Anderson
Manager
New Jersey Department of Transportation
Bureau of Traffic Engineering and Safety Programs
1035 Parkway Avenue
CN 613
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The Department of Transportation proposes to establish a new rule at N.J.A.C. 16:30-3.16 concerning turning movements along Route U.S. 206 to effect a left lane for left turns only in Lawrence Township, Mercer County. This new rule has been codified in compliance with the Department's rulemaking format.

The provisions of this new rule will improve the flow of traffic and enhance safety along the highway system.

This new rule is being proposed at the request of the local government of the Township of Lawrence, Mercer County, in a letter dated October 19, 1993, and as part of the Department's on-going review of current conditions. The traffic investigations conducted by the Department's Bureau of Traffic Engineering and Safety Programs concluded that the establishment of the turning movement restriction along Route U.S. 206 in the Township of Lawrence, Mercer County, was warranted. Signs are required to notify motorists of the restrictions proposed herein.

Social Impact

The proposed new rule will establish a left lane for left turns only along Route U.S. 206 in the Township of Lawrence, to improve traffic safety. Appropriate signs will be erected to advise the motoring public.

Economic Impact

The Department and local government will incur direct and indirect costs for mileage, personnel and equipment requirements. The Department will bear the costs for the installation of the appropriate regulatory signs. The costs involved in the installation and procurement of signs

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vary, depending upon the material used, size and method of procurement. Motorists who violate the rules will be assessed the appropriate fine in accordance with the "Statewide Violations Bureau Schedule," issued under New Jersey Court Rule 7:7-3.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because N.J.S.A. 27:1A-1 et seq. governs the subject of this rulemaking and there is no Federal requirement or standard that effects the subject of this rulemaking.

Regulatory Flexibility Statement

The proposed new rule does not place any reporting, recordkeeping or compliance requirements on small businesses as the term is defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed new rule primarily affects the motoring public and the governmental entities responsible for the enforcement of the rules.

Full text of the proposal follows:

16:30-3.16 Route U.S. 206

(a) Turning movements of traffic on certain parts of State highway Route U.S. 206 described herein below are regulated as follows:

1. In Mercer County:

i. In Lawrence Township:

(1) Left lane for left turns only:

(A) From southbound on Route U.S. 206 to eastbound onto Darrah Lane (approximate milepost 47.1).

(a)

REGIONAL OPERATIONS
REGIONS 1, 2, 3, 4
Newspaper Boxes on State Highway Right-of-Way
Proposed Readoption with Amendments: N.J.A.C. 16:41B

Authorized By: W. Dennis Keck, Acting Assistant Commissioner for Planning.

Authority: N.J.S.A. 27:1A-5, 27:1A-6, 27:7-21 and 27:7-44.1.

Proposal Number: PRN 1995-172.

Submit comments by April 19, 1995 to:

Renee Rapciewicz
Deputy Administrative Practice Officer
New Jersey Department of Transportation
Bureau of Legislative Analysis
1035 Parkway Avenue
CN 600
Trenton, New Jersey 08625
FAX (609) 530-5719

The agency proposal follows:

Summary

In accordance with the "sunset" and other provisions of Executive Order No. 66(1978), the Department of Transportation proposes to readopt with amendments N.J.A.C. 16:41B, News Dispensers on State Highway Right-of-Way. The rules are scheduled to expire on July 2, 1995.

The chapter has been reviewed by Regional Operations staff in compliance with Executive Order No. 66(1978), and the principal provisions of the rules were found adequate, reasonable, understandable and necessary for the purpose for which it was promulgated. The rules establish standard guidelines and procedures for the placement of news dispensers along State highway rights-of-way.

Upon this Departmental review, it was found that the permitting system at N.J.A.C. 16:41B-2.1(b) through (f) used to issue permits for placement of news dispensers was no longer needed. The standard guidelines and procedures outlined in the rule are adequate to continue proper placement of news dispensers on State highway right-of-way. The fee of $25.00 previously charged for a permit was a one time fee. Many news dispenser owners have applied, paid for, and received permits for news dispensers located on State highway right-of-way. The Department has not received any significant numbers of new applications for approximately two years. Owners of news dispensers wishing to locate a news dispenser on State highway rights-of-way can still do so by following the provisions of this amended rule.

The Department is proposing to amend the existing permitting process at N.J.A.C. 16:41B-2.1 with provisions that prescribe that owners of news dispensers may place their boxes on Department right-of-way, provided that they comply with Department placement and location standards. The Department will still need to be informed of what news dispenser owners have placed or are planning to place on the State highway right-of-way. The Department also will need to be informed of the address, telephone number, and whom to contact if a news dispenser is found to be in noncompliance with the provisions of this chapter.

The term "permittee" has been changed consistently throughout the rules to refer to the owner of news dispensers in addition to other grammatical changes.

At N.J.A.C. 16:41B-4.1(b)9 and 10, provisions have been added to ensure sidewalk access to persons with disabilities, and existing N.J.A.C. 16:41B-4.1(b)9 has been recodified as (b)11.

Appendix A has been added to illustrate regional offices and their jurisdictions to which the written notifications are to be forwarded.

The chapter is summarized as follows:

N.J.A.C. 16:41B-1 provides definitions of words and terms used throughout the rules.

N.J.A.C. 16:41B-2 establishes a notification and standards compliance process.

N.J.A.C. 16:41B-3 provides for indemnification of the State by the news dispenser owners for all injuries and damage involving a news dispenser located on a State highway right-of-way.

N.J.A.C. 16:41B-4 sets forth requirements for the location, installation and maintenance of news dispensers.

N.J.A.C. 16:41B-5 provides that continued placement, use and maintenance of a news dispenser is conditioned upon compliance with this chapter. The contents of a notice of non-compliance with this chapter are set forth along with a news dispenser owner's right to a post-notice meeting to discuss an alleged violation. The circumstances for revocation and the owner's legal right of appeal therefrom are also delineated. Lastly, the removal requirement for non-complying dispensers, either by the owner or, due to the owner's inaction, by the Department are set forth.

Social Impact

The proposed readoption with amendments will continue the standard guidelines and procedures for the placement of news dispensers along the State highway rights-of-way ensuring traffic safety along the highway system. The proposed amendments at N.J.A.C. 16:41B-2.1 will eliminate the need for a permit to place news dispensers along the State highway right-of-way, and the proposed amendments will establish a notification and standards compliance process to replace the permitting process.

Persons with disabilities will experience a positive impact by prohibiting the placement of news dispensers within the public sidewalk curb ramp designed to accommodate persons with disabilities and also prohibiting placement where the newspaper boxes would reduce the width of the sidewalk to less than three feet. These prohibitions will allow freedom of movement on sidewalk curb ramps and sidewalks for persons with disabilities.

Economic Impact

The Department will continue to incur direct and indirect costs for personnel, mileage, and equipment requirements in the continued enforcement of the rules. The readoption with amendments will also affect local distributors who maintain news dispensers along the State right-of-way, in that they may be required to relocate dispensers, and pay costs charged for the removal of dispensers by Department personnel. Local businesses engaged in the sale of newspapers on premises will not be affected by this readoption with amendments.

The Department will no longer receive permit fees from owners of news dispensers who lawfully place such news dispensers on the State highway right-of-way. Owners of news dispensers will no longer have to pay permit fees and obtain a permit to erect a news dispenser on any State highway right-of-way. However, the owners of the news dispensers are required to adhere to all provisions of this chapter.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the requirements of this rulemaking are dictated by State statutes and are not subject to any Federal requirements or standards.

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Regulatory Flexibility Analysis

The proposed readoption with amendments place compliance requirements on newspaper and periodical publishers or other persons owning news dispensers on the State highway right-of-way. Some of these owners may be small businesses as that term is defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Since the purpose of these rules is to set standards for news dispensers, their installation, maintenance and location; and by so doing, enhance traffic flow and safety, a differentiation of the standards contained in these rules based upon the size of the owner would serve to defeat the standardization, traffic flow and safety purposes. No such differentiation is, therefore, proposed. Costs of compliance are discussed in the Economic Impact above; no need for professional services to comply is anticipated.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 16:41B.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

16:41B-1.1 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

...

["Permittee" means the owner of the news dispenser.]

...

SUBCHAPTER 2. [PERMIT] **NOTIFICATION** PROVISIONS

16:41B-2.1 General provisions

(a) It shall be unlawful for any person to operate, erect, place or maintain, on any State highway right-of-way, any news dispenser without [obtaining a permit from] **notifying** the Department of Transportation, as set forth in this section.

[(b) With regard to news dispensers in place as of August 15, 1988, the permitting procedure shall be as follows:

1. The Department shall initiate a State-wide survey of news dispensers located on the right-of-way within 30 days of the enactment of these amendments. This survey shall be conducted on a regional basis with one county per region being surveyed every 30 days until completion. The survey shall identify the locations of news dispensers within the State highway right-of-way and shall develop the information, if available, required by this section. The publisher of the newspaper or periodical being displayed and sold in the news dispenser or the owner of the news dispenser, if different from the publisher and known to the Department, shall be notified within 30 days thereof, as to which news dispensers are found to be in violation of the provisions of this chapter. Notices of non-compliance shall conform with the requirements set forth in N.J.A.C. 16:41B-5.

2. All other news dispensers identified during the initial State-wide survey of news dispensers shall be deemed in compliance with this chapter. The Department shall prepare and provide to the publisher of the newspaper or periodical being displayed and sold in the news dispenser or the owner of the news dispenser, if different from the publisher and known to the Department, a list of those news dispensers deemed in compliance with this chapter within 30 days. Said list shall be incorporated into the format of a single application per publisher, or owner if different from the publisher and known to the Department. A permit shall be issued by the Department immediately upon the return of the application, provided that it bears the owner's signature; includes the information required by this section that was not available to the Department during the State-wide survey; and is accompanied by payment of the appropriate fee(s) established in (e) below. In the event the application, accompanied by the requisite information and fee(s), is not returned to the Department within 30 days, the news dispensers listed thereon shall be deemed in violation of this chapter.

(c) With regard to news dispensers placed on the State right-of-way after August 15, 1988, the owner shall, on the day of the placement of a news dispenser, submit an application for a permit. The application shall include the owner's name, address, telephone number and location of the news dispenser and a certification that such location is in conformity with this chapter. The Department shall issue a permit or a notice of non-compliance within 30 days of receipt of the application. Notices of non-compliance shall conform with the requirements set forth in N.J.A.C. 16:41B-5. In the event no action is taken within the aforesaid 30 day period, the continued use and maintenance of the news dispenser in question shall be permissible until such time as a notice of non-compliance, if any, is issued.

(d) Application forms may be obtained from the regional maintenance offices or from the Department's principal office, Bureau of Maintenance, Construction and Maintenance Unit, 1035 Parkway Avenue, Trenton, New Jersey 08625. Completed forms shall be forwarded to the regional office having jurisdiction over the area in which the news dispenser is located. The regional offices and their jurisdiction are set forth in N.J.A.C. 16:41-1.1(b).

(e) The owner shall include with the application a fee in the amount of $25.00 per news dispenser. Fees must be in the form of a check or money order made payable to the New Jersey Department of Transportation. Cash will not be accepted.

(f) Permits shall be valid for as long as all of the conditions of this chapter have been observed. In the event of change of ownership of a news dispenser(s), the permit(s) shall remain valid as long as the location(s) remain the same and the Department is notified, in writing, of such change and the new owner accepts the terms and conditions of the permit(s).]

(b) Owners of news dispensers who want to place or continue the existing placement in compliance with this chapter may do so by notifying the Department of Transportation in writing. This one-time notification will include the following information:

1. Intent to place or continue existing placement of news dispensers on State highway right-of-way in accordance with the provisions of this chapter. Individual placement locations do not need to be identified; only the owner's intent to place news dispensers on the State highway right-of-way needs to be established;

2. Name of news dispenser owner;

3. Person to contact with regard to news dispenser placement;

4. Address of owner; and

5. Telephone number of owner and contact person.

(c) Written notifications should be forwarded to the regional office having jurisdiction over the areas in which the news dispensers are located. The regional offices and their jurisdictions are set forth in the Appendix to this chapter.

16:41B-3.1 General requirements

[(a)] The owner of the news dispenser, upon the placement of a news dispenser within the State highway right-of-way, assumes the unconditional obligation and thereby agrees to defend, indemnify and save harmless the State, its agents, servants and employees from all suits, actions or claims of any character brought because of death or any injury received or sustained by any person or persons or because of any damage received or sustained by any property, irrespective of fault, arising out of the installation, use or maintenance of any news dispenser located on State highway right-of-way, or where such suit, action or claims arise out of such installation, use of maintenance of any news dispenser being a contributing factor to any such injury or damage, or on account of any act, omission, neglect or misconduct by the [permittee] **owner of the news dispenser**, its employees, agents, distributors or servants relating to the installation, use or maintenance of any news dispenser within the State highway right-of-way.

[(b) The aforesaid indemnification provision shall be contained in each permit issued by the Department pursuant to this chapter.]

16:41B-4.1 General requirements

(a) (No change.)

(b) Placement of news dispensers within the State highway right-of-way is prohibited in the following locations:

1.-7. (No change.)

8. Within three feet of any bus bench, except where such bench is within a bus shelter, in which event this restriction shall not apply provided that the news dispenser is not placed within such bus shelter; [and]

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9. Within the public sidewalk curb ramp designed to accommodate persons with disabilities;

10. Where the placement of the newspaper box would reduce the width of the sidewalk to less than three feet; and

Recodify existing 9. as **11.** (No change in text.)

(c) Any news dispenser which in whole or in part rests upon, in, or over the State highway right-of-way shall comply with the following standards:

1.-4. (No change.)

5. Any news dispenser maintained on any State right-of-way which creates an imminent, unreasonable hazard to pedestrians or traffic or interferes with the response to an emergency situation by a public officer, fire fighter, ambulance corps or medic, may be summarily relocated to the nearest location not presenting said hazard. Any such relocation shall be reported as soon as reasonably possible to the [permittee] **owner of the news dispenser** who shall relocate the news dispenser to any location which is in compliance with the terms of this chapter.

6.-8. (No change.)

16:41B-5.1 General requirements

(a) The continued placement, use and maintenance of news dispensers is conditioned upon compliance with all of the provisions of this chapter. If any of the provisions of this chapter are alleged to have been violated or if the location, installation, or condition of the news dispenser no longer meets with the specifications of this chapter and any amendments thereto, the [permittee] **owner of the news dispenser** shall be notified of the non-compliance by registered mail.

(b) (No change.)

(c) The notice shall further state that, upon request by the [permittee] **owner of the news dispenser** within 15 days of the receipt of said notice, the official issuing the notice of violation shall meet with the [permittee] **owner of the news dispenser** to discuss the basis for the determination that a violation exists and any proposed means of eliminating any violations. That meeting shall take place within 30 days of said request. A request for such a meeting shall stay the further enforcement of this chapter, except in emergency situations as set forth in N.J.A.C. 16:41B-[4.1]**3.1**(c)5. Following any such meeting, the official issuing the notice of violation may rescind the notice if it is determined that there was no violation or in the event the alleged violation is otherwise eliminated. The official may also grant time for the correction of any violation upon request.

(d) If, within 30 days after mailing the notice of non-compliance, or within 30 days after the meeting referred to in (c) above, in the event a meeting is requested and does not resolve the dispute in a mutually acceptable manner, or the [permittee] **owner of the news dispenser** has failed to remove the news dispenser or otherwise correct the violation or reason for non-compliance, the [permit shall be revoked and the permittee] **owner of the news dispenser** shall be notified by registered mail [that the permit has been revoked] **that the news dispenser in question will not be permitted to remain in its present location.**

(e) [A permittee or applicant] **The owner of a news dispenser** may appeal from a decision to [revoke a permit or a decision not to grant a permit] **prohibit a news dispenser to remain in a certain location** within 15 days of the date of receipt of a [revocation notice or a notice that a permit has not been granted] **notice informing the owner of the news dispenser that the news dispenser in question will not be permitted to remain in its present location.** The [permittee or applicant] **owner of the news dispenser** shall file a letter of appeal from the decision and request either a hearing in accordance with Department procedures or that the letter of appeal be forwarded by the Department to the Office of Administrative Law as a contested case to be heard in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1. In the event an informal Department hearing is requested, any decision therefrom may be referred to the Office of Administrative Law for a de novo hearing. Any appeal shall stay enforcement of this chapter except in emergency situations as set forth in N.J.A.C. 16:41B-[4.1]**3.1**(c)5.

(f) If the [permittee (or applicant where no permit has been issued] **owner of the news dispenser** fails to appeal from the [revocation of a permit or a decision not to grant a permit,] **decision to prohibit the news dispenser to remain in its present location,** and does not remove or have removed the news dispenser in question within 30 days from the receipt of a [revocation notice or a notice that a permit has not been granted,] **notice that the news dispenser will not be permitted to remain in its present location,** the news dispenser shall be removed by **and stored by the** Department of Transportation [maintenance personnel and stored at a Department of Transportation maintenance yard]. The [permittee or applicant] **owner of the news dispenser** shall be notified by registered mail of the location of the news dispenser and the hours when it may be obtained. The Department of Transportation shall not be liable for any damage to the news dispenser, to any material contained therein, or for any lost sales caused by the removal, transportation or storage of the news dispenser. A charge of $50.00 shall be levied by the Department. If [a permittee (or applicant where no permit has been issued)] **the owner of the news dispenser** is unsuccessful on appeal, the [permittee or applicant] **owner of the news dispenser** shall have 30 days within which to remove the news dispenser. If the news dispenser is not removed within 30 days, the Department of Transportation shall remove it in accordance with the procedures set forth in this subsection.

APPENDIX

Region 1—Netcong
(Hunterdon, Morris, Somerset, Sussex, Warren Counties)
New Jersey Department of Transportation
310 Ridge Plaza
Route 31 and Cregar Road
Clinton, New Jersey 08809
(201) 691-4921

Region 2—Newark
(Bergen, Essex, Hudson, Passaic, Union Counties)
New Jersey Department of Transportation
2 Route 21
Newark, New Jersey 07114
(201) 648-2814

Region 3—Freehold
(Mercer, Middlesex, Monmouth, Ocean Counties)
New Jersey Department of Transportation
Route 79 and 100 Daniels Way
Freehold, New Jersey 07728
(908) 308-4106

Region 4—Cherry Hill
(Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Salem Counties)
New Jersey Department of Transportation
Route 70 at New Jersey Turnpike
Cherry Hill, New Jersey 08034
(609) 795-4725

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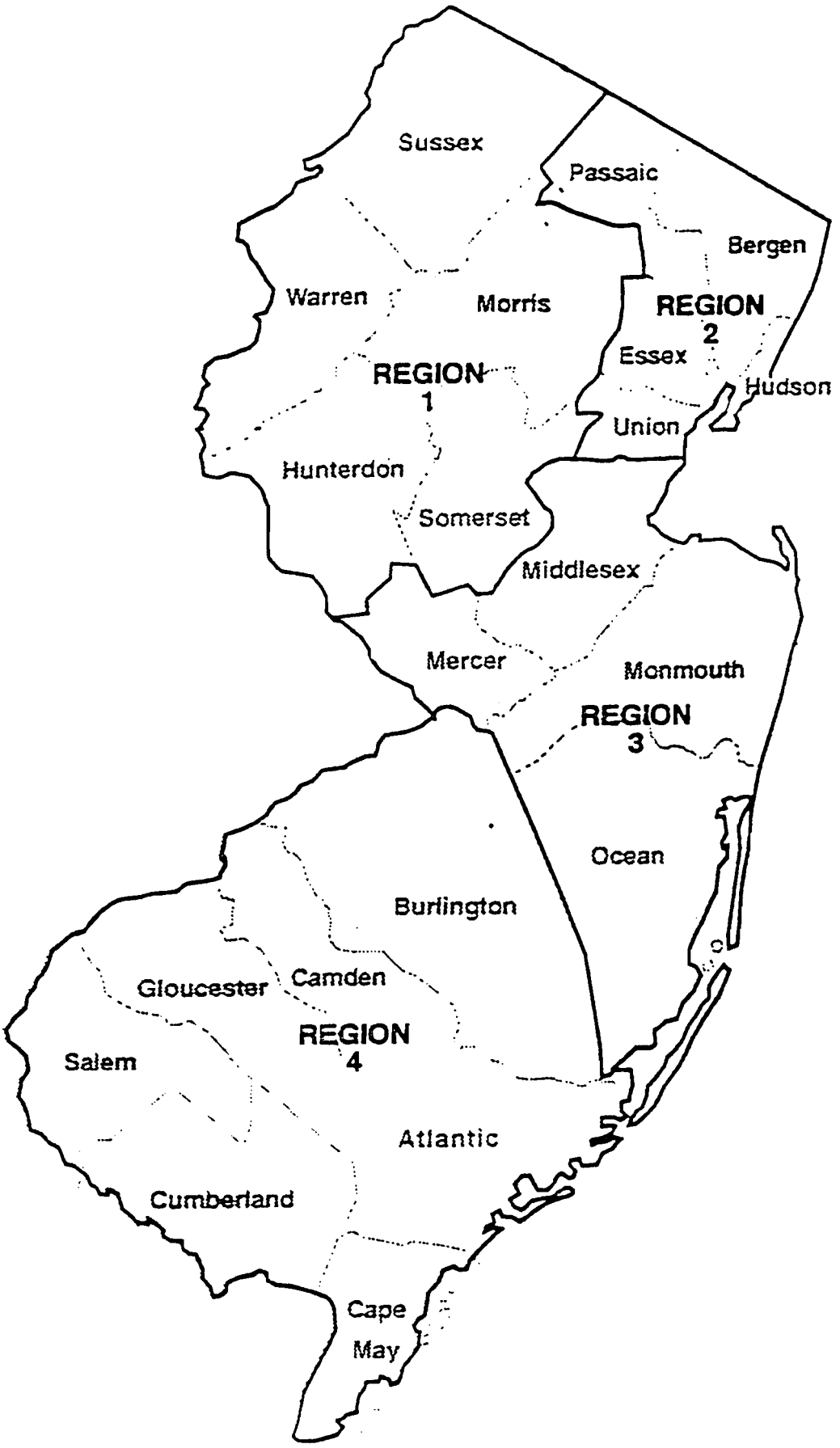

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OTHER AGENCIES

(a)

ELECTION LAW ENFORCEMENT COMMISSION

Filing By Electronic Facsimile

Proposed Amendments: N.J.A.C. 19:25-8.6, 8.9, 8.10, 8.12, 9.3, 9.4 and 9.6

Authorized By: Election Law Enforcement Commission, Frederick M. Herrmann, Ph.D., Executive Director.

Authority: N.J.S.A. 19:44A-6.

Proposal Number: PRN 1995-170.

Submit written comments by April 19, 1995 to:
Gregory E. Nagy, Esq., Legal Director
Election Law Enforcement Commission
CN-185
Trenton, New Jersey 08625-185

The agency proposal follows:

Summary

The Election Law Enforcement Commission (hereafter, the Commission) proposes to amend N.J.A.C. 19:25-8.6, 8.9, and 8.12 to permit candidate committees, joint candidate committees, and political committees to file by electronic facsimile transmission (that is, by FAX) notices of the receipt of a contribution in excess of $500.00. During the 13-day period from the close of the 11-day preelection report until the date of the election, such notices must be filed with the Commission within 48 hours of receipt of the contribution. Also, the Commission proposes to amend N.J.A.C. 19:25-8.10 to permit political committees to file by electronic facsimile transmission (FAX) any notices of the making of an expenditure in excess of $500.00 in a preelection period, which notices also must be filed within 48 hours after an expenditure is made.

The Commission also proposes to amend N.J.A.C. 19:25-9.3 and 9.6 to make parallel changes so that continuing political committees, political party committees and legislative leadership committees also may file notices of the receipt of contributions in excess of $500.00 by electronic facsimile transmission (FAX). Finally, a parallel amendment is proposed to N.J.A.C. 19:25-9.4 to extend the same permission to continuing political committees filing notices of the making of an expenditure in excess of $500.00 in an election. (Hereafter, the notices affected by these proposed amendments are collectively referred to as "48-hour notices"). Other than "48-hour notices," filing entities and their treasurers or organizational treasurers cannot use electronic facsimile transmissions to accomplish filing of reports.

The requirement to file "48 hour notices" was added to the Campaign Contributions and Expenditures Reporting Act, N.J.S.A. 19:44A-1 et seq. (hereafter, the Act) by amendments enacted into law in 1984 (see P.L. 1983, c.579, sections 11 and 16, eff. January 17, 1984). Apparently in anticipation of the difficulty created by the short timeframe for filing the notices, the statutes provided that "48-hour notices" could be filed "... in writing or by telegram ..." (see N.J.S.A. 19:44A-8b and 19:44A-16i). Since the enactment of these statutes in 1984, the use of electronic facsimile transmission has become commonplace. The Commission concludes, therefore, that since the "48-hour notice" statutes permit filing of such notices by telegrams, permitting filing of the notices by FAX is consistent with the legislative design.

The Commission notes that all other reports, many of which require original signatures or certifications, still must be delivered to the Commission offices in order for filing to be accomplished.

Social Impact

The Commission believes that permitting "48-hour notices" to be filed by electronic facsimile transmission (FAX) will alleviate the hardships inherent in the short timeframe for such filings. Many treasurers and filing agents have suggested the use of FAX technology for this purpose. For example, the Commission received a comment at the time it was proposing new rules for continuing political committee reporting to the effect that "48-hour notices" filings should be accomplished by FAX, and the Commission responded at that time that it lacked the equipment that would be necessary to handle the heavy volume that would be generated before an election. The Commission did state, however, that it was exploring the feasibility of taking such a step (see 26 N.J.R. 4638(a), Comment of James E. Cunningham, Treasurer, New Jersey Health Care Political Action Committee, November 21, 1994). Since that time, the Commission has acquired equipment that it anticipates will be sufficient to handle the volume of expected traffic.

The Commission believes that permitting "48-hour notices" to be filed by FAX will promote preelection disclosure of contributions and expenditures because it anticipates that more notices will be filed timely.

Economic Impact

The proposed amendments are not anticipated to have any significant economic impact because they do not create any new reporting burden. Instead, they offer the option for filing of "48-hour reports" by FAX, which option, in most cases, should prove less costly than incurring the expense of overnight or special delivery services.

Executive Order No. 27 Statement

The proposed amendments are not subject to any Federal standards or requirements, and accordingly a Federal exceedance analysis is not applicable to the rulemaking.

Regulatory Flexibility Statement

The Commission's proposed amendments do not impose any requirements on small businesses, as that term is defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Small businesses may be employed to provide electronic facsimile transmission services to various reporting entities or their treasurers, but the filing requirements described in the amendments are solely on the reporting entities or their treasurers.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

19:25-8.6 Contributions received immediately before an election

(a) (No change.)

(b) The report or written notice described in (a) above shall be filed with the Commission within 48 hours of receipt of the contribution, and shall be signed by the campaign treasurer or a candidate, except that a report made by telegram need not be signed. Use of electronic facsimile transmission (that is, FAX) [shall not be permitted] **to file the report or written notice is permitted.**

19:25-8.9 Political committee contributions received immediately before an election

(a) (No change.)

(b) The report or written notice described in (a) above shall be filed with the Commission within 48 hours of receipt of the contribution, and shall be signed by the campaign treasurer, except that a report made by telegram need not be signed. Use of electronic facsimile transmission (that is, FAX) [shall not be permitted] **to file the report or written notice is permitted.**

19:25-8.10 Political committee expenditures made immediately before an election

(a) (No change.)

(b) The report or written notice described in (a) above shall be filed with the Commission within 48 hours of the making of the expenditure, and shall be signed by the campaign treasurer, except that a report made by telegram need not be signed. Use of electronic facsimile transmission (that is, FAX) [shall not be permitted] **to file the report or written notice is permitted.**

19:25-8.12 Time and place of filing reports

(a) An original and two copies of all reports required to be filed must be received at the Commission offices no later than 5:00 P.M. on the date the report is due for filing in order to be deemed timely filed. A report submitted by United States mail postmarked on or before a filing date but not received until after 5:00 P.M. of the date the report is due for filing will not be deemed timely filed. **A report or written notice of contributions received immediately before an election made pursuant to N.J.A.C. 19:25-8.6 or 8.9, or a report or written notice of expenditures made immediately before an election pursuant to N.J.A.C. 19:25-8.10, may be filed by electronic facsimile transmission (that is, FAX).**

(b)-(c) (No change.)

19:25-9.3 Contributions received immediately before an election

(a)-(c) (No change.)

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(d) The report or written notice described in (a) above shall be signed by the organizational treasurer, except that a report made by telegram need not be signed. Use of electronic facsimile transmission (that is, FAX) [shall not be permitted] **to file the report or written notice is permitted.**

19:25-9.4 Continuing political committee expenditures made immediately before a primary or general election

(a) (No change.)

(b) The report or written notice described in (a) above shall be signed by the organizational treasurer and filed with the Commission within 48 hours of the making, authorizing or incurring of the expenditure, or aggregate expenditures, except that all expenditures or aggregate expenditures made, incurred or authorized before 12:01 A.M. on the 13th day preceding the date of a primary or general election may be reported together on a report or written notice to be filed no later than the 11th day before that election. A report of an expenditure or aggregate expenditures in excess of $500.00 made, incurred or authorized on or after 12:01 A.M. on the 13th day preceding the date of a primary or general election shall be filed within 48 hours of receipt, and such a report made by telegram need not be signed. Use of electronic facsimile transmission (that is, FAX) [shall not be permitted] **to file the report or written notice is permitted.**

19:25-9.6 Time and place of filing reports

An original and two copies of all reports required to be filed must be received at the Commission offices no later than 5:00 P.M. on the date the report is due for filing in order to be deemed timely filed. A report submitted by United States mail postmarked on or before a filing date but not received until after 5:00 P.M. of the date the report is due for filing will not be deemed timely filed. **A report or written notice pursuant to N.J.A.C. 19:25-9.3 of contributions received immediately before an election, or a report or written notice pursuant to N.J.A.C. 19:25-9.4 of expenditures made immediately before an election, may be made by electronic facsimile transmission (that is, FAX).**

(a)

CASINO CONTROL COMMISSION

General Provisions
Construction and Application of Rules; Definitions
Applications
License and Registration Requirements; Scope and Applicability; Position Endorsements; Experience and Training Requirements; Qualification Standards: Table Games Positions
Standards for Qualification; Employee Standards
Forms; Personal History Disclosure Forms
Information; Application for the Issuance of Employee Licenses or Registrations and Natural Person Qualification
Fees; Employee License Position Additions and Deletions
Casino Licensees
Employment Requirements; Employee Experiential Hours; Petitions for Casino Hotel Employee Registration
Internal Controls
General Provisions; Casino Licensee's Organization; Persons Assigned to the Operation and Conduct of Gaming and Slot Machines
Rules Of the Games
Double Down Stud; Supervision Requirements; Required Training and License Endorsements; Equal Employment and Business Opportunity; Designation of Equal Opportunity Officer

Proposed Repeals: N.J.A.C. 19:41-1.5A, 1.8, 1.9 and 9.16; and 19:43-9.4

Proposed Amendments: N.J.A.C. 19:40-1.2; 19:41-1.5, 4.3, 5.2 through 5.5, 7.1A, 7.1B, 8.8 and 9.15; 19:43-9.5; 19:45-1.11 and 1.12; 19:47-17.7; 19:51-1.3; and 19:53-1.4

Authorized By: Casino Control Commission, Joseph A. Papp, Executive Secretary.

Authority: N.J.S.A. 5:12-63c, 69a, 70a, 80, 89 and 90 and P.L. 1995-18.

Proposal Number: PRN 1995-161.

Submit written comments by April 19, 1995 to:
Mary S. LaMantia, Senior Counsel
Casino Control Commission
Tennessee and Boardwalk
Atlantic City, New Jersey 08401

The agency proposal follows:

Summary

The proposed repeals and amendments conform Casino Control Commission ("Commission") rules to recent amendments to the Casino Control Act ("the Act"), N.J.S.A. 5:12-1 et seq. (P.L. 1995-18, eff. January 15, 1995). Among other things, the Legislature repealed subsections 89c and 90d of the Act, which required that the Commission endorse upon each casino key employee and casino employee license the positions that the licensee is qualified to hold. This proposal would therefore repeal N.J.A.C. 19:41-1.5A (Position endorsements) and 19:41-9.16 (Employee license position additions and deletions). Other references to position endorsements are eliminated in N.J.A.C. 19:41-5.3 and 5.4; 19:45-1.1, 1.11 and 1.12; 19:47-17.7; and 19:53-1.4. N.J.A.C. 19:40-1.2 is amended to cross-reference the duties of the supervisors of the mandatory casino departments listed in N.J.A.C. 19:45-1.11.

The legislation also repealed N.J.S.A. 5:12-89b, which required that key employee license applicants demonstrate "sufficient business ability and casino experience" as to establish "the reasonable likelihood of success and efficiency in the particular position involved." Such requirement was also deleted from subsection 90b, which provided that these standards could be met by a casino employee license applicant by a showing of casino job experience and knowledge of the Act and regulations or by completion of a course of study at a licensed school in an approved curriculum. The proposal herein deletes these standards from N.J.A.C. 19:41-4.3, (Employee Standards), and from N.J.A.C. 19:41-5.2 through 5.4 (Disclosure forms) and 8.8 (Reapplication); and 19:51-1.3 (Casino service industry standards). The proposal also repeals N.J.A.C. 19:41-1.8 (Standards for satisfying the experience and training requirements for position endorsements); N.J.A.C. 19:41-1.9 (Qualification standards for endorsement of table games positions); and N.J.A.C. 19:43-9.4 (Records of employee experiential hours).

Finally, with the repeal of N.J.S.A. 5:12-8 and the amendment of N.J.S.A. 5:12-91, the Legislature limited registration of hotel employees to "casino service employees." N.J.A.C. 19:43-9.5 (Petitions for casino hotel employee registration) and 19:41-1.5 (Scope of employee licensing and registration requirements), 7.1B (Application for casino hotel employee registration) and 9.15 (Casino hotel employee registration fee) are amended accordingly, as are references to hotel registration in N.J.A.C. 19:41-5.5 and 7.1A.

Social Impact

The proposed repeals and amendments implement recent statutory amendments intended to streamline casino regulation while maintaining the integrity of casino operations and ensuring the public trust and confidence in the casino industry. By limiting the registration process to casino service employees, and by eliminating position endorsements, the legislative and regulatory changes can be anticipated to result in a savings of time and expense for casino licensees, their employees and the regulatory agencies. The legislative and regulatory revisions also

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eliminate the Commission's responsibility to determine business ability and experience of casino key and casino employees, so that the Commission's focus is on the integrity of the person.

Economic Impact

The amendments to the Casino Control Act, and the regulatory repeals and amendments proposed herein, can be anticipated to result in savings for both casino licensees and their employees. For example, many hotel employees will no longer be required to register with the Commission, and will thus save the time and expense involved therewith. Likewise, casino key employee and casino employee licensees will no longer expend time and money in obtaining the license endorsements formerly required to perform particular job functions. Moreover, the elimination of position endorsements and employee experientials, and the revised employee registration requirements, can be expected to reduce the costs of regulating the industry.

The Legislature has provided that any savings from reduction in regulatory costs will go into a fund for financing projects in Atlantic City to improve its appearance and safety and make it more attractive and competitive, thus providing a benefit to the city and the State.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the rulemaking requirements of the Casino Control Commission are dictated by the New Jersey Casino Control Act, N.J.S.A. 5:12-1 et seq., and are not subject to any Federal requirements or standards.

Regulatory Flexibility Statement

The proposed repeals and amendments affect casino licensees and individual casino employee licensees and license applicants, none of which qualify as a small business under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. A regulatory flexibility analysis is thus not required.

Full text of the proposed repeals may be found in the New Jersey Administrative Code at N.J.A.C. 19:41-1.5A, 1.8, 1.9 and 9.16 and 19:43-9.4.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]).

19:40-1.2 Definitions

(a) (No change.)

(b) The following words and terms, when used in these rules, shall have the following meanings, unless the context clearly indicates otherwise:

. . .

Audit department executive is defined in N.J.A.C. 19:41-1.11(b)2.

. . .

Casino manager is defined in N.J.A.C. 19:45-1.11(b)4 and 1.12(b)9.

. . .

Credit manager is defined in N.J.A.C. 19:45-1.11(b)6.

Director of security is defined in N.J.A.C. 19:45-1.11(b)7.

Director of surveillance is defined in N.J.A.C. 19:45-1.11(b)1.

. . .

MIS department manager is defined in N.J.A.C. 19:45-1.11(b)3.

. . .

Slot department manager is defined in N.J.A.C. 19:45-1.11(b)5 and 1.12(h)5.

. . .

19:41-1.5 Scope and applicability of employee licensing and registration requirements

[(a) No casino licensee or applicant shall employ any natural person unless such person holds a current and valid license or registration as an employee issued in accordance with sections 89, 90 or 91 of the Act and the rules of the Commission.]

[(b)]**(c)** In determining whether a natural person who will provide services to a casino licensee or applicant must hold a license or registration as an employee or, alternatively, be registered as a vendor or junket enterprise pursuant to N.J.A.C. [19:41-11.1] **19:43-10.4**, it shall be presumed that any such person will be required to hold the appropriate license or registration as an employee if the provision of services by such person is characterized by any of the following indicia of an employment relationship:

1.-6. (No change.)

[(c)]**(b)** (No change in text.)

[(d)]**(c)** The Commission may, upon consideration of the factors in [(b)1] **(a)1** through 6 above and any other relevant information, require any natural person to obtain an employee license or registration prior to providing or continuing to provide any services to a casino licensee or applicant notwithstanding:

1. (No change.)

2. That a vendor registration form or junket enterprise registration form has been filed by a casino licensee or applicant on behalf of the natural person pursuant to N.J.A.C. [19:41-11.1] **19:43-10.4**.

19:41-4.3 Employee standards

(a) The employee standards set forth in Sections 89, 90 and 91 of the Act and the regulations of the Commission are as follows:

1. (No change.)

2. The good character and reputation of the person for honesty and integrity; **and**

[3. The sufficiency of the business ability and casino experience of the person to adequately establish the likelihood of his success and efficiency in the particular position involved;]

[4.]**3.** The age of the person.

19:41-5.2 Personal History Disclosure Form 1A (Casino Key Employee/Qualifier Form)

(a) (No change.)

(b) In addition to the information in (a) above, a completed PHD-1A may include the following:

1. The name, address, occupation and phone number of persons who can attest to the applicant's good character[,] **and** reputation [and business ability];

2.-3. (No change.)

19:41-5.3 Personal History Disclosure Form 1B (Basic Key Form)

(a) A Personal History Disclosure Form 1B (Basic Key Form or PHD-1B) shall be in a format prescribed by the Commission and may require the applicant to provide the following information:

1.-6. (No change.)

[7. Position endorsement selection;]

Recodify existing 8. through 15. as **7. through 14.** (No change in text.)

(b) In addition to the information in (a) above, a completed PHD-1B may include the following:

1. The name, address, occupation and phone number of persons who can attest to the applicant's good character[,] **and** reputation [and business ability];

2.-3. (No change.)

19:41-5.4 Personal History Disclosure Form 2A (Casino Employee License Application)

(a) A Personal History Disclosure Form 2A (Casino Employee License Application or PHD-2A) shall be in a format prescribed by the Commission and may require the applicant to provide the following information:

1.-6. (No change.)

[7. Position endorsement selection;]

Recodify existing 8. through 15. as **7. through 14.** (No change in text.)

(b) In addition to the information in (a) above, a completed PHD-2A may include the following:

1. The name, address, occupation and phone number of persons who can attest to the applicant's good character[,] **and** reputation [and business ability];

2.-3. (No change.)

19:41-5.5 Personal History Disclosure Form 4A (Casino [Hotel] **Service** Employee Registration Application)

(a) A Personal History Disclosure Form 4A (Casino [Hotel] **Service** Employee Registration Application or PHD-4A) shall be in a format prescribed by the Commission and may require the applicant to provide the following information:

1.-10. (No change.)

(b) (No change.)

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19:41-7.1A Application for the issuance of employee licenses or registrations and natural person qualification

(a) An application for the initial issuance of an employee license or registration or for individual qualification shall include the following:

1. A completed original and one photocopy of the appropriate Personal History Disclosure (PHD) Form or Qualifier Disclosure Form (QDF), as follows:

i.-ii. (No change.)

iii. An applicant for a casino [hotel] **service** employee registration shall file a PHD-4A as set forth in N.J.A.C. 19:41-5.5;

iv.-vii. (No change.)

2.-5. (No change.)

(b)-(d) (No change.)

19:41-7.1B Application for casino [hotel] **service** employee registration; filing requirements

(a) No casino [hotel] **service** employee registration shall be issued by the Commission unless:

1.-2. (No change.)

(b) A completed application for casino [hotel] **service** employee registration as set forth in N.J.A.C. 19:41-7.1A shall be filed as follows:

1.-2. (No change.)

19:41-8.8 Reapplication by natural person after denial or revocation

(a) (No change.)

(b) Any natural person whose licensure, registration, qualification or approval is denied or revoked by the Commission on the basis of any of the statutory or regulatory provisions specified in (b)1 through [6] **5** below may reapply for licensure, registration, qualification or approval upon satisfaction of the relevant requirements stated below. If the denial or revocation was based upon two or more statutory or regulatory provisions, the Commission shall permit reapplication only upon compliance with the requirements of this subsection as to each such provision. Any person seeking to reapply pursuant to this subsection shall file a certified petition stating with particularity the satisfaction of the specified requirements.

1. (No change.)

[2. Lack of business ability and casino experience pursuant to sections 89b(3) or 90b of the Act: Reapplication is permitted upon said person acquiring the requisite business ability and casino experience.]

Recodify existing 3. through 6. as **2. through 5.** (No change in text.)

(c)-(d) (No change.)

19:41-9.15 Casino [hotel] **service** employee registration fee

(a) Under section 91 of the Act, no person may be employed as a casino [hotel] **service** employee unless such person is registered with the Commission. [Under subsection 94d of the Act, a casino hotel employee shall be registered with the Commission.] A casino [hotel] **service** employee registration shall remain in effect unless revoked, suspended, limited, or otherwise restricted by the Commission in accordance with the provisions of the Act. The one time registration fee for a casino [hotel] **service** employee shall be $60.00.

(b) (No change.)

19:43-9.5 Petitions for casino [hotel] **service** employee registration

(a) In accordance with N.J.S.A. 5:12-91f, no casino [hotel] **service** employee registration shall be issued by the Commission except upon the petition of a casino licensee or applicant. Such petition shall be in writing and shall include the following:

1.-3. (No change.)

4. Either of the following:

i. A completed application for casino [hotel] **service** employee registration as set forth in N.J.A.C. 19:41-7.1A, which shall be accompanied by a written statement, signed and dated by the applicant for registration and an authorized representative of the casino licensee or applicant, authorizing the casino licensee or applicant to file the application on behalf of the applicant for registration; or

ii. (No change.)

19:45-1.11 Casino licensee's organization

(a) (No change.)

(b) In addition to satisfying the requirements of (a) above, each casino licensee's system of internal controls shall include, at a minimum, the following departments and supervisory positions. Each of these departments and supervisors shall be required to cooperate with, yet perform independently of, all other departments and supervisors. Mandatory departments **and supervisory positions** are as follows:

1. A surveillance department supervised by a [casino key employee holding a license endorsed with the position of] **person referred to herein as the** director of surveillance. The [supervisor of the surveillance department] **director of surveillance** shall be subject to the reporting requirements specified in (c) below. The surveillance department shall be responsible for, without limitation, the following:

i.-xii. (No change.)

2. An internal audit department supervised by [a casino key employee holding a license endorsed with the position of] **a person referred to herein as an** audit department executive. The [supervisor of the internal] audit department **executive** shall be subject to the reporting requirements specified in (c) below. The internal audit department shall be responsible for, without limitation, the following:

i.-v. (No change.)

3. A management information system ("MIS") department supervised by a [casino key employee holding a license endorsed with the position of executive employee] **person referred to herein as an MIS department manager**. The MIS department shall be responsible for the quality, realiability and accuracy of all computer systems used by the casino licensee in the conduct of casino and casino simulcasting facility operations including, without limitation, specification of appropriate computer software, hardware, and procedures for security, physical integrity, audit, and maintenance of:

i.-iii. (No change.)

4. A table games department supervised by a [casino key employee holding a license endorsed with the position of] **person referred to herein as a** casino manager. The table games department may be responsible for the operation and conduct of the simulcast counter and shall be responsible for the operation and conduct of the following games:

i.-xi. (No change.)

5. A slot department supervised by a [casino key employee holding a license endorsed with the position of a] **person referred to herein as a** slot department manager. The slot department shall be responsible for the operation of the slot machines and bill changers.

6. A credit department supervised by a [casino key employee holding a license endorsed with the position of] **person referred to herein as a** credit manager. The credit department shall be responsible for the credit function including, without limitation, the following:

i.-iv. (No change.)

7. A security department supervised by a [casino key employee holding a license endorsed with the position of] **person referred to herein as a** director of security. The security department shall be responsible for the overall security of the establishment including, without limitation, the following:

i.-xi. (No change.)

8. A casino accounting department supervised by a [casino key employee holding a license endorsed with the position of] **person referred to herein as a** controller. The [supervisor of the casino accounting department] **controller** may be responsible for the operation and conduct of the simulcast counter and, except as otherwise provided in N.J.A.C. 19:45-1.11(b)9, shall also be responsible for the control and supervision of the cashiers' cage and any satellite cages. The casino accounting department shall be responsible for, without limitation, the following:

i.-iv. (No change.)

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9.-10. (No change.)

(c)-(e) (No change.)

[(f) Functions described in this section shall be performed only by persons holding the appropriate license and position endorsement required by the casino licensee's approved jobs compendium to perform such functions, or by persons holding the appropriate license and position endorsement to supervise persons performing such functions, subject to the limitations imposed by (a) above.]

[(g)]**(f)** Notwithstanding the provisions of (b)4 above and N.J.A.C. 19:45-1.12, a casino licensee may operate and conduct the game of poker separately from the other table games. If a casino licensee elects to operate the game of poker as its own unit, the operation and conduct of poker shall be the responsibility of a casino key employee [holding a license endorsement approved by the Commission]. The supervisor of the poker unit shall report directly to the casino manager or to a casino key employee in a direct reporting line above the casino manager as approved by the Commission.

19:45-1.12 Personnel assigned to the operation and conduct of gaming and slot machines

(a) Each casino licensee shall be required to employ the personnel herein described in the operation of its casino and casino simulcasting facility, regardless of the position titles assigned to such personnel by the casino licensee in its approved jobs compendium[. Functions described in this section shall be performed only by persons holding the appropriate license and position endorsement required by the casino licensee's approved jobs compendium to perform such functions, or by persons holding the appropriate license and position endorsement required by the casino licensee's approved jobs compendium to supervise persons performing such functions,] **and** subject to the limitations imposed by N.J.A.C. 19:45-1.11(a). Each casino licensee shall at all times maintain a level of staffing which ensures the proper operation and effective supervision of all table games in the casino and casino simulcasting facility.

(b)-(j) (No change.)

19:47-17.7 Supervision requirements; required training and license endorsements

[(a)] For purposes of complying with the organizational and supervision requirements of N.J.A.C. 19:45-1.11 and 1.12, the number of personnel required for each double down stud table shall be the same as that required for a blackjack table.

[(b) For purposes of training and license endorsements, all casino personnel dealing and supervising the game of double down stud shall have such experience and obtain such training as the Commission shall require, pursuant to N.J.A.C. 19:44-8.3(b), and shall obtain all necessary license endorsements, pursuant to N.J.A.C. 19:41-9.16.]

19:51-1.3 Standards for qualifications

(a) (No change.)

(b) Each applicant required to be licensed as a casino service industry in accordance with subsections 92a and b of the Act, except as otherwise required for gaming schools (see N.J.A.C. 19:44, shall, prior to the issuance of any casino service industry license, produce such information, documentation and assurances to establish by clear and convincing evidence:

1.-2. (No change.)

[3. That the applicant, either directly or through its employees, has sufficient business ability and experience to establish, operate and maintain the enterprise with reasonable prospects for successful operation;]

Recodify existing 4. through 6. as **3. through 5.** (No change in text.)

(c)-(e) (No change.)

19:53-1.4 Designation of equal opportunity officer by casino licensee or applicant; responsibility of chief executive officer and equal opportunity officer

(a) Each casino licensee or applicant shall designate a principal member of its organization to serve as an equal opportunity officer. A casino license applicant shall designate its equal opportunity officer prior to the start of actual construction by the applicant or by any affiliated entity of any structure or facility to be used as an approved casino hotel, or prior to the recruitment and employment of personnel necessary to undertake the business of the hotel or casino, whichever first occurs. The chief executive officer shall be ultimately responsible for insuring that equal employment opportunity is afforded to all prospective and actual employees, that equal business opportunity is afforded to all persons, that affirmative efforts are made to recruit and employ women and minorities for positions in which the licensee or applicant is below the applicable employment goals, that the casino licensee makes affirmative efforts to achieve the applicable participation goals for business with certified and provisionally certified MBEs and WBEs, that a policy advocating the employment and advancement of persons with disabilities is promulgated and enforced, and that the licensee or applicant achieves full implementation of its approved EEBOP. The equal opportunity officer shall be directly responsible for the organization and effective and continuing implementation of its approved EEBOP. The position of equal opportunity officer shall require a casino key employee license [endorsed as such].

(b)-(f) (No change in text.)

(a)

CASINO CONTROL COMMISSION

Applications

Forms; Labor Organization Registration Statement; Labor Organization Individual Disclosure Form

Information; Application for the Issuance of Employee Licenses or Registrations and Natural Person Qualification

Labor Organization Registration; Definitions; Registration Required; Exemption; Registration Statement; Application; Renewal; Continuing Duty to Disclose; Federal Reports Exception; Qualification of Officers, Agents and Principal Employees; Qualification Procedure; Waiver of Disqualification Criteria; Interest in Casino Hotel or Casino Licensee; Failure to Comply

Proposed Amendments: N.J.A.C. 19:41-7.1A, 12.1 through 12.7, 12.9, 12.11 and 12.12

Proposed Repeal: N.J.A.C. 19:41-12.8 and 12.10

Proposed New Rules: 19:41-5.13, 5.14 and 12.4A

Authorized By: Casino Control Commission, Joseph A. Papp, Executive Secretary.

Authority: N.J.S.A. 5:12-63c, 69a and 93.

Proposal Number: PRN 1995-162.

Submit written comments by April 19, 1995 to:
Ruth S. Morgenroth, Counsel
Casino Control Commission
Tennessee and Boardwalk
Atlantic City, New Jersey 08401

The agency proposal follows:

Summary

The proposed new Casino Control Commission rules, N.J.A.C. 19:41-5.13 and 5.14, codify the Labor Organization Registration Statements and the Labor Organization Individual Disclosure Forms which labor organizations and qualifiers of labor organizations are currently required to file. Proposed new rule N.J.A.C. 19:41-12.4A details what must be included in an application for an initial or renewal labor organization registration. The proposed amendments to N.J.A.C. 19:41-7.1A, 12.5, 12.6 and 12.9 are updated to include references to the new rules. The proposed amendments to N.J.A.C. 19:41-12.1, 12.2, 12.3, 12.9 and 12.12 reflect changes in section 93a of the Act which make it clear that a labor organization is required to register with the Commission if it represents or is seeking to represent employees who are employed in a casino hotel, casino or casino simulcasting facility. Amendments to N.J.A.C. 19:41-12.11 reflect similar changes in section 93c of

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the Act which prohibit labor organizations and their officers or agents from holding any financial interest in a casino hotel, casino or casino simulcasting facility.

Additionally, the proposed amendments to N.J.A.C. 19:41-12.4 and 12.9 impose new time limits for the filing of forms. The amendments to N.J.A.C. 19:41-12.4 impose a 30 day time limit for the filing of a Labor Organization Registration Statement from the time a labor organization begins organizing activities directed at casino employees. The amendments to N.J.A.C. 19:41-12.9 impose a 30 day time limit for the filing of a Labor Organization Individual Disclosure Form by new officers, agents and principal employees of registered labor organization from the time of election, appointment or hire. The proposed amendments to N.J.A.C. 19:41-12.9 and 12.12 and the repeal of N.J.A.C. 19:41-12.10 eliminate incorrect references to affirmative qualification requirements, but also make it clear that an officer, agent or principal employee of a labor union may be found disqualified pursuant to N.J.S.A. 5:12-86. N.J.A.C. 19:41-12.12 is reorganized to clarify the sanctions which may be imposed if a labor organization or its officers, agents or principal employees fail to comply with Commission rules.

Social Impact

The proposed amendments, repeal and new rules are not expected to have any significant social impact. However, the proposed 30 day time limits should be helpful in clarifying when a labor organization is obligated to file a Labor Organization Registration Statement and when an officer, agent or principal employee is required to file a Labor Organization Individual Disclosure Form.

Economic Impact

The proposed amendments, repeal and new rules are not expected to have any economic impact. Labor organizations and qualifiers of labor organizations required to file the forms described in the proposal incur time and expense in compiling the required information and in completing and filing the forms. The regulatory agencies likewise incur costs in reviewing and processing these disclosure forms. However, the Commission has always required this type of disclosure as part of the application process. The proposal herein merely codifies existing forms, which in itself should not result in any incremental economic impact.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the rulemaking requirements of the Casino Control Commission are dictated by the Casino Control Act, N.J.S.A. 5:12-1 et seq., and are not subject to any Federal requirements or standards.

Regulatory Flexibility Statement

The proposed amendments, repeal and new rules affect labor organizations, unions and affiliates, as well as the officers, agents and principal employees of labor organizations, unions and affiliates. These organizations and individuals do not qualify as small businesses under the Regulatory Flexibility Act, N.J.S.A. 52:14b-16 et seq. Accordingly, a regulatory flexibility analysis is not required.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

19:41-5.13 Labor Organization Registration Statement

(a) A Labor Organization Registration Statement shall be in a format prescribed by the Commission and may require the labor organization, union, or affiliate to provide the following information:

1. The name of the registrant as shown on its charter or in its constitution;

2. The current and former business addresses of the registrant, including the address of any office where matters pertaining to employees of a casino license will be conducted;

3. The names of the registrant's parent organization and all affiliates of the registrant or its parent organization;

4. The nature of the actual or probable involvement of any affiliate which represents or is seeking to represent employees who are employed in a casino hotel, casino or casino simulcasting facility by a casino licensee, or which is involved or seeking to be involved in the control or direction of such representation;

5. Financial data, including information concerning any financial interests held in a casino hotel, casino, casino simulcasting facility or casino licensee;

6. The name, address and, where applicable, date of birth, title or position and authority or responsibility, of the following persons or entities:

i. Any pension or welfare system maintained by the registrant;

ii. Each officer and agent of any pension or welfare system maintained by the registrant;

iii. Each officer and officer-elect of the registrant;

iv. Each agent authorized to represent the registrant; and

v. Each principal employee of the registrant.

(b) In addition to the information in (a) above, a completed Labor Organization Registration Statement may include the following:

1. A notarized affidavit of truth, which shall be dated and signed by the registrant's president or chief executive officer, treasurer and secretary;

2. A certification of truth, dated and signed by the registrant's attorney of record;

3. A Release Authorization directing all courts, probation departments, selective service boards, employers, educational institutions, financial and other institutions and all governmental agencies to release any and all information pertaining to the registrant as requested by the Commission or the Division;

4. A waiver of liability as to the State and its instrumentalities and agents for any damages resulting to the registrant from any disclosure or publication of information acquired during the investigation process, in accordance with N.J.S.A. 5:12-80c; and

5. Consent to inspection, searches and seizures and the supplying of handwriting exemplars, in accordance with N.J.S.A. 5:12-80c.

19:41-5.14 Labor Organization Individual Disclosure Form

(a) A Labor Organization Individual Disclosure Form shall be in a format prescribed by the Commission and may require the applicant to provide the following information:

1. Name, including any aliases or nicknames;

2. Title or position with the labor organization;

3. Date and place of birth;

4. Physical description;

5. Current address and residence history;

6. Social security number, which information is voluntarily provided in accordance with section 7 of the Privacy Act, 5 U.S.C. 552a;

7. Citizenship and, if applicable, information concerning resident alien status;

8. Telephone number at current place of employment;

9. Employment history, including all positions held with a labor organization, union or affiliate, whether or not compensated;

10. Licenses or other approvals held or applied for which are required to participate in any lawful gambling operation in this State or any jurisdiction;

11. Civil, criminal and investigatory proceedings in any jurisdiction as follows:

i. Convictions for crimes or disorderly persons offenses; and

ii. Convictions for contempt for refusal to testify or cooperate with any legislative investigatory body or other official investigatory body; and

12. Financial data, including information concerning any financial interests held in a casino hotel, casino, casino simulcasting facility or casino licensee.

(b) In addition to the information in (a) above, a completed Labor Organization Individual Disclosure Form may include the following:

1. The name, address, occupation and phone number of references;

2. A signed, dated and notarized affidavit of truth;

3. A signed, dated and notarized release authorization which shall direct all courts, probation departments, selective service boards, employers, educational institutions, financial and other institutions and all governmental agencies to release any and all information pertaining to the officer, agent or principal employee as requested by the Commission or the Division; and

4. A waiver of liability as to the State and its instrumentalities and agents for any damages resulting to the officer, agent or prin-

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cipal employee from any disclosure or publication of information acquired during the investigation process, in accordance with N.J.S.A. 5:12-80c.

19:41-7.1A Application for the issuance of employee licenses or registrations and natural person qualification

(a) An application for the initial issuance of an employee license or registration or for individual qualification shall include the following:

1. A completed original and one photocopy of the appropriate [Personal History Disclosure (PHD) Form or Qualifier Disclosure Form (QDF)] **disclosure form**, as follows:

i.-v. (No change.)

vi. An applicant required to qualify pursuant to subsections 92a and b of the Act by virtue of his or her position with a casino service industry enterprise or gaming school shall file a PHD-1A as set forth in N.J.A.C. 19:41-5.2; [and]

vii. An applicant required to qualify pursuant to subsection 92c of the Act by virtue of his or her position with a casino service industry enterprise shall file a QDF as set forth in N.J.A.C. 19:41-5.9. If such enterprise is required to be licensed pursuant to N.J.A.C. 19:51-1.2A(f), the applicant shall also provide two copies of his or her Federal tax returns and related documents[.]; **and**

viii. An applicant required to qualify pursuant to N.J.S.A. 5:12-93 by virtue of his or her position with a labor organization, union or affiliate shall file a Labor Organization Individual Disclosure Form as set forth in N.J.A.C. 19:41-5.14.

2.-5. (No change.)

(b)-(d) (No change.)

19:41-12.1 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

. . .

"Labor organization agent" or "agent" means any person, whether compensated or not, who is authorized or allowed to represent a labor organization in any employment matter relating to employees [licensed under the Act and] **who are** employed [by] **in** a casino hotel [or]**, casino or casino simulcasting facility by a** casino licensee, or who undertakes on behalf of the labor organization to promote, facilitate or otherwise influence the relations between the labor organization and the [casino hotel or] casino licensee.

. . .

"Labor organization principal employee" or "principal employee" means any employee of a labor organization who, by reason of remuneration or of a management, supervisory or policy making position exercises any authority, discretion or influence with regard to any matter relating to employees [licensed under the Act and] **who are** employed [by] **in** a casino hotel [or]**, casino or casino simulcasting facility by a** casino licensee. [For purposes of these regulations, any employee other than one performing exclusively clerical or custodial services, whose functions relate to employees licensed under the Act and employed by a casino hotel or casino licensee shall be included unless the contrary clearly appears from information supplied to the Commission.]

19:41-12.2 Registration required

Each labor organization, union or affiliate representing or seeking to represent employees [licensed under the Act and] **who are** employed [by] **in** a casino hotel [or]**, casino, or casino simulcasting facility by** a casino licensee shall register with the Commission annually in accordance with [Section 93] **N.J.S.A. 5:12-93** and the [regulations] **rules** of the Commission.

19:41-12.3 Registration exemption; standards and findings

(a) The Commission may in its discretion exempt any labor organization, union, or affiliate from [the] **annual** registration **in accordance with the** requirements of [Section 93 of the Act] **N.J.S.A. 5:12-93a.** [where the Commission finds that such labor organization, union or affiliate:

1. Is not the certified bargaining representative of any employee licensed under this Act and employed by a casino hotel or casino licensee; and

2. Is neither involved nor seeking to be involved actively, directly or substantially in the control or direction of the representation of any such employee.]

(b) (No change.)

19:41-12.4 [Registration] **Initial filing of registration** statement

(a) [In order to register,] **Within 30 days of the date on which it begins organizing activities directed at the employees who are employed in a casino hotel, casino or casino simulcasting facility by a casino licensee, or within such additional time as the Commission may, upon a showing of good cause, permit,** a labor organization, union or affiliate shall file with the Commission [a "Labor Organization Registration Statement" which shall be completed, signed and filed in accordance with the requirements of N.J.A.C. 19:41-1.7] **an application for labor organization registration in accordance with N.J.A.C. 19:41-12.4A.** [Said statement shall be in the form prescribed by the Commission and shall include, without limitation, the following:

1. The names of all labor organizations affiliated with the registrant;

2. Information as to whether any affiliate is involved or seeking to be involved actively, directly or substantially in the control or direction of the representation of any employee licensed under the Act and employed by a casino hotel or a casino licensee;

3. Information as to whether the registrant, holds, directly or indirectly, any financial interest whatsoever in the casino hotel or casino licensee whose employees it represents;

4. The names of any pension and welfare systems maintained by the registrant and all officers and agents of such systems;

5. The names of all officers, agents and principal employees of the registrant; and

6. All written assurances, consents, waivers and other documentation required of a registrant by N.J.A.C. 19:41-1.7.]

(b) For purposes of this section, organizing activities shall include, without limitation, soliciting membership by means of any direct personal contact, or any public notices such as the posting or distribution of fliers, posters or advertisements.

19:41-12.4A Application for initial and renewal of labor organization registration

(a) An application for initial or renewal labor organization registration shall consist of the fee specified in N.J.A.C. 19:41-9.10 and a completed original and one copy of the following:

1. A Labor Organization Registration Statement as set forth in N.J.A.C. 19:41-5.13; and

2. Any Labor Organization Individual Disclosure Forms as set forth in N.J.A.C. 19:41-5.14 required pursuant to N.J.A.C. 19:41-12.9.

19:41-12.5 [Registration] **Duration of registration;** renewal

[A] **An initial** labor organization registration shall be [effective] for **a period of** one year **from the date on which the initial Labor Organization Registration Statement is accepted for filing by the Commission.** [Any such registration may be renewed upon filing of an updated] **Subsequent** ["]Labor Organization Registration [Statement"] **Statements shall be filed annually pursuant to N.J.A.C. 19:41-12.4A** no later than 120 days prior to the expiration of the current registration[, and the payment of any fee on or before the date of expiration of the current registration. The Commission shall act upon such application for renewal no later than 30 days prior to the date of expiration of the current registration] **period.**

19:41-12.6 Continuing duty to disclose

Every registered labor organization shall be under a continuing duty to promptly disclose any change in the information contained in the ["]Labor Organization Registration Statement["] **set forth in N.J.A.C. 19:41-5.13** or **any information** otherwise requested by the Commission or the Division.

19:41-12.7 Federal reports exception

Notwithstanding the reporting requirements imposed by [Section 93 of the Act] **N.J.S.A. 5:12-93** and the [regulations] **rules** of the

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Commission, no labor organization, union, affiliate or person shall be required to furnish any information which is included in a report filed by any labor organization, union, affiliate or person with the Secretary of Labor pursuant to 29 U.S.C. Section 431, et seq. (Labor-Management Reporting and Disclosure Act) or 29 U.S.C. Section 1001 et seq. (Employee Retirement Income Security Act) if a copy of such report, or if the portion thereof containing such information, is furnished to the Commission pursuant to the aforesaid Federal provisions.

19:41-12.8 [Qualification of officers, agents and principal employees] **(Reserved)**

[Every officer, agent and principal employee of a labor organization, union or affiliate required to register with the Commission pursuant to Section 93 of the Act and the regulations of the Commission shall be qualified in accordance with criteria contained in Section 86 of the Act.]

19:41-12.9 [Qualification procedure] **Officers, agents and principal employees; initial and renewal filing requirements**

(a) [In order to be qualified in accordance with section 93 and 96 of the act, every] **Every** officer, agent and principal employee of a labor organization, union or affiliate required to register with the [commission] **Commission** pursuant to [section 93 of the act] **N.J.S.A. 5:12-93** and the [regulations] **rules** of the [commission] **Commission** shall file with the [commission] **Commission** a **completed original and one copy of a** ["labor organization individual disclosure form" which shall be completed, signed and filed in accordance with the requirements of N.J.A.C. 19:41-1.7;] **Labor Organization Individual Disclosure Form as set forth in N.J.A.C. 19:41-5.14.** [provided, however, that such a form]

(b) Notwithstanding (a) above, a Labor Organization Individual Disclosure Form need not be filed by an officer of a national or international labor organization [where that officer] **who** exercises no authority, discretion or influence over the operation of such labor organization with regard to any employment matter relating to employees [licensed under the act and] **who are** employed [by] **in** a casino hotel [or], **casino or casino simulcasting facility by a** casino licensee[; and] provided[, further] that [any such officer of a national or international labor organization may be directed by] the [commission] **Commission** or the [division] **Division may direct such officer** to file [a "labor organization individual disclosure] **such** form["] or to provide any other information in the same manner and to the same extent as may be required of any other officer of a labor organization which is required to register [under section 93 of the act] **pursuant to N.J.S.A. 5:12-93**.

[(b)]**(c)** Each officer, agent or principal employee required to file a ["labor organization individual disclosure form"] **Labor Organization Individual Disclosure Form** shall do so initially at the time the pertinent labor organization, union or affiliate applies or should apply for registration, or [at the time] **within 30 days of the date on which** the individual is elected, appointed or hired, whichever is later[.], **or within such additional time as the Commission may, upon a showing of good cause, permit.**

[(c)]**(d)** [Following an initial finding of qualification, each qualified] **Each** individual who has filed an initial ["labor organization individual disclosure form"] **Labor Organization Individual Disclosure Form** shall annually file with the [commission] **Commission** [a properly completed,] **an** updated **original and one copy of a** ["labor organization individual disclosure form".] **Labor Organization Individual Disclosure Form at the time the pertinent labor organization files for renewal of its registration pursuant to N.J.A.C. 19:41-12.4A.**

(e) Notwithstanding the requirements of N.J.S.A. 5:12-93 and this section, the Commission may waive any disqualification criterion of N.J.S.A. 5:12-86 with respect to any officer, agent or principal employee of a labor organization, union or affiliate in accordance with the standards set forth in N.J.S.A. 5:12-93b.

19:41-12.10 [Waiver of disqualification criteria] **(Reserved)**

[Notwithstanding the qualification requirements of N.J.A.C. 19:41-12.8 as to any such officer, agent or principal employee, the commission may waive any disqualification criterion of section 86 of the act consistent with the public policy of the act and upon a finding that the interests of justice so require.]

19:41-12.11 Interest in casino hotel or casino licensee prohibited

[Neither] **In accordance with N.J.S.A. 5:12-93c, neither** a labor organization, union or affiliate nor its officers[,] and agents not otherwise individually licensed under the [act] **Act** and employed by a casino licensee may hold any financial interest whatsoever in the casino hotel**, casino, casino simulcasting facility** or casino licensee whose employees they represent.

19:41-12.12 Failure to comply; consequences

(a) [No labor organization, union or affiliate required to register with the commission shall receive any dues from or on behalf of or administer any pension or welfare funds from or on behalf of any employee licensed under the act and employed by a casino licensee or its agent] **The Commission may impose any sanction permitted by the Act including the imposition of fines or the revocation of any registration, if**:

1. [If the said] **A** labor organization, union or affiliate [shall fail] **fails** to properly register with the [commission] **Commission pursuant to N.J.A.C. 19:41-12.4 and 12.5** or **fails to** provide all information requested by the [commission] **Commission** or [division] **Division** in accordance with the provisions of the [act] **Act** or the [regulations] **rules** of the [commission] **Commission**;

2. [If any] **Any** officer, agent or principal employee of such labor organization, union or affiliate [shall fail to qualify] **has been found disqualified by the Commission** in accordance with the provisions of the Act or the [regulations] **rules** of the [commission,] **Commission;** [or,]

3. [If the said] **The** labor organization, union, affiliate or any officer or agent thereof [shall hold] **holds** a prohibited interest in a casino hotel [or], **casino, or casino simulcasting facility, or** [a] casino licensee[.]**; or**

4. An officer, agent or principal employee of a labor organization, union or affiliate fails to properly register with the Commission pursuant to N.J.A.C. 19:41-12.9 or fails to provide all information requested by the Commission or Division in accordance with the provisions of the Act or the rules of the Commission.

[(b) Nothing herein shall be construed to limit the right of the commission to impose any sanctions or take any action authorized by the act.

EDITOR'S NOTE: In addition to the text above, a sample labor organization individual disclosure form and a labor organization registration statement were adopted with these rules but are not reproduced herein. Information on these items may be obtained from the Casino Control Commission, Arcade Building, Tennessee Avenue and Boardwalk, Atlantic City, NJ 08401.]

(a)

CASINO CONTROL COMMISSION

Applications

Application for the Issuance of Employee Licenses, Registrations and Natural Person Qualification; Junket Representative License Fees; Contents of Renewal Application; Junkets

Definitions; Junket Representatives; Junket Enterprises; Junket Final Reports; Monthly Reports: Non-Junket Gaming Arrangements; Purchases of Patron Lists; Monthly Reports: Employee Junket Activities

Persons Doing Business with Casino Licensees

Standards for Qualification

Proposed Amendments: N.J.A.C. 19:41-7.1A, 9.11A and 14.3, and 19:49-1.1, 2.1, 2.2, 3.3, 3.5 and 3.6

Proposed Repeal: N.J.A.C. 19:49-3.4

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Authorized By: Casino Control Commission, Joseph A. Papp, Executive Secretary.
Authority: N.J.S.A. 5:12-63c and d; 69a, 70a and e, 92 and 102.
Proposal Number: PRN 1995-163.

Submit written comments by April 19, 1995 to:
Ruth S. Morgenroth, Counsel
Casino Control Commission
Tennessee and Boardwalk
Atlantic City, New Jersey 08401

The agency proposal follows:

Summary

The proposed amendments to Casino Control Commission ("Commission") rules are required by recently adopted amendments to the Casino Control Act ("the Act"), N.J.S.A. 5:12-1 et seq.

The Legislature changed the definition of "junket representative" in section 29.2 of the Act so that individuals who accompany a junket for the purpose of monitoring or evaluating participants are no longer considered junket representatives, and in section 102, downgraded the license required by junket representatives from a casino key employee license to a casino employee license. Changes to section 102 also require junket representatives employed by affiliates of casino licensees to be licensed. Formerly only junket representatives employed by casino licensees or applicants were required to be licensed. In addition, the Legislature eliminated the requirement that casino licensees obtain signed acknowledgements from junket participants indicating that they understand the terms of the particular junket and the requirement that casino licensees submit reports on arrangements which would be junkets but for the fact that they do not include a selection or approval of participants in accordance with the provisions of section 29 of the Act. Changes in Section 89 of the Act eliminate the requirement that licenses issued by the Commission be endorsed with the position the licensee is qualified to hold.

Proposed amendments to N.J.A.C. 19:49-2.1 change the definition of junket representative to conform to the definition in section 29.2 of the Act. The proposed amendments to N.J.A.C. 19:49-2.1 and 3.6 also eliminate the existing reference to the position endorsement requirements of section 89 of the Act. Proposed amendments to N.J.A.C. 19:41-9.11A and 14.3 and 19:49-2.1 indicate that junket representatives are required to be licensed to the standard of a casino employee, rather than a casino key employee. Proposed amendments to N.J.A.C. 19:41-9.11A and 19:49-1.1, 2.1, 3.5 and 3.6 indicate that junket representatives employed by an affiliate of a casino licensee are required to be licensed. The proposed amendment to N.J.A.C. 19:49-3.3 eliminates the requirement that each junket participant sign a statement acknowledging that he or she understands the terms of the junket. The proposed amendments to N.J.A.C. 19:41-9.11A also change the fees for the issuance and renewal of junket representative licenses so that these fees are consistent with the fees charged for the issuance and renewal of casino employee licenses. The proposed amendments to N.J.A.C. 19:41-7.1A specify the personal history form required to be filed by applicants for an initial junket representative license. N.J.A.C. 19:49-3.4 is repealed because reports on non-junket gaming arrangements are no longer required. Erroneous citations are corrected in N.J.A.C. 19:49-2.1, 2.2, and 3.5.

Social Impact

It is not anticipated that the changes in the definitions of junket representatives or the requirement that junket representatives employed by affiliates of casino licensees be licensed will have any significant social impact. However, downgrading the license required for junket representatives from a key license to a casino employee license will result in regulatory savings because the background investigation required for licensure and renewal of a junket representative license to a casino employee standard will be less extensive than if he or she were licensed to a key standard. The Legislature has provided that any savings from reduction in regulatory costs will go into a fund for financing projects in Atlantic City to improve its appearance and safety.

Economic Impact

Under current Commission rules, the minimum fee for the issuance and renewal of a junket representative license is $750.00. However, because applicants must also pay expenses incurred by the Commission and Division, that fee could be increased to a maximum of $4,000. The proposed amendment to N.J.A.C. 19:41-9.11A reduces the initial license fee to $350.00 and the renewal fee to $250.00. Elimination of the requirements that a casino licensee submit monthly reports on certain non-junket arrangements and obtain signed acknowledgments from all junket participants that they understand the cost of a particular junket will also result in savings, albeit small, to casino licensees.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the rulemaking requirements of the Casino Control Commission are dictated by the Casino Control Act, N.J.S.A. 5:12-1 et seq., and are not subject to any Federal requirements or standards.

Regulatory Flexibility Statement

The proposed amendments and repeal affect casino licenses and individuals who hold or are applicants for junket representative licenses, none of which qualify as a small business under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. A regulatory flexibility analysis is thus not required.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

19:41-7.1A Application for the issuance of employee licenses or registrations and natural person qualification

(a) An application for the initial issuance of an employee license or registration or for individual qualification shall include the following:

1. A completed original and one photocopy of the appropriate Personal History Disclosure (PHD) Form or Qualifier Disclosure Form (QDF), as follows:

i. An applicant for a casino key employee license, [junket representative license,] resident director license or an applicant required to qualify pursuant to subsection 102c of the Act by virtue of his or her position with a junket enterprise shall file a PHD-1B as set forth in N.J.A.C. 19:41-5.3;

ii. An applicant for a casino employee license [or], gaming school employee license **or junket representative license** shall file a PHD-2A as set forth in N.J.A.C. 19:41-5.4;

iii.-vii. (No change.)

2.-5. (No change.)

(b)-(d) (No change.)

19:41-9.11A Junket representative license **term and** fees

(a) In accordance with [subsection 102(b) of the Act] **N.J.S.A. 5:12-102b**, all junket representatives employed by a casino licensee**, an applicant for a casino license or an affiliate of a casino licensee** shall meet the standards established for casino [key] employees, except for residency, in order to be licensed. [Under subsection 94(d) of the Act,] **Pursuant to N.J.S.A. 5:12-94d,** such a license shall be issued for [a] **an initial term of** three [year period] **years** and [shall be renewable for additional] **for a term of** four [year periods] **years for all subsequent renewals**.

(b) [The fee for the issuance or renewal of a junket representative license shall be as follows:

1. A minimum application charge of $750.00, which shall be credited to the total fee; and

2. Payment for the efforts of the Commission and the Division on matters directly related to the applicant or licensee at hourly rates to be set by the Commission in accordance with N.J.A.C. 19:41-9.4(e); and

3. Payment for all unusual or out of pocket expenses incurred by the Commission and Division on matters directly related to the applicant or licensee; provided, however, that the amount of the issuance or renewal fee shall not exceed $4,000.] **The issuance fee for an initial three year licensee shall be $350.00. The renewal fee for a four year license shall be $250.00**.

19:41-14.3 Contents of renewal application

(a) (No change.)

(b) In addition to the materials identified in (a) above, an application for the renewal of a casino key employee license[,] **or** a gaming school-resident director license [or a junket representative license] shall include:

1.-2. (No change.)

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(c) In addition to the materials identified in (a) [and (b)] above, an application for the renewal of a junket representative license shall include, in a form required by the Commission, designation of an agent to receive service of process in this State and an affirmation that the applicant submits to the jurisdiction of this State.

19:49-1.1 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

"Agent" means any person, including a junket representative, junket enterprise or casino [key] employee acting as a junket representative, acting directly or indirectly on behalf of a casino licensee **or an affiliate of a casino licensee**.

. . .

19:49-2.1 Junket representatives

(a) A junket representative, as defined in the Act, is any natural person who negotiates the terms of, engages in the referral, procurement or selection of persons who may participate in[, or accompanies for purposes of monitoring or evaluating the participants on,] any junket to a licensed casino, regardless of whether or not those activities occur within the State of New Jersey. If a person performs any one of these functions in connection with a junket to a licensed casino, that person is a junket representative for the purposes of the Act and this chapter.

(b)The fact that a person licensed as a casino [key] employee may, pursuant to N.J.S.A. 5:12-102 and (c)3 below, act as a junket representative while employed by a casino licensee **or affiliate of a casino licensee** [without further endorsement of his or her license] does not excuse the casino licensee, **affiliate of a casino licensee** or any other person from meeting any other licensing, registration or reporting obligation which may exist as a result of the conduct of the junket activity.

(c) Except as otherwise provided by N.J.S.A. 5:12-102o, no person shall act as a junket representative in connection with a junket to a licensed casino unless he or she:

1. Has been plenarily or temporarily licensed as a junket representative in accordance with the provisions of section 102 of the Act and is employed by a licensed casino **or an affiliate of a casino licensee**;

2. (No change.)

3. Is the holder of a current and valid casino [key] employee license, is currently employed by the casino licensee **or affiliate of the casino licensee** for whom such junket representative services are being rendered and is reported to the Division in accordance with the requirements of N.J.A.C. 19:49-3.6, or

4. Is employed as a junket representative by a junket enterprise which is licensed in accordance with the provisions of section 102 and subsection 92(c) of the Act, N.J.A.C. [19:43] **19:41 and 19:51** and this chapter, or by a junket enterprise which is registered as a junket enterprise vendor in accordance with the provisions of N.J.A.C. [19:41-11] **19:43-10.4** and this chapter.

(d) A junket representative may only be employed by one casino licensee, **an affiliate of a casino licensee** or junket enterprise at a time. For the purposes of this section, to qualify as an employee of a casino licensee, a junket enterprise licensee or a junket enterprise vendor, a junket representative must:

1.-2. (No change.)

(e) (No change.)

19:49-2.2 Junket enterprises

(a) (No change.)

(b) A junket enterprise shall be registered as a junket enterprise vendor in accordance with the provisions of N.J.A.C. [19:41-11] **19:43-10.4** and this chapter or licensed as a junket enterprise in accordance with the provisions of N.J.S.A. 5:12-92(c), 5:12-102 and N.J.A.C. [19:43] **19:41 and 19:51** prior to a casino licensee permitting a junket involving that junket enterprise to arrive at its casino. A junket enterprise shall be considered "involved" in a junket to a licensed casino if it receives any compensation whatsoever from any person as a result of the conduct of the junket. No casino licensee or junket enterprise may engage the services of any junket enterprise which has not been so registered or licensed.

19:49-3.3 Junket final reports

(a)-(b) (No change.)

(c) [Final] **A final** report shall include:

1.-2. (No change.)

[(d) Attached to each final report on a junket involving complimentary guest room accommodations shall be an acknowledgment by each participant that he understands the terms of the particular junket. The acknowledgment shall clearly explain the junket arrangement and be signed and dated by the participant on or prior to the arrival date of the junket.]

19:49-3.4 [Monthly reports: non-junket gaming arrangements] **(Reserved)**

[(a) A casino licensee shall prepare a report on those arrangements in which it participates which would be junkets but for the fact that the arrangements do not include a selection or approval of participants in accordance with the provisions of Section 29 of the Act and N.J.A.C. 19:49-1.2; provided, however, that such report shall only include those arrangements which involve either:

1. Complimentary services or items furnished directly or indirectly by the casino licensee which have a value in excess of $100.00 per person calculated in accordance with the provisions of N.J.A.C. 19:45-1.9; or

2. Compensation paid directly or indirectly by the casino licensee to any person who is not an employee of the casino licensee (other than the same complimentary services and items of value provided by the casino licensee to other participants pursuant to the terms of the particular arrangements); or

3. Complimentary transportation furnished directly or indirectly by the casino licensee for a group of 10 or more persons.

(b) The report required by (a) above shall be filed on a monthly basis with the Division by the casino licensee on or before the 15th day of the following month.

(c) The report required by (a) above shall be prepared in tabular form and shall include:

1. The name and address of any person, other than an employee of the casino licensee, receiving direct or indirect compensation from the casino licensee pursuant to the arrangement (other than the same complimentary services or items of value provided by the casino licensee to other participants pursuant to the terms of the particular arrangement);

2. The terms of any compensation agreement with a person identified in (c) above;

3. The arrival and departure dates of each visit to the casino hotel;

4. The name, address and basis of affiliation of any group participating in the arrangement;

5. The number of persons participating in the arrangement;

6. The means of transportation utilized; and

7. The value of complimentary services or items to be provided to the participants, calculated in accordance with the provisions of N.J.A.C. 19:45-1.9.]

19:49-3.5 Purchases of patron lists

(a) Each casino licensee, **affiliate of a casino licensee,** junket representative or junket enterprise shall prepare and maintain a report with respect to each list of names of junket patrons or potential junket patrons purchased from any source whatsoever.

(b)-(c) (No change.)

(d) If a list of names of junket patrons or potential junket patrons has been compiled in whole or in part by selecting the names included therein on a "basis related to their propensity to gamble," as the phrase is defined in N.J.A.C. 19:49-1.2, the seller of such list shall be appropriately licensed or registered in accordance with the provisions of N.J.S.A. 5:12-102, 5:12-92(c), N.J.A.C. 19:41[-11], 19:43-**10.4, 19:51** and this chapter prior to engaging in such sale. No casino licensee, **affiliate of a casino licensee** or junket enterprise shall purchase a list of names compiled in such fashion unless the seller has been so licensed or registered.

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19:49-3.6 Monthly reports: employee junket activities

Each casino licensee shall, on or before the 15th day of the month, prepare and maintain a report listing the name and license number of each person employed by that casino licensee **or an affiliate of a casino licensee** who performed the services of a junket representative during the preceding month[, but whose license was not endorsed as such]. The report shall be maintained by the casino licensee on the premises of its casino hotel and made available to the Division for inspection.

(a)

CASINO CONTROL COMMISSION

Applications

Gaming Related Casino Service Enterprise License Fee; Casino Employee License Fees; Scope of Subchapter; Modification of License at Renewal; Duration of Renewed Licenses

Persons Doing Business with Casino Licensees

Duration of Licenses; Renewal

Proposed Amendments: N.J.A.C. 19:41-9.8, 9.14, 14.1, 14.4 and 14.6; and 19:51-1.8

Authorized By: Casino Control Commission, Joseph A. Papp, Executive Secretary.

Authority: N.J.S.A. 5:12-63c and d; 69a, 70a and e and 92.

Proposal Number: PRN 1995-164.

Submit written comments by April 19, 1995 to:
Ruth S. Morgenroth, Counsel
Casino Control Commission
Tennessee and Boardwalk
Atlantic City, New Jersey 08401

The agency proposal follows:

Summary

The proposed amendments to Casino Control Commission ("Commission") rules are required by recently adopted amendments to the Casino Control Act ("the Act"), N.J.S.A. 5:12-1 et seq. Changes in section 90 of the Act eliminate the distinction between casino employees who are engaged in gaming activity and those whose functions are not directly related to gaming activity. Changes to section 94 of the Act, among other things, increase the renewal term for casino key licensees and gaming-related casino service industry licensees from two to four years and eliminate the requirement that employees of gaming schools be licensed. Changes to section 102 of the Act eliminate the need for separate junket representative licenses.

The proposed amendments to N.J.A.C. 19:41-9.8 and 19:51-1.8 reflect the changed license renewal term for gaming-related casino service industry enterprises while the proposed amendments to N.J.A.C. 19:41-14.6 reflect the changed license renewal term for casino key employee licenses. The proposed amendments to N.J.A.C. 19:51-1.8 also correct an erroneous reference to the Commission rule which describes vendor and junket enterprise registration requirements. The proposed amendments to N.J.A.C. 19:41-9.14, 14.1 and 14.4 eliminate references to gaming and non-gaming related casino employees. The proposed amendments to N.J.A.C. 19:41-14.1 and 14.4 also eliminate references to junket representative and gaming school resident director and gaming school employee licenses.

Social Impact

Increasing the renewal terms for gaming-related casino service industries and casino key employees and eliminating licensure requirements for employees of gaming schools will reduce the cost of regulating these employees and entities. The Legislature has provided that any savings from reduction in regulatory costs will go into a fund for financing projects in Atlantic City to improve its appearance and safety.

Economic Impact

The amendments to the Casino Control Act and the regulatory amendments proposed herein will result in savings to employees of gaming schools, applicants for casino key employee and gaming-related casino service industry licenses but will increase the cost of licensure for non-gaming related casino employees. Employees of gaming schools are no longer required to be licensed and consequently will no longer be required to pay licensing fees. Although the proposed amendments do not directly reduce the license fees for casino key employee licenses or gaming-related casino service industry licenses, the proposed amendments increase the renewal terms for these licenses from two to four years without a corresponding increase in the renewal license fee. The proposed amendments eliminate the category of employees previously referred to as non-gaming related employees. Previously these individuals were charged lower issuance and renewal fees than gaming related casino employees. These individuals will now be required to pay the application and renewal fees paid by other applicants for initial and renewal casino employee licenses.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the rulemaking requirements of the Casino Control Commission are dictated by the Casino Control Act, N.J.S.A. 5:12-1 et seq., and are not subject to any Federal requirements or standards.

Regulatory Flexibility Statement

Some of the proposed amendments affect casino service industry enterprises. Those enterprises may qualify as small businesses under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed amendments will benefit these businesses by increasing the license renewal periods without a comparable increase in the renewal fee.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

19:41-9.8 Gaming related casino service industry enterprise license fee

(a) In accordance with subsections 92a and b of the Act, all casino service industry enterprises offering goods and services which directly relate to casino, simulcast wagering or gaming activity, including gaming equipment manufacturers, suppliers and repairers, schools teaching gaming and dealing techniques, and casino security services, shall meet the standards established for casino key employees in order to be licensed. Such a license shall be issued for **an initial term of** two years and [shall be renewable for additional two year periods] **for a term of four years for all subsequent renewals**.

(b)-(d) (No change.)

19:41-9.14 Casino employee license fees

(a) Under section 90 of the Act, no person may be employed as a casino [hotel] employee unless such person is the holder of a valid casino employee license. [The Act creates a distinction between casino employees whose functions are directly related to gaming activity and those whose functions are not so related. The fee schedule established herein for casino employees recognizes that distinction and the difference in effort generally required to investigate, consider and monitor the two classes of casino employees.]

(b) Under subsection 94d of the Act, a casino employee license [for a person whose position is directly related to gaming activity] shall be issued for three years and be renewable for four year periods thereafter. The issuance fee for such a three year license shall be $350.00. The renewal fee for such a four year license shall be $250.00.

[(c) Under subsection 94d of the Act, a casino employee license for a person whose position is not directly related to gaming activity shall be issued for three years and be renewable for four year periods thereafter. The issuance fee for such a three year license shall be $250.00. The renewal fee for such a four year license shall be $225.00.]

[(d)]**(c)** Any person who applies for the issuance of a casino employee license pursuant to (b) [or (c)] above may pay the appropriate application fee in accordance with the following schedule upon payment of an additional fee of $10.00 to cover the cost of processing the payment plan:

1. An applicant for the issuance of a casino employee license [for a position directly related to gaming] may submit an initial payment of $275.00 upon filing of the application and a subsequent payment of $85.00 within 30 days from the date that the license is granted or denied or the application is withdrawn, or upon the prior issuance of the license.

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[2. An applicant for the issuance of a casino employee license for a position not directly related to gaming may submit an initial payment of $195.00 upon filing of the application and a subsequent payment of $65.00 within 30 days from the date that the license is granted or denied or the application is withdrawn, or upon the prior issuance of the license.]

[(e)]**(d)** The Commission may waive the fee in (b) [or (c)] above for an applicant for initial licensure if:

1.-2. (No change.)

19:41-14.1 Scope of subchapter; effect of expiration of license

(a) This subchapter shall govern applications for the renewal of [the following employee licenses:] **casino key employee and casino employee licenses.**

[1. Casino key employee;
2. Junket representative;
3. Gaming school—resident director;
4. Casino employee—gaming;
5. Casino employee—nongaming;
6. Gaming school—instructor.]

(b) (No change.)

19:41-14.4 Modification of license at renewal

(a) An applicant for the renewal of [an] **a casino key** employee license may, in lieu of renewing his or her current license, apply for a modification of his or her current license at renewal to [any employee license which is lower in rank. For purposes of this section, the rank of employee licenses, from highest to lowest, is as follows:] **a casino employee license.**

[1. Casino key employee;
2. Junket representative;
3. Gaming school—resident director;
4. Casino employee—gaming;
5. Casino employee—nongaming; and
6. Gaming school—instructor.]

(b)-(c) (No change.)

19:41-14.6 Duration of renewed licenses

(a) (No change.)

(b) Casino key employee licenses shall be renewed for a term of [two] **four** years.

19:51-1.8 Duration of licenses; renewal

(a) Licensure pursuant to N.J.S.A. 5:12-92a is granted for [a] **an initial** term of two years [for the initial license term] and for a term of [two] **four** years for all subsequent renewals; provided, however, that the Commission shall reconsider the granting of such a license at any time at the request of the Division. Licensure pursuant to N.J.S.A. 5:12-92c and 5:12-102 is granted for [a] **an initial** term of three years [for the initial license term] and for a term of four years for all subsequent renewals. An application for renewal of a license shall be filed no later than 120 days prior to the expiration of that license.

(b)-(d) (No change.)

(e) Any enterprise which is not required to, and chooses not to, renew its casino service industry enterprise license pursuant to (c) above shall not transact business with any casino licensee or applicant or any employee or agent thereof upon the expiration of such license unless a completed vendor registration form is filed on its behalf by a casino licensee or applicant in accordance with N.J.A.C. [19:41-11.1(c)] **19:43-10.4**.

(f) (No change.)

(a)

CASINO CONTROL COMMISSION

Accounting and Internal Controls
Accounting Controls for the Cashiers' Cage, Satellite Cages, Master Coin Bank and Coin Vault
Procedure for Filling Payout Reserve Containers of Slot Machines and Hopper Storage Areas
Proposed Amendments: N.J.A.C. 19:45-1.15 and 1.41

Authorized By: Casino Control Commission, Joseph A. Papp, Executive Secretary.

Authority: N.J.S.A. 5:12-63(c), 70(j) and 99(a).

Proposal Number: PRN 1995-165.

Submit written comments by April 19, 1995 to:
Barbara A. Mattie, Manager
Casino Control Commission
Arcade Building
Tennessee Avenue and the Boardwalk
Atlantic City, NJ 08401

The agency proposal follows:

Summary

N.J.A.C. 19:45-1.41(b)1 presently requires Hopper Fill Slips to be prepared by a slot cashier. The proposed amendment to N.J.A.C. 19:45-1.41 would also allow for the preparation of Hopper Fill Slips by master coin bank cashiers and general cashiers as well. The flexibility afforded by this amendment would be consistent with the procedures that currently govern the preparation of Jackpot Payout Slips. Accordingly, the responsibilities of the master coin bank and general cashiers outlined in N.J.A.C. 19:45-1.15 would be amended to reflect the preparation of Hopper Fill Slips.

Social Impact

The proposed amendments would provide casino licensees with additional ways to perform hopper fills and could thus result in better service to patrons.

Economic Impact

Since a casino licensee would have additional methods by which to complete a hopper fill, there may be less "down time" during which slot machines are unavailable for play.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the rulemaking requirements of the Casino Control Commission are dictated by the Casino Control Act, N.J.S.A. 5:12-1 et seq., and are not subject to any Federal requirements or standards.

Regulatory Flexibility Statement

The proposed amendments will only affect the operations of New Jersey Casino Licensees, and therefore, will not impact on any business protected under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Accordingly, a regulatory flexibility analysis is not required.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

19:45-1.15 Accounting controls for the cashiers' cage, satellite cages, master coin bank and coin vault

(a)-(b) (No change.)

(c) The cashiers' cage and any satellite cage shall be physically segregated by personnel and function as follows:

1. General cashiers shall operate with individual imprest inventories of cash and, at the discretion of the casino licensee, slot tokens, and such cashiers' functions shall include, but are not limited to, the following:

i.-xiii. (No change.)

xiv. Prepare Jackpot Payout Slips in accordance with N.J.A.C. 19:45-1.40; [and]

xv. Prepare Hopper Fill Slips in accordance with N.J.A.C. 19:45-1.41; and

[xv.]**xvi.** (No change in text.)

2.-4. (No change.)

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5. Master coin bank cashiers' function shall include, but are not limited to, the following:

i.-vi. (No change.)

vii. Prepare Jackpot Payout Slips in accordance with N.J.A.C. 19:45-1.40; [and]

viii. Prepare Hopper Fill Slips in accordance with N.J.A.C. 19:45-1.41; and

[viii.]**ix.** (No change in text.)

(d)-(f) (No change.)

19:45-1.41 Procedure for filling payout reserve containers of slot machines and hopper storage areas

(a) (No change.)

(b) The filling of a hopper or a hopper storage area by means of a Hopper Fill Slip shall be accomplished as follows:

1. Whenever a slot supervisor, attendant or mechanic requests coins, slot tokens or prize tokens to fill a hopper or a hopper storage area of a slot machine, he or she shall obtain a properly completed and signed Hopper Fill Slip ("Hopper Fills") from a slot cashier**, general cashier or master coin bank cashier**.

2. Hopper Fills shall be serially prenumbered forms, each series of Hopper Fills shall be used in sequential order, and the series numbers of all Hopper Fills received by a casino licensee shall be accounted for by employees independent of the cashiers' cage and the slot department. All original and duplicate void Hopper Fills shall be marked "VOID" and shall require the signature of [a slot cashier] **the preparer**. Notwithstanding the above, a serially prenumbered combined Jackpot Payout/Hopper Fill form may be utilized in conjunction with N.J.A.C. 19:45-1.40(b), as approved by the Commission, provided that the combined form shall be used in a manner which otherwise complies with the procedures and requirements established by this section.

3.-4. (No change.)

5. On originals, duplicates and triplicates, or in stored data, the Hopper Fill shall include, at a minimum, the following information:

i.-v. (No change.)

vi. The signature and, if computer prepared, the identification code of the [slot cashier] **preparer**;

vii.-viii. (No change.)

6. (No change.)

7. All coins, slot tokens or prize tokens distributed from a slot booth**, master coin bank or the cashiers' cage** to a slot machine or its corresponding hopper storage area shall, during their transportation directly to the machine and until their deposit into the appropriate hopper, remain in pre-wrapped secured bags; provided, however, that:

i.-iii. (No change.)

8. (No change.)

9. Signatures attesting to the accuracy of the information contained on the Hopper Fill shall be, at a minimum, of the following personnel at the following times:

i. The original:

(1) The slot cashier**, master coin bank cashier or general cashier** —upon preparation; and

(2) (No change.)

ii. The duplicate:

(1) The slot cashier**, master coin bank cashier or general cashier** —upon preparation;

(2)-(3) (No change.)

10. Upon meeting the signature requirements as described in (b)9 above, the security department member shall maintain and control the duplicate and the slot cashier**, master coin bank or general cashier** shall maintain and control the original of the Hopper Fill Slip.

11. At the end of each gaming day, at a minimum, the original and duplicate Hopper Fill Slip shall be forwarded as follows:

i. The original Hopper Fill Slip shall be forwarded**, in exchange for coin, currency or credit,** to the [cashiers' cage] **master coin bank if prepared** by [the] **a** slot cashier [for exchange for coin, currency or credit, after which the original] **or to the main bank if prepared by a general cashier. All original Hopper Fill Slips received or prepared by the master coin bank or received by the main bank** shall **then** be forwarded to the accounting department, which, as reasonably practicable after receipt, shall confirm that the information on the original Hopper Fill agrees with the information on the triplicate or in stored data.

ii. (No change.)

(c)-(e) (No change.)

(a)

CASINO CONTROL COMMISSION

Gaming Equipment

Slot Machine Areas; Density; Arrangement; Floor Plans; Slot Stools

Proposed Amendment: N.J.A.C. 19:46-1.27

Authorized By: Casino Control Commission, Joseph A. Papp, Executive Secretary.

Authority: N.J.S.A. 5:12-63(c), 69(a) and 100.

Proposal Number: PRN 1995-166.

Submit written comments by April 19, 1995 to:

E. Dennis Kell
Assistant General Counsel
Casino Control Commission
Arcade Building
Tennessee Avenue and the Boardwalk
Atlantic City, NJ 08401

The agency proposal follows:

Summary

Effective May 19, 1992, the Casino Control Act was amended to eliminate statutory restrictions on the amount of casino floor space which a casino licensee may dedicate to slot machines and to give the Commission the authority to determine, by regulation, the permissible number and density of slot machines. Thereafter, effective September 21, 1992, the Commission amended N.J.A.C. 19:46-1.27 to permit a casino licensee to allocate 45 percent of its casino floor to slot machines and the walkways between them, and an additional 30 percent to slot machine support space and circulation space. Currently, therefore, a casino licensee may allocate a maximum of 75 percent of its casino floor space to slot machines, walkways between them, and slot machine support and circulation space ("slot area").

Effective June 12, 1992, the Casino Control Act was amended to permit a casino licensee to conduct simulcasting on horse races in a casino simulcasting facility which may be adjacent to, but not part of, the casino floor. In addition to casino simulcasting, a casino simulcasting facility may contain any authorized game other than slot machines, which are restricted to the casino floor.

Effective January 25, 1995, the Casino Control Act was again amended. Although slot machines continue to be restricted to the casino floor, the most recent amendments require that the Commission consider in the calculation of the permissible number and density of slot machines all casino floor space and all space within a casino licensee's casino simulcasting facility. N.J.A.C. 19:46-1.27 is therefore proposed to be amended to permit a casino licensee to allocate to slot area in its casino room an amount equal to a percentage of the combined area of its casino floor and casino simulcasting facility floor space. The proposal contains four alternative percentages: 75, 80, 85 and 90 percent. Commenters should indicate which of the alternatives, if any, that they support.

The amendment would also eliminate the distinction between "slot machines and the walkways between them," on the one hand, and "slot machine support and circulation space" on the other. In the two years that the current regulation has been in effect, it has been the experience of the Commission that no regulatory purpose is served by requiring that slot area be differentiated in this manner.

Although the amendment retains the requirement of a maximum density of 10 square feet per slot machine, it would eliminate certain other facility-related requirements, such as the width of the walkways between slot machines, which are subject to the jurisdiction of other agencies such as the Department of Community Affairs.

Finally, the reference to "table games" in N.J.A.C. 19:46-1.27(g) has been changed to "authorized games other than slot machines" in light of the introduction of keno, which is neither a table game nor a slot machine.

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Social Impact

The proposed amendment is not anticipated to have any significant social impact. The amendment would permit casino licensees to devote more of their casino floor space to slot machines, should they wish to do so.

Economic Impact

The proposed amendment may have a favorable economic impact upon casino licensees who elect to devote additional space on their casino floor to slot machines. It may also encourage casino licensees to construct or expand simulcasting facilities. However, it would be highly speculative to attempt to estimate at this time the economic effect, if any, of this proposal.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the rulemaking requirements of the Casino Control Commission are dictated by the Casino Control Act, N.J.S.A. 5:12-1 et seq., and are not subject to any Federal requirements or standards.

Regulatory Flexibility Statement

The proposed amendment will only affect the operations of New Jersey casino licensees, none of which qualifies as a "small business" under the Regulatory Flexibility Act, N.J.S.A. 52:14B et seq. Therefore, a regulatory flexibility analysis is not required.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

19:46-1.27 Slot machine areas; density; arrangement; floor plans; slot stools

(a) (No change.)

(b) Each casino licensee shall be permitted to install and operate one slot machine for every 10 square feet of its casino floor space which may be allocated to slot [machines and walkways between them] **area**, as determined in accordance with [(e)] **(d)** below.

(c) Each casino licensee shall comply with the following design requirements in arranging [its floor plan] **the layout of its casino floor**:

[1. The slot aisle or walkway between any two rows of slot machines facing each other in a casino shall be at least six feet in width. A slot aisle or walkway shall be defined as the space between a row of slot machines and any obstruction, including other slot machines, immediately opposite that row;

2. Whenever a row of slot machines without slot stools faces an obstruction other than the front of another slot machine, there shall be a walkway between the slot machines and the obstruction of at least three feet in width;]

Recodify existing 3. as **1.** (No change in text.)

[4. The placement of slot stools on the casino floor shall comply with the following requirements:

i. Slot stools shall only be located on one side of a slot aisle between two rows of slot machines that measures less than seven feet in width;

ii. Slot stools shall only be located in every other slot aisle, unless the width of each slot aisle is seven feet or greater;

iii. Slot stools shall only be located in slot aisles where there is a distance of at least four feet between the back of each slot stool and the slot machine or other obstruction immediately opposite that stool; and]

Recodify existing iv. as **2.** (No change in text.)

[(d) Each casino licensee may, in furtherance of the objectives identified in (a) above, allocate additional casino floor space to provide adequate slot machine support space and circulation space in excess of the floor space authorized for slot machines and the walkways between them. For the purposes of this section, "slot machine support space and circulation space" shall include slot booths; change booths; change machines; slot carousels; walls, columns or other architectural structures, and any other structures or areas which are reasonably related to, and contained within casino floor space which is dedicated to the use of slot machines.]

[(e)]**(d)** The total amount of casino floor space that a casino licensee may utilize for slot machines [and], the walkways between them, **and other structures or areas which are reasonably related to the use of slot machines ("Slot Area") such as slot booths, change booths, change machines, slot carousels, walls, columns or other architectural structures, and any other structures or areas which are reasonably related to, and contained within casino floor space which is dedicated to, the use of slot machines,** shall not exceed [45] **75** percent (**AGENCY NOTE:** The Commission is seeking public comment on alternative amendments that would increase the maximum percentage of slot area to 80, 85 or 90 percent) of the total amount of casino floor space **and casino simulcasting facility floor space**. [The total and the amount of casino floor space that a casino license may utilize for slot machine support space and circulation space shall not exceed 30 percent of the total amount of casino floor space. The total of these two areas shall be known as the "Slot Area." An example of the Slot Area calculation is as follows:

For a casino hotel operating an authorized casino room of 60,000 square feet, there may be a maximum of 2,700 slot machines located within a total slot area that does not exceed 45,000 square feet, computed as follows:

slot machines and walkways between them	45 percent of 60,000 = 27,000
slot machine support and circulation space	+30 percent of 60,000 = 18,000
maximum permissible slot area	45,000 square feet
calculation of the number of slot machines	27,000 divided by 10 square feet = Maximum Number of Slot Machines Permitted 2,700]

[(f)]**(e)** The total amount of casino floor space dedicated to the Slot Area[, which includes slot machines, the walkways between them and slot support and circulation space] shall be measured by identifying the perimeter of each such area on the casino floor plan.

[(g)]**(f)** Any casino floor space which [may] **is** not [be] used for slot [machines, the walkways between them or slot support or circulation space] **area** pursuant to [(f)] **(e)** above shall be dedicated to [table games and table game] **authorized games other than slot machines and related** support and circulation space.

Recodify existing (h)-(k) as **(g)-(j)** (No change in text.)

(a)

CASINO CONTROL COMMISSION

Rules of the Games
Blackjack; Baccarat-Punto Banco; Red Dog; Minibaccarat
Payment and Collection of Wagers
Collecting or Marking Vigorish
Proposed Amendments: N.J.A.C. 19:47-2.3, 2.18, 3.10, 6.5 and 7.10

Authorized By: Casino Control Commission, Joseph A. Papp, Executive Secretary.

Authority: N.J.S.A. 5:12-63c, 69, 70f, 99a(16) and 100.

Proposal Number: PRN 1995-167.

Submit written comments by April 19, 1995 to:
Leonard J. DiGiacomo, Senior Counsel
Casino Control Commission
Arcade Building
Tennessee Avenue and Boardwalk
Atlantic City, NJ 08401

The agency proposal follows:

Summary

In the authorized games of minibaccarat and baccarat-punto banco, the rules of the New Jersey Casino Control Commission (Commission) are susceptible to an interpretation that would require vigorish to be collected or marked only after the payment of winning wagers. N.J.A.C. 19:47-3.10(b) and 7.10(b). Although it is true that, in all cases, losing wagers must be collected before any action is taken to pay winning wagers or collect or mark vigorish, the sequence between the payment of winning

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wagers and the collection or marking of vigorish is a matter that can be left to the discretion of each individual casino licensee.

For that matter, the Commission has recently heard from several casino licensees that have requested greater flexibility in the sequence for paying winning wagers and collecting or marking vigorish. Consequently, the Commission is publishing this proposal as the first formal step towards granting that relief.

The proposed amendments afford casino licensees four specific options for the sequence they may use to pay winning wagers and collect or mark vigorish. Although any one of the four options may be used at all minibaccarat and baccarat-punto banco tables within the same gaming pit, a casino licensee must provide its surveillance department and the Commission with at least 30-minute prior written notice each time it changes from one option to another at a given gaming pit with either type of table.

As part of the proposal, and to allay any confusion, the proposed amendments to N.J.A.C. 19:47-3.10(b) and 7.10(b) also specifically require losing wagers to be collected before a casino licensee acts on the winning wagers and any corresponding vigorish. For similar reasons, three separate regulations (N.J.A.C. 19:47-2.3(e), 2.18(f) and 6.5(i)) involving other authorized games are also being amended as part of this proposal.

Social Impact

The Commission does not anticipate that the proposed amendments will have any overall societal impact given that they merely adjust a small component of the rules of several authorized games. To the extent that casino licensees derive greater flexibility in their operations from the proposed amendments, a positive social impact on them may be anticipated.

Economic Impact

Although the Commission anticipates that any overall economic impact from these amendments will be minimal, casino licensees may derive an economic benefit from the amendments which grants them greater flexibility in the sequence in which they may collect or mark vigorish at several authorized games.

Executive Order No. 27 Statement

An Executive Order No. 27(1994) analysis is not required because the rulemaking requirements of the Commission for this proposal are dictated by the Casino Control Act, N.J.S.A. 5:12-1 et seq., and are not subject to any Federal requirements.

Regulatory Flexibility Statement

No regulatory flexibility analysis is required because the proposed amendments will only affect the operation of New Jersey casino licensees, none of which is a "small business" as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

19:47-2.3 Wagers

(a)-(d) (No change.)

(e) After each round of play is complete, the dealer shall **first** collect all losing wagers and **then** pay [off] all winning wagers. All winning wagers made in accordance with (a) above shall be paid at odds of 1 to 1 with the exception of standard blackjack which shall be paid at odds of 3 to 2. Notwithstanding any other provision of this subsection, a casino licensee may, in its discretion, offer one or more of the following payout odds for winning wagers made in accordance with (a) above, provided that the casino licensee complies with the notice requirements set forth in N.J.A.C. 19:47-8.3:

1.-4. (No change.)

(f)-(k) (No change.)

19:47-2.18 Multiple action blackjack rule

(a)-(e) (No change.)

(f) Once all wagers on the dealer's first hand have been decided, the dealer shall **first** collect all losing wagers and **then** pay [off] all winning wagers based on wagers placed in the first spot of each player's betting area, except that all of a player's wagers shall be collected along with his or her cards when that player's hand exceeds a hard total of 21. The dealer shall collect all of his or her cards and place them face down in the discard rack in accordance with one of the following:

1.-2. (No change.)

(g) (No change.)

(h) Once all wagers on the dealer's second hand have been decided, the dealer shall **first** collect all losing wagers and **then** pay [off] all winning wagers based on wagers placed in the second spot of each player's betting area. The dealer shall then collect all of his or her cards except his or her original face up card and place them face down in the discard rack. The dealer shall then move his or her original face up card to the area of the layout designated for the dealer's third hand and shall deal a second card to his or her original face up card in accordance with N.J.A.C. 19:47-2.6(h) and any additional cards required by N.J.A.C. 19:47-2.12(b), except that if no player has made a third wager the round shall be concluded in accordance with (j) below.

(i) Once all wagers on the dealer's third hand have been decided, the dealer shall **first** collect all losing wagers and **then** pay [off] all winning wagers based on wagers placed in the third spot of each player's betting area.

(j) (No change.)

19:47-3.10 Announcement of result of round; payment and collection of wagers

(a) After each hand has received all the cards **to which** it is entitled [to by these regulations] **pursuant to N.J.A.C. 19:47-3.7, 3.8 and 3.9**, the dealer shall announce the final Point Count of each hand indicating which hand has won the round. If the two hands have equal Point Counts, the dealer shall announce "Tie Hand."

(b) After the result of the round is announced, the dealer or dealers responsible for the wagers on the table shall **first** collect [all] **each** losing [wagers, payoff all] **wager. Thereafter, the dealer or dealers shall, in accordance with one of the following procedures, pay each** winning [wagers and either] **wager and** collect or mark [up] any vigorish or [Commission] **commission** owed [in accordance with these regulations] **pursuant to N.J.A.C. 19:47-3.3.**

1. Starting at the highest numbered player position at which a winning wager is located and proceeding in descending order to each next highest numbered player position, the dealer shall first pay each winning wager and then, returning to the highest numbered player position at which a winning wager was located and proceeding in like order, mark or collect the vigorish owed by each player.

2. Starting at the highest numbered player position at which a winning wager is located and proceeding in descending order to each next highest numbered player position, the dealer shall first mark or collect the vigorish owed by each player and then, returning to the highest numbered player position at which a winning wager is located and proceeding in like order, pay each winning wager.

3. Starting at the highest numbered player position at which a winning wager is located, the dealer shall pay that player's winning wager and immediately thereafter mark or collect the vigorish owed by that player and then, proceeding in descending order to the next highest numbered player position at which a winning wager is located, repeat this procedure until each winning wager is paid and the vigorish owed by each player is either marked or collected.

4. Starting at the highest numbered player position at which a winning wager is located, the dealer shall mark or collect the vigorish owed by that player and immediately thereafter pay that player's winning wager and then, proceeding in descending order to the next highest numbered player position at which a winning wager is located, repeat this procedure until the vigorish owed by each player is either marked or collected and each winning wager is paid.

(c) A casino licensee may, in its discretion, elect to use any of the procedures authorized in (b) above at any punto banco table in its establishment; provided, however, that:

1. The same procedure shall be used for all punto banco tables located within the same gaming pit; and

2. The Commission and the casino licensee's surveillance department shall be notified, in writing, at least 30 minutes prior to the implementation of or a change in the particular procedure to be used at a table or gaming pit.

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19:47-6.5 Procedures for each round of play; wagers; payouts

(a)-(h) (No change.)

(i) After all raise wagers have been made and prior to dealing the third card, the dealer shall announce "Raises closed." The dealer shall then draw a third card, place it face up on on the box between the initial two cards and announce the value of the third card. [The] **Thereafter, the** dealer shall [then] **first** collect all losing wagers and **then** pay all winning wagers as follows:

1.-3. (No change.)

(j)-(k) (No change.)

19:47-7.10 Announcement of result of round; payment and collection of wagers

(a) After each hand has received all the cards **to which** it is entitled [to by these regulations] **pursuant to N.J.A.C. 19:47-7.7, 7.8 and 7.9**, the dealer shall announce the final Point Count of each hand indicating which hand has won the round. If two hands have equal Point Counts, the dealer shall announce "Tie Hand".

(b) After the result[s] of the round is announced, the dealer responsible for the wagers on the table shall **first** collect [all] **each** losing [wagers, payoff all] **wager. Thereafter, the dealer shall, in accordance with one of the following procedures, pay each** winning [wagers and either] **wager and** collect or mark [up] any vigorish or commission owed [in accordance with these regulations] **pursuant to N.J.A.C. 19:47-7.3.**

1. Starting at the highest numbered player position at which a winning wager is located and proceeding in descending order to each next highest numbered player position, the dealer shall first pay each winning wager and then, returning to the highest numbered player position at which a winning wager was located and proceeding in like order, mark or collect the vigorish owed by each player.

2. Starting at the highest numbered player position at which a winning wager is located and proceeding in descending order to each next highest numbered player position, the dealer shall first mark or collect the vigorish owed by each player and then, returning to the highest numbered player position at which a winning wager is located and proceeding in like order, pay each winning wager.

3. Starting at the highest numbered player position at which a winning wager is located, the dealer shall pay that player's winning wager and immediately thereafter mark or collect the vigorish owed by that player and then, proceeding in descending order to the next highest numbered player position at which a winning wager is located, repeat this procedure until each winning wager is paid and the vigorish owed by each player is either marked or collected.

4. Starting at the highest numbered player position at which a winning wager is located, the dealer shall mark or collect the vigorish owed by that player and immediately thereafter pay that player's winning wager and then, proceeding in descending order to the next highest numbered player position at which a winning wager is located, repeat this procedure until the vigorish owed by each player is either marked or collected and each winning wager is paid.

(c) A casino licensee may, in its discretion, elect to use any of the procedures authorized in (b) above at any minibaccarat table in its establishment; provided, however, that:

1. The same procedure shall be used for all minibaccarat tables located within the same gaming pit;

2. Any minibaccarat table located in a gaming pit that also contains a punto banco table shall use the same procedure that is to be used at the punto banco table pursuant to N.J.A.C. 19:47-3.10(c); and

3. The Commission and the casino licensee's surveillance department shall be notified, in writing, at least 30 minutes prior to the implementation of or a change in the particular procedure to be used at a table or gaming pit.

Recodify existing (c)-(d) as **(d)-(e)** (No change in text.)

(a)

CASINO CONTROL COMMISSION

Rules of the Games
Shuffle and Cut of the Cards
Proposed Amendments: N.J.A.C. 19:47-3.5, 4.4 and 7.5

Authorized By: Casino Control Commission, Joseph A. Papp, Executive Secretary.

Authority: N.J.S.A. 5:12-63(c), 69(a) and 100.

Proposal Number: PRN 1995-168.

Submit written comments by April 19, 1995 to:
Barbara A. Mattie
Manager—Operations Unit
Casino Control Commission
Arcade Building
Tennessee Avenue and the Boardwalk
Atlantic City, NJ 08401

The agency proposal follows:

Summary

N.J.A.C. 19:47-3.5, 4.4 and 7.5 currently provide casino licensees the option to reshuffle some or all of the cards after they have been laced in the games of baccarat-punto banco, baccarat-chemin de fer and minibaccarat, respectively. The current regulations require that a casino licensee indicate directly in its internal controls submission whether it has elected to reshuffle the cards after they have been laced.

The proposed amendments would permit casino licensees to initiate or terminate the use of the reshuffling option at all tables within a pit with 30 minutes prior written notice to the Casino Control Commission and the casino licensee's surveillance department.

Social Impact

The proposed amendments would merely provide casino licensees with more flexibility in initiating or terminating the use of the option to reshuffle some or all of the cards after they have been laced in the games of baccarat-punto banco, baccarat-chemin de fer and minibaccarat, which should have no social impact.

Economic Impact

No economic impact is anticipated as a result of the proposed amendments, which merely provide casino licensees increased flexibility in initiating or terminating a certain reshuffling option.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the rulemaking requirements of the Casino Control Commission are dictated by the Casino Control Act, N.J.S.A. 5:12-1 et seq., and are not subject to any Federal requirements or standards.

Regulatory Flexibility Statement

The proposed amendments will affect only casino licensees, none of which is a "small business" as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Accordingly, a regulatory flexibility analysis is not required.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

19:47-3.5 Shuffle and cut of the cards

(a) (No change.)

(b) After the cards have been shuffled, the dealer shall lace approximately one deck of cards so that they are evenly dispersed into the remaining stack. After lacing the cards, the dealer calling the game shall, if the casino licensee elects this option, shuffle some or all of the cards again. **If elected, the option must be implemented at all tables within a pit. A casino licensee shall not initiate or terminate the use of this reshuffling option unless the casino licensee provides its surveillance department and the Commission with at least 30 minutes prior written notice.** After lacing the cards and, where applicable, reshuffling them, the dealer calling the game shall offer the stack of cards, with backs facing away from the dealer, to the participants to be cut. The dealer shall begin with the participant seated in the highest number position at the table or, in the

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case of reshuffle, the last curator and working clockwise around the table, shall offer the stack to each participant until a participant accepts the cut. If no participant accepts the cut, the dealer shall cut the cards. [A casino licensee shall indicate in its internal controls submission whether it has elected to reshuffle the cards after they have been laced.]

(c)-(d) (No change.)

19:47-4.4 Shuffle and cut of the cards

(a) (No change.)

(b) After the cards have been shuffled, the dealer shall lace approximately one deck of cards so that they are evenly dispersed into the remaining stack. After lacing the cards, the dealer calling the game shall, if the casino licensee elects this option, shuffle some or all of the cards again. **If elected, the option must be implemented at all tables within a pit. A casino licensee shall not initiate or terminate the use of this reshuffling option unless the casino licensee provides its surveillance department and the Commission with at least 30 minutes prior written notice.** After lacing the cards and, where applicable, reshuffling them, the dealer calling the game shall offer the stack of cards, with backs facing away from the dealer, to the participants to be cut. The dealer shall begin with the participant seated in the highest number position at the table or, in the case of reshuffle, the participant seated to the left of the participant responsible for dealing the cards, and working clockwise around the table, shall offer the stack to each participant until a participant accepts the cut. If no participant accepts the cut, the dealer shall cut the cards. [A casino licensee shall indicate in its internal controls submission whether it has elected to reshuffle the cards after they have been laced.]

(c)-(d) (No change.)

19:47-7.5 Shuffle and cut of the cards

(a) (No change.)

(b) After the cards have been shuffled, the dealer shall lace approximately one deck of cards so that they are evenly dispersed into the remaining stack. After lacing the cards, the dealer calling the game shall, if the casino licensee elects this option, shuffle some or all of the cards again. **If elected, the option must be implemented at all tables within a pit. A casino licensee shall not initiate or terminate the use of this reshuffling option unless the casino licensee provides its surveillance department and the Commission with at least 30 minutes prior written notice.** After lacing the cards and, where applicable, reshuffling them, the dealer calling the game shall offer the stack of cards, with backs facing away from the dealer, to the participants to be cut. The dealer shall begin with the participant seated in the highest number position at the table and, working clockwise around the table, shall offer the stack to each participant until a participant accepts the cut. If no participant accepts the cut, the dealer shall cut the cards. [A casino licensee shall indicate in its internal controls submission whether it has elected to reshuffle the cards after they have been laced.]

(c)-(d) (No change.)

NOTES

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RULE ADOPTIONS

ADMINISTRATIVE LAW

(a)

OFFICE OF ADMINISTRATIVE LAW

Special Hearing Rules
Special Education Program

Readoption with Amendment: N.J.A.C. 1:6A

Proposed: January 3, 1995 at 27 N.J.R. 4(a).
Adopted: February 27, 1995 by Jeff S. Masin, Acting Director, Office of Administrative Law.
Filed: February 27, 1995 as R.1995 d.176, **with a substantive change** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 52:14F-5(e), (f), and (g).

Effective Date: February 27, 1995, Readoption;
March 20, 1995, Amendment.
Expiration Date: February 27, 2000.

Summary of Public Comments and Agency Responses:
The Office of Administrative Law (OAL) received one written comment concerning the proposed readoption.

COMMENT: Marilyn Arons, on behalf of the Parent Information Center of New Jersey, commented that the rule concerning non-lawyer representation should be changed. The rule currently permits parties to be accompanied and advised by non-lawyers with special knowledge or training with respect to handicapped pupils. Ms. Arons suggested that the rule should permit parties to be represented by such non-lawyers. She believes that the current language permits continued challenge to the appearance of non-lawyers in special education hearings.

RESPONSE: In 1990, the Supreme Court Rule amended R:21-1(e)(8) to permit non-lawyers "to represent parents or children in special education proceedings, provided the non-attorney has knowledge or training with respect to handicapped pupils or their educational needs so as to enable the non-attorney to facilitate the presentation of the claims or defenses of the parent or child." Therefore, the Office of Administrative Law concurs with the suggestion that the rule be clarified to expressly permit representation of parents and children by non-lawyers who otherwise comply with the standards and application process contained in N.J.A.C. 1:1-5.4 and 5.5. Since the Supreme Court Rule does not provide for such non-lawyer representation of any party, OAL is not authorized to amend the rule in the manner suggested. The rule continues to provide that any party can be accompanied and advised by individuals with expertise concerning handicapped pupils as required by Federal law. 20 U.S.C. §1415(d)(1).

Executive Order No. 27 Statement

The readoption conforms to Federal requirements that any party in a special education due process hearing may be accompanied and advised by counsel and by individuals with special expertise regarding handicapped children. 20 U.S.C. §1415(d). Pursuant to R. 1:1-21(e), the readoption also permits parents and children to be represented by nonlawyers who meet the requirements of the rule. This alternative has been available to parents and children and is perceived as having significant utility as it provides parties who cannot afford an attorney with the option of obtaining representation.

Full text of the readoption can be found in the New Jersey Administrative Code at N.J.A.C. 1:6A.

Full text of the adopted amendment follows (additions to proposal indicated in boldface with asterisks ***thus***; deletion from proposal indicated in brackets with asterisks *[thus]*):

1:6A-5.1 Representation

(a) At a hearing, any party may be ***represented by legal counsel or*** accompanied and advised *[legal counsel or]* by individuals with special knowledge or training with respect to handicapped pupils and their educational needs, or both. ***Parents and children may be represented by individuals with special knowledge or training with respect to handicapped pupils and their educational needs.***

COMMUNITY AFFAIRS

(b)

DIVISION OF CODES AND STANDARDS

Uniform Construction Code
Subcodes

Adopted Amendments: N.J.A.C. 5:23-3.4 and 3.18

Proposed: December 19, 1994 at 26 N.J.R. 4872(a).
Adopted: February 14, 1995 by Harriet Derman, Commissioner, Department of Community Affairs.
Filed: February 16, 1995 as R.1995 d.143, **with substantive changes** not requiring additional public notice or comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 52:27D-124.

Effective Date: March 20, 1995.
Operative Date: July 1, 1995.
Expiration Date: February 3, 1998.

Summary of Public Comments and Agency Responses:
Comments were received from Michael Fink, President of the New Jersey Builders Association, and from Robert McCullough, Director of the Ocean County Construction Inspection Department.

COMMENT: The New Jersey Builders Association (NJBA) agrees with the Department's findings that the expense to upgrade from current energy subcode requirements to those contained in the CABO Model Energy Code would be substantial and would limit home ownership opportunities for many people. Paybacks in energy cost savings would extend beyond reasonable timeframes. NJBA also supports using heating degree day design value that better reflect actual regional climatic conditions than does the current single design value of 5500. NJBA asks (1) whether it is the Department's intention to retain chapter 2 of the BOCA 1993 National Energy Conservation Code unamended in lieu of administrative definitions and (2) what the Department's basis is for lowering the winter design temperature for heating systems and equipment from 14 degrees Fahrenheit to six degrees Fahrenheit.

RESPONSE: The Department appreciates NJBA's support for this action. As noted, definitions that were previously added have been deleted. These definitions were necessary for use with text that had been adopted by the former Department of Energy when it had responsibility for the energy subcode. Since these terms are not used in the BOCA National Energy Code, there is no need to retain them.

In response to the comment concerning the design temperature for heating systems and equipment, the Department has reevaluated the proposed amendment at N.J.A.C. 5:23-3.18(b)3 and, in recognition of the fact that the State Uniform Construction Code Act does not give the Department the authority to substitute a different value for one established in an adopted model code, has restored the language of the model code, with additional reference to values for various locations in New Jersey as set forth in Table 1 of the ASHRAE 1989 Fundamentals Handbook, with provision for extrapolation for locations not listed. Section E-402.1.1 of the energy subcode requires use of the 97.5 percent value for heating as determined from Appendix A or other approved source. The ASHRAE 1989 Fundamentals Handbook is referenced in the BOCA National Mechanical Code/1993 Commentary and is an "approved source."

COMMENT: The proposed amendment to N.J.A.C. 5:23-3.18(b)8i changes the scope of IES Standard LEM-1-1982 so as to make it apply only to buildings in Use Groups R-3, R-4, and R-2 which are three stories or less in height. However, N.J.A.C. 5:23-3.18(c)2 lists other use groups that are subject to the lighting efficiency standards of the energy subcode. This is a source of confusion. Existing language that makes clear the applicability of the lighting efficiency standard to all use groups should be retained.

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RESPONSE: Lighting standards for non-residential buildings are included in the ASHRAE 90.1-1989 standard, which is being adopted for those buildings in compliance with Federal law. The LEM-1-1982 standard will continue to be applicable to those residential buildings to which ASHRAE 90.1-1989 does not apply. Since both of these lighting standards are included in the energy subcode, there is no contradiction between different provisions.

Executive Order No. 27 Statement

These rules are being amended in order to comply with Federal law, specifically the Energy Policy Act of 1992. The rule incorporates by reference energy efficiency requirements for commercial buildings that meet, but do not exceed, Federal requirements. The Federal requirement is that the provisions of each state's commercial building code regarding energy efficiency meet or exceed the ASHRAE 90.1-1989 standard. The Department has adopted ASHRAE 90.1-1989 for those buildings subject to this Federal requirement and has therefore not imposed any requirements over and above those required by Federal law.

Full text of the adoption follows (additions indicated in boldface with asterisks ***thus***; deletions indicated in brackets with asterisks *[thus]*):

5:23-3.4 Responsibility

(a)-(d) (No change.)

(e) Responsibility for enforcement of specific provisions of the energy subcode shall be as follows:

1. Chapters 3 and 4 of the BOCA National Energy Conservation Code and Sections 8, 9, 10, and 13 of ASHRAE/IES 90.1-1989 shall be enforced exclusively by the building subcode official.

2. Chapter 5 of the BOCA National Energy Conservation Code and Section 11 of ASHRAE/IES 90.1-1989 shall be enforced exclusively by the plumbing subcode official.

3. Chapter 6 of the BOCA National Energy Conservation Code standard LEM-1 and sections 5, 6, 7, and 12, of ASHRAE/IES 90.1-1989 shall be enforced exclusively by the electrical subcode official.

4.-5. (No change.)

(f)-(j) (No change.)

5:23-3.18 Energy Subcode

(a) (No change.)

(b) The following chapters and sections of the energy subcode are amended as follows:

1. The following amendments are made to Chapter 1 of the energy subcode entitled "Scope and Application":

i. (No change.)

ii. The text of Section E-101.3 is deleted and the following language is substituted: "Buildings other than those of use group R-3 and R-4 as well as R-2 which are three stories or less in height shall meet the requirements of ASHRAE/IES 90.1-1989. For buildings of use group R-3, and R-4 as well as R-2 which are three stories or less in height, compliance with the applicable provisions of ASHRAE 90A or 90B listed in Chapter 8 shall be deemed to meet the requirements of this code, unless otherwise specifically provided for herein".

iii. Section E-101.4 is amended to add the words "... except for buildings and structures required to comply with ASHRAE/IES 90.1-1989 as noted in section E-101.3 "after the words" ... shall apply" in the last sentence.

2. The following amendments are made to Chapter 3 of the energy subcode entitled "Building Envelope":

i. Section E-302.1 is amended to delete the words "or the CABO Model Energy Code" and to add the following sentences: "For determining required thermal transmittance values for buildings of use groups R-3, R-4 and R-2 that are three stories or less in height, the following heating degree day values shall be used for the following counties:

(1) 4,500 annual Fahrenheit heating degree days shall be used for the counties of Cape May, Salem, Cumberland, Camden, Atlantic and Gloucester.

(2) 5,000 annual Fahrenheit heating degree days shall be used for the counties of Burlington, Ocean, Monmouth, Mercer, Middlesex, Essex, Hudson and Union.

(3) 5,500 annual Fahrenheit heating degree days shall be used for the counties of Somerset, Warren, Hunterdon, Morris, Bergen and Passaic.

(4) 6,000 annual Fahrenheit heating degree days shall be used for the county of Sussex."

3. The following amendments are made to Chapter 4 of the energy subcode entitled "Heating, Ventilating and Air Conditioning Systems and Equipment":

i. Delete section E-402.1.1 and substitute the words "*[Design]* ***Outdoor design*** temperatures shall be *[as follows: Winter six degrees F.; Summer DB 90°F.; Summer WB 76°F."]* ***based on the 97½-percent value for heating and the 2½-percent value for cooling determined from Appendix A or from Table 1, Climatic Conditions for the United States, set forth in the current edition of the ASHRAE Fundamentals Handbook. Values between locations listed shall be determined by extrapolation."****

Recodify existing 5.-8. as 4.-7. (No change in text.)

8. The following amendments are made to section 2 of standard LEM-1 of the energy subcode, entitled "Scope":

i. Delete the first paragraph in the section and in lieu thereof, substitute "These provisions regulate the amount of power which may be utilized by buildings of use group R-3 and R-4 as well as R-2 which are three stories or less in height for lighting. No such building shall employ more power for lighting than that determined through the use of the criteria and calculated procedures contained herein."

(c) (No change.)

(a)

DIVISION OF HOUSING AND DEVELOPMENT

Uniform Construction Code

Barrier Free Subcode

Adopted Amendments: N.J.A.C. 5:23-2.4, 2.6 and 3.14

Adopted New Rule: N.J.A.C. 5:23-7.1

Adopted Repeals: N.J.A.C. 5:23-7.1 through 7.99

Adopted Recodification with Amendments: N.J.A.C. 5:23-7.100 through 7.116 as N.J.A.C. 5:23-7.2 through 7.18

Proposed: July 5, 1994 at 26 N.J.R. 2698(a) (see also 26 N.J.R. 3524(a)).

Adopted: February 15, 1995 by Harriet Derman, Commissioner, Department of Community Affairs.

Filed: February 16, 1995 as R.1995 d.144, **with substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 52:27D-124.

Effective Date: March 20, 1995.

Operative Date: July 1, 1995.

Expiration Date: February 3, 1998.

Summary of Hearing Officer Recommendations and Agency Responses:

A public hearing on these proposed rules was held at 10:00 a.m. on September 16, 1994 at 3131 Princeton Pike, Building 3, Lawrenceville, New Jersey. Two testifiers, Andrew Cattano representing New Jersey Builders Association, and Glen Borghoff representing Delta Plumbing, were heard. Their comments are summarized below. Michael L. Ticktin, Esq., the hearing officer, made no recommendations. The hearing record may be reviewed by contacting Michael L. Ticktin, Esq., Chief, Legislative Analysis, Department of Community Affairs, CN 802, Trenton, NJ 08625.

Summary of Public Comments and Agency Responses:

Written comments were received from Andrew Cattano, New Jersey Builders Association; Edward Mulvan, Department of Environmental Protection, Division of Parks and Forestry; Glen Borghoff, Delta Plumbing; John Del Colle, Eastern Paralyzed Veterans Association; Thomas

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Shaw, Association of County Offices for the Disabled; and David Popiel, Community Health Law Project.

General Comments

1. COMMENT: New Jersey Builders Association (NJBA) observed that a statement repealing N.J.A.C. 5:23-7.1 through 7.99 should have been included.

RESPONSE: The statement was included. It preceded the proposed amendments at 26 N.J.R. 2700.

2. COMMENT: The Association of County Offices for the Disabled congratulated the Department on its work and added that education will be a critical component of effective rules. This commenter suggested that the Department prepare video tapes for purchase by architectural firms, construction firms, and public resource facilities such as libraries. The commenter offered to assist the Department in this educational effort.

RESPONSE: The Department thanks the Association for the expression of support. The Department plans to offer a course in the amended Barrier Free Subcode as part of its educational program for code officials. The Department believes that the provisions of the Barrier Free Subcode will be effectively enforced by licensed code officials. The Department believes that the need for video presentations has been adequately met by the United States Department of Justice (USDOJ) and professional societies.

3. COMMENT: During the public hearing, Glen Burghoff asked when the Department would enforce the Americans With Disabilities Act (ADA) and when dimensional conflicts between the Americans With Disabilities Act Accessibility Guidelines (ADAAG) and the Barrier Free Subcode (BFSC) would be resolved.

RESPONSE: The ADA is Federal civil rights law. It is enforced by complaint or civil law suit alleging discrimination against people with disabilities. Since the enforcement of the ADA has not been delegated to State or local governments, the Department does not intend to enforce the ADA. Through this adoption, however, the Department ensures that State regulations match both the scoping provisions of the ADA, which are contained in regulations promulgated by the USDOJ, and the ADA's technical standards, which are contained in regulations promulgated by the Architectural and Transportation Barriers Compliance Board (ATBCB). The code officials in New Jersey will enforce State law that, after this adoption, matches Federal law in scope and in technical requirements. Dimensional differences, which have been an area of confusion, are hereby eliminated.

4. COMMENT: Eastern Paralyzed Veterans Association (EPVA) expressed support for the Department's efforts, stating that the best possible access should be a common goal whether in compliance with Federal law, model code, or State law. EPVA believes that this proposal, with several modifications detailed in comments below, achieves this goal.

RESPONSE: The Department thanks EPVA for the positive comment. Responses to suggested modifications in language are summarized in the section-by-section comment summary below.

5. COMMENT: NJBA asked that the Department thoroughly review the Building Officals and Code Administrators (BOCA) National Building Code for the effect of BOCA's mainstreamed access provisions. Earlier this year, the Department adopted an amendment at N.J.A.C. 5:23-2.5 (see 26 N.J.R. 3706(a), September 6, 1994) stating that wider doorways required in newly constructed residential dwellings shall not be required in the existing building when a dwelling is increased in size. NJBA believes that this was a sensible response and that the unintended effect of other mainstreamed provisions should be reviewed and similarly qualified.

RESPONSE: The Department is aware that many provisions, such as wider doorways, that used to be considered a part of accessible construction are now required in all construction. The Department is not aware of another mainstreamed provision that adversely affects an existing building. Those who are aware of any specific problem created by applying mainstreamed provisions to existing buildings should contact the Department.

6. COMMENT: The Community Health Law Project (CHLP) stated that this proposal requires the use of three documents—the BOCA National Building Code, the Council of American Building Officials/American National Standards Institute (CABO/ANSI) A117.1 technical standard, and the Barrier Free Subcode (BFSC) as amended. CHLP believes this is impractical for the code user and asks the Department to reprint as part of its rule in subchapter 7 those portions of the BOCA National Building Code and the CABO/ANSI A117.1 standard that it has proposed for adoption by reference.

RESPONSE: See response following Comment 7.

7. COMMENT: EPVA commended the Department for adopting Chapter 11 of the BOCA National Building Code and the CABO/ANSI A117.1 standard of technical design. EPVA believes that the need for separate barrier free rules has passed. Such separate rules were necessary when the model codes were deficient in their accessibility requirements, but this is no longer the case. EPVA also believes that the standardization of the accessibility components of the national model codes is a movement whose time has come. Its effect will be to increase and standardize access throughout the country wherever these model codes are adopted. EPVA commends New Jersey for encouraging the mainstreaming of accessibility provisions in the BOCA National Building Code. In doing so, New Jersey has preserved its leadership in code enforcement. EPVA believes, on the other hand, that states which insist on printing separate, unique accessibility codes will hinder the progress of universal design.

RESPONSE: The Department agrees with the EPVA and believes that several of EPVA's comments respond to the points raised by CHLP. In addition, the Department believes that it is appropriate to adopt BOCA Chapter 11 to emphasize that accessibility requirements are part of the building subcode. This should mitigate the temptation to regard access as a subchapter separate and distinct from the other adopted subcodes. In addition, because many building provisions that were considered "accessible building elements" have been mainstreamed into other chapters of the BOCA National Building Code, to re-print Chapter 11 including those sections not amended does not ensure that the code user has all applicable requirements in one discrete subchapter.

N.J.A.C. 5:23-7.1(b)1

8. COMMENT: EPVA asks the Department to re-think N.J.A.C. 5:23-7.1(b) which amends BOCA section 1107.4.2. EPVA asks that these rules provide adequate turning spaces in bathrooms, wide hallways, and maneuvering space at doorways. The Federal Fair Housing Amendments Act Guidelines (FFHAA Guidelines) allow sunken living areas; New Jersey should resist this provision, which has the effect of segregating an occupant with a disability. New Jersey should lead the way and should propose rules that ensure adaptable dwelling units that really work.

RESPONSE: The Department is puzzled by this comment. It is adopting the CABO/ANSI A117.1 standard, which includes the same requirements for adaptable bathrooms that the BFSC required at N.J.A.C. 5:23-7.96. Figure 7.96a was taken from the ANSI A117.1 standard that preceded the current CABO/ANSI A117.1. Since there are no separate requirements in CABO/ANSI A117.1 for doors in the section on dwelling units, the general door section, at CABO/ANSI A117.1 section 4.13, applies. This section includes adequate width and maneuvering space at doorways. The requirements for hall width have been mainstreamed into the BOCA National Building Code at section 1011.3.2; the required width for a corridor that serves an occupant load of 50 or fewer people is 36 inches, which is the width of an accessible route. Finally, although the FFHAA Guidelines state that sunken living areas are allowed in accessible dwelling units, no such language was included in our rules; therefore, sunken living areas are not allowed in an adaptable dwelling unit.

9. COMMENT: EPVA indicated agreement with the provision at N.J.A.C. 5:23-7.1(b)1 to exempt one-to-three family dwelling units and to specify that dwelling units in a single structure separated by firewalls are not considered to be in separate buildings. The commenter added that this meets FFHAA requirements.

RESPONSE: See response following Comment 10.

10. COMMENT: NJBA asked that the phrase "For purposes of applying this chapter" preceding "dwelling units within a single structure separated by fire walls do not constitute separate buildings" be deleted. NJBA suggested that the FFHAA more appropriately addresses this issue in its definition of "covered multi-family dwellings." NJBA further proposes that the application of fire walls be resolved by adding an Exception 5 at N.J.A.C. 5:23-7.1(b)8, which amends BOCA section 1104.2, stating that the barrier free rules apply when "there are structures with fire walls through which there are openings for human passage." NJBA believes that the proposed language exceeds the requirements of the FFHAA.

RESPONSE: The Department believes that the language at N.J.A.C. 5:23-7.1(b)1 as proposed meets the requirements of the FFHAA. The definition of "covered multifamily dwelling" published in the FFHAA Guidelines, March 6, 1991, states that " 'Covered multifamily dwellings'

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means buildings consisting of four or more dwelling units if such buildings have elevators; and ground floor dwelling units in other buildings consisting of four or more dwelling units. Dwelling units within a single structure separated by firewalls do not constitute separate buildings." The Department believes that the proposed language meets but does not exceed the FFHAA and its Guidelines and that to apply accessibility requirements only to dwelling units separated by firewalls penetrated for human passage would not meet the requirements of Federal law.

N.J.A.C. 5:23-7.1(b)2

11. COMMENT: NJBA commented that applying the definition from N.J.S.A. 52:32-4 of "large buildings" and "small buildings" to residential buildings will have the effect of requiring elevators in buildings not currently required to provide elevators. NJBA states that this distinction was meant to apply only to commercial buildings and should not be applied to residential buildings. NJBA suggests that the Department retain the requirements at N.J.A.C. 5:23-7.68(a)4i through iv, and modify section 1104.2 to reflect that amendment.

RESPONSE: See response following Comment 13.

12. COMMENT: CHLP commented that the division of "large buildings" and "small buildings" was intended to be applied to commercial buildings. CHLP attached a copy of the legislative history checklist which categorized the amendment to the enabling legislation as "public buildings—clarify plans to include facilities for the handicapped." CHLP requests that the application to residential buildings be dropped.

RESPONSE: See response following Comment 13.

13. COMMENT: EPVA supports the Department's decision to adopt the language in the BOCA National Building Code regarding the provision of an accessible route in all buildings other than residential buildings. EPVA also supports the Department's decision to apply the "large building/small building" definitions in State law to residential buildings. EPVA points out that the language in the existing State law applies to all buildings as long as there is no conflicting provision for a specific use group. Since no such provision exists, it is appropriate to apply the New Jersey statutory language to residential use buildings.

RESPONSE: The Department is persuaded by the comments of the Community Health Law Project and the New Jersey Builders Association. Upon further review, the Department finds that, in its promulgation of amendments at N.J.A.C. 5:23 (August 6, 1990 at 22 N.J.R. 2267(a)) that followed the statutory change, the "large building/small building" distinction (that determined when an elevator was required) was not applied to multifamily residences. This reflects the Department's contemporaneous understanding of the legislative intent. For multifamily residences, the Barrier Free Subcode included a specific section, at N.J.A.C. 5:23-7.68, which detailed the elevator requirements for certain use groups, including use group R-2 (multifamily residences). Although the Department received many comments on that rule proposal, not one commenter suggested that the "large building/small building" definitions be applied to multi-family residential buildings or that the Legislature had intended such an application. Indeed, in the past four years, the Department has not received one comment or complaint regarding the Barrier Free Subcode's distinct access requirements for multifamily dwellings. Therefore, in recognition of the history of these provisions, the Department has decided to retain the Barrier Free Subcode's provisions that have been codified at N.J.A.C. 5:23-7.68(a)4. To do otherwise would require a reinterpretation of legislative intent for which there is no basis, as was pointed out by commenters with interests as diverse as NJBA and CHLP.

14. COMMENT: EPVA supports requiring accessibility for B use or M use areas in dwelling units that are otherwise exempt from access requirements. EPVA believes that these provisions will be enforced in a straightforward manner for new construction.

RESPONSE: These provisions were included because they are included in the ADA. The Department agrees that enforcement will be clear.

N.J.A.C. 5:23-7.1(b)3

15. COMMENT: EPVA welcomes the greater number of accessible parking spaces that will be required, but wishes that there were more illustrations. There should be an illustration of a van parking space, for example, with its eight-foot access aisle.

RESPONSE: The Department agrees that graphics are helpful. In the event that EPVA feels strongly, it can contact CABO/ANSI at the address given in the rules and make its suggestion to them.

N.J.A.C. 5:23-7.1(b)5

16. COMMENT: EPVA expressed its disagreement with the requirements for accessible correctional facilities. EPVA believes that the Department should have proposed five percent accessible confinement areas to meet the current provisions of the Uniform Federal Accessibility Standards (UFAS). The Architectural and Transportation Barriers Compliance Board (ATBCB) has proposed that three percent of the confinement areas be accessible. EPVA believes that the Department should adopt five percent and then amend to three percent when the USDOJ adopts the ATBCB proposal. EPVA asks that when this section is amended in the future, the Department retain the provision included in this proposal that common and employee areas be accessible.

RESPONSE: At the time that this proposal was submitted for publication, the ATBCB had not published its Interim Final Rule (36 C.F.R. Part 1191, June 20, 1994). The Department based its decision on correctional facilities on whether the standards that have existed in the Barrier Free Subcode (BFSC) were adequate pending the promulgation of the additional ADA requirements for Title II, State and Local governments. When the Department proposed the requirement for accessible correctional facilities in 1986, it was learned that in the entire population of State correctional facilities there was one inmate who required an accessible confinement area. In reviewing the issue for this proposal, the Department determined that the existing language, about which there have been no complaints, would be retained pending specific requirements by the Federal government. The Department believes this was a reasonable decision. Future amendments to this section will match the Federal ADA Title II requirements.

N.J.A.C. 5:23-7.1(b)6

17. COMMENT: EPVA asks the Department to re-phrase the BOCA exemption for one to five guestrooms from accessibility requirements. EPVA states that the ADA exempts the one to five guestroom facilities only when they are owner-occupied. In addition, EPVA requests that the current BFSC requirement for minimal accessibility, that is, grab bars, in hotel rooms not otherwise required to be accessible be retained. Also, EPVA suggests deleting the first sentence following the table for accessible rooms because the fire protection signalling devices are maintained at BOCA section 917.8.1.

RESPONSE: The Department has added language to make it clear that owner occupied residences with one to five guestrooms are exempt from this subchapter. Such residences are Use Group R-3 which is not generally subject to access requirements. The requirement for grab bars in hotel rooms not otherwise required to be accessible is more appropriately raised with the Federal government through its regulatory process or with BOCA through its code change procedures. The Department thanks EPVA for the note on the fire protection signalling devices. The first sentence following the table is deleted upon adoption.

N.J.A.C. 5:23-7.1(b)8 and 9

18. COMMENT: CHLP commented that the minimal accessibility provisions in the BFSC be retained in order to comply with the statutory requirement that "**all** plans and specifications for the construction or remodeling of any public buildings in the State provide facilities for the physically handicapped."

RESPONSE: The minimal accessibility requirements in the current code are not proposed for adoption. These amendments are intended to provide New Jersey with accessibility requirements that meet Federal and State law. In addition, as EPVA pointed out in an earlier comment, the adoption of requirements that are national in scope will benefit everyone—design professionals will have one, clear design standard, and people with disabilities will know what to expect as they travel throughout this State and this nation. The Department agrees with this movement toward standardized, universal design and believes that ultimately access will be impeded by those states that insist on retaining unique, unconventional requirements. The New Jersey BFSC is well-known nationally; the minimal accessibility provisions were not accepted by any other regulatory group. There is no need to perpetuate them. The Department believes that its statutory obligation to ensure accessibility in plans and specifications for public buildings is well-met through these rules.

N.J.A.C. 5:23-7.1(b)10

19. COMMENT: NJBA states that the FFHAA Guidelines include site impracticality provisions for areas such as flood plains and hilly terrains. Because these site conditions are common in New Jersey, NJBA believes that the Department should have retained the site impracticality provision at BOCA section 1107.4.3. Also, NJBA declares that an ac-

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cessible vehicular route should be an option for providing access among buildings on the same site.

RESPONSE: See response following Comment 20.

20. COMMENT: EPVA expressed its support for not specifying an accessible vehicular route as an alternative to an accessible route. EPVA comments that to require a person with a mobility impairment to use a vehicle to access buildings on a site would clearly segregate that individual.

RESPONSE: The FFHAA does include site impracticality standards in its Guidelines, published March 6, 1991. These standards, however, are extremely difficult to apply, would be even more difficult to enforce, and include a minimum accessibility requirement that, regardless of whether the site qualifies for the exemption, 20 percent of the ground floor dwelling units be accessible. The language that BOCA included at section 1107.4.3. could be interpreted to allow a building site to be altered to qualify for the exemption. In the absence of clearer, enforceable language, the Department deleted the BOCA language and did not replace it with the muddled FFHAA Guidelines provisions. The Department recognizes that there may be some site impracticality problems. Although it is hard to conceive of a site where it would not be possible to provide any accessible dwelling units, there may be sites where it is not possible to provide the required number of accessible dwelling units. In these cases, the variation process should be followed.

N.J.A.C. 5:23-7.1(b)15

21. COMMENT: EPVA commends the Department for its amendments to the BOCA section on the accessibility of historic structures.

RESPONSE: The Department thanks EPVA for this comment. The section was revised to reflect the requirements of the Title II of the ADA and ADAAG.

N.J.A.C. 5:23-7.1(c)

22. COMMENT: EPVA states that it disagrees with the omission of the current BFSC requirement at N.J.A.C. 5:23-7.8(b) that "when existing entrance, stairs, elevators, or toilet rooms are altered, such changes are to be constructed in accordance with this subchapter without regard to the percentage relationship between the cost of the alteration and the physical value of the building or facility." EPVA expressed particular concern that the absence of this provision would allow the construction of a new inaccessible entrance once the required 50 percent accessible entrances have been provided and that this section should be retained "as it applies to existing or new entrances."

RESPONSE: First of all, this section of the BFSC applies only to existing entrances; it does not apply to new entrances. Also, although there is a requirement that 50 percent of the entrances be accessible, there is no prohibition against providing an additional inaccessible entrance. In fact, both the ADA (at ADAAG section 4.1.6(1)(d)) and this rule (at N.J.A.C. 5:23-7.1(c)2) clearly state that existing buildings shall not be required to exceed the standards provided for new construction. Finally, this rule includes the requirement that all alteration work must include accessibility up to the standard established in the ADA of disproportionate cost. This provision ensures that alteration work—including alterations to a building entrance, an interior accessible route, restrooms, telephones, and drinking fountains—will include accessibility. Since this was the effect of the language EPVA quotes and since the Department fails to identify an advantage to retaining the familiar language, the language proposed, which more closely matches the requirements of the ADA, is adopted.

N.J.A.C. 5:23-7.7 Recreation: swimming and skating areas

23. COMMENT: The Division of Parks and Forestry, Department of Environmental Protection, requests that the requirement that a ramp be provided into the water to a depth of three feet be deleted. The experience of the Division of Parks and Forestry has been that the ramps become slippery, attract algae, and are not used by people with disabilities.

RESPONSE: The Department is working on revisions to the recreation portion of subchapter 7, the BFSC. The Department decided to separate the building proposal from the recreation proposal in order to avoid confusion. Therefore, this proposal included only changes in citations. The revisions to the recreation section will be proposed for public comment in the near future.

Additional Comments

24. COMMENT: NJBA requests that the Department adopt Appendices A and B in the CABO/ANSI A117.1 technical standard for accessible design as part of this rule. The CABO/ANSI A117.1 standard declares that these sections are for guidance only and are not binding. Appendix A includes helpful information; Appendix B includes the graphics.

RESPONSE: Changes to the CABO/ANSI A117.1 standard are more appropriately directed to CABO/ANSI at the address listed at the beginning of these rules. The current CABO/ANSI A117.1 standard includes written descriptions of each requirement. Because of this, the graphics in Appendix B are illustrative only. Previously, the ANSI A117.1 standard included some graphics instead of language and, in those instances, the graphics contained the requirements themselves. Since CABO/ANSI A117.1 published this standard with graphics intended to be illustrative and not intended to be binding, the Department declines to adopt them separately. The graphics are not exhaustive and, for example, as was pointed out in an earlier comment, include only some of the required parking space configurations. The Department adopts CABO/ANSI A117.1 as published.

25. COMMENT: EPVA asks the Department to retain the provision at N.J.A.C. 5:23-7.81(f)3 which restricts the use of key-operated platform lifts to a few, clearly stated applications. Since neither BOCA nor CABO/ANSI includes such restrictions, key-operated platform lifts will be installed and access will be thwarted.

RESPONSE: The Department recognizes the difficulty of the keys and platform lifts. However, in the interest of adopting rules that meet Federal law and include the universal design provisions currently in the BOCA National Building Code, the Department recognizes that whereas some provisions, such as parking spaces, will be more stringent than they were in the BFSC, other provisions, such as the key operation of platform lifts, will be less stringent. Neither the Federal government in the ADA, nor the model code organizations in the model codes, nor the national standards organizations in the national standards have specifically limited the key operation of platform lifts. The appropriate group to effect such a change is BOCA, the USDOJ or the ATBCB, or the standard writing groups, CABO/ANSI A117.1 or ANSI A17.1, the technical standard for elevators and platform lifts. However, the Department points out that, because CABO/ANSI at section 4.11 references section 4.25 (controls and operating mechanisms), any key must be usable with no pinching, twisting, or grasping. In addition, at section 4.11, CABO/ANSI specifies that lifts must not be attendant operated.

26. COMMENT: EPVA suggests that the Department allow platform lifts to special purpose areas in new construction per N.J.A.C. 5:23-7.18(a)3i or ADAAG 4.1.3(5). EPVA suggests adopting the ADAAG language in Exception 4.

RESPONSE: The Department agrees that such clarification is helpful. Therefore, the Department is amending N.J.A.C. 5:23-7.1(b)12 to include the language on adoption from Exception 4 in ADAAG which is clear and direct.

Summary of Agency-Initiated Changes:

The Department has added a cross-reference at N.J.A.C. 5:23-2.4(a)8 to direct those consulting the requirements of the UCC for alteration work to the provisions of subchapter 7 for accessibility standards for alteration work.

At N.J.A.C. 5:23-7.1(b)2, the Department has modified the requirements for the provision of elevators in buildings of less than 10,000 square feet total gross enclosed floor area. It was the Department's stated intention to amend the current rules to conform with the provisions of the Americans with Disabilities Act (ADA). The ADA does not require an elevator in buildings of less than three stories. New Jersey statute and the existing New Jersey Barrier Free Subcode being replaced by this adoption do not require elevators in small buildings, defined as those with total gross enclosed floor area of less than 10,000 square feet. The BOCA Code exceeds the ADA and New Jersey law by requiring an elevator in buildings of only two stories if the second floor has more than 3,000 square feet and an occupant load of more than 50. Combining the requirements of the ADA and of New Jersey law, buildings of less than three stories in height and less than 10,000 square feet should not be required to have elevators unless they house one of several entities not permitted to be in an inaccessible space under the ADA. Accordingly, the Department is amending the BOCA requirement upon adoption to retain the elevator exemption contained in New Jersey law and permitted under the ADA.

At N.J.A.C. 5:23-7.1(b)6, the Department is changing the word "elements" in the table to "rooms" for clarity.

The existing BFSC, at N.J.A.C. 5:23-7.8, provides that change of use of a small building is exempt from complying with the provisions of this

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subchapter. This exemption was taken from the enabling legislation (N.J.S.A. 52:32-4 et seq.) and included in the rule when the "large building/small building" distinction was made. Therefore, as a statutory requirement, it must be included in these rules and was inadvertently omitted in the proposal. The Department has added a provision at N.J.A.C. 5:23-2.6(b)2 and 7.1(c) clarifying language that the exemption is allowed only where there is "no attendant construction."

Executive Order No. 27(1994) Statement

Executive Order No. 27(1994) does not apply to this rulemaking because these rules are not being promulgated "under the authority of or in order to implement, comply with or participate in any program established under Federal law," nor are they promulgated pursuant to "a State statute that incorporates or refers to Federal law, Federal standards or Federal requirements." Rather, this rulemaking is being undertaken by the Department to conform, to the greatest extent possible, the Department's regulations governing the provision of access for the disabled to Federal civil rights law on the same subject. The Uniform Construction Code exists under statutory authority that is entirely independent of Federal law.

However, in keeping with the spirit and intent of Executive Order No. 27, the Department offers the following statement as to standards contained in this adoption which exceed requirements imposed by Federal law. All of the regulations contained in this adoption governing buildings other than residential buildings meet, but do not exceed, the standards set forth in the Americans with Disabilities Act (ADA) and the Americans with Disabilities Act Accessibility Guidelines (ADAAG). The only exception to this statement is in the scope of New Jersey law. Churches, other places of religious assembly and private clubs are exempt from the requirements of the ADA, but are not exempt under State law.

For residential buildings, these rules differ from the Federal Fair Housing Act Amendments (FFHAA) and the Final Fair Housing Accessibility Guidelines promulgated by the United States Department of Housing and Urban Development (HUD Guidelines) in several ways. Each of these differences, together with the justification for deviating from the requirements of Federal law, is given below.

The HUD Guidelines provide an exemption for multifamily dwellings without elevators based on "site impracticality." The site impracticality provisions included in the HUD Guidelines are very cumbersome and difficult to interpret, apply and enforce. Furthermore, as discussed in the response to a comment made by the New Jersey Builders Association above, the State Uniform Construction Code includes a provision for granting variations from specific requirements of the Code. The HUD document contains no such relief. It is the position of the Department that any problems with strict compliance with the Code presented by a given site can be better and more flexibly addressed through the variation process than through HUD provisions.

Additionally, New Jersey law requires the provision of elevators as an accessibility feature in multifamily buildings. The State leaves it to the Department, through its rules, to specify which multifamily buildings must have elevators and which need not. The HUD Guidelines contain no requirement that elevators be provided. It is the Department's position that the current requirements of the Barrier Free Subcode regarding the provision of elevators in residential buildings are reasonable and are consistent with the intent of the New Jersey Legislature as expressed in the enabling statute. (N.J.S.A. 52:32-4 et seq.)

Finally, the Department is adopting here, by reference, the Council of American Building Officials/American National Standards Institute (CABO/ANSI) Standard A117.1 for Accessible and Usable Buildings and Facilities. This model code contains the specific technical requirements for adaptable dwelling units and differs in a number of ways from the HUD Guidelines. The FFHAA provides a legal safe harbor in the case of a discrimination suit for buildings that conform to the CABO/ANSI standard. No such assurance of compliance is provided under Federal law for adherence to the HUD Guidelines. It is difficult to make sense out of this odd two level approach taken by HUD. As a practical matter, the HUD rules are ANSI A117.1. We believe that HUD has taken this approach because it has no statutory authority or administrative capability to consider and approve site specific variations in cases of practical difficulty. Its much less restrictive "guidelines", in effect, allow the constructor of a building to give themselves a variation subject to later judicial review if it it challenged. This is not a very satisfactory process but it is about all HUD could do given the statute's determination to try to enforce building code standards through a civil rights law. The State regulatory scheme suffers from no such infirmities. Variations, in cases of practical difficulty, are available in the State system. Further, it is the Department's position that strict adherence to the HUD Guidelines does not yield HUD's stated goal—making a building readily adaptable for use by a disabled occupant. If money is to be spent to create adaptable dwelling units, then those units should be usable by the citizens intended to benefit from this law. Also, those following the code for the construction of new residential buildings have a right to expect that by doing so they will have met the nondiscrimination requirements of Federal law. Accordingly, the Department is adopting HUD's "safe harbor", the ANSI A117.1 standard as the State code. The Department believes that, in doing so, it is not adopting rules which exceed Federal standards.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

5:23-2.4 Alterations, replacements and damages

(a) Except as provided in N.J.A.C. 5:23-2.5***,*** existing structures when altered or repaired shall conform to the following arrangements:

1.-7. (No chnage.)

8. Notwithstanding any of the above, the requirements for providing access for the disabled shall be determined in accordance with N.J.A.C. 5:23-7.1(d).

(b) (No change.)

5:23-2.6 Change in use group

(a) (No change.)

(b) Change in use: It shall be unlawful to make any change in the use group of any structure which would subject it to any special provision of the regulations without the prior application for and issuance of a certificate of occupancy as herein provided.

1. (No change.)

2. The provisions of N.J.A.C. 5:23-7 shall not apply to a change of use of a building of less than 10,000 square feet total gross enclosed floor area where there is no attendant construction or renovation work being performed.

(c) (No change.)

5:23-3.14 Building subcode

(a) (No change.)

(b) The following chapters of the building subcode are modified as follows:

1.-7. (No change.)

8. Chapter 11 of the building subcode entitled "Accessibility", is modified in the manner set forth in N.J.A.C. 5:23-7.

9.-20. (No change.)

5:23-7.1 Accessibility standards

(a) Chapter 11 of the building subcode, entitled "Accessibility," is adopted with the modifications set forth in this subchapter.

1. Copies of the building subcode, which is the BOCA National Building Code/1993, including all subsequent revisions and amendments thereto, may be obtained from the sponsor at: BOCA, International, 4051 West Flossmoor Road, Country Club Hills, Illinois 60478-5795.

2. Copies of CABO/ANSI A117.1, referenced in the BOCA National Building Code, may be obtained from the secretariat at: Council of American Building Officials, 5203 Leesburg Pike, Suite 708, Falls Church, Virginia 22041.

(b) The following sections of chapter 11 of the building subcode are modified as follows:

1. Section 1103.1, Exception 3 is modified to read as follows: "Buildings of Use Group R-2, R-3 or R-4 with three or fewer dwelling units are not required to comply with the provisions of this Chapter. For purposes of applying this Chapter, dwelling units within a single structure separated by fire walls do not constitute separate buildings.

3.1. Multistory dwelling units in buildings without elevators are not required to comply with the provisions of this Chapter.

3.2. Accessory structures for individual exempt dwelling units are not required to comply with the provisions of this Chapter.

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3.3 Facilities and their associated sites available to the general public or available for the common use of the building's residents are required to comply with the provisions of this Chapter.

3.4 When any dwelling unit, regardless of whether it is exempt from the provisions of this Chapter, includes a B use or an M use, the portion of the dwelling unit used exclusively for the B use or M use and that portion used both for the B use or M use and for residential purposes shall comply with all applicable provisions of this subchapter. This shall include the sidewalk, if any, the door or entryway and hallways, and those portions of the dwelling unit, interior or exterior, available to or used by customers or clients, including toilet facilities."

2. In Section 1104.2, Exception 2, is modified to read as follows: "Buildings of less than 10,000 square feet total gross enclosed floor area and less than three stories in height shall not be required to have elevators unless they house the offices of health care providers (Use Group B), passenger transportation facilities and airports (Use Group A-3), multitenant facilities of Use Group M, or are owned and occupied by public entities. Additionally, floors with less than 3,000 square feet are not required to be served by an elevator unless they contain the offices of health care providers (Use Group B) or are within passenger transportation facilities and airports (Use Group A-3), multitenant facilities of Use Group M, or buildings owned and occupied by public entities."

*[2.]***3.* *In*** Section 1104.2, add the following exceptions:

"3. In buildings of Use Group R-2, R-3 or R-4 *[with a total gross enclosed floor area of less than 10,000 square feet, floors at other than the entry level are not required to be served by an accessible route of travel.

4. In buildings of Use Group R-2, R-3 or R-4 with a total gross enclosed floor area of 10,000 square feet or more, floors which contain less than 3,000 square feet of total floor area and are at other than the entrance level are not required to be served by an accessible route of travel."]* ***elevators are required to provide an accessible route of travel with the following exceptions:**

3.1 Buildings which are less than four stories and which have four or fewer dwelling units per floor;

3.2 Buildings less than three stories;

3.3 Floors that contain less than 3,000 square feet and are at other than the entry level."*

*[3.]***4.*** Section 1105.1 is modified to read as follows: "Where parking is provided at sites required to be accessible or adaptable, accessible parking spaces complying with CABO/ANSI A117.1 listed in Chapter 35 shall be provided in compliance with Table 1105.1 except as required by Section***s***1105.2 and 1105.3." At Table 1105.1, delete the title and text of "Note a."

*[4.]***5.*** In Section 1107.2.3, Table 1107.2.3 is modified to provide that, in assembly spaces with a capacity of over 500 seats, the number of required wheelchair spaces shall be "6 plus 1 for each 100 over 500."

*[5.]***6.*** Section 1107.3.3 is modified to read as follows: "Buildings or portions thereof of Use Group I-3 shall have at least one accessible inmate confinement area or room per institution, and at least one accessible inmate toilet and bathing facility per institution. All public or common areas and employee areas, including toilet or bathing facilities, shall be accessible."

*[6.]***7.*** Section 1107.4.1 is modified to read as follows: "In occupancies in Use Group R-1 containing six or more guestrooms, accessible guestrooms shall be provided in accordance with the following table:

Number of Rooms	Accessible *[Elements]* ***Rooms***
1 to 25	1
26 to 50	2
51 to 75	3
76 to 100	4
101 to 150	5
151 to 200	6
201 to 300	7
301 to 400	8
401 to 500	9
501 to 1000	2% of Total
1001 and up	20 plus 1 for each 100 over 1000

Add the following note at the end of the Table: "Note: Owner-occupied residences with 1-5 lodgers are Use Group R-3 and are exempt."

[In addition to the accessible guestrooms required above, guestrooms with alarms that comply with CABO/ANSI A117.1, 4.26 shall be provided in compliance with the preceding table.] In hotels with more than 50 guestrooms, roll-in type showers shall be provided in one-half, but not less than one, of the required accessible guestrooms."

*[7.]***8.*** The main paragraph of Section 1107.4.2 is modified to read as follows: "Unless exempted under Section 1103.1, as modified, all dwelling units in buildings served by elevators and all ground floor units in buildings without elevators shall be made adaptable in accordance with CABO/ANSI A117.1 listed in Chapter 35. For purposes of applying this requirement, the ground floor shall mean the first floor of a building containing dwelling units, regardless of whether that floor is at grade."

*[8.]***9.*** Section 1107.4.2, Exceptions are modified to read as follows:

"1. In buildings without elevators, multistory dwelling units are not required to comply with the provisions of this Chapter. In multistory dwelling units in buildings with elevators, all rooms or spaces on the entry level must be accessible or adaptable and an adaptable bathroom or powder room must be provided on the entry level; however, an interior accessible route to the other levels of living space is not required.

2. Recreational facilities must be accessible in accordance with N.J.A.C. 5:23-7.2 through 7.18."

*[9.]***10.*** The main paragraph of Section 1107.4.3 is modified to read as follows: "In buildings of Use Group R-2 and R-3 not otherwise exempted from the provisions of this Chapter by Section 1103.1, as modified, at least one accessible route shall connect accessible building or facility entrances with all accessible and adaptable dwelling units within the building or facility and with those exterior and interior spaces and facilities that serve the accessible or adaptable dwelling unit."

*[10.]***11.*** Delete the title and text of the Exception to Section 1107.4.3.

***12. In Section 1108.3, modify the Exception as follows:**

"Exceptions

1. Elevators within a dwelling unit.

2. Platform lifts may be part of an accessible route when necessary to provide:

2.1 a line of sight while complying with dispersal requirements in A use buildings;

2.2 access to a performing area;

2.3 access to incidental occupiable spaces, such as, but not limited to, projection booths and equipment control rooms, that are not open to the general public and that have not more than 5 occupants."*

*[11.]***13.*** In Section 1108.7, add the following additional subsections:

"1108.7.4 Telephones: When public use telephones are provided, one telephone per floor or one telephone in each bank of public telephones shall comply with CABO/ANSI A117.1, Section 4.29. Each accessible public telephone and 25 percent of other public

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telephones in each bank shall be equipped with volume control that complies with CABO/ANSI A117.1, Section 4.29.5. At each accessible telephone, either a forward or a parallel approach shall be provided that complies with CABO/ANSI A117.1, Section 4.2.4.

1108.7.5 Automatic Teller Machines (ATM's): At each ATM, clear floor space shall be provided for either a parallel or forward approach pursuant to CABO/ANSI A117.1, Section 4.2.4. If only a forward approach is provided, all operating controls shall comply with the reach ranges in CABO/ANSI A117.1, Section 4.2.5. If only a parallel approach is provided, reach ranges shall be provided as follows: Where the reach depth to the controls is 10″ or less, the maximum height for the controls shall be 54″. For each increase in reach depth of 1″, the maximum height for the controls shall be reduced by ½″. The reach depth shall not exceed 24″ with a corresponding maximum height of 46″. If both a parallel and a forward approach are provided, the reach ranges shall comply with CABO/ANSI A117.1, Section 4.2.5 or with the parallel reach range requirements described above."

*[12.]**14.* Section 1108.7.3 is modified to read as follows:

"Where check-out aisles are provided, accessible check-out aisles shall be installed in accordance with Table 1108.7.3. Where check-out aisles of different types are provided (express lanes, for example), at least one of each type shall be accessible. Traffic control devices, security devices and turnstiles located in accessible check-out aisles or lanes shall be accessible."

*[13.]**15.* Section 1109.2, number 1, is modified to read as follows:

"1. Accessible parking spaces required by Section 1105.1. Each accessible parking space shall be marked with an R7-8 sign from the Manual of Uniform Traffic Control Devices displaying the international symbol of accessibility. Beneath the R7-8 sign, each accessible parking space shall also be marked with an R7-8P sign, as required by N.J.S.A. 39:4-197.3.c., containing the following language:

"PENALTY
$100 FIRST OFFENSE
SUBSEQUENT OFFENSES
$100 MINIMUM AND/OR
UP TO 90 DAYS
COMMUNITY SERVICE
TOW-AWAY ZONE"

The bottom of the R7-8 sign shall be mounted approximately 60 inches above the parking lot surface."

*[14.]**16.* Section 1109.2, number 4, is modified to read as follows:

"4. Accessible toilet and bathing units."

*[15.]**17.* Section 1110.4 is modified to read as follows: "These provisions shall apply to buildings and facilities designated as historic structures that undergo alterations or a change of occupancy, unless technically infeasible. If the historic character of the building is adversely affected, the application of Section 3406.0 shall be permitted. At a minimum, at least one accessible route from an accessible parking space, public transportation stop or passenger loading zone to an accessible entrance shall be provided; at least one accessible entrance shall be provided; an accessible route from the accessible entrance to all publicly-used spaces on the level of the accessible entrance shall be provided; when toilet facilities are provided, at least one accessible toilet facility shall be provided."

(c) The provisions of this Chapter shall not apply to a change of use of a building of less than 10,000 square feet total gross enclosed floor area where there is no attendant construction or renovation work being performed.

*[(c)]**(d)* When alteration or renovation work is performed on a building, the following shall apply:

1. No alteration work shall decrease the accessibility of the building;

2. No alteration shall be required to provide greater accessibility than is required by the standards for new construction;

3. If compliance with the new construction standards in (b) above is technically infeasible, accessibility shall be provided to the maximum extent feasible.

4. Accessibility shall be included as part of alteration work to the extent that the cost of providing accessible building features, such as, but not limited to, an accessible building entrance, an accessible route to the altered area, accessible restrooms, accessible telephones, or accessible drinking fountains is not disproportionate to the cost of the overall alteration work. A cost is considered disproportionate if it exceeds 20 percent of the cost of the alteration work.

*[(d)]**(e)* Variations and exceptions are as follows:

1. Where it can be demonstrated that one or more of the provisions of this subchapter are technically infeasible, variations or exceptions to those specific provisions may be granted if:

i. The spirit and intent of the law are observed;

ii. Public welfare and safety are assured; and

iii. Equivalent facilitation and protection for people with disabilities are secured.

2. In no case shall a complete waiver of these requirements be granted.

3. Procedures for granting variations and exceptions shall be in accordance with N.J.A.C. 5:23-2.9 through 2.13.

*[(e)]**(f)* Enforcement responsibility shall be divided among subcode officials as follows:

i. Plan review with regard to compliance with BOCA, Chapter 11, Section 1108; CABO/ANSI A117.1, Section 4.17.2; Section 4.19; Section 4.20; and Section 4.15 shall be the joint responsibility of the building and plumbing subcode officials.

ii. Plan review with regard to compliance with CABO/ANSI A117.1, Section 4.25 shall be the responsibility of the plumbing, fire protection and electrical subcode officials.

iii. Plan review and inspection with regard to compliance with CABO/ANSI A117.1, Section 4.15.2; Section 4.15.3; Section 4.17.3; Section 4.17.4; Section 4.19.2; Section 4.19.4; Section 4.20.2; Section 4.20.4; Section 4.21.5; Section 4.22.5; Section 4.22.6; Section 4.33.3.2.2; Section 4.33.3.4.4; Section 4.33.4.3; Section 4.33.4.4.1; Section 4.44.4.4.3; Section 4.33.4.5.1; and Section 4.33.4.5.2 shall be the responsibility of the plumbing subcode official.

iv. Inspection with regard to compliance with CABO/ANSI A117.1, Section 4.17.2 and BOCA, Chapter 11, Section 1108.4 shall be the responsibility of the building subcode official.

v. Inspection with regard to compliance with BOCA, Chapter 11, Section 1108, as modified by vi below, shall be the responsibility of the plumbing subcode official.

vi. Inspection of all controls and operating mechanisms referred to in CABO/ANSI A117.1, Section 4.25 regulated by the electrical, fire protection or plumbing subcodes shall be the responsibility of the corresponding subcode official. Controls of all other mechanisms shall be inspected by the building subcode official.

vii. Enforcement of the remaining sections of this subchapter shall be the responsibility of the building subcode official.

5:23-7.2 Recreation

(a) All facilities, equipment, and sites or portions thereof, intended for outdoor, active or passive recreation shall meet all applicable requirements of this subchapter in addition to the provisions of N.J.A.C. 5:23-7.3 through 7.18. All support facilities and site access points required to be on an accessible route of travel shall be made accessible in accordance with the applicable provisions of this subchapter.

(b) (No change.)

5:23-7.3 (No change in text.)

5:23-7.4 Recreation: exceptions

These recreation requirements do not apply to undeveloped areas as defined in N.J.A.C. 5:23-7.3. These requirements also shall not apply to facilities, equipment or sites which are associated with buildings exempted by N.J.A.C. 5:23-7.1(b)1, 2 or 3.

5:23-7.5 (No change in text.)

5:23-7.6 Recreation: pools

(a) At least one pool of each type provided in each distinct area on a site, intended for swimming, soaking, wading, or diving, exclusive of those intended for ornamental, decorative, or mechanical purposes, must adjoin an accessible route of travel. The interior of

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swimming pools, defined as pools with a depth ranging between 24 inches and 13 feet, and the interior of soaking pools, shall be made accessible by one of the methods detailed in (a)1 through 3 below. Wading pools, defined as pools with a maximum depth of less than 24 inches, and diving pools, defined as pools or tanks whose minimum depth is over 13 feet, are excluded from this interior access requirement.

1. A vertical lift meeting the following criteria and as shown in Figure 7.6a:

i. (No change.)

ii. Equipped with a chair designed for independent transfer from a wheelchair. The chair shall have a rigid seat with a depth of at least 15 inches and shall have a rigid back support at least 15 inches high;

(1) As an alternative to (a)1ii above, a pool may be equipped with a moving platform meeting the criteria of CABO/ANSI A117.1, Section 4.11. A wheelchair shall be provided to the user if this option is used.

iii. Adjoining a clear level floor area meeting the criteria of CABO/ANSI A117.1, Section 4.3 whose minimum dimensions are five feet by five feet;

iv. Having controls which meet the criteria of CABO/ANSI A117.1, Section 4.25; and

v. Located to meet the criteria of Figure 7.6a.

2. Interior/exterior steps meeting the criteria of Figure 7.6b:

i. (No change.)

3. A ramp meeting the criteria of Figure 7.6c.

i.-ii. (No change.)

Figure 7.6a
Pool Entry

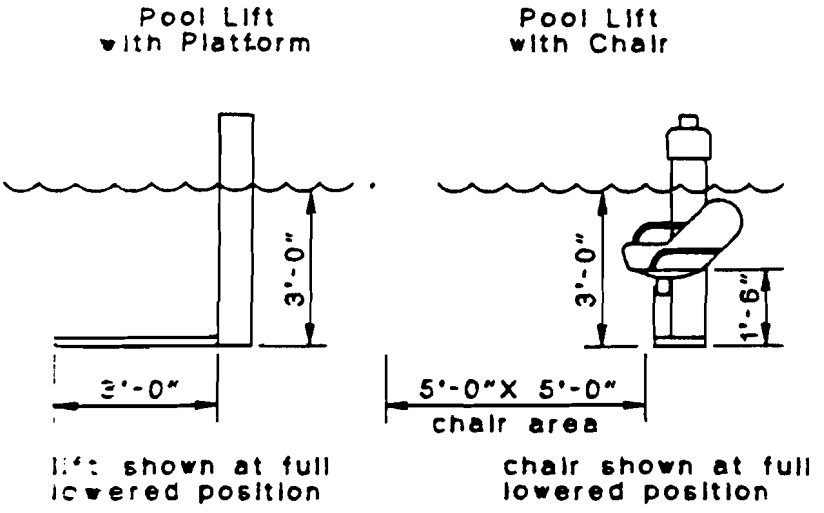

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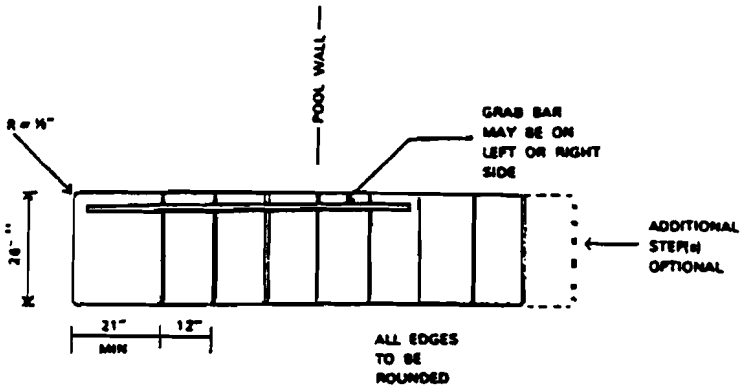
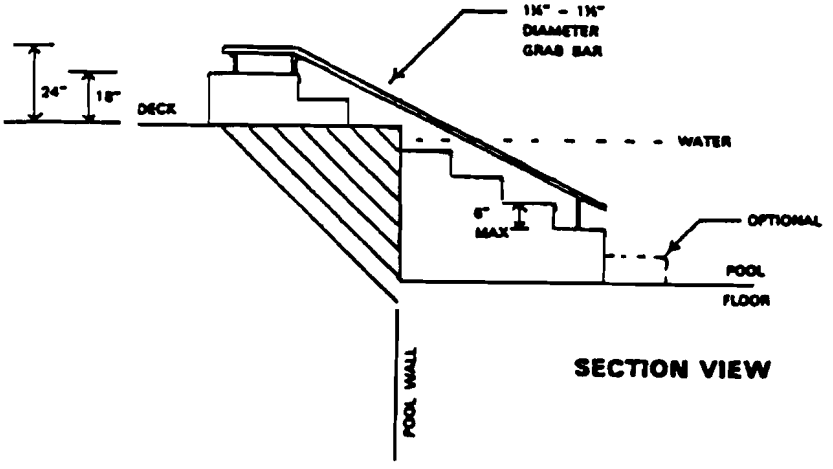
Figure 7.6b

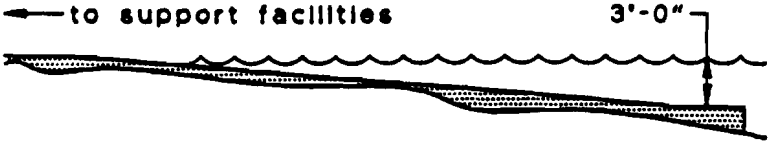


PLAN VIEW



SECTION VIEW

Figure 7.6c
Ramp Into Water



Maximum ramp slope 1:12.
Provide no handrails but provide curbs.
Maximum ramp run 30'-0", use additional ramp runs with 5'-0" level, platforms between, as necessary.
In pools, assure no access under ramp.

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5:23-7.7 Recreation: swimming and skating areas

(a) (No change.)

(b) Where swimming is provided, there shall be a ramp leading into the water to a depth of three feet. The ramp shall meet the criteria of CABO/ANSI A117.1, Section 4.8 and of Figure 7.6c except that handrails shall not be provided. Visual markings for the underwater portion of the ramp, such as floats or flags, shall be provided to define the side edges. Alternately, means of access to a minimum water depth of three feet may be achieved by other methodologies, as specified in N.J.A.C. 5:23-7.6. This provision shall not apply in those ocean front areas where wave action would render the provision of a ramp impractical from an engineering standpoint.

5:23-7.8 (No change in text.)

5:23-7.9 Recreation: fishing areas

If docks are provided in a fishing area, the criteria of N.J.A.C. 5:23-7.8 shall apply.

5:23-7.10 Recreation: court games

(a) The surface of the court must adjoin an accessible route of travel. Entrances to courts required to be accessible shall meet criteria of CABO/ANSI A117.1, Section 4.13. On sites with more than one court, at least one of each type of court in each distinct area at a site shall adjoin an accessible route of travel. Where there is a main or center court, this court shall be included as one of those on an accessible route of travel. Additionally, all permanent spectator viewing areas seating 50 or more persons shall be on an accessible route of travel.

(b) Court surfaces shall meet the criteria of CABO/ANSI A117.1, Section 4.3, except in those instances where the recognized rules of the particular game dictate another surface.

Recodify existing 5:23-7.109 and 7.110 as 7.11 and 7.12 (No change in text.)

5:23-7.13 Recreation: golf facilities

(a) (No change.)

(b) Bridges, if provided, shall either be designed for use by golf carts or shall meet the criteria of CABO/ANSI A117.1, Section 4.8.

(c) Where curbs are provided at points where courses cross thoroughfares, ramps or curb ramps meeting the criteria of CABO/ANSI A117.1, Section 4.8 shall be provided.

5:23-7.14 Recreation: ski lifts, aerial tramways, and conveyors

(a) (No change.)

(b) In areas where aerial tramways, conveyors or other comparable mechanisms for sightseeing are provided, there shall be an accessible route of travel connecting site access point(s) and support facilities required to be accessible and the moving seat, car or platform of the aerial tramways, conveyors, or comparable mechanisms. A five feet by five feet clear, level area meeting the criteria of CABO/ANSI A117.1, Section 4.3 shall be provided immediately adjacent to the upper, lower, and any intermediate terminals of such mechanisms to facilitate transfer from a wheelchair to the seat, car, or platform. If seats are involved, they shall be at a height of 16 inches to 18 inches above the clear, level area.

(c)-(d) (No change.)

5:23-7.15 Recreation: trails

(a) (No change.)

(b) All other trails shall meet the criteria of CABO/ANSI A117.1, Section 4.3.

1. Signs, where provided, shall meet the criteria of CABO/ANSI A117.1, Section 4.28.

5:23-7.16 Recreation: camping sites

(a) In camping areas in other than undeveloped areas, at least four percent (rounded off to the next higher whole number) of camp sites shall meet the following criteria:

1. (No change.)

2. Sites and signs leading to such sites shall be marked with the International Symbol of Accessibility displayed as specified in CABO/ANSI A117.1, Section 4.28;

3. Where tent platforms are provided, each of those required to be accessible shall be equipped with a ramp meeting the criteria of CABO/ANSI A117.1, Section 4.8;

4. (No change.)

5:23-7.17 (No change in text.)

5:23-7.18 Recreation: equestrian facilities

At the area normally used for mounting at each recreational equestrian facility, a mounting platform for people with disabilities shall be provided. The top of the platform shall be at a height 32 inches above the surface upon which the horse stands. The mounting platform shall have a minimum dimension of five feet long and three feet wide. Any ramp necessary to provide access to the mounting platform shall meet the criteria of CABO/ANSI A117.1, Section 4.8, except that a maximum slope of 1:9 shall be allowed.

(a)

DIVISION OF LOCAL GOVERNMENT SERVICES

Local Government Financial Regulation

Cooperative Pricing and Joint Purchasing Systems

Adopted Amendments: N.J.A.C. 5:34-7.6 and 7.8

Adopted Repeal: N.J.A.C. 5:34-7.9

Proposed: December 5, 1994 at 26 N.J.R. 4724(a).

Adopted: February 9, 1995 by Beth Gates, Director, Division of Local Government Services.

Filed: February 16, 1995 as R.1995 d.142, **without change**.

Authority: N.J.S.A. 40A:11-11.

Effective Date: March 20, 1995.

Expiration Date: December 3, 1995.

A copy of the proposed revisions to the rule was mailed to 40 individuals serving as the administrative head of a cooperative purchasing system's lead agency.

Summary of Public Comments and Agency Responses:

The Division received a total of five telephonic comments from representatives of a Cooperative Purchasing System's Lead Agency:

Ms. Mary Lou Stanton, Purchasing Agent for the County of Somerset; Mr. Frederick E. Cenci, Purchasing Agent for the County of Bergen; Mr. Gene Sicilia, Purchasing Agent for the County of Cape May; Mr. Nicholas C. A. Puleio, School Business Administrator, Lawrence Township Board of Education acting as the Lead Agency for the Educational Cooperative Pricing System; and Mr. Raymond S. Lawson, Jr., Assistant General Manager of Electric Utility acting as the Lead Agency for the Public Power Association of New Jersey Cooperative Pricing System.

COMMENT: No substantive comments were made. All respondents were in full support of the proposed changes. The most vocal commended the Division for reducing the amount of paperwork required to achieve the renewal of a system's registration.

RESPONSE: The Division thanks the commenters for their support.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the process of cooperative purchasing by units of local government is not subject to any Federal requirements or standards.

Full text of the adoption follows:

5:34-7.6 Membership registration

(a)-(d) (No change.)

(e) The lead agency shall notify the Director in writing within five days of the withdrawal of any registered member from an approved cooperative purchasing system.

(f) (No change.)

(g) A registered member of a cooperative purchasing system shall retain membership in a system until the member formally withdraws from participation or the system is dissolved.

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5:34-7.8 System renewal
(a)-(c) (No change.)
(d) The renewal application package shall include the following:
1. Form CP-2001;
2. Lead agency resolution or ordinance, as appropriate, reauthorizing the system; and
3. A list of the current membership of the System.
(e)-(f) (No change.)

5:34-7.9 (Reserved)

(a)

OFFICE OF THE COMMISSIONER

Volunteer Coaches' Safety Orientation and Training Skills Program

Adopted New Rules: N.J.A.C. 5:52

Proposed: January 3, 1995 at 27 N.J.R. 21(a).
Adopted: February 10, 1995 by Harriet Derman, Commissioner, Department of Community Affairs.
Filed: February 23, 1995 as R.1995 d.150, **without change**.
Authority: N.J.S.A. 2A:62A-6(e); Reorganization Plan No. 002-1994.
Effective Date: March 20, 1995.
Expiration Date: March 20, 2000.

Summary of Public Comments and Agency Responses:
Comments were received from David A. Feigley, Ph.D., Director of the Youth Sports Research Council at Rutgers University and from William D. Foelsch, Executive Director of the New Jersey Recreation and Park Association.

COMMENT: These rules must be readopted because, without them, there are no standards for defining what constitutes adequate safety training. Partial civil immunity from lawsuits has been upheld in New Jersey courts in part because of the existence of well-defined standards. This immunity is necessary in order to protect people who volunteer their time to coach and who are responsible enough to become safety trained. Since 1986, more than 100,000 coaches have received safety training. These rules have standardized the definition of such training. Since volunteer coaches serve for an average of two to three years, there is a continuing need to train new coaches. Safety training has become a universally accepted standard of care in municipal and nonprofit youth programs and has become accepted as an effective means of upgrading the ability of volunteer coaches to work safely with children. An *ad hoc* committee, on which the commenters served, reviewed the rules in 1992, found that they were working well, and recommended that they be continued unchanged.

RESPONSE: The Department agrees that these rules are necessary and appropriate and is therefore exercising the jurisdiction conferred by Reorganization Plan No. 002-1994 in order to keep them in effect.

Executive Order No. 27(1994) Statement

No Executive Order No. 27(1994) analysis is required because these rules are not being adopted, readopted or amended under the authority of, or in order to implement, comply with, or participate in, any program established under Federal law or under a State statute that incorporates or refers to Federal law, standards or requirements.

Full text of the expired rules adopted herein as new rules may be found in the New Jersey Administrative Code at N.J.A.C. 5:52.

Full text of the adopted amendment to the expired rules follows:

CHAPTER 52
VOLUNTEER COACHES' SAFETY ORIENTATION AND TRAINING SKILLS PROGRAMS

INSURANCE

(b)

DIVISION OF PROPERTY AND CASUALTY

Automobile Insurers: Examination of Financial Experience of Private Passenger Automobile Insurers

Repeal: N.J.A.C. 11:3-31 and Appendix
Adopted Amendments: N.J.A.C. 11:3-16.4 and 16.5

Proposed: January 3, 1994 at 27 N.J.R. 41(a).
Adopted: February 17, 1995 by Andrew J. Karpinski, Commissioner, Department of Insurance.
Filed: February 27, 1995 as R.1995 d.171, **without change**.
Authority: N.J.S.A. 17:1C-6(e); 17:23-1 et seq.; 17:29A-1 et seq.; and 17:29B-1 et seq.
Effective Date: March 20, 1995.
Expiration Date: January 4, 1996.

Summary of Public Comments and Agency Responses:
During the comment period, which closed on February 3, 1995, a total of eight comments were submitted to the Department of Insurance ("Department"). Five insurers responded (Allstate Insurance Company; Liberty Mutual Insurance Company; New Jersey Manufacturers Insurance Companies; Selective Insurance Group, Inc.; and State Farm Insurance Companies). Two comments were received from national insurance property and casualty trade associations (Alliance of American Insurers and the American Insurance Association). One comment was received from a producers association, the New Jersey Professional Insurance Agents, Inc.

COMMENT: All commenters were in favor of the adoption and commended to the Department in its effort to reduce redundant regulatory oversight.

RESPONSE: The Department appreciates the positive reactions to its proposal.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the business of private passenger automobile insurance as addressed in these amendments is not subject to any Federal requirements or standards.

Full text of the adoption follows:

11:3-16.4 Insurer information filings due July 1 of each year
(a) (No change.)
(b) The information filing shall consist of the following documents:
1. The insurer's Excess Profits Report for each company filed pursuant to N.J.A.C. 11:3-20. In lieu of providing copies, the filer may submit a certification of an officer that the report has been filed and is incorporated by reference.
2. (No change.)

11:3-16.5 Insurer flex rating filings
(a) Any insurer that desires to increase its rates in accordance with the flex rate provisions of N.J.S.A. 17:29A-44 and applicable Orders of the Commissioner issued pursuant to N.J.A.C. 11:3-16A shall provide the following information in support of its flex rate filing:
1.-2. (No change.)
3. The Excess Profits Report (required by N.J.A.C. 11:3-20. In lieu of providing copies, the filer may submit a certification by an officer that the document has been filed and is incorporated into the filing by reference;
4.-5. (No change.)

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(a)

DIVISION OF THE NEW JERSEY REAL ESTATE COMMISSION

Notice of Administrative Corrections
Consumer Information Statement
Adopted New Rule: N.J.A.C. 11:5-1.43

Take notice that the New Jersey Real Estate Commission has discovered four errors in the published text of adopted new rule N.J.A.C. 11:5-1.43, published in the February 21, 1995 New Jersey Register at 27 N.J.R. 697(a).

In N.J.A.C. 11:5-1.43(h), in the first paragraph of the "Consumer Information Statement on New Jersey Real Estate Relationships," the word "transaction" is misspelled, and the word "term" should be the plural "terms" (see R.1995 d.110).

In N.J.A.C. 11:5-1.43(k)1i, the phrase "notices directed or" should be "notices directed to" (see R.1995 d.110).

In N.J.A.C. 11:5-1.43(k)1ii, the term "buyer/brokers" should be "buyer brokers" (see PRN 1994-426 and R.1995 d.110).

This notice of administrative correction is published pursuant to N.J.A.C. 1:30-2.7.

Full text of the corrected rule follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

11:5-1.43 Consumer Information Statement

(a)-(g) (No change.)

(h) The mandatory text of the Consumer Information Statement to be delivered by licensees as provided in (e) above is as follows:

CONSUMER INFORMATION STATEMENT ON NEW JERSEY REAL ESTATE RELATIONSHIPS

In New Jersey, real estate licensees are required to disclose how they intend to work with buyers and sellers in a real estate [transacton] **transaction**. (In rental transactions, the terms "buyers" and "sellers" should be read as "tenants" and "landlords," respectively.)

. . .

(i)-(j) (No change.)

(k) Licensees shall disclose to other licensees what type of business relationship they have with the party with whom they have a brokerage agreement, and with any other parties with whom they may be working, in the following manner:

1. In all written or computer generated notices directed [or] **to** other brokerage firms through a Multiple Listing Service or otherwise, the listing broker shall indicate whether they are working as a seller's agent or as a transaction broker. On listings where the listing broker is operating as a seller's agent, such notices shall also state:

i. Whether subagency is offered;

ii. Whether the seller has authorized the sharing of the listing broker's compensation with cooperating subagents and/or transaction brokers and/or [buyer/brokers] **buyer brokers**; and

iii. The amount of compensation offered to cooperating subagents and/or transaction brokers and/or buyer brokers.

2. (No change.)

(l) (No change.)

LAW AND PUBLIC SAFETY

(b)

DIVISION OF CONSUMER AFFAIRS LEGALIZED GAMES OF CHANCE CONTROL COMMISSION

Amusement Games
Maximum Fee for Participation in Game
Adopted Amendment: N.J.A.C. 13:3-3.4

Proposed: December 19, 1994 at 26 N.J.R. 4951(a).

Adopted: February 22, 1995 by the Legalized Games of Chance Control Commission, Russell Lupo, Chairman.

Filed: February 27, 1995 as R.1995 d.175, **without change.**

Authority: N.J.S.A. 5:8-79 and 5:8-107.

Effective Date: March 20, 1995.

Expiration Date: May 17, 1998.

The Legalized Games of Chance Control Commission afforded all interested parties an opportunity to comment on the proposed amendment to N.J.A.C. 13:3-3.4.

A notice of proposal appeared in the New Jersey Register on December 19, 1994 at 26 N.J.R. 4951(a) and copies of the published proposal were forwarded to the Star Ledger, the Trenton Times, the Asbury Park Press, the Atlantic City Press, the Bergen Record and municipal clerks of each municipality and other interested parties. The proposal included a notice of public hearing to be held on January 9, 1995.

During the official 30 day comment period which ended on January 18, 1995, the Commission received one written comment. Three persons provided to the Commission comments during the public hearing.

A full record of this opportunity to be heard may be inspected by contacting the Legalized Games of Chance Control Commission, Post Office Box 46000, Newark, New Jersey 07101.

Summary of Public Comments and Agency Responses:

On January 9, 1995 the Commission held a public hearing on the proposal as required by N.J.S.A. 5:8-107. Three persons provided comments in support of the proposal at the hearing. John Paul Doyle, Esq., representing the New Jersey Amusement Association, and Wayne Cimorelli and Daniel Jeleniewski, both licensed amusement games operators, commented that the proposal would provide the flexibility necessary to compete in the market as well as providing an ability to raise sufficient proceeds to cover increasing costs associated with the operation of the business. The Commission in its proposal acknowledged the need for such flexibility and recognized that the cost of business had increased significantly while the permissible charge to play had not changed since 1983. The Commission thanks the commenters for their support.

Vincent Lehotsky submitted a written comment stating his belief that the $2.00 price to play "is too much" and asserting that for a $2.00 fee "maybe we, the public can get 4 throws instead of 3." He further commented that the regulation should contain a provision to "de-escalate" the fees if the amusement business slackens. It appears that Mr. Lehotsky has misread the proposal. The rule does not require licensees to charge $2.00 to play an amusement game. The rule provides that $2.00 is the maximum charge. Operators are free to charge less than the maximum and similarly are free to structure the games in accordance with amusement games certifications, thereby providing additional "throws" for the price to play. As the rule anticipates that market forces will drive the fee charged by operators to play, the Commission believes that Mr. Lehotsky's concerns are met.

The Commission is confident that the maximum fee to be charged for participation in a game as set by this rule will provide licensees with an opportunity to earn a reasonable profit while at the same time protecting the public from excessive charges.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the amendment being adopted does not involve any Federal standard or regulation.

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Full text of the adoption follows:

13:3-3.4 Maximum fee for participation in game

(a) No licensee shall charge or accept, or allow or permit, directly or indirectly, the charging or accepting of more than $2.00 from any one player for an opportunity to participate in any one amusement game.

(b) All prizes or tickets or tokens redeemable for a prize awarded in a game shall be awarded immediately upon completion of the game and before making or accepting a charge for participation in any subsequent game.

(c) No charge may be made or accepted for participation in a game in excess of the posted charge for the opportunity to participate in the game. Nothing in this section shall be construed to prohibit a licensee from offering a discounted entry fee for multiple opportunities to participate in a single game not in excess of $2.00.

(d) Upon receipt of currency greater than the charge to play a game, the licensee must immediately remit the appropriate change to the player.

(a)

DIVISION OF CONSUMER AFFAIRS OFFICE OF WEIGHTS AND MEASURES

Regulated Consumer Commodities and Their Approved Units of Measure: Infant Formula

Adopted Amendment: N.J.A.C. 13:45A-14.4

Proposed: January 17, 1995 at 27 N.J.R. 302(a).
Adopted: February 27, 1995 by William J. Wolfe, State Superintendent, Office of Weights and Measures.
Filed: February 25, 1995 as R.1995 d.181, **without change.**

Authority: N.J.S.A. 56:8-25.

Effective Date: March 20, 1995.
Expiration Date: November 9, 1995.

A notice of proposal appeared in the New Jersey Register on January 17, 1995 at 26 N.J.R. 302(a) and copies of the published proposal were forwarded to the Star Ledger, the Trenton Times, and other interested parties.

Summary of Public Comments and Agency Response, and Hearing Officer's Recommendations:

A public hearing on this proposal was held at the Division of Consumer Affairs Office, 124 Halsey Street, Newark, New Jersey, on February 1, 1995 at 10:00 A.M. Harvey Goodman, Ross Products Division of Abbot Laboratories, spoke in favor of the proposed amendment. Thomas W. Kelly, Director of Special Projects for the New Jersey Food Council, and Richard Grillo, Director of Administration for Kings Supermarkets, who appeared at the hearing, did not wish to present formal comments for the record. However, they did express support for the change in rule. Further, the Division had previously received favorable comments from Richard Konopka, Manager of Regulatory Compliance, Twin County Grocers, Inc., Edison, New Jersey; William J. Vitulli, Vice President, Government and Community Relations, the Great Atlantic & Pacific Tea Company, Inc., Montvale, N.J.; and Mary Ellen Gowin, Vice President, Consumer and Corporate Affairs, Wakefern Food Corporation, Edison, N.J. There were no comments in opposition to the proposal presented at the hearing. After considering all of the comments and the additional fact that the proposed amendment provides the consumers a uniform method of comparing the unit prices of the infant formula, the hearing officer recommended that the proposed amendment be adopted. The hearing record may be reviewed by contacting Audrey Weiner, Regulatory Analyst, Division of Consumer Affairs, Director's Office, 124 Halsey St., Newark, NJ 07102.

There were no other written comments received during the official comment period which ended on February 16, 1995.

Executive Order No. 27(1994) Statement

The proposed amendment of N.J.A.C. 13:45A-14.4 permits the unit pricing of infant formula in powder and concentrated form in terms of unit of volume of the reconstituted form of the infant formula.

National Institute of Standards and Technology (hereinafter NIST), an agency within the United States Department of Commerce, has the statutory authority, pursuant to the provisions of 15 U.S.C. §§271 et seq., to secure uniformity of weights and measures laws and methods of inspection. In exercise of that authority, it sponsors the National Conference on Weights and Measures, an organization composed of regulatory agencies and commercial businesses involved in weighing and measuring activities.

The National Conference on Weights and Measures has, over the years, developed Uniform Laws and Regulations, including the Uniform Unit Pricing Regulations, which are published as the NIST Handbook 130. The proposed amendment is consistent with the most recent change in the Uniform Unit Price Regulation. Except as cited above, Congress has left the development and enforcement of Unit Price regulations with the States.

In view of the above facts, the proposed amendments contained in this rule are the same as those sponsored by NIST under the provisions of 15 U.S.C. §271 et seq.

Full text of the adoption follows:

13:45A-14.4 Regulated consumer commodities and their approved units of measure

(a) (No change.)

(b) The following consumer commodities shall be considered regulated consumer commodities with their approved units of measure.

1. (No change.)
2. Baby food
   i. Baby food (solid, powder) ..... pound
   ii. Baby food (liquid) ..... fluid ounce
   iii. Infant formula (liquid, ready to use) ..... fluid ounce
   iv. Infant formula (liquid, concentrate) ..... fluid ounce, reconstituted fluid ounce
   v. Infant formula (dry, powder) ..... pound, reconstituted fluid ounce

3-45. (No change.)

(b)

NEW JERSEY RACING COMMISSION

Thoroughbred Rules
Collection and Dissemination of Social Security Numbers

Adopted New Rule: N.J.A.C. 13:70-4.22

Proposed: January 3, 1995 at 27 N.J.R. 44(a).
Adopted: February 16, 1995 by the New Jersey Racing Commission, Frank Zanzuccki, Executive Director.
Filed: February 24, 1995 as R.1995 d.163, **without change.**

Authority: N.J.S.A. 5:5-30.

Effective Date: March 20, 1995.
Expiration Date: January 25, 2000.

Summary of Public Comments and Agency Responses:
No comments received.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the rules of racing are dictated by statute, N.J.S.A. 5:5-22 et seq., and by the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the rule subject of the instant amendment is designed to implement the requirements of the Federal laws of the "Social Security Act" and the "Privacy Act" as concerns the collection and dissemination of social security numbers and is completely consistent therewith. The rules subject of the instant adoption do not exceed the Federal standards, as set forth in the "Social Security Act" and the "Privacy Act," and those requirements are thus cumulative to the rules encompassed by the instant adoption. Accordingly, the instant adoption shall not have any consequences or implications to Federal requirements or standards, including those of the "Social Security Act" and the "Privacy Act."

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Full text of the adoption follows:

13:70-4.22 Collection and dissemination of Social Security numbers

(a) The Racing Commission may request Social Security numbers to be furnished for use in determining an applicant's eligibility for licensure especially as it relates to credit checks, background checks or other such investigations, including those relative to open claiming. No application shall be denied for failure to comply with such request provided that a person may be required to submit such other information as the Commission may require in order to determine an applicant's eligibility for licensure.

(b) Any form used by the Commission to request submission of a Social Security number shall include the following:

1. A statement as to whether provision of a Social Security number is mandatory or voluntary;

2. A citation of the rule (which in the case of a request for voluntary submission shall be this section) that authorizes the Commission to request the Social Security number; and

3. A statement that the Commission will use Social Security numbers as a secondary internal identifier for the following purposes: Credit checks, background checks and other such investigations.

(c) Any Social Security number submitted to the Commission shall be concealed or removed from the document before it is made available to any agency or person outside the Racing Commission. No Social Security number shall be disclosed to any outside party, orally or in writing, except as provided by law.

(a)

NEW JERSEY RACING COMMISSION

Harness Rules

Steward or Board of Judges Hearing: Finality of Decision Absent Appeal

Adopted Repeal and New Rule: N.J.A.C. 13:71-3.3

Proposed: December 19, 1994 at 26 N.J.R. 4969(a).

Adopted: February 16, 1995 by the New Jersey Racing Commission, Frank Zanzuccki, Executive Director.

Filed: February 24, 1995 as R.1995 d.164, **without change**.

Authority: N.J.S.A. 5:5-30.

Effective Date: March 20, 1995.

Expiration Date: January 25, 2000.

Summary of Public Comments and Agency Responses:
No comments received.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the rules of racing are dictated by statute, N.J.S.A. 5:5-22 et seq., and by the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the rule subject of the instant amendment is not addressed or affected by any analogous Federal requirements or standards.

Full text of the adoption follows:

13:71-3.3 Steward or Board of Judges hearing; finality of decision absent appeal

(a) Subject to N.J.A.C. 13:71-1.23, when the State Steward or Board of Judges conduct a hearing in the first instance with regard to the provisions of this chapter, the respective decision of the State Steward or Board of Judges shall be final unless an appeal, in accord with N.J.A.C. 13:71-3.1 and 3.4, is filed with the Commission. The appeal hearings of such matters shall be de novo proceedings conducted by the Commission in accord with N.J.A.C. 13:71-3.5.

(b) Nothing contained in this section shall in any way be construed to disallow the Commission from directly conducting a hearing with respect to the provisions of this chapter and directly imposing disciplinary action, or from modifying on its own motion any imposed penalty or decision.

(b)

NEW JERSEY RACING COMMISSION

Harness Rules

Collection and Dissemination of Social Security Numbers

Adopted New Rule: N.J.A.C. 13:71-7.37

Proposed: January 3, 1995 at 27 N.J.R. 44(b).

Adopted: February 16, 1995 by the New Jersey Racing Commission, Frank Zanzuccki, Executive Director.

Filed: February 24, 1995 as R.1995 d.165, **without change**.

Authority: N.J.S.A. 5:5-30.

Effective Date: March 20, 1995.

Expiration Date: January 25, 2000.

Summary of Public Comments and Agency Responses:
No comments received.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the rules of racing are dictated by statute, N.J.S.A. 5:5-22 et seq., and by the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the rule subject of the instant amendment is designed to implement the requirements of the Federal laws of the "Social Security Act" and the "Privacy Act" as concerns the collection and dissemination of social security numbers and is completely consistent therewith. The rules subject of the instant adoption do not exceed the Federal standards, as set forth in the "Social Security Act" and the "Privacy Act," and those requirements are thus cumulative to the rules encompassed by the instant adoption. Accordingly, the instant adoption shall not have any consequences or implications to Federal requirements or standards, including those of the "Social Security Act" and the "Privacy Act."

Full text of the adoption follows:

13:71-7.37 Collection and dissemination of Social Security numbers

(a) The Racing Commission may request Social Security numbers to be furnished for use in determining an applicant's eligibility for licensure especially as it relates to credit checks, background checks or other such investigations, including those relative to open claiming. No application shall be denied for failure to comply with such request provided that a person may be required to submit such other information as the Commission may require in order to determine an applicant's eligibility for licensure.

(b) Any form used by the Commission to request submission of a Social Security number shall include the following:

1. A statement as to whether provision of a Social Security number is mandatory or voluntary;

2. A citation of the rule (which in the case of a request for voluntary submission shall be this section) that authorizes the Commission to request the Social Security number; and

3. A statement that the Commission will use Social Security numbers as a secondary internal identifier for the following purposes: Credit checks, background checks and other such investigations.

(c) Any Social Security number submitted to the Commission shall be concealed or removed from the document before it is made available to any agency or person outside the Racing Commission. No Social Security number shall be disclosed to any outside party, orally or in writing, except as provided by law.

(c)

NEW JERSEY RACING COMMISSION

Casino Simulcasting

Supervisors of Mutuels and Verifiers

Adopted Amendment: N.J.A.C. 13:72-9.1

Adopted Repeals: N.J.A.C. 13:72-9.3, 9.4 and 9.5

Adopted Recodification with Amendment: N.J.A.C. 13:72-9.6 as 13:72-9.3

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Proposed: January 3, 1995 at 27 N.J.R. 45(a).
Adopted: February 16, 1995 by the New Jersey Racing Commission, Frank Zanzuccki, Executive Director.
Filed: February 24, 1995 as R.1995 d.166, **without change**.

Authority: N.J.S.A. 5:5-30.

Effective Date: March 20, 1995.
Expiration Date: January 19, 1998.

Summary of Public Comments and Agency Responses:
No comments received.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the rules of racing are dictated by statute, N.J.S.A. 5:5-22 et seq., and by the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the rule subject of the instant amendment is not addressed or affected by any analogous Federal requirements or standards. The United States Congress has promulgated law, however, known as the "Interstate Horse Racing Act of 1978," which concerns interstate off-track wagering and imposes certain requirements relating to the acceptance of an interstate off-track wager. The rules subject of the instant adoption do not address or exceed the Federal standards, as set forth in the "Interstate Horse Racing Act of 1978," and those requirements are thus cumulative to the rules encompassed by the instant adoption. Accordingly, the instant adoption shall not have any consequences or implications to Federal requirements or standards, including those of the "Interstate Horse Racing Act of 1978."

Full text of the adoption follows:

13:72-9.1 Supervisors of Mutuels

A Supervisor of Mutuels shall be present at a hub facility at all times when casino simulcasting is being conducted. The Supervisor of Mutuels shall be an employee or designee of the Racing Commission whose compensation shall be reimbursed to the Racing Commission by the hub facility, or, if a designee, paid directly by the hub facility. If a Supervisor of Mutuels is not an employee of the Racing Commission, he or she shall be licensed as a casino key employee.

13:72-9.3 Continued access to hub facility by Racing Commission

The Racing Commission, its employees and agents shall at all times have access to the hub facility in order to maintain the integrity of horse racing and, together with the Commission and Division, to effectuate the purposes of the Casino Simulcasting Act.

PUBLIC UTILITIES

(a)

BOARD OF PUBLIC UTILITIES OFFICE OF CABLE TELEVISION

Rules of Practice and Procedure of the Office of Cable Television; Scheduling Hearings for Public Comment

Adopted Amendment: N.J.A.C. 14:17-6.17

Proposed: January 3, 1995 at 27 N.J.R. 46(a).
Adopted: February 22, 1995 by Celeste M. Fasone, Director, Office of Cable Television, and the Board of Public Utilities, Carmen J. Armenti, Commissioner.
Filed: February 27, 1995 as R.1995 d.173, **without change**.

Authority: N.J.S.A. 48:5A-10.
Agency Docket Number: CX 94110523.

Effective Date: March 20, 1995.
Expiration Date: March 21, 1999.

Summary of Public Comments and Agency Responses:
No comments received. A public hearing was held January 30, 1995 before Commissioner Edward H. Salmon, who moved the Board to adopt the proposed amendment. The hearing record may be reviewed by contacting Edward Beslow, Esq., Legal Specialist, Board of Public Utilities, Two Gateway Center, Newark, NJ 07102.

Executive Order No. 27 Statement

The adopted amendment does not contain any standards or requirements which exceed Federal standards because Federal law does not impose specific procedures on state and local rate regulators for obtaining input on proposed basic rate increases from interested parties. By allowing more flexibility and consolidation in scheduling such hearings, it reduces the cost and burdens of redundant hearings while preserving an appropriate level of public input.

Full text of the adoption follows:

14:17-6.17 Tariff filings or petitions which propose increases in charges to customers

(a)-(f) (No change.)

(g) An opportunity for public comment shall be afforded affected subscribers. In the discretion of the presiding hearer, public comment may take the form of a hearing in the service territory or other reasonably convenient location and/or the submittal of written comments, if doing so is in the interest of prompt disposition and judicial economy.

1. The presiding officer shall also have the discretion to combine any public comment hearings to encompass more than one service territory served by a single cable operator or similar rate requests filed by more than one cable operator, if doing so is in the interest of prompt disposition and judicial economy.

2. Notwithstanding the provisions of N.J.A.C. 1:1-14.10(k)6 and (1), interlocutory appeals from a hearer's decision on public comment pursuant to this subsection shall be made to the Board in accordance with the terms of N.J.A.C. 1:1-14.10.

(b)

BOARD OF PUBLIC UTILITIES DIVISION OF ENERGY PLANNING AND CONSERVATION

Technical Sufficiency Standards for Solar Energy Devices or Systems for the Purpose of Qualifying for a Sales and Use Tax Exemption

Readoption with Amendments: N.J.A.C. 14:25

Proposed: January 17, 1995 at 27 N.J.R. 307(c).
Adopted: February 22, 1995 by the Board of Public Utilities, Herbert H. Tate, President, Carmen J. Armenti and Dr. Edward H. Salmon, Commissioners.
Filed: February 23, 1995 as R.1995 d.151, **without change**.

Authority: N.J.S.A. 54:32B-8.33 and 52:27F-11(q).
BPU Docket Number: AX94110550Y.

Effective Date: February 23, 1995, Readoption;
March 20, 1995, Amendments.
Expiration Date: February 23, 2000.

Summary of Public Comments and Agency Responses:

A written comment was submitted to the Board by Steven B. Sanders, Manager, Emerging Technologies, on behalf of Jersey Central Power & Light Company (JCP&L).

COMMENT: As a result of its experience with and commitment to the development of renewable energy and the use of environmentally benign technologies, JCP&L continues to support the sales and tax exemption. In addition, JCP&L indicates its strong support for the development and enforcement of appropriate standards for equipment, construction and maintenance of solar systems as well as qualifications and, where appropriate, licensing of installer/maintainers in line with that of other trades.

RESPONSE: The Board appreciates JCP&L's recognition of the benefits of retaining the tax exemption for qualifying solar energy devices and systems. The Board is of the further opinion that while the comments of JCP&L regarding the development and enforcement of appropriate standards have merit, jurisdiction over construction issues and the licensing of solar contractors resides in the Department of Community Affairs

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and that jurisdiction pertaining to appropriate standards for solar equipment are outside the scope of the subject rules and may be beyond the jurisdiction of this agency. The Board would, however, gladly review any specific proposals that JCP&L may have on those topics that do fall within its jurisdiction.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required in that the rules proposed for readoption with amendments are not subject to any Federal requirements or standards.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 14:25.

Full text of the adopted amendments follows:

14:25-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

"Active system" means a system that converts solar radiation into thermal energy and requires a mechanical distribution system to transfer the thermal energy to the point of use.

. . .

"Distribution system" means that portion of a solar energy system which transfers thermal energy from the point of collection, through pipes or ducts and/or, from the point of collection to end-use, and where applicable, includes a fan and/or pump, reverse flow protection, and an automatic airpurging valve or which transfers electric energy through wires, conduits, inverters and devices required to connect to the utility or user's electric system.

. . .

"Solar energy system" means a system or component thereof that converts solar radiation to thermal or electrical energy.

. . .

14:25-2.1 Eligible solar energy systems

(a) The following solar energy systems shall be eligible for an exemption from sales and use taxes. The exemption shall be for 100 percent of the tax due on the cost unless stated otherwise.

1. Passive and hybrid systems of the following types, provided that the systems generate a net positive gain of thermal energy over the heating season and reduce the gain of thermal energy over the cooling season.

i. Sunspaces and direct gain devices: The following components shall be eligible, provided that the sunspace or direct gain device contains, at a minimum, (a)1i(1) through (5) below:

(1)-(4) (No change.)

(5) Storage devices, including:

(A) Thermal storage walls.

(I) (No change.)

(II) Non-load bearing thermal storage walls shall be eligible for an exemption of the tax due on the cost thereof in accordance with the formula two square feet of wall for every one square foot of south facing glazing, not to exceed the wall area of the sunspace or room in which the direct gain device is located; or

(B) (No change.)

(6)-(7) (No change.)

2.-4. (No change.)

14:25-2.2 Ineligible equipment

(a) The following shall not be considered eligible for an exemption from sales and use taxes:

1. Building insulation used to reduce heat lost through walls, roofs, slabs, and foundations except for insulation required expressly and only for insulating mass storage floors and walls.

2.-8. (No change.)

TRANSPORTATION

(a)

DIVISION OF TRAFFIC ENGINEERING AND LOCAL AID

BUREAU OF TRAFFIC ENGINEERING AND SAFETY PROGRAMS

Speed Limits

Connector Roads "B" and "D" (under State jurisdiction Route U.S. 202, Route U.S. 206 and Route 28) in Bridgewater Township and Raritan Borough in Somerset County

Adopted New Rule: N.J.A.C. 16:28-1.62

Proposed: January 3, 1995 at 27 N.J.R. 46(b).

Adopted: February 22, 1995 by Richard C. Dube, Director, Division of Traffic Engineering and Local Aid.

Filed: February 24, 1995 as R.1995 d.157, **without change.**

Authority: N.J.S.A. 27:1A-5, 27:1A-6, 39:4-98 and 39:4-198.

Effective Date: March 20, 1995.

Expiration Date: May 7, 1998.

Summary of Public Comments and Agency Responses:
No comments received.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because N.J.S.A. 27:1A-1 et seq. governs the subject of this rulemaking, and there is no Federal requirement or standard that affects the subject of this rulemaking.

Full text of the adoption follows:

16:28-1.62 Connector Roads "B" and "D" (under State jurisdiction Route U.S. 202, Route U.S. 206 and Route 28)

(a) The rate of speed designated for the certain part of Connector Roads "B" and "D" (under State jurisdiction Route U.S. 202, Route U.S. 206 and Route 28) described in this subsection shall be established and adopted as the maximum legal rate of speed thereat:

1. In Somerset County:

i. In Bridgewater Township and Raritan Borough:

(1) Connector Road "B":

(A) 35 miles per hour for its entire length for northbound traffic.

(2) Connector Road "D":

(A) 35 miles per hour for its entire length for southbound traffic.

(b)

DIVISON OF TRAFFIC ENGINEERING AND LOCAL AID

BUREAU OF TRAFFIC ENGINEERING AND SAFETY PROGRAMS

Speed Limits

Route U.S. 130 including parts of Route I-295, Route U.S. 30 and Route U.S. 206

East Windsor Township, Mercer County

Adopted Amendment: N.J.A.C. 16:28-1.69

Proposed: January 3, 1995 at 27 N.J.R. 47(a).

Adopted: February 22, 1995 by Richard C. Dube, Director, Division of Traffic Engineering and Local Aid.

Filed: February 24, 1995 as R.1995 d.158, **without change.**

Authority: N.J.S.A. 27:1A-5, 27:1A-6, 39:4-98 and 39:4-198.

Effective Date: March 20, 1995.

Expiration Date: May 7, 1998.

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Summary of Public Comments and Agency Responses:
Comments concerning N.J.A.C. 16:28-1.69 were received by the Department of Transportation from Ms. Janice S. Mironov, Chairperson, Route U.S. 130 Subcommittee of the Hightstown-East Windsor Chamber of Commerce, and from Jeffrey E. Forys of East Windsor, New Jersey.
COMMENT: Ms. Mironov's letters of December 1, 1994 and December 30, 1994 supported the Department of Transportation in lowering the speed limit.
RESPONSE: A letter was sent to Ms. Janice Mironov thanking her for her support on January 10, 1995.
COMMENT: Mr. Forys' letter of December 22, 1994 stated he was opposed to lowering the speed limit.
RESPONSE: A letter was sent to Mr. Forys on January 10, 1995 thanking him for his comment and also explaining that an investigation, which was requested by East Windsor Township, indicated that a speed reduction was warranted along Route U.S. 130.

Executive Order No. 27 Statement
An Executive Order No. 27 analysis is not required because N.J.S.A. 27:1A-1 et seq. governs the subject of this rulemaking, and there is no Federal requirement or standard that affects the subject of this rulemaking.

Full text of the adoption follows:

16:28-1.69 Route U.S. 130 including parts of Route I-295, Route U.S. 30 and Route U.S. 206
(a) The rate of speed designated for State highway Route U.S. 130, including parts of Route I-295, Route U.S. 30 and Route U.S. 206 described in this subsection are established and adopted as the maximum legal rate of speed for both directions of traffic:
1.-4. (No change.)
5. Mercer County:
i. Hamilton Township, Washington Townshp and East Windsor Township:
(1) (No change.)
(2) 50 miles per hour from Hickory Corner Road to Maple Stream Road (approximate mileposts 67.50 to 67.82); thence
(3) 45 miles per hour from Maple Stream Road to Rocky Brook (approximate mileposts 67.82 to 68.90); thence
(4) 50 miles per hour from Rocky Brook to 585 feet north of Birch Lane (approximate milesposts 68.90 to 69.27); thence
(5) 55 miles per hour from 585 feet north of Birch Lane to the East Windsor Township, Mercer County-Cranbury Township, Middlesex County corporate line (approximate mileposts 69.27 to 70.05).
6. (No change.)
(b) (No change.)

(a)

DIVISON OF TRAFFIC ENGINEERING AND LOCAL AID
BUREAU OF TRAFFIC ENGINEERING AND SAFETY PROGRAMS
Restricted Parking and Stopping
Route N.J. 47
City of Millville, Cumberland County
Adopted Amendment: N.J.A.C. 16:28A-1.33

Proposed: January 17, 1995 at 27 N.J.R. 309(a).
Adopted: February 22, 1995 by Richard C. Dube, Director, Division of Traffic Engineering and Local Aid.
Filed: February 24, 1995 as R.1995 d.153, **without change**.
Authority: N.J.S.A. 27:1A-5, 27:1A-6, 39:4-138.1, 39:4-198 and 39:4-199.
Effective Date: March 20, 1995.
Expiration Date: May 7, 1998.

Summary of Public Comments and Agency Responses:
No comments received.

Executive Order No. 27 Statement
An Executive Order No. 27 analysis is not required because N.J.S.A. 27:1A-1 et seq. governs the subject of this rulemaking, and there is no Federal requirement or standard that affects the subject of this rulemaking.

Full text of the adoption follows:

16:28A-1.33 Route 47
(a) The certain parts of State highway Route 47 described in this subsection shall be designated and established as "no stopping or standing" zones where stopping or standing is prohibited at all times except as provided in N.J.S.A. 39:4-139. In accordance with the provisions of N.J.S.A. 39:4-198, proper signs shall be erected.
1. (No change.)
2. In Cumberland County:
i. (No change.)
ii. In the City of Millville:
(1) Along both sides:
(A) (No change.)
(B) Between the southerly curb line of Menantico Avenue and the northerly curb line of Arbutus Avenue (approximate mileposts 38.72 to 38.90).
(2)-(3) (No change.)
iii. (No change.)
3. (No change.)
(b)-(e) (No change.)

(b)

DIVISON OF TRAFFIC ENGINEERING AND LOCAL AID
BUREAU OF TRAFFIC ENGINEERING AND SAFETY PROGRAMS
Restricted Parking and Stopping
Route N.J. 71
City of Asbury Park, Monmouth County
Adopted Amendment: N.J.A.C. 16:28A-1.38

Proposed: January 3, 1995 at 27 N.J.R. 48(a).
Adopted: February 22, 1995 by Richard C. Dube, Director, Division of Traffic Engineering and Local Aid.
Filed: February 24, 1995 as R.1995 d.154, **without change**.
Authority: N.J.S.A. 27:1A-5, 27:1A-6, 39:4-138.1, 39:4-198 and 39:4-199.
Effective Date: March 20, 1995.
Expiration Date: May 7, 1998.

Summary of Public Comments and Agency Responses:
No comments received.

Executive Order No. 27 Statement
An Executive Order No. 27 analysis is not required because N.J.S.A. 27:1A-1 et seq. governs the subject of this rulemaking, and there is no Federal requirement or standard that affects the subject of this rulemaking.

Full text of the adoption follows:

16:28A-1.38 Route 71
(a) The certain parts of State highway Route 71 described in this subsection shall be designated and established as "no stopping or standing" zones where stopping or standing is prohibited at all times except as provided in N.J.S.A. 39:4-139. In accordance with the provisions of N.J.S.A. 39:4-198, proper signs shall be erected.
1.-8. (No change.)
9. No stopping or standing in the City of Asbury Park, Monmouth County:
i. Along both sides:
(1) Between Seventh Avenue and the City of Asbury Park-Borough of Loch Arbour corporate line.

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ii. Northbound on the easterly side:

(1) Between the Neptune Township—City of Asbury Park corporate line and 50 feet north of the northerly curb line of Lake-Springwood Avenues.

(2) Between the northerly curb line of Asbury Avenue and a point 135 feet northerly therefrom.

iii. Southbound on the westerly side:

(1) Between Lake-Springwood Avenues and the City of Asbury Park-Neptune Township corporate line.

(b) The certain parts of State highway Route 71 described in this subsection shall be designated and established as "Time Limit Parking" zones, where parking is prohibited except as specified. In accordance with the provisions of N.J.S.A. 39:4-199, permission is granted to erect appropriate signs at the following established time limit parking zones:

1. In Monmouth County:

i.-ii. (No change.)

iii. In the City of Asbury Park:

(1) Two hours time limit parking between 8:00 A.M. and 6:00 P.M., except Saturdays and Sundays.

(A) Northbound on the easterly side, between a point 100 feet north of the northerly curb line of Lake-Springwood Avenues and Asbury Avenue.

(B) Northbound on the easterly side between a point 135 feet north of the northerly curb line of Asbury Avenue to Seventh Avenue.

(C) Southbound on the westerly side between Seventh Avenue and Lake-Springwood Avenues.

(c) The certain parts of State highway Route 71 described in this subsection are designated and established as "no parking" zones where parking is prohibited at all times. In accordance with the provisions of N.J.S.A. 39:4-199, permission is granted to erect appropriate signs at the following established Loading Zones:

1. No parking—Loading Zone in the City of Asbury Park, Monmouth County:

i. Northbound on the easterly side:

(1) Beginning at a point 50 feet from the northerly curb line of Lake-Springwood Avenues and extending 50 feet northerly therefrom.

(d) (No change.)

(a)

DIVISON OF TRAFFIC ENGINEERING AND LOCAL AID
BUREAU OF TRAFFIC ENGINEERING AND SAFETY PROGRAMS

Restricted Parking and Stopping
Route N.J. 77
Bridgeton City, Cumberland County
Adopted Amendment: N.J.A.C. 16:28A-1.41

Proposed: January 3, 1995 at 27 N.J.R. 49(a).

Adopted: February 22, 1995 by Richard C. Dube, Director, Division of Traffic Engineering and Local Aid.

Filed: February 24, 1995 as R.1995 d.155, **without change**.

Authority: N.J.S.A. 27:1A-5, 27:1A-6, 39:4-138.1, 39:4-198 and 39:4-199.

Effective Date: March 20, 1995.

Expiration Date: May 7, 1998.

Summary of Public Comments and Agency Responses:
No comments received.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because N.J.S.A. 27:1A-1 et seq. governs the subject of this rulemaking, and there is no Federal requirement or standard that affects the subject of this rulemaking.

Full text of the adoption follows:

16:28A-1.41 Route 77

(a) (No change.)

(b) The certain parts of State highway Route 77 described in this subsection shall be designated and established as "no parking bus stop" zones where parking is prohibited at all times. In accordance with the provisions of N.J.S.A. 39:4-199, permission is granted to erect appropriate signs at the following established bus stops:

1. In the City of Bridgeton, Cumberland County:

i. Along the southbound (westerly) side:

(1) Far side bus stops:

(A)-(D) (No change.)

(E) Penn Street—Beginning at the southerly curb line of Penn Street and extending 100 feet southerly therefrom.

(2) Near side bus stops:

(A)-(D) (No change.)

ii.-iii. (No change.)

2.-4. (No change.)

(c)-(f) (No change.)

(b)

DIVISON OF TRAFFIC ENGINEERING AND LOCAL AID
BUREAU OF TRAFFIC ENGINEERING AND SAFETY PROGRAMS

Restricted Parking and Stopping
Route U.S. 206-94
Town of Newton, Sussex County
Adopted Amendment: N.J.A.C. 16:28A-1.58

Proposed: January 3, 1995 at 27 N.J.R. 49(b).

Adopted: February 22, 1995 by Richard C. Dube, Director, Division of Traffic Engineering and Local Aid.

Filed: February 24, 1995 as R.1995 d.156, **without change**.

Authority: N.J.S.A. 27:1A-5, 27:1A-6, 39:4-138.1, 39:4-139, 39:4-198 and 39:4-199.

Effective Date: March 20, 1995.

Expiration Date: May 7, 1998.

Summary of Public Comments and Agency Responses:
No comments received.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because N.J.S.A. 27:1A-1 et seq. governs the subject of this rulemaking, and there is no Federal requirement or standard that affects the subject of this rulemaking.

Full text of the adoption follows:

16:28A-1.58 Route U.S. 206-94[1]

(a) (No change.)

(b) The certain parts of State highway Route U.S. 206-94 described in this section are designated and established as "Time Limit Parking" zones where parking is prohibited at all times. In accordance with the provisions of N.J.S.A. 39:4-199, permission is granted to erect appropriate signs at the following established Time Limit Parking Zones:

1. (No change.)

2. Thirty minute time limit parking in the Town of Newton, Sussex County at all times on:

i. The west side of Route U.S. 206-94 (Water Street) beginning at a point 190 feet south of the southerly curb line of Clinton Street and extending to a point 65 feet southerly therefrom.

(c) The certain parts of State highway Route U.S. 206-94 described in this subsection shall be designated and established as "loading zones." In accordance with the provisions of N.J.S.A. 39:4-139 and 39:4-198, permission is granted to erect appropriate signs at the following established loading zones:

1. In Sussex County:

i. In the Town of Newton:

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(1) Along the westerly side.
(A) Beginning at a point 40 feet south of the southerly curb line of Clinton Street and extending to a point 50 feet southerly therefrom.
[1](No change.)

(a)

DIVISION OF TRAFFIC ENGINEERING AND LOCAL AID
BUREAU OF TRAFFIC ENGINEERING AND SAFETY PROGRAMS
Miscellaneous Traffic Rules
One-Way Designation
Route U.S. 202
Bernardsville Borough, Somerset County
Adopted Amendment: N.J.A.C. 16:30-1.4

Proposed: January 3, 1995 at 27 N.J.R. 50(a).
Adopted: February 22, 1995 by Richard C. Dube, Director, Division of Traffic Engineering and Local Aid.
Filed: February 24, 1995 as R.1995 d.159, **without change**.
Authority: N.J.S.A. 27:1A-5, 27:1A-6, 39:4-85.1, 39:4-183.6 and 39:4-198.
Effective Date: March 20, 1995.
Expiration Date: May 7, 1998.

Summary of Public Comments and Agency Responses:
No comments received.

Executive Order No. 27 Statement
An Executive Order No. 27 analysis is not required because N.J.S.A. 27:1A-1 et seq. governs the subject of this rulemaking, and there is no Federal requirement or standard that affects the subject of this rulemaking.

Full text of the adoption follows:

16:30-1.4 Route U.S. 202
(a) (No change.)
(b) The certain driveways along State highway Route U.S. 202, described in this section, shall be designated as entrances/exits.
1. In Bernardsville Borough, Somerset County:
i. The railroad station (milepost 36.99):
(1) Entrance—the southernmost driveway of the railroad station shall be for entrance only.
(2) Exit—the northernmost driveway of the railroad station shall be for exit only.

(b)

DIVISION OF TRAFFIC ENGINEERING AND LOCAL AID
BUREAU OF TRAFFIC ENGINEERING AND SAFETY PROGRAMS
Lane Usage
Center Lane for Left Turn Only
Route N.J. 154
Cherry Hill Township, Camden County
Adopted New Rule: N.J.A.C. 16:30-3.14

Proposed: January 3, 1995 at 27 N.J.R. 51(a).
Adopted: February 22, 1995 by Richard C. Dube, Director, Division of Traffic Engineering and Local Aid.
Filed: February 24, 1995 as R.1995 d.160, **without change**.
Authority: N.J.S.A. 27:1A-5, 27:1A-6, 39:4-123, 39:4-124, 39:4-183.6, 39:4-198 and 39:4-199.1.
Effective Date: March 20, 1995.
Expiration Date: May 7, 1998.

Summary of Public Comments and Agency Responses:
No comments received.

Executive Order No. 27 Statement
An Executive Order No. 27 analysis is not required because N.J.S.A. 27:1A-1 et seq. governs the subject of this rulemaking, and there is no Federal requirement or standard that affects the subject of this rulemaking.

Full text of the adoption follows:

16:30-3.14 Route N.J. 154
(a) Turning movements of traffic on certain parts of Route N.J. 154, described in this subsection, are regulated as follows:
1. In Camden County:
i. In Cherry Hill Township:
(1) Center lane for left turns only:
(A) Both directions of Route N.J. 154 from a point 110 feet north of the northerly curb line of Haddonfield-Berlin Road (County Road 561) to a point 225 feet south of the southerly curb line of Kresson Road (County Road 671) (approximate mileposts 0.02 to 0.27).

(c)

DIVISION OF TRAFFIC ENGINEERING AND LOCAL AID
BUREAU OF TRAFFIC ENGINEERING AND SAFETY PROGRAMS
Turn Prohibitions
Center Lane for Left Turns Only
Route N.J. 34
Old Bridge Township, Middlesex County
Adopted New Rule: N.J.A.C. 16:30-3.15

Proposed: January 3, 1995 at 27 N.J.R. 51(b).
Adopted: February 22, 1995 by Richard C. Dube, Director, Division of Traffic Engineering and Local Aid.
Filed: February 24, 1995 as R.1995 d.161, **without change**.
Authority: N.J.S.A. 27:1A-5, 27:1A-6, 39:4-123, 39:4-124, 39:4-125, 39:4-183.6, 39:4-198 and 39:4-199.1.
Effective Date: March 20, 1995.
Expiration Date: May 7, 1998.

Summary of Public Comments and Agency Responses:
No comments received.

Executive Order No. 27 Statement
An Executive Order No. 27 analysis is not required because N.J.S.A. 27:1A-1 et seq. governs the subject of this rulemaking, and there is no Federal requirement or standard that affects the subject of this rulemaking.

Full text of the adoption follows:

16:30-3.15 Route 34
(a) Turning movements of traffic on certain parts of State highway Route 34 described below are regulated as follows:
1. In Middlesex County:
i. In Old Bridge Township:
(1) Center lane for left turns only:
(A) Beginning at a point 350 feet south of the centerline of Lexington Circle and extending to a point 550 feet north of the centerline of Canyonwoods Drive (approximate mileposts 23.65 to 23.88).

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TREASURY-GENERAL

(a)

OFFICE OF THE STATE TREASURER
COMMUNITY AFFAIRS; DIVISION OF LOCAL GOVERNMENT SERVICES
DEPARTMENT OF EDUCATION

Collection of Debts

Debts Owed to the New Jersey Higher Education Assistance Authority by State, County, or Municipal Employees

Adopted New Rules: N.J.A.C. 17:25

Proposed: January 17, 1995 at 27 N.J.R. 309(b).

Adopted: February 27, 1995 by the Department of Treasury, John Ekarius, Deputy State Treasurer; Beth Gates, Director, Division of Local Government Services, Department of Community Affairs; The New Jersey Higher Education Assistance Authority, Warren E. Smith, Chairman; Dr. Leo Klagholz, Commissioner, Department of Education.

Filed: February 27, 1995 as R.1995 d.170, **without change.**

Authority: N.J.S.A. 18A:72-23, 24, 25.1-25.6; N.J.S.A. 52:18A-30; 52:27BB-10; 20 U.S.C. §1095a; 34 C.F.R. §682.410(b)(10).

Effective Date: March 20, 1995.

Expiration Date: March 19, 2000.

Summary of Public Comments and Agency Responses:
No comments received.

Executive Order No. 27(1994) Statement

N.J.A.C. 17:25 implements the wage garnishment requirements of 20 U.S.C. §1095a et seq. and contains standards that are the same as those imposed by Federal law.

Full text of the adoption follows:

CHAPTER 25
COLLECTION OF DEBTS

SUBCHAPTER 1. DEBTS OWED TO THE NJHEAA BY STATE, COUNTY, OR MUNICIPAL EMPLOYEES, AND ANY OFFICER OR EMPLOYEE OF A LOCAL BOARD OF EDUCATION, A COUNTY OR MUNICIPAL BOARD OF HEALTH OR AN AUTONOMOUS AUTHORITY CREATED BY A COUNTY OR MUNICIPALITY PURSUANT TO STATUTE AND ANY OFFICER OR EMPLOYEE OF RUTGERS, THE STATE UNIVERSITY, THE UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, AND NEW JERSEY INSTITUTE OF TECHNOLOGY OR ANY PUBLIC AUTHORITY ESTABLISHED PURSUANT TO STATE LAW

17:25-1.1 Purpose

The purpose of this subchapter is to establish a policy and to provide a system whereby the New Jersey Higher Education Assistance Authority (NJHEAA) in conjunction with the Department of Treasury shall cooperate in identifying State, county, or municipal employees, and any officer or employee of a local board of education, a county or municipal board of health or an autonomous authority created by a county or municipality pursuant to statute, and any officer or employee of Rutgers the State University, the University of Medicine and Dentistry of New Jersey, the New Jersey Institute of Technology or any public authority established pursuant to State law who are delinquent in payments to the NJHEAA on any note held pursuant to N.J.S.A. 18A:72-16, 18A:72-23, 18A:72-25.1, 18A:72-25.2, 18A:72-25.3, 18A:72-25.4 and 18A:72-25.5. It is also the intent of this subchapter to establish procedures for deducting from the wages of such State, county, or municipal employees, and any officer or employee of a local board of education, a county or municipal board of health or an autonomous authority created by a county or municipality pursuant to statute, and any officer or employee of Rutgers the State University, the University of Medicine and Dentistry of New Jersey, and New Jersey Institute of Technology or any public authority established pursuant to State law the sum of any such debt owed to the NJHEAA. The procedures contained in this subchapter afford the State, county, or municipal employee and any officer or employee of a local board of education, a county or municipal board of health or any autonomous authority created by a county or municipality pursuant to statute and any officer or employee of Rutgers the State University, the University of Medicine and Dentistry of New Jersey, the New Jersey Institute of Technology or any public authority established pursuant to State law the opportunity to assert any legal rights he or she may have directly related to the deduction from the wages.

17:25-1.2 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings:

"Administrative resolution" means resolving any contested debt due and owing the New Jersey Higher Education Assistance Authority by the administrators of the New Jersey Higher Education Assistance Authority.

"Authority" means the New Jersey Higher Education Assistance Authority created pursuant to N.J.S.A. 18A:72-1 et seq.

"Debt" means any liquidated sum due and owing the Authority which has accrued through any note held by the Authority pursuant to N.J.S.A. 18A:72-16, regardless of whether there is any outstanding judgment for that sum.

"Debtor" means any New Jersey State, county, or municipal employee or any officer or employee of a local board of education, a county or municipal board of health or an autonomous authority created by a county or municipality pursuant to statute and any officer or employee of Rutgers the State University, the University of Medicine and Dentistry of New Jersey, the New Jersey Institute of Technology or any public authority established pursuant to State law on the State, county, municipal, or school district payroll system(s) owing money to or having a note or obligation purchased by the Authority, which obligation has not been adjudicated satisfied by court order, set aside by court order, or discharged in bankruptcy. References to "the debtor" in this subchapter shall include all endorsers or co-signers on a loan.

"Department" means the New Jersey Department of Treasury.

"Disposable pay" means that part of the debtor's compensation from an employer remaining after the deduction of any amounts required by law to be withheld (such as Social Security and Federal and State income taxes).

"Financial officer" means the chief financial officer (or equivalent) of the appropriate county, municipal local unit or school district having authority over the county, municipal or school district payroll system(s).

"Net proceeds deducted" means gross proceeds deducted from a debtor's State, county, municipal or school district payroll checks minus any collection fee charged by the Department or local unit to provide for any expenses of the collection effort.

"Payroll check" means the wages received by New Jersey State, county or municipal employees, any officer or employee of a local board of education, a county or municipal board of health or an autonomous authority created by a county or municipality pursuant to statute and any officer or employee of Rutgers the State University, the University of Medicine and Dentistry of New Jersey, the New Jersey Institute of Technology or any public authority established pursuant to State law paid by the State, county, municipal or school district payroll in return for services provided to the employee's or officer's respective State, county, municipal or school district agency, department, office or the entity using the State, county, municipal or school district payroll system by which the employee or officer is employed.

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17:25-1.3 Procedure for verification of employment

(a) For State employees, the Authority shall notify the Department in writing and supply the Department with a list of persons currently in default on notes held by the Authority. The Department shall notify the Authority of those persons currently in default on notes held by the Authority who are currently receiving wages as New Jersey State employees or officers.

(b) For county and municipal employees, and any officer or employee of a local board of education, a county or municipal board of health or any autonomous authority created by a county or municipality pursuant to statute and any officer or employee of Rutgers the State University, the University of Medicine and Dentistry of New Jersey, the New Jersey Institute of Technology or any public authority established pursuant to State law, the Authority shall notify the financial officer in writing and supply the financial officer with a list of persons currently in default on notes held by the Authority. The financial officer shall notify the Authority of those persons currently in default on notes held by the Authority who are currently receiving wages as county or municipal employees of a local board of education, a county or municipal board of health or an autonomous authority created by a county or municipality pursuant to statute, or as officers or employees of Rutgers the State University, the University of Medicine and Dentistry of New Jersey, the New Jersey Institute of Technology or any public authority established pursuant to State law.

17:25-1.4 Amount of deduction from wages

(a) Unless the debtor provides the Authority with written consent to deduct a greater amount, the amount deducted from any debtor's payroll check shall be the lesser of the following amounts in each pay period:

1. The amount of money permitted by use of the formula set forth at 15 U.S.C. § 1673 of the Consumer Credit Protection Act; or

2. Ten percent of the debtor's disposable pay for the particular pay period from which the deduction is made.

17:25-1.5 Notice to debtor

(a) Within 10 days after the notification to the Authority that the employee or officer is receiving wages from the State, county, municipal or school district payroll system, and at least 30 days before the initiation of the proposed deduction, the Authority shall mail to the debtor's last known address a written notice of the nature and amount of the debt, the intention of the Authority to initiate the proposed deduction, and an explanation of the debtor's rights.

(b) The Authority shall offer the debtor an opportunity to inspect and copy Authority records related to the debt. Upon receiving a request for an inspection, the Authority shall schedule an inspection, at which time the debtor may order copies of requested records for the fee of $10.00.

(c) The Authority shall offer the debtor an opportunity to enter into a written repayment agreement with the Authority under terms agreeable to the Authority.

(d) The Authority shall also advise debtors of the right to request a hearing if they are contesting the amount or existence of the alleged debt, or the terms of their repayment schedule. Requests for a hearing shall be made to the Authority, in writing, on or before the 15th day following the debtor's receipt of the notice described in this section. A debtor shall be considered to have received the notice described in this section five days after it was mailed by the Authority. A request for a hearing shall include a full explanation of the facts justifying said request. Only timely hearing requests, those received by the Authority within 15 days of the date the notice is received, will delay or cancel the initiation of the proposed deduction. The Authority shall not delay the institution of the proposed deduction unless the Authority determines that the delay in filing the request was caused by factors over which the debtor has no control, or the Authority received information that the Authority believes justifies a delay or cancellation of the initiation of the proposed deduction. The Authority will take into consideration such factors as illness, disability and parental leave.

(e) The Authority may not deduct from the wages of a debtor whom it knows has been involuntarily separated from employment until the debtor has been reemployed continuously for at least 12 months.

17:25-1.6 Authority procedure; administrative resolution; hearing

(a) When a debtor makes a timely written request for a hearing on the existence or amount of the debt or the terms of the repayment schedule, the Authority shall schedule an administrative resolution with the debtor, which, at the debtor's option, may be in person or by telephone, in an effort to agree upon the sum asserted as due and owing and any other relevant matters.

(b) Pending the administrative resolution of the debt asserted by the Authority, no action shall be taken in furtherance of collection of that debt through the deduction procedure established by this subchapter.

17:25-1.7 Referral to the Office of Administrative Law; hearing

If administrative resolution efforts in a contested case are unsuccessful, the matter shall be filed forthwith with the clerk of the Office of Administrative Law pursuant to the requirements of the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq. as amended and supplemented and the New Jersey Uniform Administrative Procedure Rules, N.J.A.C. 1:1. The Administrative Law Judge shall issue a final written decision at the earliest practicable date, but not later than 60 days after the Authority's receipt of the debtor's hearing request.

17:25-1.8 Authority Withholding Order

(a) Within 20 days after the debtor fails to make a timely request for a hearing or, if a timely request for a hearing is made by a debtor, within 20 days after the administrative resolution to proceed with the proposed deduction or within 20 days after the final decision in a contested case is made by the Administrative Law Judge to proceed with the proposed deduction, the Authority shall promptly issue a withholding order to the Department or financial officer to begin deductions for the repayment of the debt from the debtor's payroll check.

(b) Upon receipt by the Department or financial officer of a withholding order from the Authority, the Department or financial officer shall make the deduction(s) beginning with the first pay period that occurs after the issuance of a withholding order and transfer the net proceeds deducted for payment to the Authority.

(c) The Authority shall notify the Department or financial officer of any adjustments to be made in the amount of the debt or, if appropriate, inform the Department or financial officer to stop the deductions.

17:25-1.9 Disposition of proceeds collected; administrative fees

(a) Upon effecting deductions, the Department or financial officer shall transfer to the Authority, the net proceeds deducted on its behalf.

(b) From the gross proceeds deducted by the Department or financial officer through deductions, the Department, local unit or school district shall retain one percent, which amount shall be charged to the Authority as an administrative fee.

17:25-1.10 Accounting to the Authority; credit to debtor's obligation

(a) Simultaneously with the transmittal of the net proceeds deducted to the Authority, the Department or financial officer shall provide the Authority with an accounting of the deductions for which payment is being made.

(b) The accounting shall include:

1. The full names of the debtors;

2. The gross proceeds deducted per individual;

3. The net proceeds deducted per individual; and

4. The administrative fee charged per individual.

(c) Upon receipt by the Authority of the net proceeds deducted on the Authority's behalf by the Department or financial officer and an account of the proceeds as specified under this section, the Authority shall credit the debtor's obligation with the gross proceeds deducted.

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TREASURY-TAXATION

(a)

DIVISION OF TAXATION

Corporation Business Tax
Employer Trip Reduction Program Tax Credit
Adopted New Rule: N.J.A.C. 18:7-3.19

Proposed: December 19, 1994 at 26 N.J.R. 4976(a).
Adopted: February 17, 1995 by Richard D. Gardiner, Director, Division of Taxation.
Filed: February 17, 1995 as R.1995 d.148, **with substantive and technical changes** not requiring additional public notice and comments (see N.J.A.C. 1:30-4.2).
Authority: N.J.S.A. 54:10A-27 and 27:26A-15.
Effective Date: March 20, 1995.
Expiration Date: March 14, 1999.

Summary of Public Comments and Agency Responses:
The Department of Transportation expressed concern that the phrase "direct expenditure made after the taxpayer has registered with" the Department of Transportation, as used in proposed N.J.A.C. 18:7-3.19(b) was misleading, and recommended that subsection (b) be rewritten to specify that the taxpayer may only claim a credit for expenditures for providing commuter transportation benefits provided the taxpayer has submitted a compliance plan or a revised compliance plan which includes the expenditures to the Department of Transportation in accordance with N.J.A.C. 16:50. The Division agreed with this recommendation and has amended the rule accordingly.

Executive Order No. 27 Statement
An Executive Order No. 27 analysis is not required because the rulemaking requirements pertaining to tax credits for employee trip reduction programs are governed by N.J.S.A. 54:10A-27 and 27:26A-15, and are not subject to Federal standards.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

18:7-3.19 Employer trip reduction program tax credit
(a) Corporate taxpayers are allowed a credit under N.J.S.A. 27:26A-15 for the cost of commuter transportation benefits provided to employees. See N.J.A.C. 16:50-15 for information on the employer trip reduction program tax credit.
(b) The taxpayer may only claim a credit ***for expenditures*** for providing commuter transportation benefits *[based upon a direct expenditure made after the taxpayer has registered with]* ***provided the taxpayer has submitted a compliance plan or a revised compliance plan which includes the expenditures to*** the Department of Transportation *[as prescribed in N.J.S.A. 27:26A-5]* ***in accordance with N.J.A.C 16:50-15.1 through 15.5*.** For the purposes of verifying eligibility for the credit, the Director of the Division of Taxation will compare the claim with a list of those employers certified by the Commissioner of the Department of Transportation to have registered with the Department of Transportation or have an approved compliance plan or an approved amended compliance plan.
(c) To claim the credit, the taxpayer must complete Form 307 and attach it to the Corporation Business Tax return (Form CBT-100 or CBT-100S) being filed.

OTHER AGENCIES

(b)

ELECTION LAW ENFORCEMENT COMMISSION

Lobbying Fee Schedule
Adopted Amendment: N.J.A.C. 19:25-20.19

Proposed: December 19, 1994 at 26 N.J.R. 4978(a).
Adopted: February 23, 1995 by the Election Law Enforcement Commission, Frederick M. Herrmann, Ph.D., Executive Director.
Filed: February 24, 1995 as R.1995 d.152, **without change.**
Authority: N.J.S.A. 52:13C-23.2.
Effective Date: March 20, 1995.
Expiration Date: October 1, 1995.

Summary of Public Comments and Agency Responses:
Written comments were received as follows:
COMMENT: Phyllis Salowe-Kaye, Executive Director, New Jersey Citizen Action, suggested that the annual fee should be increased only for profit-generating entities, but not for non-profit entities that conduct lobbying.
RESPONSE: The Commission believes that the statutory intention of the Legislative Activities Disclosure Act, N.J.S.A. 52:13C-18 et seq. (hereafter, the Lobbying Act) is that all entities conducting substantial lobbying be required to pay fees without regard to their profit-generating or non-profit status.
The sole exemption from the payment of the annual lobbying fee that the Lobbying Act provides is for an entity that is exempted from payment of sales and use taxes, see N.J.S.A. 52:13C-23j. Under the Sales and Use Tax statute, only an entity that refrains from conducting "substantial" lobbying or candidate-supporting activity can be exempted from sales and use taxes, see N.J.S.A. 54:32B-9(b). Therefore, the Commission concludes that to follow the suggestion that some or all of the lobbying annual fee should be waived or reduced for non-profit entities that are not exempt from sales and use taxes because of substantial lobbying activities would be contrary to the statutory intention.
COMMENT: Russ Chaney, Executive Director, New Jersey Association of Plumbing Heating-Cooling Contractors, Inc., suggested that fees be established on a proportional basis, charging more for agents who lobby for more clients. He also suggested that the filing requirements be reduced to lower the Commission's cost.
RESPONSE: The Commission is not persuaded that it has the statutory authority to remove or substantially reduce filing requirements established in the Lobbying Act, or to establish a scale of fees based on the number of clients a legislative agent represents. In regard to establishing a scale, the Commission notes that a legislative agent representing only a single client may have more transactions to report than a legislative agent with more than one client, and therefore it is not persuaded that the number of clients would be an appropriate basis for such a scale if one were established. Finally, the Commission notes that implementing and administering a scale of fees would ultimately increase the Commission's administrative overhead, and add to the costs of the lobbying program that have to be paid with annual fee revenues.
COMMENT: Vincent Brinkerhoff, Legislative Agent, Veterans of Foreign Wars of the United States, Department of New Jersey, commented that the fee increase was unwarranted.
RESPONSE: The Commission estimates that its cost of administering the lobbying registration and reporting requirements in the current fiscal year will be $200,405. Since there are approximately 600 registered legislative agents, the cost per agent is $334.00. Therefore, the Commission believes that an increase for the annual fee to $325.00 per agent is warranted since there is no other fee imposed to meet the costs of the program.

Executive Order No. 27(1994) Statement
The adopted amendment is not subject to any Federal standards or requirements, and accordingly a Federal exceedance analysis is not applicable to the rulemaking.

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Full text of the adoption follows:

19:25-20.19 Annual fee

(a) Effective August 1, 1995, each legislative agent who is an individual and whose activities during any part of a 12-month period commencing on August 1 and ending on the following July 31 are subject to the Act shall pay an annual fee of $325.00.

(b) In the event that the legislative agent is a partnership, committee, association, corporation, or other organization or group of persons, the annual fee shall be $325.00 for each individual from the partnership, committee, association, corporation, or other organization or group of persons, who is required to wear a name tag pursuant to N.J.A.C. 19:25-20.6.

(c)-(e) (No change.)

(a)

CASINO CONTROL COMMISSION

Gaming Equipment
Rules of the Games
Roulette
Adopted Amendments: N.J.A.C. 19:46-1.7 and 19:47-5.1 through 5.4

Proposed: January 3, 1995 at 27 N.J.R. 57(b).
Adopted: February 23, 1995 by the Casino Control Commission, Bradford S. Smith, Chairman.
Filed: February 27, 1995 as R.1995 d.167, **without change**.
Authority: N.J.S.A. 5:12-5, 69(e), 70(f), 99(a) and 100.
Effective Date: March 20, 1995.
Expiration Dates: April 15, 1998, N.J.A.C. 19:46;
April 15, 1996, N.J.A.C. 19:47.

Summary of Public Comment and Agency Response:

COMMENT: The Division of Gaming Enforcement indicated that it supports the proposal.

RESPONSE: Accepted.

Executive Order No. 27 Statement

An Executive Order No. 27 Statement is not required because the rules contained in this adoption are mandated by the provisions of the Casino Control Act, N.J.S.A. 5:12-1 et seq., and are not subject to any Federal requirements or standards.

Full text of the adoption follows:

19:46-1.7 Roulette table; physical characteristics; double zero roulette wheel used as a single roulette wheel

(a) (No change.)

(b) Each roulette wheel shall be of a single zero variety or a double zero variety as described and depicted below:

1. Each single zero roulette wheel shall have 37 equally spaced compartments around the wheel where the roulette ball shall come to rest. The roulette wheel shall also have a ring of 37 equally spaced areas to correspond to the position of the compartments with one marked zero and colored green and the others marked 1 to 36 and colored alternately red and black which numbers shall be arranged around the wheel as depicted in the following diagram unless otherwise approved by the Commission. The color of each compartment shall either be a corresponding color to those depicted on the ring or a neutral color as approved by the Commission.

2. Each double zero roulette wheel shall have 38 equally spaced compartments around the wheel where the roulette ball shall come to rest. The roulette wheel shall also have a ring of 38 equally spaced areas to correspond to the position of the compartments with one marked zero and colored green, one marked double-zero (00) and colored green, and the others marked 1 to 36 and colored alternately red and black which numbers shall be arranged around the wheel as depicted in the following diagram unless otherwise approved by the Commission. The color of each compartment shall either be a corresponding color to those depicted on the ring or a neutral color as approved by the Commission.

(c) A doube zero roulette wheel may be used as a single zero roulette wheel, provided that:

1. If a double zero table layout is used, the "00" wager area on the layout is obscured with a cover or other approved device which clearly indicates that such a wager is not available; and

2. Appropriate signage is posted at the roulette table to notify players that:

i. (No change.)

ii. If the roulette ball comes to rest in a compartment marked double zero (00), the spin will be declared void and the wheel will be respun; and

iii. (No change.)

(d) Unless otherwise approved by the Commission, the layout of each roulette table shall have the name of the casino imprinted thereon and appear as depicted in the following diagrams according to whether the roulette wheel at such table is a single-zero or double-zero wheel:

Editor's Note: Graphics concerning the single and double zero roulette wheel and table layouts for those wheels were adopted with these rules but are not reproduced herein. Further information on these graphics may be obtained from the Casino Control Commission, Arcade Building, Tennessee Avenue and the Boardwalk, Atlantic City, New Jersey 08401.

(e) Notwithstanding (d) above, if a casino licensee offers an optional wager authorized by N.J.A.C. 19:47-5.1, the layout for that roulette table shall also include, in a manner approved by the Commission, designated areas for the placement of such wagers.

19:47-5.1 Roulette: placement of wagers; permissible and optional wagers

(a) All wagers at roulette shall be made by placing gaming chips or plaques on the appropriate areas of the roulette layout, except that verbal wagers accompanied by cash may be accepted provided that they are confirmed by the dealer and that the cash is expeditiously converted into gaming chips or plaques in accordance with the regulations governing the acceptance and conversion of such instruments.

(b) (No change.)

(c) Each player shall be responsible for the correct positioning of his or her wager on the roulette layout regardless of whether he or she is assisted by the dealer. Each player must ensure that any instructions he or she gives to the dealer regarding the placement of a wager are correctly carried out.

(d) (No change.)

(e) The permissible wagers in the game of roulette shall be:

1. "Straight" is a wager that the roulette ball will come to rest in the compartment of the roulette wheel that corresponds to a single number selected by the player. The player shall select a number by placing a wager within the box on the roulette layout that contains the selected number.

i. A casino licensee may, in its discretion, offer to every player at a roulette table the option to make five simultaneous straight wagers by selecting five adjacent numbers on the roulette wheel.

(1) Any casino licensee offering this "five adjacent number" option shall use an approved roulette table layout that includes a replica of the roulette wheel on the layout.

(2) A player shall make a "five adjacent number" wager by placing five gaming chips or plaques, or a multiple thereof, on the number indicated on the roulette wheel replica that is the center number of the five adjacent numbers being selected. A player making a "five adjacent number" wager shall be deemed to have made a separate "straight" wager of equal value on each of the five numbers selected.

2. "Split" is a wager that the roulette ball will come to rest in a compartment of the roulette wheel that corresponds to either of two numbers selected by the player. The player shall select the numbers by placing a wager on the line between the two boxes on the roulette layout that contain the two selected numbers, except that a split wager on "0" and "00" may also be placed on the line between the "2nd 12" box and the "3rd 12" box.

3. "Three numbers" is a wager that the roulette ball will come to rest in a compartment of the roulette wheel that corresponds to any one of three numbers in a single row on the roulette layout

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selected by the player. The player shall select a row of numbers by placing a wager on the outside line of the box on the roulette layout that contains the first number in the selected row.

i. "Three numbers" shall also include a wager that the roulette ball will come to rest in a compartment of the roulette wheel that corresponds to any one of the three numbers contained in one of the following groups of numbers: "0", "1" and "2"; "0", "2" and "00"; or "00", "2" and "3".

ii. The player shall select one of the "three numbers" wagers identified in (e)3i above by placing a wager on the common corner of the three boxes containing the selected numbers.

4. "Four numbers" is a wager that the roulette ball will come to rest in a compartment of the roulette wheel that corresponds to any one of four numbers in contiguous boxes on the roulette layout selected by the player. The player shall select the four numbers by placing a wager on the common corner of the four boxes containing the selected numbers.

5. "First five numbers" is a wager that the roulette ball will come to rest in a compartment of the roulette wheel that corresponds to any one of the numbers "0", "00", "1", "2" or "3". The player shall bet on the "first five numbers" by placing a wager on the common corner of the boxes on the roulette layout that contain the label "1st 12" and the numbers "0" and "1".

6. "Six numbers" is a wager that the roulette ball will come to rest in a compartment of the roulette wheel that corresponds to any one of six numbers contained in two contiguous rows of numbers on the roulette layout selected by the player. The player shall select the two rows of numbers by placing a wager on the outside common corner of the boxes on the roulette layout that contain the first number in each of the rows being selected.

7. "Column" is a wager that the roulette ball will come to rest in a compartment of the roulette wheel that corresponds to any one of 12 numbers contained in a single column on the roulette layout selected by the player. The player shall select a column of 12 numbers by placing a wager in the box on the roulette layout that is at the bottom of the column being selected.

8. "Dozen" is a wager that the roulette ball will come to rest in a compartment of the roulette wheel that corresponds to any one of 12 consecutive numbers from "1" through "12", "13" through "24", or "25" through "36" selected by the player. The player shall select the 12 numbers by placing a wager in the box on the roulette layout labeled "1st 12" ("1" through "12"), "2nd 12" ("13" through "24"), or "3rd 12" ("25" through "36").

9. "Red" is a wager that the roulette ball will come to rest in any compartment of the roulette wheel that corresponds to a number with a red background on the roulette wheel. The player shall bet on "red" by placing a wager within the red box on the roulette layout used for such wagers.

10. "Black" is a wager that the roulette ball will come to rest in any compartment of the roulette wheel that corresponds to a number with a black background on the roulette wheel. The player shall bet on "black" by placing a wager within the black box on the roulette layout used for such wagers.

11. "Odd" is a wager that the roulette ball will come to rest in any compartment of the roulette wheel that corresponds to an odd number. The player shall bet on "odd" by placing a wager within the box on the roulette layout that is labeled "Odd".

12. "Even" is a wager that the roulette ball will come to rest in any compartment of the roulette wheel that corresponds to an even number. The player shall bet on "even" by placing a wager within the box on the roulette layout that is labeled "Even".

13. "1 to 18" is a wager that the roulette ball will come to rest in a compartment of the roulette wheel that corresponds to any one of 18 consecutive numbers from "1" through "18". The player shall bet on "1 to 18" by placing a wager within the box on the roulette layout that is labeled "1 to 18".

14. "19 to 36" is a wager that the roulette ball will come to rest in a compartment of the roulette wheel that corresponds to any one of 18 consecutive numbers from "19" through "36". The player shall bet on "19 to 36" by placing a wager within the box on the roulette layout that is labeled "19 to 36".

(f) Notwithstanding (e) above, a casino licensee may, in its discretion, offer to every player at a roulette table the option to make a "seven numbers" wager. "Seven numbers" is a wager that the roulette ball will come to rest in a compartment of the roulette wheel that corresponds to any one of the numbers "10", "11", "12", "13", "14", "15" or "33".

1. Any casino licensee offering the "seven numbers" option shall use a roulette table layout approved by the Commission.

2. The player shall bet on "seven numbers" by placing a wager within the area on the roulette layout that is designated for such wager.

19:47-5.2 Roulette: payout odds

(a) No casino licensee, its employees or agents shall pay off winning wagers at the game of roulette at less than the odds listed below:

Bets	Payout Odds
Straight	35 to 1
Split	17 to 1
Three Numbers	11 to 1
Four Numbers	8 to 1
First Five Numbers	6 to 1
Six Numbers	5 to 1
Seven Numbers	4 to 1
Column	2 to 1
Dozen	2 to 1
Red	1 to 1
Black	1 to 1
Odd	1 to 1
Even	1 to 1
1 to 18	1 to 1
19 to 36	1 to 1

(b) When roulette is played on a double zero wheel and the roulette ball comes to rest in a compartment marked zero (0) or double zero (00), wagers on red, black, odd, even, 1 to 18, and 19 to 36 shall not be lost but each player having such a wager shall surrender half the amount on such bet and remove the remaining half. Each casino licensee offering double zero roulette shall provide notice of this rule pursuant to N.J.A.C. 19:47-8.3.

(c) When roulette is played on a single zero wheel and the roulette ball comes to rest in a compartment marked zero (0), wagers on red, black, odd, even, 1 to 18, and 19 to 36 shall be lost.

(d) When roulette is played on a double zero wheel being used as a single zero roulette wheel, as provided in N.J.A.C. 19:46-1.7(c):

1. (No change.)

2. The dealer shall announce "no spin," declare the spin void and respin the wheel if the roulette ball comes to rest in a compartment marked double zero (00); and

3. (No change.)

19:47-5.3 Roulette: rotation of wheel and ball

(a)-(b) (No change.)

(c) Upon the ball coming to rest in a compartment, the dealer shall announce the number of such compartment and shall place a point marker to be known as a "crown" or "dolly" on that number on the roulette layout.

(d) If a casino licensee offers the "five adjacent numbers" wagering option authorized by N.J.A.C. 19:47-5.1, the dealer shall then move one-fifth of each winning "five adjacent numbers" wager from the roulette wheel replica on the layout to the box on the main roulette layout that contains the single number corresponding to the compartment in which the roulette ball came to rest.

(e) After placing the crown on the layout and, if applicable, complying with the provisions of (d) above, the dealer shall first collect all losing wagers and then payoff all winning wagers.

19:47-5.4 Roulette: irregularities

(a) If the ball is spun in the same direction as the wheel, the dealer shall announce "No Spin" and shall attempt to remove the roulette ball from the wheel prior to its coming to rest in one of the compartments.

(b)-(c) (No change.)

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(a)

CASINO CONTROL COMMISSION
Casino Hotel Alcoholic Beverage Control
Conduct of CHAB Licensees
Additional Operating Conditions of CHAB Licensees
Adopted Amendment: N.J.A.C. 19:50-2.2

Proposed: January 3, 1995 at 27 N.J.R. 60(a).
Adopted: February 23, 1995 by the Casino Control Commission, Bradford S. Smith, Chairman.
Filed: February 27, 1995 as R.1995 d.168, **without change.**
Authority: N.J.S.A. 5:12-63c, 69a, 70q and 103.
Effective Date: March 20, 1995.
Expiration Date: December 15, 1998.

Summary of Public Comments and Agency Responses:
COMMENT: The Division of Gaming Enforcement; Marina Associates d/b/a/ Harrah's Casino Hotel, Atlantic City; Trump Taj Mahal Associates d/b/a/ Trump Taj Mahal Casino Resort; and Adamar of New Jersey, Inc. d/b/a/ TropWorld Casino and Entertainment Resort submitted written comments to the Casino Control Commission indicating their support for the proposed amendments.
RESPONSE: Accepted.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the rules contained in this adoption are mandated by the provisions of the Casino Control Act, N.J.S.A. 5:12-1 et seq., and are not subject to any Federal requirements or standards.

Full text of the adoption follows:

19:50-2.2 Additional operating conditions of CHAB licensees
(a)-(c) (No change.)
(d) Combination sales of any kind, consisting of more than one article, whether it be an alcoholic beverage or something else, at a single aggregate price are prohibited, except for:
1.-2. (No change.)
3. A combination sale which is part of a New Year's Eve promotional package.
(e)-(h) (No change.)

(b)

CASINO CONTROL COMMISSION
Casino Simulcasting
Supervisor of Mutuels and Verifiers
Adopted Repeals: N.J.A.C. 19:55-9.3, 9.4 and 9.5
Adopted Amendment: N.J.A.C. 19:55-9.1
Adopted Recodification with Amendment: N.J.A.C. 19:55-9.6 as 19:55-9.3

Proposed: January 3, 1995 at 27 N.J.R. 60(b).
Adopted: February 23, 1995 by the Casino Control Commission, Bradford S. Smith, Chairman.
Filed: February 27, 1995 as R.1995 d.169, **without change.**
Authority: N.J.S.A. 5:12-69(a), 70(j), 193 and 210.
Effective Date: March 20, 1995.
Expiration Date: January 19, 1998.

Summary of Public Comment and Agency Response:
COMMENT: The Division of Gaming Enforcement has no objection to the adoption of the proposed repeals and amendments as published.
RESPONSE: Accepted.

Executive Order No. 27 Statement

An Executive Order No. 27 analysis is not required because the rules contained in this adoption are mandated by the provisions of the Casino Control Act, N.J.S.A. 5:12-1 et seq., and are not subject to any Federal requirements or standards.

Full text of the adoption follows:

19:55-9.1 Supervisors of Mutuels
A Supervisor of Mutuels shall be present at a hub facility at all times when casino simulcasting is being conducted. The Supervisor of Mutuels shall be an employee or designee of the Racing Commission whose compensation shall be reimbursed to the Racing Commission by the hub facility, or, if a designee, paid directly by the hub facility. If a Supervisor of Mutuels is not an employee of the Racing Commission, he or she shall be licensed as a casino key employee.

19:55-9.3 Continued access to hub facility by Racing Commission
The Racing Commission, its employees and agents shall at all times have access to the hub facility in order to maintain the integrity of horse racing and, together with the Commission and Division, to effectuate the purposes of the Casino Simulcasting Act.

ENVIRONMENTAL PROTECTION

(c)

DIVISION OF PARKS AND FORESTRY
State Trails System
Adopted New Rules: N.J.A.C. 7:5D

Proposed: April 4, 1994 at 26 N.J.R. 1459(a).
Adopted: February 16, 1995 by Robert C. Shinn, Jr., Commissioner, Department of Environmental Protection.
Filed: February 17, 1995 as R.1995 d.147, **with substantive changes** not in violation of N.J.A.C. 1:30-4.3.
Authority: N.J.S.A. 13:1B-3; 13:1D-9; 13:8-30 et seq.; 13:8B-1 et seq.; and L.1975, c.367.
DEP Docket Number: 17-94-03/267.
Effective Date: March 20, 1995.
Expiration Date: March 20, 2000.

Summary of Public Comments and Agency Responses:
On April 4, 1994, the Department of Environmental Protection (Department) proposed new rules at 26 N.J.R. 1459(a) in order to implement the New Jersey Trails System Act, N.J.S.A. 13:8-30 et seq. The new chapter was proposed to establish standards, procedures and practices for designating and maintaining trails as part of the State Trails System created by the Act.
Secondary notice of the proposal was provided through publication of legal notice in the Asbury Park Press, the Newark Star Ledger, the Trenton Times, and the Courier-Post.
The Department received 136 written comments from 149 commenters during the public comment period ending on May 4, 1994. The list of commenters follows:
1. Mary Andersen
2. Jill H.G. Arbuckle
3. Richard B. Barrett
4. Geraldine T. Barton
5. William H. Barton
6. Marilyn Beard
7. Michael Bender
8. Andrew Benesch, NJ Chapter, Sierra Club
9. Lud C. Bohler, Sierra Club New Jersey Chapter Outings Committee
10. Harry F. Bott
11. Alson D. Bradley, Appalachian Mountain Club
12. Charlotte Brinstein
13. James Bullwinkel
14. Susan Bullwinkel
15. Mary Anne Butler
16. George H. Byrne
17. Eric Calder
18. Daniel D. Chazin
19. Herman H. Clausen
20. Martin Cohen

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21. Peter H. Craig
22. Jayne Danco
23. Jeff Danco
24. Alan K. Dennison
25. Robert S. Denzau
26. Mary Derstine and Family
27. Jennifer Devlin
28. Dennis Dillon, Point Mount Carpentry
29. Donald B. Dyson
30. Steve Ember
31. Michael Engel
32. Jean Ferris
33. Janice Ford
34. Peter Ford
35. Allan Frei
36. Richard O. Gammon
37. Ronald Geredien
38. Albert Gorlicki
39. Coralyn Gorlicki, University Outing Club
40. Robert S. Gorman
41. Donald A. Green
42. Martin Green
43. Stella Green
44. Philip M. Greenberg
45. John D. Grob
46. William A. Hand
47. Peter Heckler
48. Rita Heckler
49. Mark Hillringhouse
50. Gerard W. Hoekstra, Jr.
51. Ellen Holt
52. Robert J. Jonas, Greenbrook Electronics
53. Jane Jorgensen
54. Keir Jorgensen
55. Casey Kays
56. James J. Kennedy, Mayor, City of Rahway
57. Mike Kernahan
58. Charles Kientzler, Interstate Hiking Club
59. Kevin Knobloch, Appalachian Mountain Club
60. Anita Krauth
61. Ronald Krauth
62. Steve Lahet
63. Robert Lander
64. Betty Anne Lane
65. Peter Lane
66. William P. Lee
67. Dean Leistikow
68. Kathleen Leistikow
69. Cass R. Lewart
70. Ruth Lewart
71. George Li, Chinese Mountain Club of New York
72. Marc Liebeskind
73. Kenneth W. Lloyd
74. Gregory Ludwig
75. Frieda Luxenberg
76. Larry Luxenberg
77. Marvin Marcus, Woodland Trail Walkers, Inc.
78. Richard Martinez
79. Heiko Mauermann
80. Richard Maxfield
81. John E. McRae
82. Dennis McRitchie
83. Jim Mehnert
84. Jennifer Melville, Appalachian Mountain Club
85. Robert W. Messerschmidt
86. Karen A. Mosher
87. Robert Moss
88. Loren S. Muldowney
89. Robert L. Munschauer
90. Hugh H.D. Murray
91. Robias Namenson
92. Harold Nestler
93. Laura Newgard, Ecolsciences, Inc.
94. Robert L. Newton, New York-New Jersey Trail Conference
95. George P. Nimmo
96. Lee Nuuvally, North Jersey Chapter Adirondack Mountain Club
97. Joachim Oppenheimer, North Jersey Chapter Adirondack Mountain Club
98. Jim Palmer
99. Alexander S. Parr, Jr.
100. O. Bartlett Pendergast and Family
101. Steven Petshaft
102. J.E. Pruden
103. Karla H. Risdon, Weiss Ecology Center
104. John Q. Robinson, Jr., Township of Vernon
105. Jonathan S. Rosenberg, Newark Watershed Conservation and Development Corporation
106. Joshua Rubinstein
107. Joan J. Salzberg
108. Joseph L. Schachtele
109. Paul Schickler
110. Helmut Schneider
111. Dennis Schvejda
112. Jerrold P. Schwartz
113. Bruce Scofield
114. Dorothy T. Senior
115. George J. Shellowsky
116. J. Kenneth Sieben
117. Martin Silver, Pep Company
118. Peggy Smith, Rutgers University Outing Club
119. Scott D. Stanford
120. Marguerite N. Stanley
121. Donald P. Steig
122. Phyllis A. Stewart
123. Dorethea K. Stillinger
124. Fred Stoller
125. Robyn Stoller
126. Jeremy Strauss, Sierra Club, Raritan Valley Group
127. William Sussman
128. David Sutter
129. Paul Tarlowe
130. Francis Taylor
131. Betsy Thomason, Adventures for Women, Inc.
132. Althea S. Thornton
133. Wally Tunison, NJ Cycling Conservation Club
134. Glen Umland
135. Harold Unger
136. Marianne Van Blarcom
137. James Van Blarcom
138. Geoffrey L. Vincent, AMC New York-North Jersey Trails
139. Matthew L. Visco
140. Langdom A. Wagner, Jr.
141. John G. Waltz, Coalition of New Jersey Cyclists
142. Todd Watts
143. Larry Wehr
144. Patrick G. Welsh
145. Richard Wolff
146. David Young
147. Virginia B. Young
148. Hugh Neil Zimmerman, New York-New Jersey Trail Conference
149. Commenter name illegible

The written comments, timely submitted, and the Department's responses are summarized below. The number(s) in parentheses following each comment identifies the commenter(s) listed above.

1. COMMENT: One hundred forty-five commenters objected to proposed N.J.A.C. 7:5D-5.2(a)4, which stated as one of the criteria to be considered for the designation of trails to the State Trails System that "[t]rails which can accommodate more than one type of trail use are preferred to those which can support only a single use." In general, the commenters were concerned that under the proposed criterion trails which are currently used as foot trails would be changed upon designation to the State Trails System to allow other uses such as mountain biking, horseback riding, and motorized use. The objections to preferring multiple trails for designation to the State Trails System included environmental concerns, safety concerns and user conflicts (including management, enforcement, liability and volunteer maintenance problems). In addition, many commenters expressed the concern that use of the proposed criterion would decrease the value of the outdoor experience of trails designated to the State Trails System.

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Many commenters suggested that instead of adoptiong N.J.A.C. 7:5D-5.2(a)4 as proposed, the Department should designate only separate single use trails to the State Trails System. Other commenters suggested that a preference for multiple use trails designated to the system was not always appropriate or that multiple use trails should be encouraged where appropriate rather than preferred. Although some comments were directed at the designation of trails to the State Trails System in general, others were directed at specific trails to be designated to the State Trails System.

Those commenters who supported the designation of multiple use trails to the State Trails System suggested that the Department should require them to be designated along corridors such as woods roads and abandoned railroad right-of-way, and that the State should cooperate with other public and private organizations to develop multiple use trails in appropriate areas. (1-120, 122-128, 130-148)

RESPONSE: The Department believes that the majority of commenters objecting to the multiple use criterion, proposed N.J.A.C. 7:5D-5.2(a)4, have taken this criterion out of context and have thus misconstrued the purpose and intent of this criterion and the proposed rules. **The Department did not propose this criterion as a means for opening up established single-use hiking trails to horseback riding, biking or use by motorized vehicles,** and did not state this intention anywhere in the proposal. Rather, the Department intended proposed N.J.A.C. 7:5D-5.2(a)4 to be only one of seven criteria to be considered by persons proposing designation of trails, the Department, and the general public in determining whether or not a trail is suitable for inclusion in the State Trails System.

Under the designation procedure at proposed N.J.A.C. 7:5D-5, a trail must satisfy one of the public ownership or public access criteria at proposed N.J.A.C. 7:5D-5.1 in order to be eligible for designation to the State Trails System. Then, the suitability of a trail for designation to the System is to be evaluated under the seven criteria at proposed N.J.A.C. 7:5D-5.2. A written analysis of how the trail is (or is not) suitable for designation under these criteria to be submitted to the Department by the person proposing designation of the trail. Proposed N.J.A.C. 7:5D-5.3(a)5. The entire trail designation proposal will be reviewed by the Department and the Trails Council, and a determination will be made whether to designate the trail to the State Trails System. Proposed N.J.A.C. 7:5D-5.3(c) and (d). If the Department decides that a trail is suitable for designation, public notice of and the opportunity to comment on the proposed designation and the proposed designated uses of the trail will be provided through rulemaking. See proposed N.J.A.C. 7:5D-5.3(d)1. At that time, every concerned person will have the opportunity to comment on whether the uses proposed by the Department as the official designated uses of the trail are suitable uses and/or consistent with current uses and management of the trail.

In the context of this procedure, the purpose of proposed N.J.A.C. 7:5D-5.2(a)4 is simply to require the person proposing the designation of a trail to inform the Department whether the trail, **as currently administered,** is a single use or multiple use trail. Requiring this information as part of the suitability determination is consistent with N.J.S.A. 13:8-36 and 13:8-38, both of which direct the Department to develop and manage each segment of the State Trails System "to harmonize with and complement any **established multiple-use plans** for that specific area in order to insure continual maximum benefits from the land." (Emphasis supplied.) This policy recognizes that since New Jersey is densely populated, there may not be enough public open space to develop and designate all of the separate single-use trails that will be needed to accommodate the State population's demand for recreational trails.

Although the State Trails Act directs the Department to maximize the public benefits of the State Trails System by respecting established multiple-use plans, this does not necessarily mean that all trails designated to the System must have more than one use. In fact, the Act presumes that designated scenic trails will be limited to foot travel unless the Department determines that their use for horseback riding or by nonmotorized bicycles is appropriate. N.J.S.A. 13:8-33. As an example, the Act establishes the Appalachian Trail as the initial scenic trail component of the State Trails System, to be administered by the Department primarily as a footpath. N.J.S.A. 13:8-35. Moreover, in designating to the System a group of trails from one area, such as a State park, one or all may have separate uses yet collectively the System will be multiple use. Thus, the rules are written to allow flexibility in determining whether trails are suitable for designation to the State Trails System.

In proposing a preference for multiple-use trails as a criterion for evaluating the suitability of a trail for designation to the State Trails System, the Department did not intend to minimize the significance of single-use trails. Rather, given the limited resources that will be available for administering the State Trails Systems, the Department recognized that maximizing the benefits of the System for all State residents may sometimes mean choosing multiple-use trails for designation over single-use trails. For example, if the Department only has the administrative or financial resources in a given fiscal year to designate one trail to the System, and if two trail designations are proposed which are equally suitable for designation under the other six criteria at proposed N.J.A.C. 7:5D-5.2(a) but which differ on the multiple-use criterion, the Department intends to designate the multiple-use trail to the System first. This would not preclude designation of the single-use trail in the future, nor would this approach mean that multiple-use trails will always be preferred for designation over single-use trails, depending on each trail's suitability under the other six criteria.

In order to clarify the original intent of proposed N.J.A.C. 7:5D-5.2(a)4, the Department has amended this section upon adoption to read as follows:

4. Multiple use: Trails which are managed in a safe and environmentally protective manner to accommodate more than one type of trail use are preferred for designation to those which can support only a single use.

The specific management issues raised by the commenters with regard to converting single-use trails to multiple-use trails, such as user conflicts, increased liability, volunteer maintenance, illegal use and enforcement, are not within the scope of the current proposal. Accordingly, such issues must be addressed as they arise by the administering agency responsible for managing each trail designated to the State Trails System.

Since the Department does not intend to change the established uses of single-use trails through the designation procedure, it disagrees with the commenters' assertion that implementation of N.J.A.C. 7:5D-5.2(a)4 as proposed will decrease the value of the outdoor experience to persons using trails designated to the State Trails System.

Finally, given the wide variety of trails and potential trail locations throughout the State, the Department does not believe that it is necessary to limit the designation of multiple-use trails to corridors such as woods roads and abandoned railroad rights-of-way. However, as suggested by the commenters, the State fully intends to cooperate with other public and private organizations to develop multiple use trails in appropriate areas.

2. COMMENT: Three commenters suggested that the Trails Council, the citizen's advisory board to the State governed by proposed N.J.A.C. 7:5D-2, does not give proportional representation to trail user groups, and, therefore, does not adequately represent hikers. (3, 96, 123)

RESPONSE: In order to have the broadest possible perspective on the State's trail needs, the Trails Council is composed of representatives of a wide variety of user and interest groups, including hiking. In this manner, issues affecting trails throughout the State may be examined from different perspectives with no single interest dominating.

3. COMMENT: The Department should allow local outdoors clubs to survey trail use in their areas and to make recommendations for trail use. The commenter suggested that the results of these surveys could be used as a basis for trail designation and funding recommendations. The commenter believed that in this way many outdoor constituents would be represented. (123)

RESPONSE: Under proposed N.J.A.C. 7:5D-5.3(a) any private organization or person, including local outdoor clubs, may submit to the Department a proposal for the designation of a trail to the State Trails System. Therefore, the proposed rules would allow, but would not require, local outdoor clubs to survey trail use in their areas and to make recommendations for trail use. In addition, local outdoors clubs are always welcome to make recommendations for trail designation and trail funding directly to the Trails Council, the official advisory group to the State on trail issues governed by proposed N.J.A.C. 7:5D-2. Therefore, the Department believes that the rules as proposed already address the commenter's concerns.

4. COMMENT: The Department should prohibit smoking on trails designated to the State Trails System. (72)

RESPONSE: The proposed rules establish standards, procedures and practices for designating and maintaining trails as part of the State Trails System. Although N.J.S.A. 13:8-42 authorizes the Department to promulgate rules for the protection, management and administration of the State Trails System, the Department does not believe that there is sufficient justification at this time for regulating personal behavior on designated trails in the manner suggested by the commenter.

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5. COMMENT: A fourth class of trail, Non-motorized Transportation Trail, should be added to the proposed rules. (141)

RESPONSE: The classes of trails listed in proposed N.J.A.C. 7:5D-4.1 were established by the New Jersey Trails System Act. See N.J.S.A. 13:8-33.

6. COMMENT: Proposed N.J.A.C. 7:5D-5.2(a)5 is too vague and subjective. The commenter believed that instead of considering trail development and maintenance costs as a criterion for designation to the State Trails System, the Department should weigh other factors such as maximum capital cost per foot, length of improvement, availability of alternate routes, and potential levels of use. In addition, the commenter also suggested that the Department identify minimum trail design and construction standards because he believed that without standards unsafe trails would be developed. (141)

RESPONSE: As discussed in detail in response to Comment 1 above, the proposed rules establish general criteria to be considered in evaluating the suitability of a trail for designation to the Trails System. These criteria include consideration of development and maintenance costs, proposed N.J.A.C. 7:5D-5.2(a)5, which could encompass the factors suggested by the commenter as well as other factors as appropriate. Since these are relative, not absolute criteria, the Department disagrees with the commenter's assertion that N.J.A.C. 7:5D-5.2(a)5 as proposed is too vague and subjective.

Since the Department currently does not have any information upon which to conclude that minimum trail design and construction standards are needed to protect public safety or the environment, it has not included such minimum standards in these rules.

7. COMMENT: The Department should delay adoption of proposed N.J.A.C. 7:5D until after the updated Trails Plan becomes available for public scrutiny and comment. (21)

RESPONSE: As discussed in the proposal, the New Jersey Trails Plan was not authorized by the New Jersey Trails System Act, but was the subject of separate legislation (P.L.1975, c.367). The Trails Plan was completed in 1982 and consists of a comprehensive inventory of existing trails on public lands and the potential for future trails; an analysis of present and future trails needs; an analysis of legal, social and policy issues affecting trails resources. See 26 N.J.R. 1459(a). The Trails Plan also contains a number of administrative, legislative and policy recommendations for establishing and maintaining the State trails system, improving existing trails, and acquiring and developing new trails, and on the respective roles of the State, counties and municipalities in developing, designating and maintaining trails. In particular, the Trails Plan recommends designation of several existing or proposed trails as initial components of the Statewide trails system.

Although the Department is currently working with the Trails Council on updating the Trails Plan, the update is not expected to change substantially any of the trails policies upon which the proposed rules are based. Moreover, without these rules, the Department will not be in a position to implement any of the recommendations in the Trails Plan (or the update) for designating trails to the State Trails System. Therefore, the Department believes that the adoption of the rules at this time is appropriate and timely.

8. COMMENT: In referring to the designation of single use trails, one commenter questioned why Green Acres funds are not used to preserve more open space. (149)

RESPONSE: Green Acres funds are used for a variety of open space preservation and recreation projects, including land acquisition for trail use. In particular, the New Jersey Trails System Act authorizes the Department to use the proceeds from the 1971 Green Acres Bond issue and "such other sums as may be appropriated for like purposes" to acquire land or land interests to further the purposes of the State Trails System. See N.J.S.A. 13:8-44. However, each year the Department is faced with more requests for funding of open space and recreation projects than it can satisfy from its annual appropriations of Green Acres and other land acquisition funds. Further information on the acquisition of open space under the Green Acres program may be obtained by calling (609) 588-3450.

Summary of Agency-Initiated Change:

As discussed in the response to Comment 1 above, the Department has amended N.J.A.C. 7:5D-5.2(a)4 upon adoption to clarify that the original intent of this section was not to convert single-use trails to multiple-use trails as part of the process of designating trails to the State Trails System.

Executive Order No. 27 Analysis

Executive Order No. 27(1994), which became effective on January 2, 1995, was issued by Governor Whitman to prevent unnecessary State regulation in areas that are already regulated by the Federal government. In order to comply with Executive Order No. 27, administrative agencies which adopt, readopt or amend State regulations that exceed any Federal standards or requirements are required to include a comparison with Federal law.

As discussed in detail in the Summary of proposed N.J.A.C. 7:5D (see 26 N.J.R. 1459(a)), the purpose of these rules is to implement the New Jersey Trails System Act, N.J.S.A. 13:8-30 et seq. (State Trails Act). Under the State Trails Act, the Department is authorized to designate scenic, recreation and connecting trails for inclusion in the State Trails System. The State Trails Act requires the Department, in consultation with appropriate Federal, State and local governmental agencies and private organizations, to establish a uniform marker for the State Trails System and to coordinate the State Trails System with the National trails system "established under applicable provisions of Federal law." N.J.S.A. 13:8-34. Under N.J.A.C. 7:5D-7 (adopted herein), projects receiving Department funding must minimize potential impacts on the rights-of-way of designated trails.

The National trails system was established under the National Trails System Act, 16 U.S.C. §§1241 to 1251, and is administered by the National Park Service. The National trails system consists of four types of trails: scenic, recreational, historic and connecting. 16 U.S.C. §1242. National scenic and historic trails are authorized and designated by Act of Congress. 16 U.S.C. §1242 and §1244. Recreational and connecting trails are designated by either the Secretary of Interior or the Secretary of Agriculture (for those trails on lands administered by the U.S. Forest Service). 16 U.S.C. §1242 and §1243. The National trails system has a uniform marking system, displayed at trailheads and other primary access points. 16 U.S.C. §1242.

In New Jersey, there are five trails included in the National Trails System: the Appalachian Trail, Patriot's Path in Morris County, the Long Path and the Shore Trail in Palisades Interstate Park, and the Delaware and Raritan Canal State Park. Under N.J.S.A. 13:8-35(b), the Appalachian Trail is also established as the initial scenic trail component of the State Trail System.

Although there may be certain trails (such as the Appalachian Trail) which may qualify for and attain designation to both the National and State Trails System, there are several reasons why it is unlikely that the adoption of these rules will lead to a duplication of effort in Federal and State trails management. First, under N.J.A.C. 7:5D-5.1(a)3, the only way a trail owned by the Federal government can qualify for designation to the State Trails System is if there is a written cooperative agreement between the Department and the Federal government designating land or water areas for trail purposes. In such circumstances, management of the trail is likely to be specified in advance in a manner that avoids duplication of effort. Second, as a practical matter, the Department is not likely to expend general program funds to designate and administer trails that are already adequately managed by the Federal government since neither the State Trails Act nor these rules contain any funding mechanism. Finally, although the State Trails Act authorizes the Department to adopt rules for the use, protection, management, development and administration of the State Trails System, the only regulatory restrictions currently imposed by N.J.A.C. 7:5D apply to projects which receive Department funding.

Based on the above, it is the Department's determination that adoption of these rules will not exceed applicable Federal standards or requirements. As currently structured, the State Trails System and National Trails System are intended to be an interlocking network of trails of State and national significance, administered with all practicable cooperation between the State and Federal government. Moreover, the Department believes that the adoption of N.J.A.C. 7:5D will not impose any substantive regulatory requirements in areas already regulated by Federal law.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

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CHAPTER 5D
STATE TRAILS SYSTEM

SUBCHAPTER 1. GENERAL PROVISIONS

7:5D-1.1 Purpose and scope

This chapter constitutes the rules of the Department concerning the implementation of the New Jersey Trails System Act, N.J.S.A. 13:8-30 et seq. This chapter establishes standards, procedures and practices for designating and maintaining trails as part of the State Trails System, in order to provide for the ever-increasing outdoor recreation needs of an expanding population and to promote public access to, travel within, and enjoyment and appreciation of the outdoor, natural and remote areas of the State. Designation of trails to the System is intended to help preserve the natural, recreational, ecological, geological, historic and cultural qualities of trails and the areas through which they pass; to increase open space and recreational opportunities; and to enhance the quality of life in New Jersey for all State residents and visitors.

7:5D-1.2 Construction

This chapter shall be liberally construed to permit the Department to effectuate the purposes of the New Jersey Trails System Act, N.J.S.A. 13:8-30 et seq.

7:5D-1.3 Severability

If any subchapter, section, subsection, provision, clause or portion of this chapter, or the application thereof to any person, is adjudged unconstitutional or invalid by a court of competent jurisdiction, such judgment shall be confined in its operation to the subchapter, section, subsection, provision, clause, portion or application directly involved in the controversy in which such judgment is rendered and shall not affect or impair the validity of the remainder of this chapter or the application thereof to other persons.

7:5D-1.4 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

"Act" means the New Jersey Trails System Act, N.J.S.A. 13:8-30 et seq.

"ADA" means the Americans with Disabilities Act, 42 U.S.C. §12101 et seq.

"Administering agency" means (1) any agency of the Department that is assigned responsibility for managing a particular parcel of land, or (2) any Federal agency, State department, local unit or charitable conservancy that establishes a land management policy for a particular parcel of land included in a designated State trail.

"Charitable conservancy" means a corporation or trust whose purposes include the acquisition and preservation of land or water areas, or of a particular land or water area, or either thereof, in a natural, scenic or open condition, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and which has received tax exemption under section 501(c)3 of the Internal Revenue Code.

"Commissioner" means the Commissioner of the Department or his or her designated representative.

"Conservation restriction" means an interest in land less than fee simple absolute, stated in the form of a right, restriction, easement, convenant, or condition, in any deed, will or other instrument, other than a lease, executed by or on behalf of the owner of the land, appropriate to retaining land or water areas predominantly in their natural, scenic or open or wooded condition, or for conservation of soil or wildlife, or for outdoor recreation or park use, or as suitable habitat for fish or wildlife, executive for the purposes listed at N.J.S.A. 13:8B-2(b).

"Council" means the New Jersey Trails Council.

"Department" means the New Jersey Department of Environmental Protection and Energy, its successors and assigns.

"Division" means the Division of Parks and Forestry in the Department.

"Local unit" means a municipality, county or other political subdivision of the State or agency thereof.

"New Jersey Trails Council" means the advisory board established by the Department and authorized by L. 1975 c.367, to undertake a study and prepare a plan for a coordinated system of trails throughout the State, and continued by the Department for the purpose of providing public input into the administration of the State Trails System.

"Scenic easement" means a perpetual easement in land which (1) is held for the benefit of the public, (2) is specifically enforceable by its holder or beneficiary, and (3) limits or obligates the holder of the servient estate and his or her heirs and assigns with respect to their use and management of activities conducted thereon, the object of such limitations and obligations being the maintenance or enhancement of the natural beauty of the land in question or of areas affected by it.

"State Trails System" or "System" means the statewide system of individual trails or group of trails authorized by the Act and designated pursuant to this chapter.

"Trail facility" means any area, structure or equipment that functions to provide a service to the trail user, including, but not limited to, parking lots, picnic areas and rest rooms.

"Trail right-of-way" means a road, path, or water body and adjacent land, under the jurisdiction of an administering agency and designated for public trail access pursuant to this chapter.

"Trails Plan" means the plan for a coordinated system of trails throughout the State authorized by L. 1975, c.367, as updated.

SUBCHAPTER 2. NEW JERSEY TRAILS COUNCIL

7:5D-2.1 New Jersey Trails Council

(a) The New Jersey Trails Council shall advise the Department on the designation of trails to the State Trails System and the management of the State Trails System.

(b) The Council shall consist of representatives from trail user groups, outdoor recreation and conservation organizations, and State governmental agencies. Members of the Council representing trail user groups and outdoor recreation and conservation organizations shall be appointed by the Commissioner and shall serve for a period of three years from the date of appointment and until their successors are duly appointed. Members of the Council representing State governmental agencies shall serve as ex-officio members, and shall be appointed by the Commissioner of their respective departments.

(c) The Council shall:

1. Provide a forum for the public to discuss issues related to the designation and management of the State Trails System or the contents of the Trails Plan;

2. Advise the Department on the establishment, development, and maintenance of scenic, recreation and connecting trails on lands owned by the Department;

3. Advise the Department on the trail development potential of proposed State acquisitions;

4. Review proposals for trail designation submitted by Federal or State agencies, local units, private organizations or persons and advise the Department on such proposals;

5. Periodically evaluate the Trails Plan and advise the Department on additions, deletions, and modifications;

6. Review trail proposals and funding allocations consistent with any Federal requirements for trail acquisition and management, and advise the Department on the results of its review; and

7. Encourage the development of trails throughout the State and provide information to the State and the public on trails issues of Statewide interest.

SUBCHAPTER 3. LAND ACQUISITION FOR TRAILS

7:5D-3.1 Land acquisition for trails

(a) The Department, with the advice of the Council, may acquire interest in land for trails purposes in fee simple, or by conservation restriction or scenic easement, through purchase, donation or exchange.

(b) The Department shall review for trails acquisition potential all formal declarations of railroad right-of-way abandonments by the Interstate Commerce Commission or other Federal agencies.

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SUBCHAPTER 4. CLASSES OF TRAILS

7:5D-4.1 Classes of trails

(a) The State Trails System is composed of the following classes of trails:

1. Scenic trails;
2. Recreation trails; and
3. Connecting trails.

7:5D-4.2 Scenic trails

(a) Scenic trails are designated to the State Trails System to provide the public with the opportunity for the appreciation of natural and cultural areas, and to facilitate the conservation and enjoyment of significant scenic, historic, natural, ecological, geological or cultural areas through which such trails pass.

(b) The Department shall specify the uses of scenic trails upon their designation to the State Trails System. Such uses shall be limited to non-motorized recreational uses. The Department may allow segments of scenic trails to be used for hiking, canoeing, horseback riding, bicycling, and/or ski touring, as appropriate.

(c) Scenic trails must be five miles or longer in length, but a scenic trail may consist of segments or components of a group of trails totalling five miles or more.

7:5D-4.3 Recreation trails

(a) Recreation trails are designated to the State Trails System to provide the public with the opportunity for a variety of outdoor recreational uses.

(b) The Department shall specify the uses of recreational trails upon their designation to the State Trails System. Such uses may include hiking, canoeing, horseback riding, bicycling, ski touring, snowmobiling, motorcycling, use of off-road vehicles (ORV's), or cultural or historical touring.

7:5D-4.4 Connecting trails

Connecting trails are designated to the State Trails System to provide additional points of public access to scenic or recreation trails or to provide connections between such trails, including connections between points of interest on such trails.

SUBCHAPTER 5. DESIGNATION OF TRAILS TO THE STATE TRAILS SYSTEM

7:5D-5.1 Qualifications for designation

(a) To qualify for designation to the State Trails System, a trail must satisfy one of the following qualifications:

1. The trail right-of-way is owned through fee simple title or held under a conservation restriction or scenic easement by the State and administered by the Department;

2. The trail right-of-way is owned through fee simple title or held under a conservation restriction or scenic easement by a local unit or a charitable conservancy, and access to and use of the trail right-of-way is guaranteed through a legal instrument dedicating the trail right-of-way for trail purposes duly filed with the appropriate county clerk; or

3. The trail right-of-way is owned by the Federal government or State agency other than the Department and there is a written cooperative agreement between the owner agency and the Department designating land or water areas for trail purposes.

7:5D-5.2 Criteria for designation

(a) A proposal to designate a trail to the System prepared pursuant to N.J.A.C. 7:5D-5.3(a) shall be based on the following criteria:

1. Scenic Quality: Trail designation proposals shall take into account the presence of high quality or rare natural features, vistas, historical or cultural features or other points of interest that can be sighted or visited along the trail;

2. Accessibility: Trail designation proposals shall take into account the availability of access points for vehicles, trailers or disabled trail users along or adjacent to the trail right-of-way. Water trail rights-of-way must have public access at both ends of the trail and at areas where portage is required;

3. Length: Trails shall be a minimum of five miles in length to be eligible for consideration as scenic trails, but this criterion may be satisfied by segments or components of a group of trails totalling five miles or more. Recreation or connecting trails are not subject to a length criterion;

4. Multiple Use: Trails which *[can]* ***are managed in a safe and environmentally protective manner to*** accommodate more than one type of trail use are preferred ***for designation*** to those which can support only a single use;

5. Development and Maintenance Costs: Trails which require little capital development or reconstruction of areas critical to the designated purpose of the trail are preferred to those which require extensive time and cost to develop and maintain;

6. Public Support: Trail designation proposals shall take into account public input and recommendations from counties, municipalities, private citizens' groups or other persons indicating endorsement of or opposition to the trail designation; and

7. Environmental Impact: Trails which require extensive development causing erosion or destruction of plant, animal, historic or cultural resources shall not be included in the State Trails System unless no alternative routes are available.

7:5D-5.3 Trail designation procedure

(a) Any Federal or State agency, local unit, private organization or person may submit to the Department a proposal for the designation of a trail to the System. The trail designation proposal shall be submitted to the Department at the following address: State Trails System, Office of Natural Lands Management, Department of Environmental Protection and Energy, CN 404, Trenton, New Jersey 08625-0404. The trail designation proposal shall consist of the following:

1. A written narrative description of the trail area and trail right-of-way, including a description of the length, surrounding land use, physical condition, and need for land acquisition and/or development for the proposed trail, and a description of public support of or opposition to the proposed trail;

2. A United States Geological Survey 7.5 minute quadrangle map marked to show the location of the proposed trail;

3. A written evaluation of whether the proposed trail should be designated as a scenic trail, recreation trail or connecting trail as set forth at N.J.A.C. 7:5D-4;

4. A written statement of how the proposed trail qualifies for designation under the qualifications set forth at N.J.A.C. 7:5D-5.1;

5. A written analysis of how the proposed trail is suitable for designation under the criteria set forth at N.J.A.C. 7:5D-5.2; and

6. A listing and justification of proposed uses for the trail upon designation.

(b) The Department encourages persons proposing the designation of a trail to the System to obtain letters of endorsement from public officials and agencies, and private citizens and organizations, as applicable, indicating support for the proposed trail designation.

(c) The Division, with the advice of the Council, shall evaluate each trail designation proposal according to the criteria at N.J.A.C. 7:5D-5.1 and 5.2. The Division shall prepare a recommendation for the Commissioner's review evaluating the proposed trail's suitability for designation and recommending that the Commissioner approve or disapprove the proposed trail designation.

(d) The Commissioner shall review all trail designation recommendations submitted by the Division and shall take one of the following actions on each proposal:

1. Propose the trail designation and designated uses of the trail as an amendment to N.J.A.C. 7:5D-8.1;

2. Request that the Division reconsider its recommendation and resubmit the proposal for the Commissioner's review, if appropriate; or

3. Reject the proposed trail designation.

7:5D-5.4 Repeal of trail designation

(a) If at any time after the designation of a trail to the System the Department determines that the trail is not meeting its designated uses and/or management objectives and that mitigation measures are not available to bring the trail into conformance with

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its designated uses and/or management objectives, the Department may propose to repeal the designation of the trail to the System.

(b) The procedure for repealing the designation of a trail to the System is as follows:

1. If the Division makes a preliminary determination that the designation of a trail to the System should be repealed, it shall conduct a site evaluation of the trail to determine the extent of the trail deterioration, change of use, or unsuitability;

2. Upon completion of the site evaluation, the Division shall submit the site evaluation to the administering agency for a determination of whether mitigation measures are available to bring the trail into conformance with its designated uses and/or management objectives;

3. The Division, with the advice of the Council, shall review the administering agency's determination under (b)2 above, and, if appropriate, shall recommend repeal of the trail designation to the Commissioner;

4. The Commissioner shall review all trail designation repeal recommendations submitted by the Division and shall take one of the following actions on each proposal:

i. Propose the trail repeal as an amendment to N.J.A.C. 7:5D-8.1;

ii. Request that the Division reconsider its recommendation and resubmit the proposal for the Commissioner's review, if appropriate; or

iii. Reject the proposed repeal of the trail designation.

SUBCHAPTER 6. TRAILS MANAGEMENT

7:5D-6.1 Trails management

(a) Except as provided under (g) below and under N.J.A.C. 7:5D-7.1(g), all uses of a trail right-of-way that are inconsistent with the uses specified by the Department upon designation of the trail to the System are prohibited without prior approval by the Department.

(b) Upon designation of a trail to the System, the administering agency, in coordination with the Department and with the advice of the Council, shall prepare a management plan for the trail right-of-way.

(c) Management objectives to be addressed through preparation of a trail management plan include:

1. Management of scenic trails primarily to protect and enhance their natural and scenic qualities;

2. Protection of the natural vegetation of trail rights-of-way. Clearing of vegetation shall be permitted for public safety, trail construction, creation of occasional vistas, construction or maintenance of trail use facilities or other natural resource management that does not adversely affect the trail right-of-way or its designated uses and/or management objectives;

3. Development of multiple compatible trail uses which allow convenient exits and entrances. Special consideration shall be given to identifying trail segments and access points appropriate for the needs of disabled trail users and conducting planning to meet any applicable guidelines and/or requirements under the ADA;

4. Full consideration of and coordination with adjacent landowners and their operations in order to minimize potential adverse effects on these owners from trail use;

5. Identification of pre-existing trail uses that are inconsistent with the nature of the trail and its designated uses and/or management objectives, and evaluation of techniques to mitigate their impact;

6. Description of erosion control measures, if necessary, taking into account the designated uses of the trail and preservation of the natural environment; and

7. Identification of parking or other ancillary facilities necessary to support the classification and uses of the trail.

(d) The administering agency shall be responsible for the initial development and continued maintenance of a designated trail. The management techniques employed by the administering agency shall be compatible with the trail classification and the purposes for which the trail was designated. The administering agency may allow uses of the trail other than the designated uses only with the prior approval of the Department.

(e) In developing a trails management plan, the administering agency shall solicit the advice of the local unit(s) with jurisdiction over the area(s) through which the trail passes.

(f) The administering agency is encouraged to solicit advice on trail design and management, and assistance for routine trail maintenance, from volunteers and user groups.

(g) The administering agency shall cooperate to the fullest extent possible with the owner of the trail right-of-way in complying with the requirements of the ADA, as applicable.

(h) Emergency vehicles and authorized maintenance vehicles shall be permitted access to designated trails for emergency and management purposes.

(i) The Department shall provide administering agencies with standardized trail head signs for posting.

1. The administering agency shall place and maintain signs at trail entrances, exits, and other strategic points to indicate that a trail is a component of the System.

(j) The Department will inspect each designated trail at least every two years, with the cooperation and assistance of the administering agency. If the Department determines that the trail is not meeting one or more of its designated uses and/or management objectives, it may authorize the administering agency to undertake mitigation measures, including temporary prohibition of one or more trail uses. If the Department determines that mitigation measures are not available to bring the trail into conformance with its designated uses and/or management objectives, it may recommend repeal of the trail designation in accordance with the procedure at N.J.A.C. 7:5D-5.4.

SUBCHAPTER 7. DEPARTMENT-FUNDED CONSTRUCTION PROJECTS AFFECTING DESIGNATED TRAILS

7:5D-7.1 Review of Department-funded construction projects affecting designated trails

(a) The Department shall assess all proposed construction projects partially or wholly funded by the Department that temporarily or permanently cross, directly border upon, or interrupt use of a designated trail right-of-way or its facilities to determine the project's potential impact on the trail, trail users, associated facilities and adjacent property owners.

(b) It is the Department's policy to incorporate, through a memorandum of understanding if appropriate, an informal analysis of the impact of a proposed project on designated trails into its review of non-Department-funded construction projects under its other regulatory programs. The Department may require permittees to take measures to mitigate the impact of proposed projects on designated trails if such measures are consistent with the statutory and regulatory authority governing the permit program.

(c) The Department's review under (a) or (b) above shall assess the following:

1. The location and nature of the proposed project, including the length of time the project is expected to be under construction;

2. The potential impacts of the proposed project on the trail, including, but not limited to, soil erosion, sediment deposition, degradation of water quality, flooding, safety and health hazards, destruction or degradation of natural, historic or cultural resources, or disruption of scenic values; and

3. Proposed or potential methods for mitigating or remediating the proposed project's impacts on the trail.

(d) The Division, with the advice of the Council, shall review a proposed Department-funded construction project within 90 days of receipt of the project plans from the Department's funding program and shall provide a recommendation on the proposed project to the Commissioner.

(e) The Commissioner shall review the recommendation of the Division made under (d) above and shall take one of the following actions on the recommendation:

1. If the Commissioner determines that the proposed Department-funded construction project will temporarily interfere with the trail right-of-way, the Commissioner may require, as a condition of Department funding, mitigation measures to maintain or relocate

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the trail and its facilities in a manner consistent with the designated classification of the trail during the period of construction or permanently thereafter; or

2. If the Commissioner determines that the proposed Department-funded construction project will permanently interfere with the trail right-of-way or its uses, thereby rendering the trail unsuitable for its designated purposes, and that no satisfactory remediation or mitigation is possible, the Commissioner may disapprove use of the trail for the proposed project. Remediation for permanent interference with the trail right-of-way may include relocation of the trail right-of-way in a manner consistent with N.J.A.C. 7:5D-5.1 and 5.2.

(f) Emergency measures to protect public health, safety and welfare may be undertaken in the trail right-of-way without prior review by the Department. However, persons or organizations undertaking such measures must notify the Division in writing within 24 hours of commencing such measures.

SUBCHAPTER 8. STATE TRAILS SYSTEM

7:5D-8.1 State Trails System

(a) The following trails are designated as components of the State Trails System:

1. (Reserved)

7:5D-8.2 Public information

Interested persons may obtain information on the State Trails System by contacting:

Office of Natural Lands Management
Department of Environmental Protection
CN 404
Trenton, New Jersey 08625-0404
(609) 984-1339

(a)

ENVIRONMENTAL REGULATION—LAND USE REGULATION PROGRAM

Flood Hazard Area Control Rules

Adopted Repeal and New Rules: N.J.A.C. 7:13

Proposed: February 22, 1994 at 26 N.J.R. 1009(a).

Adopted: February 22, 1995 by Robert C. Shinn, Jr., Commissioner, Department of Environmental Protection.

Filed: February 22, 1995 as R.1995 d.149, **with substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 58:16A-50 et seq., 58:10A-1 et seq., and 13:1D-1 et seq.

DEP Docket Number: 06-94-01/123.

Effective Date: March 20, 1995.

Expiration Date: March 20, 2000.

On February 22, 1994, the Department of Environmental Protection (Department) proposed to repeal and repromulgate N.J.A.C. 7:13. The Department revised the rules to make them easier to understand, to reflect organizational changes within the Department and to bring the rules into compliance with relevant court decisions and actual agency procedure which has evolved since the original adoption in 1984.

Summary of Hearing Officer's Recommendations and Agency Response:

The Department held a public hearing concerning the proposal on March 28, 1994 in Trenton, New Jersey. Ernest P. Hahn, Administrator of the Department's Land Use Regulation Program, served as the hearing officer. The Department accepted written comments through April 25, 1994. After reviewing the testimony given at the hearing and the written comments received Administrator Hahn recommended that the proposed rules be adopted with the changes described in the Summary of Public Comments and Agency Responses and the Summary of Agency-Initiated Changes below. The Department accepted the recommendation.

Interested parties may inspect the public hearing record, or obtain a copy upon payment of the Department's normal copying charges, by contacting:

Janis Hoagland, Esq.
Administrative Practice Officer
New Jersey Department of Environmental Protection
CN 402
Trenton, New Jersey 08625-0402

Summary of Public Comments and Agency Response

The following is a list of the individuals who testified at the hearing and/or timely submitted written comments on the proposal:

1. Perry Boynton, Jersey Central Power and Light Company
2. Bob Harsell, Arthur Kill Watershed Association
3. Anthony Dilodovico, Schoor, Depalma and Canger Consulting Engineers
4. Joseph Skupien, Somerset County Engineers Office
5. Michael Amorosa, Somerset County Engineer
6. Robert Anastasia, Taylor, Wiseman & Taylor
7. Michael Baker, Jr., Michael Baker, Jr. Inc.
8. William Brash, Jr., Mercer County Soil Conservation District
9. James Byrne, Intech Engineering Corporation
10. Richard Candeletti, Associated Executives of Mosquito Control Work in New Jersey
11. Florence Caporaso
12. Joseph Caruso, Board of Chosen Freeholders of the County of Burlington
13. Lou Cattuna
14. Martin Chomski, Board of Chosen Freeholders of the County of Monmouth and Monmouth County Mosquito Extermination Commission
15. Leo Coakley, Killam Associates
16. Abigail Fair, Association of New Jersey Environmental Commissions
17. Michael Fink, New Jersey Builders Association
18. Guliet Hirsch, Heritage Minerals, Inc.
19. Jeffrey Horn, The Association for Commercial Real Estate
20. Bruce Johnson, Hunterdon County Engineer's Office
21. Stephen Kinsey, New Jersey Society of Municipal Engineers
22. Albert Knoll, Township of Dennis
23. John Lehman
24. Tony Sabidussi, New Jersey Department of Transportation—Bureau of Environmental Analysis—Permits/Ecology Section
25. James Shissias, Public Service Electric and Gas Company

The following is a summary of the oral and written comments timely submitted and the Department's responses. The number(s) in parentheses after each comment identifies the commenter(s) listed above.

General

1. COMMENT: This subchapter extends the jurisdiction of the program far beyond the current regulations by encompassing drainage basins of less than 50 acres. The regulated community is thus faced with increased costs for design applications and consultants and time delays for a limited environmental benefit. When every minor watercourse that cannot be proved man-made comes under the jurisdiction of this chapter, the resources of both the construction industry and the Department will be strained. The Department must exercise better judgment in identifying areas for decreasing, rather than increasing, regulation. (7)(12)(18)(19)

RESPONSE: The new rules reflect the policy and procedures which have evolved over the 10 years since the Flood Hazard Area Control Rules were first implemented and which are currently used to review of stream encroachment permit applications. The rules do not include any item of review or area that is not currently regulated under this program by the Department. The clarification of jurisdiction and the restatement of regulated activities actually reduce the areas and types of projects for which a permit is required under these regulations.

The rules being repealed regulated Projects of Special Concern (PSC) regardless of drainage area. For non-PSC projects the 50 acre drainage area threshold was established under those rules as a limit below which there was no need to apply the engineering standards, since flooding problems below this limit are minimal. The 50 acre drainage area threshold is retained in the new rules for the engineering standards. The new rules eliminate the classification of Projects of Special Concern but retain the environmental standards to be applied to projects regardless of drainage area.

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2. COMMENT: While the commenter supports the intent of the Department to simplify the format of these regulations, the commenter remains concerned about a number of the proposed revisions. Most importantly, the Department appears to have made only a minor attempt to address previous major concerns identified by the public and the commenter in the June 1991 pre-proposal. Specifically, there still is no significant distinction between major and minor projects and the information required to support the permit application (see proposed N.J.A.C. 7:13-4.1) regardless of the scope of the project. (1)

RESPONSE: The major/minor project classification in this program is used to apportion fees to the different project elements. The major/minor classification system is established by N.J.S.A. 13:1D-29 et seq. and the 90-Day Construction Permit Rules at N.J.A.C. 7:1C-1.5(a)4 and is based upon the detail of engineering review required by the Department. A major project is one that would require hydrologic and/or hydraulic calculations to be performed (for example channel modification, bridge or the establishment of an encroachment line). Correspondingly, a minor project is one that does not require these calculations to be performed. Subchapters 2 and 3 of these new rules set the engineering and environmental criteria to which a project must be designed. Subchapter 4 lists the information that is required for the Department to begin a review of the project.

3. COMMENT: Is it necessary to incorporate a nonpermitting program, that is, Rare and Endangered Species, into this program? N.J.A.C. 7:13-1.1, proposed for repeal, provided that the purpose of the regulations was to "control construction and other development activities in stream channels and in areas subject to flooding in order to avoid or mitigate detrimental effects of such activity."

The Department proposes to go beyond its legislative authority. These new rules will restrict development through habitat and species protection which is already provided for in other regulatory programs (for example, Freshwater Wetlands Act, Rules on Coastal Zone Management) and not through a proven need to strengthen the existing engineering standards to protect the health, safety, and welfare of the State's residents. (1)(19)

RESPONSE: While the Flood Hazard Area Control Act is the primary enabling legislation for these rules, the rules are also adopted under the authority of the Water Pollution Control Act (WPCA), N.J.S.A. 58:10A-1 et seq., and the Department of Environmental Protection Act of 1970, N.J.S.A. 13:1D-1 et seq. Under the 1970 Act, the Department is accorded broad powers of conservation and ecological control and is empowered to enforce State air pollution, water pollution, conservation and environmental protection laws, rules and regulations (N.J.S.A. 13:1D-9(f), (n)). Additionally, under the WPCA, the Legislature noted its concern that pollution of ground and surface waters of the State continued to threaten fish and aquatic life. The broad scope of environmental concerns expressed by the Legislature in these various enactments and the totality of powers accorded by the Legislature to the Department enable the Department to address these overlapping areas of flood hazard, water pollution and preservation of plant and animal life dependent upon the watercourse being encroached upon in one set of regulations. The stream encroachment program's protection of animals and plants, including rare and endangered species, was affirmed in *Society for E.E.D. v. New Jersey D.E.P.*, 208 *N.J. Super.* 1 (App. Div. 1985).

4. COMMENT: The rule should be amended to recognize the Federal "Wild and Scenic" designation given to certain watercourses. DEP must support the efforts of other agencies in order to preserve these stream corridors. For projects adjacent to such streams the rules should require greenways or larger setbacks from the top of bank, limits on the clearing of natural vegetation along these streams and supplemental planting when clearing limits are exceeded and prohibition of structures in flood plains except in extreme hardship cases. (13)

RESPONSE: The enabling statutes for the stream encroachment program rules only authorize the Department to control development in areas within its jurisdiction in order to avoid or mitigate the detrimental effects of development upon the environment and the safety, health and general welfare of the people of the State. Stream corridor preservation for the sole sake of preserving an area in its natural state is beyond the scope of these regulations. Therefore, while the changes suggested would be beneficial, areas Federally designated as "Wild and Scenic" cannot be given any special protection.

5. COMMENT: While supportive of the rules, the commenter also has several concerns. In many cases, the interpretation of the rules may depend on the reader's perspective. The Department should not adopt the proposed rules until these issues have been discussed. The readoption of the existing rules will prevent their expiration, allowing time for discussion with concerned parties. Then, a second, formal proposal can be submitted to the public through the New Jersey Register. (14)

RESPONSE: In June 1991 the Department published a pre-proposal of this rule in the New Jersey Register and then held a public hearing to solicit comments. Written comments were received, and one person attended the public hearing (but did not have any comments). The formal proposal was published in the February 22, 1994 New Jersey Register. A 60-day comment period was set and a public hearing was scheduled and held in the middle of the comment period. Comments were received from 24 commenters and four commenters testified at the public hearing (three of which also submitted written comments). The Department does not believe that delaying the implementation of these rules to hold additional hearings would be useful. If specific problems arise consistently in the implementation of the rules, the Department can undertake minor amendments through the rule amendment process.

6. COMMENT: The State of New Jersey has regulations for Flood Hazard Area Control, Dam Safety, Wetlands and Stormwater Management. To avoid confusion, conflicts, overregulation and unnecessary administrative and engineering expense for the State and permit applicants, the regulations should not be redundant or overlapping. The present Flood Hazard Area Control regulations contain provisions regarding wetlands which were incorporated before passage of the Freshwater Wetlands Act. Now that the State has passed the Freshwater Wetlands Act and adopted regulations under the authority of that Act, there is no longer a need to include wetlands provisions in the Flood Hazard Area Control regulations. If a project falls under jurisdiction of the Dam Safety, Freshwater Wetlands or Stormwater Management Acts, the applicant is required to obtain a permit under the regulations adopted pursuant to each law. It is inefficient and perhaps not in conformance with the law to make the Flood Hazard Area Control regulations all inclusive and redundant to these other regulations. It would be proper to make the Stream Encroachment permit conditional on the receipt of other required permits, but it is not proper to attempt to administer the other programs through the Flood Hazard Area Control regulations, as long as the other programs' regulations remain in effect. (15)

RESPONSE: The Department intended in these new rules to eliminate overlapping reviews by more than one regulatory program if the same aspects of the same project are reviewed by the Stream Encroachment program.

N.J.A.C. 7:13-2.12, Dams, excludes an engineering review for those dams which have received a Dam Safety Permit pursuant to N.J.A.C. 7:20. An engineering review is therefore required only for those that do not require a Dam Safety Permit. On adoption this section is clarified to specifically reference the Dam Safety Standards and the classes of dams for which an engineering review is not required under these rules. However, N.J.A.C. 7:13-2.12 does provide that the environmental requirements of this chapter apply to all dams constructed within the jurisdiction of this chapter. Since construction, reconstruction or elimination of a dam may have serious environmental impact upon to watercourses and flood plains, this requirement ensures that these environmental concerns are addressed through the permit review process.

N.J.A.C. 7:13-3.8, Freshwater wetlands, was proposed when there were still projects exempt from the requirements of the Freshwater Wetlands Protection Act, 13:9B-1 et seq., construction of which could adversely impact adjoining watercourses or the flood plain of which they are a component. However, after the these rules were proposed in February 1994, the State assumed permitting responsibilities over virtually all freshwater wetlands from the Federal Government. See 59 *FR* 9933 (March 2, 1994). State assumption of this permitting authority has eliminated all exemptions from the Freshwater Wetlands Protection Act except for freshwater wetlands in the Hackensack Meadowlands Development Area. This section, therefore, has been revised upon adoption to apply only to the Hackensack Meadowlands Development Area.

The Stormwater Management Rules, N.J.A.C. 7:8, are minimum requirements for stormwater management plans and ordinances only and do not require a review or permit from any other program in the Department at this time, so there is no overlap of jurisdiction possible in that instance.

7. COMMENT: The proposed regulations should be carefully reviewed to ensure that they do not go beyond the intent of enabling legislation. Specific attention should be paid to mitigation requirements (N.J.A.C. 7:13-3.4) which appear to apply to all vegetation at a project site, to regulation of all flows less than the regulatory flood (N.J.A.C.

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7:13-2.3(c)), and to the incorporation of requirements which are covered by other acts and regulations (Dams, Wetlands, Stormwater Management). (15)

RESPONSE: The Department has authority under the Water Pollution Control Act to require mitigation of environmental damage which will adversely affect the water quality in the receiving watercourse. N.J.A.C. 7:13-3.4, Mitigation, was revised upon adoption to clarify that mitigation in these rules refers to the restoration of disturbed areas within the jurisdiction of this chapter to the maximum extent possible.

The intent of the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., is to protect the public from flood damages by regulating construction activities within the 100-year flood plain or the flood hazard area. The removal of structures or land features in this area will most likely not affect the 100-year or flood hazard area flood elevations, but the flood elevations for the lesser magnitude, more frequent floods, such as the two-year or 10-year flood may be increased. The increased damage potential to buildings or other structures downstream under these circumstances justifies the Department's regulatory review for the lesser frequency floods.

N.J.A.C. 7:13-2.12, Dams, excludes an engineering review for those dams which have received a Dam Safety Permit pursuant to N.J.A.C. 7:20. An engineering review is therefore required only for those that do not require a Dam Safety Permit. However, N.J.A.C. 7:13-2.12 does provide that the environmental requirements of this chapter apply to all dams constructed within the jurisdiction of this chapter.

N.J.A.C. 7:13-3.8 (Freshwater Wetlands) was proposed when there were still projects exempt from the requirements of the Freshwater Wetlands Protection Act, 13:9B-1 et seq., construction of which adversely impact adjoining watercourses or the flood plain of which they are a component. However, State assumption of wetlands permitting authority (see 59 *FR* 9933 (March 2, 1994)) has eliminated all exemptions from the Freshwater Wetlands Protection Act except for freshwater wetlands in the Hackensack Meadowlands Development Area.

The Stormwater Management Rules N.J.A.C. 7:8 are minimum requirements for stormwater management plans and ordinances only and do not require a review or permit from any other program in the Department at this time, so there is no overlap of jurisdiction possible in that instance.

8. COMMENT: In view of the extent of the proposed new regulations, we suggest that the Department conduct a workshop for active participation by interested parties prior to adoption of these regulations. One aspect to be explored by such workshop should be the potential impact of the regulations on the implementation of flood mitigation and flood control projects. (15)

RESPONSE: The Department will be working with Rutgers University through its continuing education program to give seminars on the Department's various permit programs, including Stream Encroachment. Moreover, the Department notes that these rules formalize practices of the Department, some of which are a decade old. As such, the public is already familiar with many requirements contained in the rules. Further, prior to proposal, the Department provided opportunity for discussion and comment both at the pre-proposal and proposal stages. The Department held a well-advertised public hearing on the proposed new rules, but only four commenters testified.

It is unclear what the commenter means by a "flood mitigation" project; however, flood control projects will continue to be reviewed in the same manner as they have in the past. This topic may be included in the Rutgers permit seminars.

9. COMMENT: The commenter approves of the way the rules are organized and the clear engineering requirements, environmental requirements and permit processing requirements. (3)

RESPONSE: The Department acknowledges this comment in support of the new rules.

10. COMMENT: Eliminating the 50-acre threshold and the municipal/county review for projects in small watersheds is going to create a practical problem because it will increase the time and effort needed to complete small projects. Most of the structures the commenters are involved with are either small facilities, below 50 acres (with no real need to apply to the Department) or between 50 and 150 acres (approved by the municipal or county engineer under the provisions for optional review for small drainage areas). Now the number of projects submitted to the Department for review will increase. (3)(4)(5)(18)(21)

RESPONSE: The local approval option was originally intended to allow an applicant in a small watershed to go to the municipal or county engineer and get an approval without having to apply to the Department for a permit. At the time this option was implemented, the accepted theory for preventing future flood damages (and therefore the major concern of the program) was not allowing obstructions to flow in the floodway. Since that time, the engineering concerns (such as proper control of increased volumes of stormwater runoff entering the watercourse or preservation of storage in the flood fringe areas) and environmental concerns (such as control of non-point source pollution to preserve water quality in the watercourse) have become more sophisticated and have discouraged most municipal or county engineers from assuming liability for approving such projects, except for municipal or county projects that they have designed. It has been the Department's experience that since this review is at the option of the municipal or county engineer, private applicants who attempt to exercise this option will generally be rejected and have to come back to the Department for a permit. Therefore, this option is being abandoned. County agencies still have the option under N.J.A.C. 7:13-5.3 to apply for delegation of the authority to issue permits pursuant to this chapter.

Projects in small watersheds usually involve work in the channel since the flood plain is negligible. In that case, an applicant also has to apply for a freshwater wetlands permit (N.J.S.A. 13:9B-1 et seq.). The elimination of local approval should not increase the time needed to complete the project since the freshwater wetlands permit has to be obtained from the Department regardless of whether or not the stream encroachment portion of the project is approved at the local level. Since the Department has consolidated its permit review process by placing those programs responsible for issuing land use permits into the Land Use Regulation Program, the stream encroachment and freshwater wetlands permits will be reviewed and issued together. The only additional work required is the engineering calculations which would have to be prepared regardless of which agency reviews the project.

The Department also notes that in the past four years the Department has received, out of a total of approximately 5,400 jurisdictional requests and permit applications, only 79 requests for acknowledgment of local approval. The majority of these were for municipal or county engineers approving their own projects.

11. COMMENT: DEP can implement flood control and water quality protection under the umbrella of one law—the Water Quality Planning Act(WQPA), N.J.S.A. 58:11A-1 et seq. The WQPA would enable DEP to manage water resources much more efficiently than currently is the case. DEP can convert existing Water Quality Management Plans into practical, usable plans.

Adopting the State Development and Redevelopment Plan (N.J.S.A. 52:18A-200) water resource and water supply protection policies as part of the New Jersey Water Quality Management Plan is the first step. These policies were formulated over a six-year period and have broad public support. The state plan calls for a policy for stream buffers to protect streams from point and non-point source pollution. Standards for proper sizing of buffers have been established and can be found in the technical documents that accompanied the preliminary state plan draft. The standards establish various buffers based on the kind of protection desired whether from sediment, from road pollutants, for habitat protection. Another policy calls for protection of steep slopes to protect water courses, reducing sedimentation and preserving quality and flood carrying capacity. The State plan policies call for protecting slopes over 15 percent in grade.

The Department needs to establish standards to implement these policies.

With a watershed water quality management plan as a guide, DEP will be able to review permits for stream encroachment, wetlands , water quality certificates and other programs in a predictable, consistent and coordinated manner. (16)

RESPONSE: The Department is investigating consolidation of these programs. The Department has reorganized the Stream Encroachment, Freshwater Wetlands and Coastal Programs together under the Land Use Regulation Program and issues joint permits where possible. Further action such as suggested here would require legislation to consolidate laws and is beyond the scope of this proposal.

12. COMMENT: The commenter supports DEP's efforts to consolidate these rules for easy implementation and to optimize use of available resources. Water quality management planning by watershed is critically important. (16)

RESPONSE: The Department acknowledges this comment in support of the rules. Currently watershed planning pilot projects are being undertaken by another program within the Department. At such time

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as that initiative moves beyond the pilot stage, several other programs within the Land Use Regulation Program may join this large undertaking.

13. COMMENT: Although the Department states that the rules do not bring any new areas under the jurisdiction of the Department, this proposed regulation does, in fact, extend the current area regulated pursuant to the Flood Hazard Area Control Act. The regulation proposed for repeal states that the Flood Hazard Area Control rules shall apply to all "stream encroachments within the flood hazard area or 100-year flood plains" as well as all "projects of special concern." Both stream encroachments and projects of special concern are defined as structures or other activity within the 100-year flood of a nondelineated stream or within the flood hazard area of a delineated stream. Thus, the jurisdiction of the Department is strictly within the flood hazard area/flood plain. This proposed rule requires stream encroachment permits for a disturbance within 25 feet of the top of the channel bank or 50 feet from the top of the channel bank of certain waters, even if that area is not located within the flood hazard area/flood plain. If this interpretation is correct, why is this extension of jurisdiction necessary and to what extent is it statutorily authorized? (17)(18)(19)

RESPONSE: As noted in the response to Comment 3 above, while the Flood Hazard Area Control Act is the primary enabling legislation for these rules, they are also adopted under the authority of the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., and the Department of Environmental Protection Act of 1970, N.J.S.A. 13:1D-1 et seq. In *Society for E.E.D. v. New Jersey D.E.P.*, 208 *N.J. Super.* 1(App.Div.1985), the Appellate Division found that the Department had "ample power to deal comprehensively in a single set of regulations with the overlapping areas of flood hazards, water pollution, and preservation of plant and animal life dependent upon the streams being encroached upon." Protection of near stream vegetation is necessary to protect water quality and the plants and animals dependent upon the watercourse for survival.

The 25 and 50 foot setbacks are not new. Former N.J.A.C. 7:13-3.5 protected all vegetation within 25 feet of the top of bank from disturbance. Projects along Trout-associated streams, acid producing soil deposits, or along Category One waters were classified as Projects of Special Concern (PSC) and trees within 50 feet of the top of bank were protected. Furthermore, projects containing threatened and endangered species habitat were also classified as PSC and the vegetation in the area protected. The Department has found it more administratively efficient to eliminate PSCs; however, the concerns for protection of vegetation within 50 feet of the top of bank to protect water quality and/or wildlife are still valid. For thorough water quality protection, studies show that the vegetative buffer along streams in an urban area should be as much as 300 feet.

14. COMMENT: In some portions of the rules the Department has exceeded the authority provided to it by the Legislature.

First, the commenter believes that the Department is going beyond its statutory authority in N.J.A.C. 7:13-2.3(b) by prohibiting the use of the National Flood Insurance Maps since the N.J.S.A. 58:16A-52(b) directs DEP "to wherever practical to make floodway delineations identical to the floodway delineations approved by the Federal Government for the National Flood Insurance Program." The only instance in which the Department proposes to allow these NFIP Maps to be used is where there is "a viable basin wide stormwater management system in place." What does this term mean and what criteria will be used to make this determination? The Department should not impose any of these currently proposed prohibitions on developers until these basin-wide stormwater management plans are in place. Further, the cost for doing these studies should not be placed solely on the developer's shoulders. Municipalities or the State should provide for and fund these studies.

Second, proposed N.J.A.C. 7:13-3.9, Threatened and Endangered Species, states that the Department will not issue a permit for a regulated activity if it will adversely affect populations of threatened or endangered plants (which probably includes those listed in N.J.A.C. 7:5C-5.1) despite the fact that the enabling legislation, the Endangered Plant Species List Act (P.L. 1989,c.56), does not include enforcement authority or other regulatory jurisdiction for these listed endangered plants. Furthermore, proposed N.J.A.C. 7:13-3.9 includes not only animals but also the hundreds of plants listed on the Endangered Plant Species List. This is in marked contrast to those threatened and endangered species regulated under the Freshwater Wetlands Protection Act which only include two or three plants from the Federal list, of which Swamp Pink is best known. (17)

RESPONSE: NFIP maps were developed for use by the National Flood Insurance Program and the State is not obligated to use them except "where practicable." NFIP maps were developed in the 1970's and early 1980's, prior to the massive increase in building in the late 1980's. Some of the NFIP maps are based merely on observations that a particular area "floods" when it rains. Studies of this type should be updated periodically to account for increases in flow resulting from development not only in the flood plain but outside the flood plain. Many of the NFIP maps are close to 20 years old and have never been updated.

The State is bound only by the State delineations adopted by rule amendment and listed in N.J.A.C. 7:13-7.1. The State delineations recognize that development would occur in the basin and add 25 percent to the 100-year flow to delineate the flood hazard area, which is the area within which the Department regulates development under these rules. In most areas where the State has adopted a delineation, the NFIP was developed from the same study but does not incorporate the Flood Hazard Area Flood which accounts for the development of the area.

The new rules do not prohibit use of NFIP maps but require that they be checked to see if the drainage basin was fully developed or if there is a regional stormwater management plan in effect. The purpose of these rules is to protect the public from the hazards of flooding. Allowing construction of a home or business in a flood plain based on a delineation study that is outdated and where flooding will almost certainly occur conflicts with the basic intent of the Flood Hazard Area Control Act.

The requirement to assume full development in the basin applies only if there is no basin-wide stormwater management plan which would account for new development and the additional volume of flood waters generated. The Department is currently exploring ways of developing and funding basin wide planning with the Stormwater Management program in the Department.

The authority to protect threatened or endangered species through these rules comes from the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. However, recognizing that the Flood Hazard Area Control Act is the primary enabling legislation, N.J.A.C. 7:13-3.9(a) was amended to state that these rules apply only to those species on the threatened and endangered species lists that are critically dependent on the watercourse to survive.

15. COMMENT: Elimination of "Projects of Special Concern" (PSCs) N.J.A.C. 7:13-5.1 through 5.5, is troublesome. The proposal Summary states that the Department has decided to incorporate "most" of the aspects of "Special Concern" projects into the usual review standards for all projects in order to reduce administrative costs and expedite the permitting process. "Most" means something is being left out. The PSC rules had language similar to the wetlands protection rules in which the burden of proof is upon the applicant to show that there are no reasonable alternatives of less adverse impact, or that denial would place upon the applicant undue and excessive hardship disproportionate to the ecological damage. Is DEP dispensing with this? Also, special protection is needed where woodlands near a watercourse are in danger or where channel alteration is proposed. (2)(11)

RESPONSE: The specific requirements for PSCs were all retained and incorporated into subchapter 3, General Environmental Standards. The specific requirements for approval of a PSC were incorporated into the general and specific approval conditions throughout the rules. For example, N.J.A.C. 7:13-3.1(b)3 provides that, "The Department will not approve any regulated activity which it determines is likely to significantly and adversely effect the biota of the watercourse or its water quality."

N.J.A.C. 7:13-4.1(j)1 requires that all applications must submit an environmental report which includes, a "description of the scope and nature of the proposed activity including reasons why the proposed structures and their location are the most appropriate for the site and why they minimize to the greatest extent possible any adverse affects upon the pre-construction character of the site located within the jurisdiction of this chapter. The report shall also describe and analyze alternatives to the proposed activity, including the no-build option."

In addition, alternatives analysis are specifically requested in N.J.A.C. 7:13-3.2, Protection of near watercourse vegetation, and 3.5, Projects along trout-associated watercourses. Thus, protection is afforded those areas with which the commenter is concerned.

16. COMMENT: Under these rules, preservation of fish and wildlife are secondary to the perceived "cleanliness" of the ditches proposed by municipal councils and other thoughtless individuals who, in their zeal, do not seem to know when to stop ripping things out of our waterways. (2)(11)

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RESPONSE: While fish and wildlife are of major concern to the Department, the main intent of these rules is to protect the public from the damage caused by flooding. To this extent protecting fish and wildlife must be balanced against the public welfare. While sediment, debris and fallen trees may create and provide excellent habitat, they can also create obstructions to flow, which, in the event of a flood will cause the flood waters to back up and possibly damage homes or businesses along the watercourse. Under N.J.A.C. 7:13-2.5, Watercourse cleaning, the Department is trying to preserve the watercourse in its natural condition so as to maintain the existing habitat and not create additional damages from increased flooding due to obstructions.

17. COMMENT: Under the new rules, flood plain building appears to be encouraged as much or more than before, no doubt due to pressure from builders and realtors. It is unfortunate that short term gain by a wealthy few will have significant influence upon regulation. (2)(11)

RESPONSE: The intent of these regulations under the Flood Hazard Area Control Act is to regulate, not prohibit, construction within the flood plain. The rules in themselves do not encourage construction in the flood plain, but only sets the standards that must be met for such construction. The stricter requirements of these rules, and therefore the added costs, for construction in the flood plain (as opposed to outside the flood plain) should actually discourage such construction.

18. COMMENT: The format of these rules makes them very difficult to analyze. Ordinarily , the current rules are published, with rules proposed for amendment, repeal or readoption indicated through the use of boldface print or brackets. This approach is mandated by the Rules for Agency Rulemaking, N.J.A.C. 1:30-3. We believe DEP should voluntarily republish these rules in the correct form in order to assure compliance with the Administrative Procedures Act and thus allow meaningful public input. (5)(18)(21)

RESPONSE: The extent of the revisions to the repealed rules, which included consolidating duplicate sections and rearranging the chapters in order to clarify the rules, were too extensive to accomplish as amendments, which would have been published in the format to which the commenter refers. It was necessary to propose the repeal of the old rules entirely and propose the chapter as new rules. The sections that were deleted, combined and/or changed were specifically mentioned in the proposal Summary and thus there is no need to republish the proposal.

19. COMMENT: Proposed repeal of N.J.A.C. 7:13-4.2, Municipal responsibilities and procedures, flood fringe area, and 7:13-4.3, Applications to local agency, does not conform with N.J.S.A. 58:16A-51. This section of the Flood Hazard Area Control Act authorizes municipalities to adopt ordinances regulating the flood fringe area within 12 months after the delineation of any flood hazard area within the municipality. Since the Department may delineate new flood hazard areas in the future, the current rules should be left in place to allow municipal regulation in this area. (18)

RESPONSE: Repealed N.J.A.C. 7:13-4.2 and 4.3 allowed for delegation of the authority to regulate stream encroachments in the flood fringe area to municipalities that adopted ordinances either within 12 months of the promulgation of the now repealed rules or the adoption of a flood fringe area by the Department. These sections are eliminated because no municipality, when asked by the Department, was interested in seeking delegation for regulating the flood fringe area within the time frames established, including after a study was revised, and because there are no plans or currently available funds for the State to perform any new delineations of flood plains.

20. COMMENT: The commenter is generally disappointed in the rules that, in the commenter's view, increase application cost and complexity and expand the jurisdiction of the Department. The proposed rules contradict efforts to simplify the regulatory process and will have a negative economic impact on applicants, their clients and generally harm the State's business climate.

The Economic Impact discussion pays little attention to economic cost versus environmental benefit. At a time when economic recovery should be stimulated, the rules smother it, increasing cost and uncertainty by requiring more land-intensive stormwater management measures. (19)

RESPONSE: The rules reflect the policy and procedures that have come into effect over the past 10 years since the regulations were first implemented and which are currently being followed for the review of stream encroachment permits. The rules do not include any new item of review or area that has not been regulated by the Department in the last decade. The clarification of jurisdiction and of regulated activities will actually reduce the areas and types of projects that will need a permit under these regulations.

For example, watercourses with drainage areas less than 50 acres now must have a definable bed and banks to fall under the jurisdiction of this rule. Criteria for classifying reaches of tidal and tidally influenced watercourses have been established. Tidal reaches have been totally exempted and tidally influenced areas have been exempted if the project is regulated pursuant to the Waterfront and Harbor Facilities Act, N.J.S.A. 12:5-1 et seq. or the Coastal Area Facilities Review Act (CAFRA), N.J.S.A. 13:19-1 et seq. Otherwise, the project will only be subject to the environmental standards and engineering standards for the floodway under these rules. The criteria for non-regulated uses in both the floodway and the flood fringe have been made more realistic to allow more projects which have little or no impact to be exempted. Some of these projects were added to the lists of non-regulated uses.

21. COMMENT: N.J.S.A. 58:16A-6.1 requires local assessors to consider the impact of rules or regulations issued pursuant to the Flood Hazard Area Control Act in establishing full value of lands designated as floodways or flood fringe areas. To the extent that rules result in greater negative impact to property value, local municipal budgets will also be negatively affected. An impact study should be done before adoption of these rules to ascertain the actual economic impact associated with them. (19)

RESPONSE: The new rules do not change the requirements for construction in the flood fringe and relax the requirements for certain types of construction in the floodway. The Building Officials and Code Administrators (BOCA) requirements for construction in a flood-prone area are more restrictive than these rules and therefore are the controlling factor in regard to tax assessment. Thus the impact of these rules on property values remains unchanged.

22. COMMENT: The Department is exceeding its statutory authority regulating areas outside a flood plain. Jurisdiction has been expanded to areas adjacent to watercourses even where there is no flood plain. This extension of regulation is exacerbated by broadening the definition of trout associated waters to include all unnamed upstream tributaries flowing into "trout-associated waters" which themselves are not necessarily trout production or trout maintenance, but upstream of waters so designated.

Second, the Department is imposing requirements unrelated to preservation of flood storage capacity. The rules feature detailed environmental standards which go far beyond flood protection mandates and which are proposed to apply to drainage areas of less than 50 acres, traditionally the threshold of Stream Encroachment regulations. (19)

RESPONSE: While the Flood Hazard Area Control Act is the primary enabling legislation for these rules they are also adopted under the authority of the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., and the Department of Environmental Protection Act of 1970, N.J.S.A. 13:1D-1 et seq., Court decisions have established that the Department has ample power to deal comprehensively in a single set of regulations with the overlapping areas of flood hazards, water pollution, and preservation of plant and animal life dependent upon the streams being encroached upon.

Trout are a scarce and important fishery resource in this State that is very sensitive to changes in environment, particularly to change in water quality. The Department has always made provision, under the stream encroachment program, for the protection of the trout resources of the State, and has paid particular attention to activities which will affect the water quality in the tributaries that flow into the trout production and maintenance areas. The definition was modified on adoption to remove the arbitrary distinction between "unnamed" and "named" streams, and to clarify that the tributaries of concern are those that flow into the trout production and trout maintenance waters. The Department, therefore, does not anticipate any real change in the review procedure with the addition of tributaries into the definition of trout-associated watercourses. In fact, the rules now more closely conform with the standards of the Freshwater Wetlands Protection Program where wetlands discharging into FW-1 and FW-2 trout waters and their tributaries are classified as exceptional resource value wetlands.

23. COMMENT: It would create a tremendous hardship on the development community if the rules were applied to projects which have already received approvals based on existing standards. The construction of many approved projects has been delayed by the prevailing economic conditions. The costs incurred in the design and engineering and in obtaining other approvals for most of these projects are extremely high (often in excess of hundreds of thousands of dollars), and it would be unfair to require approved projects to undergo substantial redesign and new approvals in order to comply with the rules proposed. This sort

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of inequity was addressed by the Legislature in the Freshwater Wetlands Protection Act(FWPA) and the regulations promulgated thereunder. The proposed regulations should not apply to projects which, as of the effective date of the regulations: (a) have already received preliminary or final site plan or subdivision approval, or (b) have received stream encroachment permits which are still in effect or have filed with DEP applications for new stream encroachment permits or extensions to existing permits. (19)

RESPONSE: The analogy to the FWPA is inappropriate since the FWPA was an entirely new program in 1987 and the requirements could not have been incorporated into a site design reviewed by a planning board. Thus, immediate imposition of the permitting requirements of the FWPA would have been a major hardship. In comparison, the requirements set forth in these rules are not substantially different from the requirements currently imposed by the Department and which have been imposed for many years. A project that has already been approved by a planning board should have incorporated flood plain concerns into the design and therefore, should suffer no major hardship by compliance with these rules.

In cases where a permit expires before the project is complete, the Department will continue to consider the stage of construction relative to the changes that may be required in issuing a new permit. However, time limits on permits reflect the fact that regulations must change as technology and understanding of an issue evolve. If a project is not built within the time frame of the initial permit it will be subject to the new rules.

24. COMMENT: We believe that a great many of the proposed new regulations reflect a dramatic expansion of the DEP's historic scope of oversight and extends into areas that have heretofore been adequately regulated by municipalities, counties or by other statutory schemes. We view this expansion as an unnecessary and counter-productive attempt at "micro management" which, on one hand, will only add duplication and conflict to existing law and, on the other hand, will overburden both the DEP and the applicant at a time when the goal should be to streamline the regulatory process.

For example, there are other statutory schemes already in place which regulate dams, soil erosion and wetlands, and there is no reason for stream encroachment regulations to attempt to regulate the same. In addition, the regulation of, for example, detention pond maintenance and drainage areas of less than 50 acres have heretofore been reviewed and regulated by municipalities and counties which are better equipped than the State to balance the burdens to be placed upon development against potential impacts which are essentially of local concern. Finally, the attempt to dictate the detailed design specifics of artificial wetlands and other stormwater management effort will only stifle innovation and increase costs. Within a performance standard of maintaining water quality, the applicant should be permitted to design systems which are practicable and site-specific. (19)

RESPONSE: The majority of the standards and criteria contained within these regulations are the same as those that the Department has been implementing under the stream encroachment program for almost 10 years. The Department has carefully avoided unnecessary or redundant regulation where legally permissible. For example, N.J.A.C. 7:13-2.12, Dams, was written to exclude an engineering review for dams which have received a Dam Safety Permit; an engineering review is required only for those that do not require a Dam Safety Permit. The section was clarified upon adoption to state this more clearly.

Furthermore, N.J.A.C. 7:13-2.12 also states that the environmental requirements of this chapter shall apply to all dams constructed within the jurisdiction of this chapter. Since construction, reconstruction or elimination of a dam has the potential for serious environmental impacts to watercourses and flood plains, this requirement was added to ensure that the environmental concerns of this chapter are addressed.

N.J.A.C. 7:13-3.3, Soil erosion and sediment control, remains virtually unchanged from the repealed rule with the exception of a few minor clarifications and therefore is not expanding the jurisdiction of this chapter in any way.

N.J.A.C. 7:13-3.8, Freshwater wetlands, was written and proposed when there were still projects exempt from the requirements of the Freshwater Wetlands Program, which could result in serious impacts to adjoining watercourses or the flood plain of which they are a component. However, after the proposal was published, the State assumed permitting responsibilities under the Clean Water Act from the Federal Government. The assumption of this permitting authority has eliminated all exemptions except for those in the Hackensack Meadowlands Development Area. This section, therefore, has been revised upon adoption to only apply to the Hackensack Meadowlands Development Area.

The intent of these rules is to protect the public from increased flood damages caused by development. One of the major contributing factors to flooding and impaired water quality is improper management of stormwater. Formerly, the rules required that any detention basin in the flood plain be designed in accordance with the Stormwater Management Rules, which, together with the 20 percent net fill rule, required the consideration of impacts to downstream flooding caused by increased volumes of water discharged into the flood plain. While this should be a concern of the local or county government, it is not always considered in the course of various local or county approval processes. Furthermore, the adverse effects of improper stormwater management (that is, increased volumes of stormwater discharged into the watercourse) will appear in the lower end of the drainage basin, making this a regional and not a local problem. Therefore, it is in the public interest for the Department to continue to regulate stormwater within its jurisdiction until such time as regional plans are implemented.

Under both the repealed and these new rules, the engineering requirements do not apply to projects where the contributing watershed is less than 50 acres. See N.J.A.C. 7:13-2.1. If a project in an area with a drainage area less than 50 acres was deemed to be a project of special concern under the repealed rule, the Department had jurisdiction over the environmental aspects of the project. Under these rules, the environmental standards (subchapter 2 and 3) apply to areas with a drainage area less than 50 acres; however, in contrast to the repealed rules which allowed the Department unlimited environmental jurisdiction below the 50 acres limit, now there must be a natural channel with defined bed and banks before the Department can assume jurisdiction. Therefore, the adopted rules will reduce the area, along watercourses with a drainage area less than 50 acres, over which the Department will exercise jurisdiction for environmental considerations.

As for the water quality aspects of N.J.A.C. 7:13-2.8, Stormwater management, creative solutions are encouraged by these rules. The rules set the goals and offer the listed practices as examples that have been used successfully in the past. New designs are welcomed and encouraged if they can be shown to meet the established criteria.

25. COMMENT: The proposed rules drop the "Project of Special Concern" (PSC) category and essentially apply current rules for PSCs to all projects. No justification is given for the need to impose broader, stricter, more expensive requirements on all projects indiscriminately. The PSC category should be retained. (5)(21)

RESPONSE: Under the repealed rules, the Department had to review each submitted project in order to determine whether or not it met the PSC criteria. This usually involved requesting additional information from the applicant either during the pre-review or well into the project review process and caused additional delay and expense to the applicant. The intent of the new rules is to have the applicant address the environmental concerns, if any, before submitting an application. The environmental report only need be as detailed as necessary to address the level of intrusion proposed into the flood plain. A full Environmental Impact Statement (EIS) is not required. For example, in the case of threatened and endangered species, every site will not require a survey. Rather, a survey will only be required in those cases in which the Department has reasonable evidence that a species may be on site and the development will be impacting that habitat. N.J.A.C. 7:13-3.9(a) was clarified upon adoption to state that a threatened and endangered species survey will only be required if the proposed project will disturb an area documented to contain a threatened and endangered species, or nearby areas in which the habitat that can support these species is present.

26. COMMENT: The proposed rules drop the 50 acre threshold for permit applicability (in conjunction with the elimination of PSCs). All projects would be subject to environmental review regardless of drainage area unless there is no definable bed or banks or the waterway is man-made (not man-altered). No justification is given for the need to impose broader, stricter, more expensive requirements on all projects regardless of drainage area. The 50 acre threshold should be retained in conjunction with exceptions for PSCs. (5)(21)

RESPONSE: The 50 acre threshold was not eliminated and still applies to the engineering standards of the rules. However, under the repealed rules the 50 acre threshold did not apply to PSCs. A project could be classified as a PSC regardless of the drainage area. These rules maintain the Department's authority to review environmental issues associated with stream encroachments.

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27. COMMENT: The commenter supports the following aspects of the proposed rules: their organization; their recognition of increased flood peaks due to future development; the allowance of stream cleaning with hand tools without a permit; the elimination of the loop-hole for Class IV (small) dams; and the intent and scope of the stormwater management requirements (including better control of downstream peak increases and enforceable maintenance). (5)(21)

RESPONSE: The Department acknowledges this comment in support of the rules.

28. COMMENT: There has not been ample time to address the issues and concerns presented by the proposed rules. The public comment period should be extended by, at a minimum, three months. (22)

RESPONSE: The 60 day comment period was adequate for the regulated public to review the proposed changes and to submit comments.

29. COMMENT: The commenter disagrees with deletion of the list of exempted watercourses, currently found at N.J.A.C. 7 :13-1.3. This list is a useful way to identify at a glance whether a watercourse is exempted. This list should be reinstated N.J.A.C. 7:13-1.3, Applicability. (25)

RESPONSE: The list of streams was incomplete and often resulted in a stream that was near the listed stream and subject to the same flooding conditions being regulated only because it was not included on the exempted list. The new rule at N.J.A.C. 7:13-1.3 provides specific standards for determining if a stream is regulated. Consequently, a new list of exempted watercourses is unnecessary.

30. COMMENT: The commenter offers congratulations on the organization of the new rules. (4)

RESPONSE: The Department acknowledges this comment in support of the regulations.

31. COMMENT: The commenter is concerned about the legality of requiring storm water quality, storm water management and mitigation provisions for a project that is outside of the flood hazard area or within the 25 or 50 foot buffer if that buffer is outside of the flood plain. The Flood Hazard Area Control Act only addresses the need to protect carrying capacity of streams and prevent flood damage, yet the proposed rules seem to encompass much more. (4)

RESPONSE: As stated previously (see responses to Comments 3 and 13), while the Flood Hazard Area Control Act is the primary enabling legislation for these rules they are also adopted under the authority of the Water Pollution Control Act (WPCA), N.J.S.A. 58:10A-1 et seq., and the Department of Environmental Protection Act of 1970 (DEPA), N.J.S.A. 13:1D-1 et seq. The authority to regulate these environmental issues mentioned by the commenter comes from the WPCA and the DEPA.

32. COMMENT: It is unclear whether the environmental standards to be applied to dams and bridges are only those set forth in N.J.A.C. 7:13-2.12 and 2.13 or whether the general environmental standards in subchapter 3 apply as well. (4)

RESPONSE: The general environmental standards of subchapter 3 apply to all projects. The environmental standards contained in subchapter 2 are additional and address the concerns for specific types of projects.

SUBCHAPTER 1 GENERAL PROVISIONS

33. COMMENT: The commenter supports all language in the statement of purpose and scope at N.J.A.C. 7:13-1.1 that confirms the important relationship between water quality and flood control. (16)

RESPONSE: The Department acknowledges this comment in support of the regulations.

34. COMMENT: In the past the Stream Encroachment program has not exercised jurisdiction over streams with drainage basins of less than 50 acres. This policy should be retained in the regulations, and the definition of "watercourse" should be "a path which conveys surface water runoff with a total contributory drainage area of greater than 50 acres." The term "no definable bed and banks" is subjective and should not be the basis of the Department's jurisdiction. (7)(12)(19)

RESPONSE: While the Department did not regulate engineering concerns below the 50 acre limit under the repealed rules, it did regulate projects of special concern (PSC) below this limit. The new definition of "watercourse," specifying that a definite bed and bank be present, actually eliminates areas that were previously regulated as PSCs, such as headwaters which were swampy. Therefore this definition does not represent an increase in regulatory area but a decrease.

35. COMMENT: The commenter strongly supports basing these regulations on the Water Pollution Control Act as well as the Flood Hazard Area Control Act. (16)

RESPONSE: The Department acknowledges this comment in support of the rules, but notes that this is not new authority. The rules were originally adopted in 1984 under the triple authority of the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., the Water Pollution Control Act, 58:10A-1 et seq., and the Department of Environmental Protection Act of 1970, 13:1D-1 et seq.

36. COMMENT: The commenter objects to the "Category One Waters" definition which applies to waters originating wholly within Federal, interstate or State lands. Federal law clearly includes water courses tributary to those originating wholly within Federal, interstate or State lands. (16)

RESPONSE: The definition was taken directly from the Surface Water Quality Standards, N.J.A.C. 7:9B. It is not within the authority of this program to change the definition.

37. COMMENT: The definition for "Central Passaic Basin" should be expanded to include all of the Central Basin and the Highlands Area as shown on the U.S. Army Corps of Engineers map. Expanding the no-net fill area (under the provision of N.J.A.C. 7:13-2.15) in this manner will protect the lower valley from increased, costly flooding. (16)

RESPONSE: While preserving flood storage capacity is extremely important, in order for the zero net fill concept to work as anticipated, it assumes that there will be no increase in future runoff. This can only be achieved by prohibiting development within the entire watershed and is obviously impracticable. Furthermore, if the zero net fill standards applied to the entire watershed then, theoretically, fill could be removed from the headwater areas where there is no flooding problem and brought down to the lower reaches where it could become an obstruction to flow and raise flood elevations. The flooding would worsen but the zero net fill requirements would still be satisfied. The zero net fill rule adopted herein prevents increased flooding impacts because it is applied to a limited area. There are no large areas from which to obtain fill, so applicants are forced to balance fill within their site—the ideal situation. Therefore, expanding the scope of the Central Passaic Basin would not protect the lower valley and might cause increased flooding.

38. COMMENT: The definition of Category One Waters is too open-ended. Additionally, it includes "waters and their tributaries that flow through, or border, Federal, State, county or municipal parks, forests, fish and wildlife lands and other special holdings." This definition is far too expansive since most waterways do flow through some type of park. Is it the Department's intent to classify all such waterways as Category One Waters? This definition should be deleted and the Surface Water Quality Standards (SWQS) at N.J.A.C. 7:9B referenced instead. "Category One Waters" as used in the SWQS was developed for the purpose of implementing an anti-degradation policy and should not be applied to stream encroachment projects. (17)

RESPONSE: The definition of "Category One Waters" is taken directly from the Surface Water Quality Standards, N.J.A.C. 7:9B. The Department is committed to the anti-degradation policy and enforces it in all its programs. It is particularly applicable to the stream encroachment program because of the potential impacts to water quality resulting from activities in or adjacent to streams which are regulated by this program.

39. COMMENT: The Department should define the checklist which will be used to determine an application's completeness; this is especially important given the Environmental Management Accountability Plan mandates of N.J.S.A. 13:1D-101 and 102. (17)

RESPONSE: Checklists for administrative and engineering completeness have been developed and are included in all application packages for stream encroachment projects.

40. COMMENT: The definition of "dam" is incorrect and the rules should refer to the New Jersey Dam Safety Standards at N.J.A.C. 7:20-1.2 for this definition. (17)

RESPONSE: The definition is the same as that in the Dam Safety Standards. See N.J.A.C. 7:20-1.2.

41. COMMENT: Please clarify the difference between a detention basin and a dam. Detention basins should not be regulated as dams. (17)

RESPONSE: A dam is used to impound water. A detention basin is an impoundment of water. If the structure used to impound the water for a detention basin meets the requirements of the Dam Safety Regulations, it is regulated as a dam under these rules.

42. COMMENT: The Department should delete the definition of "freshwater wetlands" and simply refer to the Freshwater Wetlands Protection Act. The courts have already ruled that the Department does not have the authority to regulate wetlands under this program. (17)

RESPONSE: The definition is the same as in the Freshwater Wetlands Protection Act. *N.J. Chapter of NAIOP v Dept.,* 241 *N.J. Super* 145 (App.

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Div 1990), did not prohibit the stream encroachment program from regulating wetlands, only from regulating wetlands for the sake of wetland preservation. The Court stated: "Where another regulation or statute has merely a tangential or ancillary effect upon a wetland and is predicated upon a different regulatory concern, be it water quality, flood control, pollution or whatever, we do not believe the legislature intended to render the other concern meaningless." (241 *N.J.Super.* at 156)

Furthermore, N.J.A.C. 7:13-3.8 was proposed when there were still projects exempt from the permitting requirements of the Freshwater Wetlands Program, construction of which could adversely impact adjoining watercourses or the flood plain of which they are a component. However, after these rules were proposed, the State assumed permitting responsibilities from the Federal Government over virtually all freshwater wetlands under the Clean Water Act. The assumption of this permitting authority has eliminated all exemptions except for those in the Hackensack Meadowlands Development Area. This section, therefore, has been revised upon adoption to only apply to the Hackensack Meadowlands Development Area.

43. COMMENT: The definition of "mitigation" should be deleted. The Department does not have the authority to require mitigation for non-wetlands matters. The policy and standards for mitigation of wetland loss are found in the Freshwater Wetlands Regulations at N.J.A.C. 7:7A. (17)

RESPONSE: While the concept of "mitigation" is most commonly associated with freshwater wetlands, it is by no means only limited to freshwater wetlands. The Department has ample authority under the Water Pollution Control Act to require mitigation of environmental damage to compensate for any loss of water quality. In the past, the stream encroachment program has required mitigation not only in the form of replacing disturbed vegetation (for example, wetlands) but also in the form of engineered systems to provide water quality treatment lost by the destruction of vegetation.

As proposed, N.J.A.C. 7:13-3.4, Mitigation, was written to complement N.J.A.C. 7:13-3.8, Freshwater wetlands, and to state the standards that were being implemented under the stream encroachment program. However, the State's assumption of Federal authority over virtually all freshwater wetlands under the Clean Water Act (see response to Comment 42 above) has eliminated the need to require "wetland" type mitigation under the stream encroachment program. Therefore, N.J.A.C. 7:13-3.4 was revised upon adoption to clarify that mitigation refers to the restoration, to the maximum extent possible, of disturbed areas within the jurisdiction of this chapter and not the creation of areas to replace the areas destroyed.

44. COMMENT: The definition of "stream encroachment" should be modified pursuant to the Flood Hazard Area Control Act to limit the Department's jurisdiction to floodways and to the 100 year flood plain for nondelineated streams. (17)

RESPONSE: The Flood Hazard Area Control Act is not the only statutory authority under which this chapter was adopted, and the definition was written to reflect these other authorities and to clarify the intent of the regulations. The Flood Hazard Area Control Act only limits the Department's authority to the floodway if individual municipalities elect to regulate the flood fringe. To date, none have.

45. COMMENT: The proposed definition for "trout-associated watercourses" significantly extends the definition by adding the category of "unnamed tributaries flowing into trout-associated waters." The new definition appears to include all watercourses from the headwaters to the actual trout production or trout maintenance waters. In contrast, the definition in the rules proposed for repeal regulates only nontrout waters less than one mile upstream from trout maintenance waters or non-trout waters upstream from trout production waters. If this interpretation is correct, what is the scientific basis for this definition? This new definition should not be adopted until the Department promulgates a map showing the extent of the area regulated as trout-associated waters. (17)(18)(19)

RESPONSE: Water quality is affected not only at the site where the activity that causes the degradation occurs, but downstream as well. If the water quality in the headwaters of a stream is degraded then that degradation will affect the water quality in all downstream watercourses that receive flow from that site. A water quality model is not needed to illustrate this principle, but only to show how much degradation occurs. In asking for such a model, the Department assumes that the commenter is thinking of the effects on water quality from one individual site. In such a case, there may be only a very minimal impact on water quality far downstream. However, the rules apply equally to all properties along watercourses and therefore must consider the cumulative impacts if the entire reach of every watercourse is developed in the same manner.

Trout are a scarce and important fishery resource in this State that is very sensitive to changes in environment, particularly to change in water quality. The Department has always made provision, under the stream encroachment program, for the protection of the trout resources of the State, and has paid particular attention to activities which will affect the water quality in the tributaries that flow into the trout production and maintenance areas. The definition was modified on adoption to remove the arbitrary distinction between "unnamed" and "named" streams, and to clarify that the tributaries of concern are those that flow into the trout production and trout maintenance waters. The Department, therefore, does not anticipate any real change in the review procedure with the addition of tributaries into the definition of trout-associated watercourses. In fact, the rules now more closely conform with the standards of the Freshwater Wetlands Protection Program where wetlands discharging into FW-1 and FW-2 trout waters and their tributaries are classified as exceptional resource value wetlands.

46. COMMENT: The definition of "freshwater wetlands" does not conform with the definition contained in the Freshwater Wetlands Protection Act. See N.J.S.A. 13:9B-3. The definition should be revised to refer to the April 1, 1987 interim final draft of the U.S.E.P.A. Manual and any subsequent amendments. (18)

RESPONSE: The definition is taken directly from the Freshwater Wetlands Protection Act Rules at N.J.A.C. 7:7A, which refer specifically to the 1989 U.S.E.P.A. Federal Manual for Identifying and Delineating Jurisdictional Wetlands.

47. COMMENT: The definitions of channel, floodway, flood hazard area, relative risks, flood fringe area, department, and person are set forth in the Flood Hazard Area Control Act. To the extent that the rules have definitions which vary from the Act, they conflict with the Act and are not authorized. In particular, the proposed definition of floodway includes the term "regulatory flood," which is nowhere in the statute, but which, as used in the proposed regulation, automatically expands the area of jurisdiction. (19)

RESPONSE: The definition of "channel" is different from that in the statute only in that it clarifies that the channel bed and banks must be "well defined." The actual area of jurisdiction is the same as specified in the Act.

The definition of "floodway" in these rules specifically states the specific flood flow the area must carry, not just the area "reasonably required to carry and discharge the flood water" as phrased in the Act. This area was not previously defined and standard practice was to use the 100-year flood to measure it. Additionally, "floodway" includes those areas between the stream and the encroachment lines because the area is not only commonly referred to as a "floodway" but it is determined in the same manner and serves the same purpose.

Neither these rules nor the repealed rules contain a definition for "Flood Hazard Area" or "relative risks."

As was done with the definition of "floodway," the definition of "flood fringe" is modified to include those areas within the flood plain but outside of the floodway which are not only commonly referred to as the "flood fringe" but is determined in the same manner and serves the same purpose.

The definition of "person" is modified in the rules to include the Federal Government so that the definition is uniform among this and the other programs administered by the Land Use Regulation Program.

48 COMMENT: The definition of "Category One Waters" is altogether too broad, and inappropriately classifies many waters as Category One. While waters originating within public holdings are entitled to this classification while flowing within them, the definition ignores the fact that existing water quality may not justify this category. There are many waters, particularly in the more urbanized, parts of the state, that are far from pristine even though they may touch public lands.

In addition, extension of Category One Waters to all tributaries of those waters further extends this most stringent category to the entire upstream basin and numerous small waterways, vastly expanding the scope of this stringent jurisdiction. Further, this definition is inconsistent with that used in the Surface Water Quality Standards. It is confusing for the regulated community and inefficient for the Department to have varying definitions for the same term.

Thus, "Category One Waters" should mean "those waters designated in the tables in N.J.A.C. 7:9B-1.15(c) through (h) for the purposes of implementing the Antidegradation Policies in N.J.A.C. 7:9B-1.5." (19)

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RESPONSE: This definition is taken from the existing Surface Water Quality Standards, N.J.A.C. 7:9B. It is beyond the scope and authority of these rules to change this definition.

49. COMMENT: "Net fill" refers to the volumes of cut and fill made on the project site. "Net fill" should mean the volume of fill left after the total volume of cuts made within the flood plain has been subtracted from the total volume of fill placed within the flood plain. (19)

RESPONSE: The commenter is correct. The definition has been clarified upon adoption to state that, for the purposes of this chapter, "net fill" applies only in the flood plain area and not the entire site.

50. COMMENT: The proposal Summary (at 26 N.J.R. 1010) states that within tidally influenced areas the engineering requirements will apply only within the floodway. It appears that this statement refers to N.J.A.C. 7:13-1.3(b)2, which defines the term "tidally influenced." However, a floodway is generally considered to be a fluvial concept. It would be useful to add the definition of a tidally influenced floodway in the new rules and include a procedure for its delineation. (6)

RESPONSE: Tidally influenced areas are subject to both fluvial and tidal flooding. The floodway is a fluvial concept and its location is determined by modeling the fluvial flood flows, without regard to the tidal backwater elevations.

51. COMMENT: The commenter strongly supports the Department's intent to consider the siting of utility poles and towers as a non-regulated use given the minimal impacts upon the environment and the contribution to the health, safety and general welfare of the State's residents that the services supported by these structures provide. (1)

RESPONSE: The Department acknowledges this comment in the support of the rules.

52. COMMENT: As proposed at N.J.A.C. 7:13-1.3(a)3iii, it appears that the Department is asserting jurisdiction up to 50 feet from the edge of a flood plain or channel bank to protect threatened or endangered species which use that buffer area for "temporary resting." Regulating "temporary resting areas" to preclude development of otherwise developable property can have significant adverse impact on the economy. (1)

RESPONSE: As the rule states, if the resting area is not "a critical part of the habitat supporting" these plants and animals, a permit can be issued.

53. COMMENT: The commenter supports N.J.A.C. 7:13-1.3(e)2iii which expands non-regulated uses to include stream cleaning projects done by hand or removal of individual obstructions that cannot be removed by hand. This reduction of "red tape" is urgently needed. (10)(14)

RESPONSE: The Department acknowledges this comment in support of the rules.

54. COMMENT: The commenter supports N.J.A.C. 7:13-1.3(e)2v which now allows repairs and in-kind replacement of bridges, culverts, and so on, without a permit. This will reduce much red tape for projects that do not impact on the encroachment area. (10)(12)(25)

RESPONSE: The Department acknowledges this comment in support of the rules.

55. COMMENT: Small increases in the width of lineal features such as roads and bridges do not increase flood elevations and should be allowed to be made without permit. We suggest that N.J.A.C. 7:13-1.3(e)2v include activities which do not increase the footprint of the structure by more than 25 percent. (12)

RESPONSE: The Department allows maintenance and in-kind replacement of existing structures only because they maintain the existing conditions and do not affect flooding. Increases in the footprint of a structure, even by just 25 percent, could significantly affect flood elevations under the right conditions (for example, increased paved areas for roads increases the volume of runoff, or increasing the length of a culvert will increase the frictional losses and could raise the upstream flood elevations). Therefore, while a 25 percent increase may not affect the flood elevations, the potential to do so is there. Accordingly, the Department still regulates any proposed increases in the footprints of structures within its jurisdiction.

56. COMMENT: N.J.A.C. 7:13-1.3(f)2v should consider all roadway repairs and maintenance in the flood fringe as non-regulated, not just such repairs or maintenance "that will not raise the existing road grade." The flood fringe area can, by definition, be filled without causing a rise in floodwater greater than 0.2 feet. The 0.2 feet limitation has been the standard for many years and should remain. (12)

RESPONSE: Non-regulated uses are those which will not affect flooding elevations. The Department has included roadway repair and maintenance that does not raise the existing grade because such activities will not affect flooding. To change to the standard as suggested would imply that changes to the roadway that will affect flood elevations would not be regulated. This would violate the intent of the Flood Hazard Area Control Act, which is to protect the public from the hazards of increased flooding.

57. COMMENT: Does N.J.A.C. 7:13-1.3(e)2iii (hand removal of debris) conflict with P.L. 1993, c.376, approved January 11, 1994? (10)(14)

RESPONSE: P.L. 1993, c.376, allows a county or municipality to remove debris, but not sediment, from a natural channel or to remove debris and sediment from a lined channel without first obtaining a permit from the State, provided that the county or municipality first notifies the Department, which has 30 days to review the proposed work and provide technical objections, if any.

With the exception of the removal of sediment from lined channels, N.J.A.C. 7:13-1.3(e)2iii deregulates all the activities covered under P.L. 1993, c.376. In the case of sediment removal from lined channels, counties and municipalities may still perform the removal in accordance with the requirements of the new law, while all other applicants must apply for a stream encroachment permit.

58. COMMENT: The Department has jurisdiction 25 feet back from top of bank, or 50 feet back along waters classified as Category 1, FW-1, or FW-2 trout associated. Don't the FW-1 and FW-2 water classifications cover all waters? (3)(17)

RESPONSE: The commenter is correct. FW-1 and FW-2 classifications include all freshwater watercourses in the state, and it was the intent of the Department to regulate only FW-1 and FW-2 trout-associated streams. N.J.A.C. 7:13-1.3(a)3ii was revised upon adoption to assert jurisdiction 50 feet back from the top of bank along waters classified as FW-1 trout associated and FW-2 trout associated.

59. COMMENT: N.J.A.C. 7:13-1.3(e)2ii exempts inground pools in the floodway but prohibits fences. Municipal engineers have difficulty approving a pool without a fence. Either prohibit the pools or allow a fence around them and specify what type of fence is allowable. (3)

RESPONSE: In view of the legitimate public safety concern raised in this comment, N.J.A.C. 7:13-1.3(e)2ii has been amended upon adoption to allow an open fence to surround a pool if needed to limit access to the pool.

60. COMMENT: N.J.A.C. 7:13-1.3(f)2ii provides that in the flood fringe a pool cannot displace more than 100 cubic yards of flood plain storage. One hundred cubic yards is not that much. (3)

RESPONSE: This rule reflects a policy instituted several years ago to deregulate the construction of pools in private yards. The 100 cubic yards of displacement corresponds to a pool approximately 24 feet in diameter, four feet deep. This is considered to be an average-sized pool. The volume standard was used in recognition that the shapes of pools can vary.

61. COMMENT: N.J.A.C. 7:13-l.3(a), which requires permits for all development "within the larger of" the enumerated areas, needs clarification. (16)

RESPONSE: The Department will require a permit for the following:(1) all development performed within the regulatory flood plain; (2) all development within 25 feet of the top of bank if the flood plain does not extend 25 feet from the top of bank, and; (3) all development within 50 feet of the top bank if the flood plain does not extend 50 feet from the top of bank if there are deposits of acid-producing soils as defined in N.J.A.C. 7:13-5.10; the watercourse is classified as Category One, FW-1 trout-associated, or FW-2 trout-associated; if the area is a critical part of the habitat supporting a threatened or endangered species of plant or a current population of any species of threatened or endangered animal on a permanent or temporary basis, for any purpose such as resting, breeding or feeding, during any portion of its life-cycle; or if the area is located within documented, historic habitat for threatened or endangered species of animals, which habitat remains suitable for breeding, resting or feeding by those species of animal during any portion of its life-cycle.

62. COMMENT: At N.J.A.C. 7:13-1.3(e)2i (non regulated uses in the floodway) please clarify what is meant by "areas specifically designed and intended for use by children"? (17)

RESPONSE: "Areas specifically designed and intended for use by children" means play areas for use by young children. These areas are usually referred to as "tot lots" by planners.

63. COMMENT: At N.J.A.C. 7:13-1.3(f)1i (non regulated uses in the flood fringe) what criteria does the Department use to quantify "insignificant" reduction in volume of flood storage? This section is confusing. (17)

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RESPONSE: The flood fringe acts to store flood waters during a flood. The Department regulates the addition of fill in the flood fringe because if enough storage is lost, flooding downstream can increase. However, the Department realizes that fill such as picnic tables, small utility buildings, utility poles and towers are in the public interest and do not by themselves represent enough fill to affect the flood elevations. With the exception of residential additions of up to 300 square feet, which are exempt to allow the single family homeowner the opportunity to reasonably expand a home, "insignificant" reduction in volume of flood storage means projects for individual residential, recreational, or agricultural use or part of the infrastructure for such uses, that does not require fill imported to the site for the purpose of raising the existing grades, and the "fill" involved are individual items necessary for the type of project involved.

64. COMMENT: At N.J.A.C. 7:13-1.3(f)liv, (Non-regulated uses in the flood fringe) includes activities that "do not cause or contribute to a violation of any applicable state water quality standard or otherwise adversely affect water quality." How will an applicant know whether an activity will adversely affect water quality and by what criteria will he or she be judged? (17)

RESPONSE: The Department has a broad mandate to protect water quality and these rules have been promulgated under the authority of the Water Pollution Control Act which is also concerned with preservation of water quality. Activities will be regulated if there is a point discharge of stormwater into the flood plain, a major disturbance of the vegetation in the overland flow path for a non-point source discharge, or if there is some hazardous substance that may be washed into the watercourse. The criteria in N.J.A.C. 7:13-2.8 will be applied to determine compliance.

65. COMMENT: N.J.A.C. 7:13-1.3(g) should be revised to require the Department to issue a letter of jurisdictional determination along with the actual basis for this determination within 30 days to provide applicants with predictable, fair decisions. Failure to take action within this time should be deemed a finding of "no jurisdiction." (17)

RESPONSE: The Department offers jurisdictional letters as a courtesy but they are not required by any of the enabling Acts upon which the rules are based. As such, no time limit applies to their issuance. Further, the potential environmental, safety and health impacts of development in areas within the jurisdiction of these regulations are too significant to waive jurisdiction based on a delay in issuing a jurisdictional letter.

66. COMMENT: N.J.A.C. 7:13-1.3(a)2 and 3 establish a buffer area around waterways even when no flood plain is present. The 25- to 50-foot buffers conflict with the Freshwater Wetlands Protection Act, which imposes no transition area adjacent to State open waters. (19)

RESPONSE: One of the objectives of these rules is the protection of water quality in the watercourse. Natural vegetation along the banks of a watercourse is the most effective "filter" for removing pollutants from stormwater. The repealed rules contained provisions for the protection of near stream vegetation within 25 feet of the top of bank along all watercourses and 50 feet back for certain projects of special concern. The Department exerted jurisdiction over these areas regardless of whether they were in the flood plain or not. The new rules continue that policy of protection of near stream vegetation for the purpose of water quality but specifically state that jurisdiction will be exerted over the 25 or 50 foot setback.

The 25- and 50-foot limits in these rules are not buffer areas because work is not absolutely prohibited within this area. If it can be shown that the disturbance is necessary and that water quality protection was incorporated into the design, then the project can be built in this area.

In comparison, wetlands buffers are true buffers because no disturbance is allowed in them. Since the purpose of such buffers is to protect existing wetlands, the Department does not require them along State open waters but only adjacent to wetlands.

Since the purpose of the 25 or 50 foot jurisdiction limit for under these rules differs greatly from that of the buffer requirements for the Freshwater Wetland Program, there is no conflict between the two programs on this issue.

67. COMMENT: The commenter supports N.J.A.C. 7:13-1.3(e) (non-regulated uses in the floodway) because it clarifies and eliminates the need to contact the Department for many situations. (19)

RESPONSE: The Department acknowledges this comment in support of the rule.

68. COMMENT: Minor repairs of roads, bridges and other structures which will not change the cross sectional area open to flow during the regulatory flood are non regulated uses under N.J.A.C. 7:13-1.3(e)2v, but the rule should further provide that such repairs may not change the regulatory flood hydraulics through the structure due to any proposed structure length variation in the direction of flow. Such a provision would allow for the correction of a sub-standard bridge, culvert or road width in the floodway as a non-regulated use, providing the flood hydraulics do not change as a result of the correction. (20)

RESPONSE: Non-regulated uses are projects for which there is no need to review any calculations. The change suggested by the commenter would require a review of hydraulic calculations in order to determine the impact upon the flood elevations. Projects necessitating hydraulic calculations will remain regulated.

69. COMMENT: N.J.A.C. 7:13-1.3(f)2v (non-regulated uses in the flood fringe) should be changed to read: "Roadway repairs and maintenance resulting in road grades that will not change the cross-sectional area open to flow during the regulatory flood." This provision would allow for the correction of substandard roadway vertical alignment in the flood fringe as a non-regulated use, providing the resulting cross-sectional area open to the regulatory flood flow will not change, thereby resulting in no change in flood hydraulics. (20)

RESPONSE: The suggested change implies that the existing grade of the road can be changed. Changes in the vertical alignment of roads can cause impacts to flooding through a variety of construction techniques associated with such work. It was never the Department's intention to waive review of such work. Only repair and replacement of existing roads is non regulated.

70. COMMENT: Are the non-regulated uses listed in N.J.A.C. 7:13-1.3 the same as exempted uses? (24)

RESPONSE: Non-regulated uses are any uses that are not subject to the provisions of the sections of this chapter and that therefore do not require a stream encroachment permit.

The term "exempted uses" is not defined by nor used in the rule. The rules do allow for "exemptions" from strict compliance with certain standards (see N.J.A.C. 7:13-2.8(a)5, 2.13(a)7i, 2.14(a)7, 2.15(a)3, and 2.16(c)3ii) but these projects are still regulated and require a permit.

Subchapter 2 Project Standards

71. COMMENT: The proposal to apply Environmental Standards to the 25 and 50 foot buffer areas at N.J.A.C. 7:13-2.1(b) expands the jurisdiction of the Stream Encroachment program beyond that authorized and increases costs in terms of consultant fees, design constraints and time delays. N.J.A.C. 7:13-1.3(a)2 should be eliminated as beyond the authority of the Flood Hazard Area Control Act. (19)

RESPONSE: The Department had been applying these environmental standards in and adjacent to the flood plain for many years under the repealed rules pursuant to the Water Pollution Control Act, 58:10A-1 et seq., and the Department of Environmental Protection Act of 1970, 13:1D-1 et seq. Therefore, the environmental standards of these rules are not an expansion of jurisdiction but a clarification of it. As such the rules will not cause any increase in costs. The rules may even save time and reduce costs because they state jurisdiction clearly and allow these concerns to be considered early in the design process rather than later, after a project has been submitted to the Department for review.

72. COMMENT: The commenter supports the exclusion of utility poles, towers, and utilities "jacked" under watercourses within the floodway and flood fringe from regulation pursuant to N.J.A.C. 7:13-1.3(e) and (f). However, this appears to conflict with N.J.A.C. 7:13-2.11(a)4 (aboveground utilities in the flood plain) which states, "Electric and telephone aerial crossings... shall be located outside the floodway unless the Department determines that no other location is available." Under the rules, a stream encroachment permit application would be required for utility poles and tower installations within the floodway so the Department could determine that no other location is available. N.J.A.C. 7:13-2.11(a)4 should be deleted. (25)

RESPONSE: The Department agrees. N.J.A.C. 7:13-2.11(a)4 has been deleted on adoption since utility poles and towers are exempt from review under N.J.A.C. 7:13-1.3.

73. COMMENT: N.J.A.C. 7:13-2.1(b) states that the environmental standards will apply except along man-made watercourses with a total contributory drainage area less than 50 acres. Does this include all drainage ditches along developments and roadways as long as the drainage area is less than 50 acres? Also, would county mosquito control agencies still be required to obtain freshwater wetlands permits in these situations? (10)(14)

RESPONSE: The environmental standards do not apply to all man-made drainage ditches with a total contributory drainage area less than 50 acres. A freshwater wetlands permit would be required for such a

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drainage ditch if the project falls under the jurisdiction of the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq., and rules N.J.A.C. 7:7A.

74. COMMENT: N.J.A.C. 7:13-2.1 states that the engineering and environmental standards apply to watercourses "within the jurisdiction of this chapter" that have a total contributory drainage area greater than 50 acres. The commenter requests that this jurisdictional reference be deleted and replaced with the specific areas in which the Department intends these regulations to apply. (17)

RESPONSE: The specific areas of regulation are set forth in N.J.A.C. 7:13-1.3. To repeat the area of jurisdiction within each section is unnecessary.

75. COMMENT: Does N.J.A.C. 7:13-2.2(a)6 (prohibited uses in the floodway) exclude on-channel detention/retention basins? Has an agreement been reached within the Department concerning relaxing the requirements under the freshwater wetlands program for such basins? (14)

RESPONSE: N.J.A.C. 7:13-2.2(a)6 prohibits the construction of off-channel detention/retention basins and not on-stream detention/retention basins. Therefore, on-channel detention/retention basins are allowed in the floodway under this rule. No special agreement has been arranged with the Freshwater Wetlands Program. An on-stream basin would still have to meet the requirements of the Freshwater Wetlands Protection Act Regulations, N.J.A.C. 7:7A.

76. COMMENT: The commenter opposes the reduction of prohibited uses set forth at N.J.A.C. 7:13-2.2(b)1 (existing, already-permitted uses maintained) unless the public benefit is better defined. (19)

RESPONSE: The Stream Encroachment Program is regulatory, not prohibitive. If an expansion of an existing use is proposed that meets both the engineering and environmental requirements of this chapter, then the Department shall issue a permit. This section is amplified from the repealed rules to more specifically state what requirements must be met in order to maintain or expand an existing use.

77. COMMENT: N.J.A.C. 7:13-2.2(a)1 prohibits all fill in the floodway. Under the rules proposed for repeal, additional "net fill" is prohibited. The concept of "net fill" used in the current regulations provides a rational approach to construction in the floodway and results in no reduction of the flood storage capacity of the floodway. In the Social Impact statement, the Department states that the proposed notion of "no fill" is a more liberal approach to construction in the floodway. However, the example presented ("an undeveloped lot located in the floodway surrounded by existing buildings that effectively shield the lot from flows of flood water" has no real application.

The proposed regulations should maintain the existing prohibition against the addition of "net fill in the floodway," since no reduction would occur in storage capacity. The proposed fill prohibition would create a hardship in many cases. Improvements or expansions to existing roadways that cross the floodway would be prohibited under this provision. Such improvements are often required as a condition for subdivision approval. (19)

RESPONSE: The 20 percent "net fill" requirement was imposed under the repealed rules on the flood fringe because managing "net fill" is an effective way to preserve flood storage within the flood plain. However, a floodway is an area necessary for conveyance of flood waters and not an area for flood storage. While the repealed rules allowed for no "net fill" in the floodway, the Department has always regulated the floodway to prevent obstructions to flow, and in most cases, this has meant no fill at all in the floodway. Furthermore, under the old policies, the Department did not allow expansion or second story additions above the flood elevation to existing structures.

Changing the rule to allow no further obstruction to flow instead of no "net fill" is actually more realistic and less restrictive then the requirements imposed by the Department under the repealed rules. It reflects the regulatory concerns of building in a floodway, including preserving flow area, while now allowing for the expansion of lawful, pre-existing structures.

78. COMMENT: The rules proposed for repeal placed damaged structures into two categories, those damaged by flooding and those damaged by any other means. Structures damaged by flooding were required to provide floodproofing and stabilization to prevent future flood damages. Structures damaged by other means could be rebuilt provided that they were not enlarged.

New N.J.A.C. 7:13-2.2(b)2 (prohibited uses, exceptions) combines the categories and requires floodproofing and anchoring even if the structure was damaged by means other than a flood. This will make rebuilding structures damaged by means other than flooding difficult. (4)(5)(21)

RESPONSE: N.J.A.C. 7:13-2.2(b)2 still allows damaged buildings to be reconstructed to pre-damaged size or even expanded, provided that there is no increased obstruction to flow. The floodproofing requirement is to protect the owner from potential future flood damage and can be in the form of wet floodproofing to equalize hydrostatic forces. The requirements for anchoring are added to bring the rules into conformance with BOCA building requirements. In fact, the BOCA requirements for construction in the flood plain are more restrictive than these requirements and will actually dictate what restoration can be performed.

79. COMMENT: N.J.A.C. 7:13-2.3(b)1 states that "regulatory flood flows along non-delineated streams shall be calculated assuming that the entire contributory drainage area is fully developed in accordance with the current zoning plan, to the maximum impervious cover allowed thereunder, and in accordance with applicable storm water management regulations." This procedure allegedly accounts for the increase in the volume of flood water which will result from the development of a watershed. However, N.J.A.C. 7:13-2.8(a)1 states that "stormwater runoff discharges within the regulatory jurisdiction of this chapter resulting from the development of the site, for the two, 10 and 100 year storm events shall be controlled so that the pre-project construction peak flow rate and the velocity of the receiving watercourse is not increased at or downstream of the point of discharge." N.J.A.C. 7:13-2.18(b)2 states that the applicant shall submit a detailed routing analysis to the Department to show impacts to downstream flood elevations from regulated activities. Why must a 100 year flood plain analysis use a peak flow based on future full development of the upstream watershed when N.J.A.C. 7:13-2.8, Stormwater management, prohibits a flow greater than the existing one, and N.J.A.C. 7:13-2.18, Impacts to other properties, requires the applicant to prove there will be no impacts to other properties? If it can be assumed that future development will be constructed in compliance with the rules, then use of existing peak discharges should be suitable for flood plain delineation. This would allow for use of National Flood Insurance Program data, thus reducing consultant costs. (6)

RESPONSE: The stormwater management standards in N.J.A.C 7:13-2.8 apply only to projects that discharge directly into the flood plain. Such projects are located in or immediately adjacent to the flood plain, which constitutes only a small percentage of an entire watershed. New development outside of the flood plain can increase the volume of flood waters which reach the watercourse and increase flooding. These areas are not subject to the jurisdiction of these rules and the requirements therein for reducing the peak flows. In order to fulfill the Program's goal of protecting the public from increased flood damages, it becomes necessary to look at the potential flooding and not just current flooding. Accordingly, the rules consider the entire, developed drainage area in order to calculate the flood flows, unless there is a comprehensive basin-wide stormwater management plan to regulate the increased volumes generated by new development outside of the flood plain. A person buying a home in the flood plain should reasonably expect that the house was constructed so that it will not be subject to inundation by floodwaters within a few years.

80 COMMENT: N.J.A.C. 7:13-2.3(c) (project standards) states that "all projects shall be designed so that they do not increase the flood damage potential during the regulatory flood or any lower frequency level of flood (such as the two or 10 year floods) in either delineated or nondelineated flood plains." This is ambiguous. The rules should clearly list all storm events in addition to the regulatory flood that must be analyzed as part of a permit application.

The Department should delete the requirement to design projects to address the two or 10 year floods in either delineated or nondelineated flood plains since the Flood Hazard Area Control Act does not provide authority to regulate storms of a greater frequency than the 100 year storm. Designing to the more frequent two and 10 year storms is more costly and if the Department believes that this is necessary, then such changes should be made to the statute. (6)(17)

RESPONSE: The goal of the stream encroachment program is to prevent increases to the flood damage potential within the regulatory flood plain. This includes damages from floods of lower frequency than the regulatory flood. N.J.A.C. 7:13-2.3(c) correctly stated the Department's concern that all projects should be designed so that they do not increase the flood damage potential during the regulatory flood or any lower frequency level of flood. However, the majority of projects will meet this requirement, and additional calculations for lesser frequency floods would be extraneous. Therefore, N.J.A.C. 7:13-2.3(c) has been amended upon adoption to clarify the Department's interest in protecting existing buildings from damages due to increases in flooding from lesser

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frequency floods which will occur more often than the regulatory flood. This analysis would only be required in developed areas where there are existing buildings close to the watercourse that could be adversely affected by an increase in lesser frequency flood elevations.

81 COMMENT: The Department should define the "lesser frequency floods" which projects should not increase (N.J.A.C. 7:13-2.3(c)1). All projects that require an applicant to model multiple storms will result in an increase in consulting costs and review time. Hydrology and hydraulics of particular areas vary substantially. What is the social cost of establishing two and 10 year flood plains? Will property owners now be sued if damages to downstream users for less than 100 year storm are alleged? What precedent is there for expanding the regulations to delineate two, 10, 25, 50, 100, 100 +25 percent or 500 year flood lines? It appears that this is inappropriate. (7)

RESPONSE: A "lesser frequency flood" is any flood event below the regulatory (100-year), flood or in other words, a lesser frequency flood that statistically will occur more often than the regulatory flood. The 100 +25 percent flood is only used in State adopted flood delineations. The 100 +25 percent and the 500 year flood plains were never, and still are not, required to be determined for the purposes of the stream encroachment program.

Designing for floods of a lesser frequency than the 100-year flood is necessary to protect existing structures from flood damages, the main objective of these rules and the Flood Hazard Area Control Act. The Department has had applications submitted for review where the design either did not affect or reduced the regulatory flood elevation, but increased the lesser frequency flood elevations, subjecting existing buildings to increased flooding and potential damages. It is irresponsible to ignore the potential impacts of these lesser floods in the design of a project.

As noted in the response to Comment 80 above, N.J.A.C. 7:13-2.3 has been clarified on adoption to require this analysis only in developed areas where there are existing buildings close to the watercourse that could be adversely affected by an increase in lesser frequency flood elevations. As for the cost of such modeling, the primary cost is incurred in developing the model which must be done anyway to determine the 100-year flood; determining the lesser frequency flood elevations is just a matter of changing the flow rates used in the model. Finally, the Department declines to speculate as to liability for a cause of action arising from flooding allegedly attributable to a hypothetical project.

82. COMMENT: The commenter objects to calculating the regulatory flood flow along non-delineated streams assuming that the entire contributory drainage area is fully developed in accordance with the current zoning plan. This rule presents special difficulty for bridge replacement projects that increase the width of bridges. The drainage area of bridges can encompass several municipalities. To assume that the entire drainage area will be developed within the next 50 years (the expected life of a bridge) is clearly wrong. There are many extenuating circumstances in Burlington County, such as land increasingly reverting to permanent farmland preservation and greenway conservation areas. The rule will mean more engineering work (determining zoning) and higher construction costs (larger openings) for the county's bridge replacement projects which increase the width of bridges. State, county and municipal bridges and culverts should be exempted from this provision. A basinwide storm water management system is also impractical for Burlington County for political and social reasons. It has been tried and has failed. (12)

RESPONSE: The rule assuming full development in the drainage area is actually most important in counties such as Burlington which are not yet fully developed, especially if a basinwide storm water management system will not or cannot be provided. The rule will facilitate appropriate planning of development in the flood plain to avoid future problems such as those experienced in the northeast counties, where increased flood volumes due to development outside the flood plain causes increased flood elevations and increased flood damages to those structures in or near what was calculated to be the flood plain 15 or 20 years ago.

The rate of development of an area cannot be predicted absolutely. While an area might not be developed within the next 50 years as the commenter has stated, it might also be fully developed within the next ten.

Land reverting to permanent farmland preservation is not an extenuating circumstance. If farmland is "preserved" it means that it exists as such, now, and is most likely zoned agricultural. If it were to become a permanent preservation area there would not be any zoning change and therefore would be of no effect in the calculations required under this rule. Greenway conservation areas, on the other hand, can be created out of any type of zoning. However, greenways can come in any size and shape and may or may not affect the stormwater runoff expected from an area. If a planning board requires a certain percentage of greenway for a certain type of project, then this can be incorporated into the calculations as part of the zoning. If the planning board does not require a certain percentage, then the greenways should not be included in any calculations in the interest of public safety.

Increasing the width of a road (usually in response to development that makes the structure inadequate to handle flood or traffic) or the area of the opening under a bridge or culvert will change the hydraulics of the structure. This is the type of project that the Legislature intended to regulate when the stream encroachment program was initiated in 1929. Therefore the Department declines to exempt bridges or culverts from the requirements of this chapter, other than in-kind replacements.

The additional work required to calculate the flood flow based on full development involves obtaining the zoning maps from the various municipalities involved and considering an area developed instead of forested or open. Any engineering or planning groups working in an area most likely already have information regarding zoning. Therefore, there should be little extra work involved in calculating the flow rate based on the assumption of full development. No change in the type of hydraulic calculations is required. The only impact this rule might have on the cost of the project would be if the difference in the flow rate warrants a larger structure.

Furthermore, this chapter does not require that bridges or culverts be designed to pass the regulatory flood without overtopping. Structures can be designed to be overtopped provided that the applicant understands and accepts the risks. If the county believes that a structure can safely be undersized for the regulatory flood then it can be designed that way. In this way construction costs can be controlled and may actually be reduced.

83. COMMENT: N.J.A.C. 7:13-2.3(c) requires all projects to be designed so that they do not increase the flood damage potential during the regulatory flood or any lower-frequency flood. It is impractical if not impossible to check for impacts for all frequency floods. This additional hydrologic and hydraulic analysis will increase engineering costs with no benefit. (12)(15)

RESPONSE: N.J.A.C. 7:13-2.3(c) has been clarified on adoption as explained in the responses to Comments 80 and 81, above. The reference to the two and 10 year flood is replaced by "any lesser frequency flood," and the conditions under which this type of analysis will be required are more clearly defined.

84. COMMENT: The requirement to calculate regulatory flood flows along non-delineated streams based on full development in accordance with current zoning to the maximum impervious cover and in accordance with applicable storm water management regulations (N.J.A.C. 7:13-2.3(b)1) is impractical, overly conservative and inconsistent with the State's delineations, which are based on the 100-year flood plus 25 percent.

To be consistent, the regulatory flood for the non-delineated watercourses should also be based on the 100-year flood plus 25 percent. Computation of flows for full development, which may or may not be accompanied by effective stormwater detention facilities, is based on many assumptions which may never materialize. The more complex calculations required under the rules may not produce any more meaningful results than the more simplistic 25 percent increase adopted by the State of New Jersey for its delineations. Since many projects may be in areas with Federal Emergency Management Agency (FEMA) 100-year flood delineations, the applicant should be allowed to increase the FEMA 100-year flow by 25 percent and determine the corresponding flood elevations based upon the FEMA study stage-discharge relationships. (15)

RESPONSE: The 100 year flood plus 25 percent was a percentage selected to account for future increases in runoff caused by development. While assuming full development in a drainage area may be unrealistic because zoning can be changed or development may or may not happen, the Department feels that this is a more realistic approach than using an arbitrary number that will give higher flood elevations in developed areas and underestimate flows in undeveloped areas.

The FEMA mapping was done for the implementation of the Flood Insurance Program. The methods used to delineate the flood elevation vary from one municipality to the next and in some cases are not based on calculations at all, but upon observed flooding. In one example, the flood elevation on one side of a river that was a municipal boundary was 10 feet higher than on the other bank because each municipality

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had done its own study. The Department has always reviewed the merits of the FEMA mapping before accepting or rejecting FEMA flood elevations for the purposes of the stream encroachment program. To use the FEMA studies and increase the flows by 25 percent (assuming that flows had been calculated) would provide a far more unrealistic flood elevation than assuming full development.

85. COMMENT: These regulations seem to eliminate the FEMA delineations because they were not developed assuming full development in the basin. There are many small projects for which it costs more to delineate the flood plain than to actually design the project. The Federal mapping was very helpful in these cases. (3)

RESPONSE: The FEMA delineations have always been accepted or rejected for use under this chapter on the merits of each individual study. Since most FEMA studies were prepared for developed areas, it is far more likely that the FEMA study will be rejected because of unscientific methods in its preparation rather than its failure to account for full development. Each FEMA delineation will have to be reviewed individually before the Department will accept it for the purposes of implementing these rules. Some studies may be accepted.

86. COMMENT: The commenter reminds the Department that the Flood Hazard Area Control Act limits the Department's jurisdiction on delineated streams to the floodways only. There is no clear authority for extending the Department's review powers beyond this area. On the other hand, the Act specifically provides the Department with authority to regulate activities both in the floodways and within the 100 year flood plain of non-delineated streams (N.J.S.A. 58:16A-55.2). As such, N.J.A.C. 7:13-2.3 should be modified to reflect this limitation. (17)

RESPONSE: The Flood Hazard Area Control Act authorizes the Department to regulate the entire flood hazard area along delineated streams, provided that no municipality assumes responsibility for regulating the flood fringe and the 100-year flood plain along non-delineated streams, which none have. N.J.A.C. 7:13-2.3 does not change the regulatory authority granted under the Act. Along delineated streams, the jurisdiction is still the flood hazard area. Along non-delineated streams, the jurisdiction is still the 100-year flood plain, but that 100-year flood plain assumes full development in order to more effectively and realistically carry out the legislative mandate to protect the public from damages due to flooding.

87. COMMENT: The commenter opposes N.J.A.C. 7:13-2.3(b), which requires regulatory flood flows to be calculated assuming that the entire contributory drainage area is fully developed in accordance with the current zoning plan to the maximum impervious cover allowed thereunder. The rule should be deleted. Why should the developer have to pay for this type of study, which can cost $50,000 or more? The regulations already impose a 20 percent net fill limitation along these waterways. Additionally, municipalities will never be allowed to develop to this limit of impervious coverage. (17)

RESPONSE: The Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., authorizes the Department to protect the public from the dangers of flooding from the 100-year flood. When the repealed rule was adopted in 1984, the Department implemented the 20 percent net fill rule for the flood fringe area because it became apparent that filling in the flood fringe area forced the floodway to handle greater volumes of flood waters and this larger volume of flood waters was increasing flood elevations downstream. The 20 percent net fill rule minimizes the added volume of flood waters forced into the floodway by preserving 80 percent of the flood storage on a site. The concept of the 20 percent net fill rule is sound, provided that the volume of flood waters remains constant. What was not considered at the time was that new development in the basin will also increase the volume of flood waters that enters the flood way and that this volume will also increase downstream flooding. Designing projects for the existing flood conditions virtually guarantees that the project will be exposed to increased flooding and damage as the upper basin is developed. Moreover, the less developed an area is, the greater is the potential for flood damages to increase along with new development. Therefore, to protect future occupants of structures, the Department requires construction to be built to survive future potential flood elevations. Although zoning maps are continuously changed they are the best available information at this time as to how any particular basin will be developed. The maximum impervious limit is used because that is the worst case scenario which, again, is assumed to protect the public against flood related damage. Whether or not a municipality allows development to this limit is usually decided by the local planning boards. The Department cannot assume that all municipalities will not allow development to full impervious cover. However, if certain municipalities have an enforceable policy regarding stormwater runoff that is not reflected in the zoning requirements, the Department will take that into consideration in determining the flood flows based on full development.

88. COMMENT: N.J.A.C. 7:13-2.3(b) requires that the regulatory flood flows along non-delineated streams shall be calculated assuming that the entire contributory drainage area is fully developed in accordance with the current zoning plan, to the maximum impervious cover allowed thereunder, and in accordance with applicable stormwater management regulations. The Flood Hazard Control Act authorizes the Department to regulate land use in the floodway and "the area which would be inundated by the 100-year design flood for any non-delineated stream." It does not require all potential future land use to be considered. Current applicable stormwater management regulations promulgated by the State, counties, and municipalities all require any proposed development to discharge less stormwater runoff from a site after development than that which occurred on the site before development. Accordingly N.J.A.C. 7:13-2.3(b) is unnecessary.(19)(25)

RESPONSE: The Flood Hazard Area Control Act gives the Department authority over the 100-year design storm. While the Act does not require full development to be accounted for, it also does not prohibit such a calculation. In ether case, the legislative mandate is to protect the public from the dangers of flooding.

The applicable stormwater management regulations promulgated by the State, counties, and municipalities that the commenter refers to do not require that a development discharge less stormwater runoff from a site than was discharged prior to development. That would be physically impossible, since a developed area generates a greater volume of runoff than an undeveloped area. Instead, stormwater regulations usually regulate the rate of runoff from a developed site to be discharged into the flood plain. If this volume is not properly managed it could actually increase flood elevations while not changing the rate of runoff from the site. Therefore, the Department is honoring its mandate to protect the public by requiring the applicant to design for full development, unless a basin-wide stormwater management plan is implemented.

89. COMMENT: It is not uncommon for the watershed feeding an on-site watercourse to be located in more than one municipality, thus making it necessary to obtain the zoning ordinances and maps of more than one municipality and to reconcile the scale of the maps with that of the drainage basin information in order to comply with N.J.A.C. 7:13-2.3(b). This costs an applicant additional time and consulting expense. (19)

RESPONSE: Most developers and engineering firms that provide services for developers are already well aware of the local zoning ordinances and have the zoning maps for the areas in which they work. Otherwise, this information is easily obtained from the municipality at a very minimal cost. It is also not necessary to "reconcile" the scale of different zoning maps to obtain the necessary data for determining the flow rate since the information required is the size of the zoned area which can be easily obtained from maps of different scales. While assuming full development will require a little more work, the time expended and costs should be minimal. Further, once full build-out is determined for a project, the information can be reused for future projects in the same locality.

90. COMMENT: The rules proposed for repeal limit increases in 100-year flood levels to 0.2 feet in accordance with the Flood Hazard Area Control Act. The new rules would limit increases to 0.2 feet for the 100-year and all more frequent (less severe) events. While this expands the rules in an important and valuable direction, its legal basis is questionable. In addition, the proposed requirements for more frequent floods should be modified to allow greater than 0.2 feet in those instances where greater increases in such floods will not cause flooding or erosion problems. (Example: in areas of existing flooding, limit increases in flood levels for more frequent events to either 0.2 feet or to the top of the channel bank, whichever is greater. In areas not subject to flooding, limit increases for more frequent events to 0.2 feet or to some vertical distance below lowest damageable structure or facility along waterway). (5)(21)

RESPONSE: The rule as proposed was not intended to set a 0.2 foot rise on lesser frequency storms. While the regulatory flood is the 100-year flood, flood damages within the 100-year flood plain can be increased during lesser frequency floods. Therefore, the regulation of lesser frequency storms is consistent with the legislative intent of the Act. The Department, however, did not intend for every project to be reviewed for lesser frequency floods, so N.J.A.C. 7:13-2.3(c) has been clarified upon adoption to require this review only if there is the potential for adverse effects upon existing structures.

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91. COMMENT: N.J.A.C. 7:13-2.3(b) requires regulatory flood flows in non-delineated streams to be calculated assuming the drainage area is fully developed in accordance with the current zoning plan. This will lead to unnecessarily large regulated areas as it ignores the requirement of most communities that post-development runoff not exceed the pre-development condition. Also, utilizing current zoning plans to calculate the regulatory flood elevations will be very complicated for waterways with large drainage areas that are located in several municipalities. The use of FEMA maps and existing drainage area conditions should continue to be allowed to determine the regulated area for non-delineated waterways.(24)

RESPONSE: Stormwater management regulations at present regulate the **rate** of runoff from a developed site, which still allows for a much greater **volume** of stormwater to be discharged into the flood plain. If this volume is not properly managed, it could actually increase flood elevations while still meeting the current stormwater management requirements.

The increased volume generated by new development will cause an increase in flood elevations downstream. To design structures to the existing conditions is to therefore knowingly subject them to flood damage as the basin develops. Most of the FEMA maps were prepared from data collected in the 1970s. Since these maps have never been updated, they do not show current flood elevations. In addition, there was no standardization of the methods used for determining the elevations on those maps. Thus, the Department has never accepted these maps without first examining how the mapping was performed.

The most effective method of protecting the public from the hazards of flooding, in keeping with the legislative mandate, is by designing for full development, unless a basin-wide stormwater management plan can be implemented.

92. COMMENT: Establishing the regulatory flood for non-delineated watercourses as proposed in N.J.A.C. 7:13-2.3, Regulatory flood, is onerous. FEMA Maps would no longer be acceptable to determine the flood hazard area limits. Under the proposed rules, an applicant could only use the FEMA study if it were demonstrated to DEP that the FEMA study reflects full development in the drainage basin or that there is a viable basin-wide storm water management system in place. The taxpayer-financed FEMA information would then be relegated to background information. Under the proposed rule, if a watercourse has not been delineated by DEP, the applicant would be required to delineate the boundaries of a flood plain for all regulated development and would incur substantial engineering costs, no matter how insignificant the project. (25)

RESPONSE: As explained in the response to Comment 87 above, National Flood Insurance Program (NFIP) rate maps were developed for the purpose of implementing the Flood Insurance Program and were not developed for use by the Department in its stream encroachment program. The NFIP maps have historically been accepted or rejected for use under this chapter on the merits of each individual study.

An applicant would not have to delineate the flood plain for all applications. Many minor projects are now included as non-regulated under these new rules. An applicant whose regulated projects obviously will not affect flood elevations will not be required to delineate a flood plain.

93. COMMENT: N.J.A.C. 7:13-2.4(b) states the floodway "is established through equal conveyance reduction calculations." The equal conveyance reduction method was developed in order to guarantee that property owners on each overbank of a particular stream equally share in the benefit of fill in the flood fringe. When an applicant owns the entire width of the flood plain within a certain reach, delineating the floodway through equal conveyance reduction can be an inefficient way of using fringe area. There is no hydraulic advantage associated with the equal conveyance proportionally (or any other way, for that matter) within the limits of the applicant's property as long as it can be demonstrated that offsite water surface elevations are not increased more than 0.2 feet. This is not to suggest that the 20% net fill requirement should be waived, only that there be more flexibility in defining the flood fringe area within the limits of the project site. This section should be revised to allow alternate methods of floodway determination when the applicant owns the full width of the flood plain. (6)

RESPONSE: The Department allows an applicant who owns the property within the flood plain on both sides of the watercourse to adjust the floodway limits so that there is not an increase at the upstream property limit of more than 0.2 feet. This is reflected in N.J.A.C. 7:13-2.18, Impacts to other properties.

94. COMMENT: N.J.A.C. 7:13-2.4 refers to standard "stop" back water analysis; it should be step. (3)

RESPONSE: The error has been corrected.

95. COMMENT: N.J.A.C. 7:13-2.5(b) allows public entities to apply for a cleaning/maintenance permit for portions of any watercourse under their jurisdiction. However, the information required under N.J.A.C. 7:13-4.1 and 2.5(c) would prohibit county agencies from undertaking such surveys of all the waterways within their counties. Also, under N.J.A.C. 7:13-2.5(b) and (c), if maintenance is allowed over the five year duration of the permit, why must all the specific snags, rocks, etc. that are to be removed be identified on the site plans? The documentation is excessive. (10)(14)

RESPONSE: The Department assumes that the commenter is referring to the requirement for an environmental report (N.J.A.C. 7:13-4.1(j)) since the other information requested in N.J.A.C. 7:13-2.5(c) is the same as has always been required. The new rules make the requirements of the environmental report as detailed as necessary to properly address the site conditions.

The requirements of N.J.A.C. 7:13-2.5(b) reflect the information that the Department has been requiring to fully assess the impacts of such a project, so it is unclear how this will prohibit the county from undertaking such a project.

The requirement to show all "specific snags, rocks, logs, sand bars, etc." enables the Department to determine the impact of the proposed project on stream habitat. This information should have already been identified in order to properly plan a project of this type and anticipate what equipment and manpower are needed to complete the project.

96. COMMENT: N.J.A.C. 7:13-2.5(e) requires county mosquito control agencies to submit more information when applying for a simple stream cleaning and maintenance permit than is required from a developer. Why would a county agency have to provide all the information required under N.J.A.C. 7:13-4.1 plus the additional information proposed in N.J.A.C. 7:13-2.5(e)? (10)(14)

RESPONSE: N.J.A.C. 7:13-2.5(e) requires additional information from all applicants who propose projects meant solely for mosquito control purposes and which exceed the limitations of N.J.A.C. 7:13-2.5(a) to (d). Applicants whose stream cleaning projects meet the requirements of N.J.A.C. 7:13-2.5(a) to (d) would not have to submit the additional information. N.J.A.C. 7:13-2.5(e) has been revised on adoption to clarify that the additional information is required when the proposed project exceeds the requirements of N.J.A.C. 7:13-2.5(a) to (d). N.J.A.C. 7:13-2.5(e)5 as proposed did impose additional requirements on county mosquito control and Federal Government agencies; however, it has also been changed on adoption to apply to all applicants and not just county mosquito control and Federal Government agencies.

97. COMMENT: Does N.J.A.C. 7:13-2.5(e)5 require county mosquito control agencies to have their projects reviewed on a case by case basis, rather than applying for one permit as stated in N.J.A.C. 7:13-2.5(b), or does this exempt mosquito control agencies from the other criteria listed in N.J.A.C. 7:13-2.5?

Also, it appears that if a developer or private land owner wants to conduct stream cleaning for the purpose of mosquito control, the applicant must meet all the criteria in N.J.A.C. 7:13-2.5(e) except paragraph(e)5. N.J.A.C. 7:13-2.5(e)5 should be revised to require all applicants (private or public entities) to submit mosquito control project proposals to the Administrator of the State Office of Mosquito Control Coordination and to perform all work in compliance with the Department's Best Management Practices for Mosquito Control. (10)(14)

RESPONSE: As stated in the response to Comment 96 above, N.J.A.C. 7:13-2.5(e) is applicable only if the proposed project exceeds the requirements of N.J.A.C. 7:13-2.5(a) to (d) and is intended solely for mosquito control purposes. N.J.A.C. 7:13-2.5(e) has been revised on adoption to clarify this intent and to make N.J.A.C. 7:13-2.5(e)5 applicable to all applicants.

98. COMMENT: Many county mosquito control agencies deal with flooding in conjunction with mosquito control. Do the counties apply for a permit under N.J.A.C. 7:13-2.5(b) or 2.5(e)? (10)(14)

RESPONSE: Projects undertaken for flood control generally exceed the scope of stream cleaning and will be subject to all the requirements of this chapter and not just N.J.A.C. 7:13-2.5.

99. COMMENT: Who determines if a project is "of significant public interest" as provided in N.J.A.C. 7:13-2.5(e)2? (10)(14)

RESPONSE: N.J.A.C. 7:13-2.5(e) is intended to allow, in the interest of public health, an applicant to perform stream cleaning projects that do not conform to the other requirements of N.J.A.C. 7:13-.25 if the

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projects are inteded only for mosquito control. In this sense it is a hardship waiver and the Department will consider "significant public interest" to be inquiries from five interested parties, which is the number required under N.J.A.C. 7:13-4.8, Hardship waivers, for a public hearing to be conducted.

100. COMMENT: With regard to N.J.A.C. 7:13-2.5(e)5, what if county mosquito control agencies want to perform maintenance to prevent a mosquito problem from developing? This section would then conflict with N.J.A.C. 7:13-2.5(b). As public entities, county mosquito control agencies would be better off applying for a permit under N.J.A.C. 7:13-2.5(b). (10)(14)

RESPONSE: If a mosquito control agency is undertaking a maintenance project which conforms to N.J.A.C. 7:13-2.5(a), then it will not be required to submit any more information than any other applicant. The requirements of N.J.A.C. 7:13-2.5(e) apply only if the project does not conform to N.J.A.C. 7:13-2.5(a) and the agency is seeking an exemption from strict compliance.

101. COMMENT: N.J.A.C. 7:13-2.5(e)1 requires compliance with notice requirements at N.J.A.C. 7:13-4.2 which in turn applies to any project considered a "major" project under the 90-day Construction Permit Rules at N.J.A.C. 7:1C. If a mosquito extermination commission (MEC) is proposing a stream cleaning project which is considered a "minor" project, then does it have to meet these more stringent notice requirements? Shouldn't MECs apply for a cleaning and maintenance permit to avoid additional requirements? (14)

RESPONSE: As explained in the response to comment 96 above, the requirements of N.J.A.C. 7:13-2.5(e) must be met only if an applicant's project does not conform to the requirements of N.J.A.C. 7:13-2.5(a) to (d) and the project is intended solely for mosquito control. The notice requirements of N.J.A.C. 7:13-4.2 which are referred to in N.J.A.C. 7:13-2.5(e)1 do not apply only to "major" projects; they also apply to projects along trout associated watercourses, to projects exposing acid-producing soils, to projects for which a hardship exemption is sought and to appeals of the Department's decisions. Since the requirements of N.J.A.C. 7:13-2.5(e) approve in essence a hardship exemption, the Department is requiring the applicant to provide the notice required for other projects for which a hardship exemption is sought. N.J.A.C. 7:13-2.5(e)1 has been revised on adoption accordingly.

102. COMMENT: N.J.A.C. 7:13-2.5, Watercourse cleaning, should refer to P.L. 1993, c.376 that was enacted January 11, 1994. This law now allows counties, municipalities and agencies thereof to undertake certain stream cleaning activities upon notice and certification to the Department. The Department should also adopt permit-by-rule for stream cleaning activities. (3)(17)

RESPONSE: The new rules deregulate the removal of debris from a watercourse, but still regulate the removal of sediment (N.J.A.C. 7:13-2.5(a)1). The rules are in accordance with P.L. 1993, c.376; the Department does not see any need to specifically reference the law.

The Department does not believe it is appropriate to adopt a permit-by-rule for watercourse cleaning projects. The type of watercourse cleaning projects which require Department review under the rules are those which have the greatest potential for environmental damage. Therefore, it is appropriate for the Department to do a detailed review of such projects. A permit-by-rule would not provide that review.

103. COMMENT: N.J.A.C. 7:13-2.5, watercourse cleaning, should prohibit use of heavy equipment. (16)

RESPONSE: The rule discourages the use of heavy equipment "to the greatest extent possible." The Department will decide whether equipment can be used in the channel on a case-by-case basis based on the merits of the project and the resulting potential for environmental damage.

104. COMMENT: The commenter objects to considering additional watercourses not included in the original permit as a modification to a stream cleaning permit under N.J.A.C. 7:13-2.5(b) unless full public notice is provided. (16)

RESPONSE: Watercourse cleaning permits are minor permits and as such do not require public notices. Watercourses added to the original watercourse cleaning permit pursuant to N.J.A.C. 7:13-2.5(b) will therefore have the same public notice requirement that a new application for a watercourse cleaning permit would have.

105. COMMENT: The commenter fully supports N.J.A.C. 7:13-2.5(e)3 that requires applicants for mosquito control activities to fully examine alternatives. In this context, "reasonable" should be clearly defined. (16)

RESPONSE: The Department acknowledges this comment in support of the rule. To clearly define "reasonable" in the rule is very difficult since this determination will depend on the specifics of the project and the site involved as well as many other factors.

106. COMMENT: N.J.A.C. 7:13-2.5, watercourse cleaning, is redundant since streams and rivers clean themselves. Constant removal of snags is not cleaning, it is killing, Sediment removal and snag removal should appropriately be called "channel alteration" or "watercourse alteration," not cleaning. Removal of junk such as appliances or shopping carts never required a permit and should not be referred to in the same context as desnagging. The occasional tree that falls across waterways is a natural occurrence and blessing that provides essential structure to streams, providing cover and scouring deep pools. Stream energy is broken or rather diverted to doing the work it had always done in the sculpting of waterways. (2)(11)

RESPONSE: As used in the stream encroachment program, watercourse cleaning has come to mean the removal of debris and or sediment from the natural watercourse bed, thereby restoring, or "cleaning" the original channel bed. While it can be called channel modification because it can change the channel bed, it can also be considered channel restoration.

The commenter refers to the importance of structure in the health of the waterways and ultimately in the entire ecology. However, a watercourse is constantly eroding and shifting. A flood, which is nature's way of "cleaning" a stream, can easily carry away snags or other obstructions performing the very task to which the commenter objects to and claims is "killing."

The commenter allows that removal of a shopping cart or discarded appliance is not objectionable but that removal of a snag is. However, if a shopping cart or appliance is left in the stream to collect sediment or debris it is the equivalent of a snag. The commenter considers fallen trees a "blessing" because they provide essential structure to watercourse, providing cover and scouring deep pools. While this can happen, there are so many variables, including the size of the watercourse and the established habitat, that it cannot responsibly be assumed that all fallen trees provide a benefit. The conditions created by the fallen tree may change a fragile habitat, destroy a species or divert the flow of a watercourse and cause erosion which threatens a dwelling or roadway.

Sound water resource management requires that all the pertinent factors be taken into account. Each watercourse must be evaluated and "managed" based on its own special character.

Finally, many of the commenter's concerns no longer can be addressed under this rule. The passage of the Stream Cleaning Law, P.L. 1993, c.376, supersedes this chapter and allows for the removal of individual obstructions or debris, including trees, by a county or municipality without a permit from the Department.

107. COMMENT: The commenter disagrees with the Department's assertion that snags worsen floods, or that the trapping of floatables is a nuisance. A good study shows that fallen trees have negligible effect upon the hydraulic phenomena that cause a flood plain to fill. Also snags can occur upstream of a flooded area, where any effect would be favorable to the downstream residents. The potential danger of a snag breaking loose in a flood and causing downstream damage is a genuine concern. However, securely anchoring a fallen tree that shows danger of coming loose (many remain firmly rooted) is much cheaper, easier, and more appropriate than removal. Also, snag removal in remote upstream areas is next to impossible. Those snags, which present similar danger, could be easily anchored. (2)(11)

RESPONSE: The effect of a snag on flooding is dependent on a multitude of variables, and each snag must be evaluated separately to determine the effect.

108. COMMENT: N.J.A.C. 7:13-2.5 neglects the value of fallen trees in collecting floatables all in one place on the upstream side of the snag. What positive social value is there in removal of wildlife habitat so that garbage can continue floating on down to the next town, or be strewn for miles along a waterway, some of it reaching our beaches? There should be language in the new rules that strongly discourages the removal of fallen trees where they are not obstacles to navigation. (2)(11)

RESPONSE: While it is true that a fallen tree will collect garbage on the upstream side and prevent it from being carried downstream, this is of no value unless there is a dedicated effort to remove that garbage from the stream. If not removed, the collected debris and garbage can cause stagnant conditions that would eliminate the area as useful animal habitat.

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109. COMMENT: The commenter agrees that mosquitoes are a health threat. However, the traditional methods of mosquito control, draining and channel alteration, should be discouraged. Mosquitoes are very opportunistic and return very quickly. It is the predators of the mosquito that are our true allies in mosquito control. Those predators are the most adversely affected by traditional control measures. There should be language in the new rules that encourages genuine wildlife habitat improvement. If the mosquito is prey for certain animals, let the protection of those animals be a priority.

The aesthetic and recreational value of a stream is lost to the extent that it is continually desnagged or having its channel reworked. Removal of structure equals removal of fish and wildlife. (2)(11)

RESPONSE: The Department discourages draining and channel alteration under any circumstance unless there is no other alternative and the project is in the public interest. A Best Management Practices for Mosquito Control Manual has been developed jointly by the Department and the Mosquito Control Agencies to ensure that the most environmentally sensitive approach possible for mosquito control is followed. In addition, the stream encroachment program often works with the State mosquito control coordinator in the Division of Fish, Game and Wildlife to correct mosquito problem areas with minimal disturbance to the environment. In some cases, stream cleaning must be considered.

110. COMMENT: N.J.A.C. 7:13-2.5(b) indicates that public entities may apply for cleaning and maintenance permits. There is no reason why private entities should not be able to seek such a permit where a property owner is responsible for a watercourse passing through the subject property. (19)

RESPONSE: While stream cleaning is traditionally done by public agencies, the Department did not intend to exclude a private entity from performing stream cleaning, and the rule was revised upon adoption to reflect that both private and public entities may apply to undertake such a project.

111. COMMENT: N.J.A.C. 7:13-2.6(a)2 (excavation) should be deleted since there are no criteria by which an applicant can know in advance whether excavation would be so deep as to affect any wells in the surrounding area or to cause any groundwater pollution. What criteria does the Department intend to use to make this determination? (17)

RESPONSE: The Department continues to regulate excavation using the simple criteria that (a) if the excavation causes a lowering of the groundwater table, which is easily determined on any site, it may affect wells in the area; and (b) if an impervious layer is penetrated bringing ground water into contact with the surface water, pollution of the ground water may occur.

112. COMMENT: Why has the distance for deposition of spoil been extended to 25 feet in N.J.A.C. 7:13-2.7 (b) (disposal of spoils-environmental standards)? The equipment required to move spoil the additional 10 feet from the bank may be more environmentally detrimental than leaving the spoil at the 15 foot distance allowed under the rules proposed for repeal. (10)(14)

RESPONSE: The 25 or 50 foot zone from the top of bank in which the deposition of spoils is prohibited coincides with the regulated area designed to protect water quality established in N.J.A.C. 7:13-1.3(a)3.

113. COMMENT: Under N.J.A.C. 7:13-2.7(c), it appears that county mosquito control agencies will be faced with more stringent requirements than general public entities. Mosquito control agencies proposals are reviewed on a case by case basis under N.J.A.C. 7:13-2.5(e) but general public entities applying for cleaning projects are exempt from the 25 foot requirement as described at N.J.A.C. 7:13-2.7(b)1. (10)(14)

RESPONSE: N.J.A.C. 7:13-2.7(c) does not impose additional requirements upon mosquito control agencies. In effect it is a waiver from strict compliance with conditions placed upon disposal of spoils to which a private entity would be subject.

114. COMMENT: The commenter objects to the use of 25 feet as an arbitrary buffer for disposal of stream spoils in N.J.A.C. 7:13-2.7(b). Stream spoils should not be placed in certain areas at all even if they are more than 25 feet from the stream, that is, wetlands, stream corridor areas. (16)

RESPONSE: The 25 or 50 foot buffer area is consistent with the jurisdiction of the Department stated in N.J.A.C. 7:13-1.3(a) and is a continuation of the authority exercised under the repealed rules. While the Department agrees that in certain areas the 25- or 50-foot limit is small, it does not have the authority under this rule to prohibit the placement of spoils in wetlands if the wetlands are beyond the area regulated under this chapter.

115. COMMENT: What is the Department's rationale for increasing the distance from a stream bank within which spoils shall not be placed from 15 to 25 feet back from the top of channel bank or 50 feet along trout associated waters as provided in N.J.A.C. 7:13-2.7(b)? Unless this region is within the floodway or within the 100 year flood plain of a non-delineated stream, the Department does not have authority to regulate this area. (17)

RESPONSE: The increase in distance from 15 to 25 or 50 feet in the rule was made to preserve the overbank area for water quality purposes. The authority to protect water quality is derived from the Water Pollution Control Act under which these rules are promulgated. Twenty-five (or 50) feet was chosen because this is the limit of the Department's jurisdiction. To fully protect water quality, a buffer strip up to 300 feet back from top of bank should be preserved.

116. COMMENT: In N.J.A.C. 7:13-2.8(b)2 (stormwater management) it appears that there is a typographical error in the second to the last line which reads "inaccurate"; this should be corrected to read "accurate." (6)(17)(18)(19)

RESPONSE: The rule was revised on adoption to correct this mistake.

117. COMMENT: In N.J.A.C. 7:13-2.8(d)3iii (project standards) "the minimum outlet diameter, width or height is three inches" for water quality design of detention basins. Extensive experience with such a small diameter orifice has shown that it will easily clog with debris regardless of typical measures taken to prevent such an occurrence. It is suggested that a larger diameter, such as a six inch orifice, be considered for the minimum allowable size. (6)

RESPONSE: The minimum three-inch orifice standard was set through the Stormwater Management Regulations, N.J.A.C. 7:8. While it is true that an orifice that size can easily clog, it has also been demonstrated that the orifice will function properly with a properly designed trash rack. Therefore, the Department declines to make the suggested change.

118. COMMENT: If the three-inch orifice is too large for the detention basins in N.J.A.C. 7:13-2.8(d)3iii then some other method of Total Suspended Solids (TSS) removal must be used but the rules do not address what other methods should be used. (3)

RESPONSE: The three-inch minimum orifice size for detention basins was set in an effort to prevent clogging of the outlet. However, it has previously been assumed that a basin meets the water quality criteria if it is designed so that the volume of the water quality storm (N.J.A.C. 7:13-2.8(b)2) is held behind a three-inch orifice. This requirement not only drives up the size and cost of the basin but usually does not provide the detention times necessary to provide water quality. Therefore, in order to assure that water quality is maintained, N.J.A.C. 7:13-2.8(d)3iii requires that if the three-inch orifice is too large, then the TSS should be removed prior to discharge into the basin, that is, somewhere else within the stormwater system. The removal may be accomplished using one of the listed measures or by an innovative method designed specifically for the subject site and approved by the Department.

119. COMMENT: N.J.A.C. 7:13-2.8, Stormwater management, is not based on solid engineering principles and will increase the complexity of engineering applications and their number. The rule is overly restrictive and does not promote creative engineering solutions. The requirement to reduce TSS is unenforceable. There are no reliable monitoring measures for storm water runoff. (7)

RESPONSE: Stormwater management by regulating runoff and minimizing TSS has been a part of stream encroachment review since these rules were originally adopted in 1984. The only new concept here is the reduction of post-development runoff rates below the pre-development rates. This provision was added because the now repealed regulations addressed only runoff rates and not volumes. Since increased flood volume from new development (and the speed with which this volume reaches the watercourse) is the main source of increased flooding, the requirement of maintaining peak discharge rates has proven not to control flooding; in fact, it has been shown to increase flooding under certain circumstances. The percentages set in this rule for the reduction of runoff rates were based upon computer modeling of drainage basins in New Jersey derived from well-accepted engineering standards.

Controlling TSS to protect water quality is a well established practice throughout the country and is mandated by the U.S. Environmental Protection Agency. There are several water quality computer programs available to professionals which model water quality in stormwater runoff.

Contrary to the commenter's assertion, the Department believes that this rule promotes creative solutions for stormwater management be-

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cause it sets goals and does not mandate that particular methods be used. The rule merely provides examples of methods that have been successful.

120. COMMENT: N.J.A.C. 7:13-2.8(a)2 (stormwater management) provides that a 20 acre drainage area limit shall be used for the Modified Rational Method (MRM)"unless otherwise approved by the Department." The MRM can only be used for a 20 acre limit. (8)

RESPONSE: The rule has been modified on adoption to reflect the 20 acre limit for the MRM.

121. COMMENT: N.J.A.C. 7:13-2.8(a)4 (stormwater management) states that "the applicant shall provide plans and calculations to show that the discharge attributable to the proposed project will not cause erosion along the flow path between the outfall and the receiving waterbody. All stormwater discharge paths shall be stabilized in accordance with the criteria in N.J.A.C. 7:13-3.3." This is a duplicative regulation and should be rewritten to clearly state that the Soil Conservation Districts will require and regulate stability from all outfalls for erosion control. (8)

RESPONSE: While it is within the jurisdiction of the Soil Conservation Districts (SCDs) to regulate the stability of outfalls, many municipalities (as well as the New Jersey Department of Transportation) are allowed to approve their own soil erosion and sediment control plans. In addition many plans are submitted to the Department prior to SCD approval of soil erosion and sediment control plans. While the Department continues to accept SCD approval as proof of stability of outfalls, it cannot assume that every outfall will be specifically approved by a SCD. Since stability of the flow path is extremely important in preventing sediment from entering the stream, the Department feels that any duplication is warranted to protect water quality.

122. COMMENT: N.J.A.C. 7:13-2.8(d)4 (stormwater management) refers to use of grassed waterways for filtering out the "total suspended solids" (TSS). There is a conflict between designing these grassed waterways under this section as opposed to under the Standards for Soil Erosion and Sediment Control in New Jersey. Although grassed waterways will probably benefit water quality to some degree, vegetative filter strips are preferable. (8)

RESPONSE: N.J.A.C. 7:13-2.8(d)4iv and v were added on adoption to include grass swale standards that conform with the Standards for Soil Erosion and Sediment Control in New Jersey.

123. COMMENT: The commenter opposes the creation of wetlands with water levels of less than one foot in N.J.A.C. 7:13-2.8(d)1i. The creation of such sites will provide optimal mosquito breeding habitats and will be in violation of the Public Health Statutes (Title 26, Chapters 3 and 9). If open water is preferred, the Department should require a depth where fish and other natural predators of mosquito larvae can survive. (10)(14)

RESPONSE: The commenter is correct in that if the artificial wetland were to have six inches of standing water, it would create an optimum mosquito breeding area with few, if any, natural predators to control the mosquitos—an unbalanced wetlands system. An artificial wetland as described in the proposal would create a health hazard in a populated area. Studies have shown that in order to establish the artificial wetland and have it provide the necessary water quality protection, a diverse system including standing water with a transition area between the standing water and the upland areas is required. The requirement at N.J.A.C. 7:13-2.8(d)1i that artificial wetlands should be designed to have a standing water depth of six inches was in error and has been amended upon adoption so that the wetlands must be created around a standing pool of water at least six feet deep.

N.J.A.C. 7:13-2.8(b) requires stormwater systems whose discharges come under the jurisdiction of this chapter to be designed to reduce, to the maximum extent possible, the total suspended solids (TSS) generated by the development for storm events up to the water quality design storm. Artificial wetlands are only one of the methods presented as a means of meeting this requirement. As proposed, the six inch depth of water throughout the artificial wetland would restrict an applicant to the creation of marshes and exclude other types of wetlands. In addition, these marsh areas would be difficult to maintain and, as pointed out above, contribute to the mosquito problem. The revised requirement to "where feasible" create the wetlands around a central pool six feet deep, allows an applicant more options for creating a working system which will meet the water quality requirements of this rule. Therefore, while the change may seem more restrictive, it actually will benefit an applicant by increasing the design options available to meet the water quality requirements of the rule.

124. COMMENT: N.J.A.C. 7:13-2.8(d)5 (infiltration basin) should include mosquito control concerns for such basins. Whenever it rains, a "failed" basin will often become a significant mosquito breeding site. Another mosquito breeding problem occurs in hydraulic fills when they dry and crack. Then, even a minor rain creates a breeding environment. Infiltration basins that dry out will pose the same problem. (10)(14)

RESPONSE: If an infiltration basin fails, it will become a standing pond. In the context of this rule, designing for failure means assuming that the water will overflow the basin. In that event, a stable flow path should have been provided. Short of prohibiting infiltration basins entirely, the Department is unaware of any design feature that could be incorporated into the design of an infiltration basin that would allow a failed basin to drain and still act as an infiltration basin.

Infiltration basins shall use natural ground and shall not be constructed with fill (N.J.A.C. 7:13-2.8(d)5) so cracking should not be a problem especially if the basin is vegetated.

125. COMMENT: In the past, county mosquito control agencies have been required to obtain Freshwater Wetland Permits to maintain or restore poorly-functioning basins. Is this still true? (10)

RESPONSE: The requirements for obtaining a Freshwater Wetland Permit are not affected these rules. However, the freshwater wetland program is considering a maintenance General Permit which would allow for the continual maintenance of the basin.

126. COMMENT: There are no provisions in the rule to compel maintenance of stormwater systems. How will this issue be addressed? (10)

RESPONSE: N.J.A.C. 7:13-2.8(e) requires maintenance as part of all stormwater management plans.

127. COMMENT: What if a regional stormwater management plan exists that does not meet peak flow rate concerns? Who approves regional plans? (14)

RESPONSE: Regional stormwater plans should be developed based on the needs of the region. Conditions could exist that warrant controls less stringent than are required in this rule. However, whatever plan is in use should take into account stormwater effects on the entire basin and not a site-by-site basis. If a plan does not meet the peak flow rate concerns, the plan may still be acceptable depending on the conditions (for example, zoning, or amount of development) that exist in the particular region.

The Department is currently exploring the best methods for developing regional stormwater management plans. It is envisioned that the plans would be jointly developed by the Department, the county and the municipalities involved.

128. COMMENT: The phrase "contributing watershed" in N.J.A.C. 7:13-2.8(d)1iii needs to be defined. This could be interpreted as the entire watershed in which the development occurs rather than the specific subwatershed. (14)

RESPONSE: This requirement has been clarified upon adoption to state that the artificial wetland should be three percent of the area contributing flow into the artificial wetland.

129. COMMENT: Will maintenance of new basins require a permit? What about existing basins? (14)

RESPONSE: Under N.J.A.C. 7:13-2.8(e), a maintenance plan for a basin will be required as part of the application for a permit to construct the basin and will become a condition of the permit, if issued. Existing basins will not require a new permit unless the applicant is proposing to modify the basin in some way and the basin is under the jurisdiction of this chapter.

130. COMMENT: Under N.J.A.C. 7:13-2.8(e)2, there are no provisions for enforcement of maintenance. Yearly submission of maintenance records should be a requirement. This will ensure that someone in DEP will check that proper maintenance is occurring. (14)(17)

RESPONSE: A yearly submission of written reports, alone, would not ensure that the maintenance is being undertaken. The only way to ensure proper maintenance is to physically inspect the system. Since inspection of every facility is beyond the resources currently available to the Department, maintenance of written records to be produced upon demand by the Department was considered the most reasonable alternative. The Department relies on the counties, municipalities and the general public to report these maintenance problems.

131. COMMENT: The stormwater management provisions in the rules should be promulgated as Stormwater Management Regulations. (15)(17)

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RESPONSE: The Stormwater Management Rules, N.J.A.C. 7:8, are outdated and promote methods which have been shown to increase flooding downstream by allowing increased volumes of stormwater to enter the watercourse. The Department is currently updating the Stormwater Management Rules but has not yet finalized the proposed changes. The stormwater management requirements in these rules are expected to be incorporated into the proposed changes in the Stormwater Management Rules. However, since similar requirements have been part of the stream encroachment program for years, the Department adopted these standards within the Flood Hazard Area Regulations to provide the public with standards for design until such time as the appropriate amendments to the Stormwater Management rules are adopted.

132. COMMENT: The stormwater management water quality measures in N.J.A.C. 7:13-2.8(d) need to be clarified in respect to what percentage of TSS removal is necessary and whether using one of the listed measures (for example, detention basin, artificial wetlands) will satisfy the requirements of this section. (3)(17)

RESPONSE: The standard for TSS removal for water quality set by the U.S. Environmental Protection Agency is 80 percent of the expected annual loading. However, while many water quality computer models and general sediment transfer equations can show that the 80 percent reduction is met, many of the assumptions made in those models are unrealistic. Therefore, while the data from the models are a good estimate of what may happen, they cannot be relied upon absolutely. Therefore, the Department has attempted to be flexible by requiring that TSS be removed "to the maximum extent possible."

The Department did not intend N.J.A.C. 7:13-2.8(d) to be an inclusive list of all acceptable practices from which a design must be chosen to satisfy the requirements of the section. Water quality systems must be designed for the particular expected loadings and site conditions in order to be effective. Thus, N.J.A.C. 7:13-2.8 sets the standards that must be part of the acceptable design and contains examples of some of the methods in use that meet the standards. The use of artificial wetlands, wet ponds/retention basins and detention basins designed to satisfy the requirements of N.J.A.C. 7:13-2.8, Stormwater management, will always be accepted as meeting the standards of this subchapter. However, the other methods listed are not as effective and, although acceptable under certain circumstances, will not always meet the requirements of this subchapter if used alone.

133. COMMENT: The design standards on swales at N.J.A.C. 7:13-2.8(d)4 are very good. (3)

RESPONSE: The Department acknowledges this comment in support of the rule.

134. COMMENT: If full development in the basin is assumed in calculating flows, only a two-tenths rise in the water surface elevation allowed. Do not the two-tenths rise and the 20 percent net fill rule address development in the flood plain? (3)

RESPONSE: The two-tenths of a foot rise in water surface elevation limits constrictions to flow in the flood plain that will cause increased flooding upstream. The 20 percent net fill rule, N.J.A.C. 7:13-2.14(a)1, preserves existing flood plain storage to limit increases in flood elevations downstream which would be caused if these volumes of flood waters were passed downstream. These requirements alone would be adequate to protect the public from increased flood damages provided that the volume of stormwater runoff reaching the watercourse remained constant.

The development of a watershed, however, increases the volume of runoff that reaches a watercourse and that volume can increase the flood elevations even if the two-tenths rise restriction and 20 percent net fill rule have been applied. The solution is to impose restrictions on the amount and/or timing of the stormwater reaching the watercourse, such as the restrictions set forth in N.J.A.C. 7:13-2.8. However, since these rules cannot control runoff from areas beyond the Department's jurisdiction, the only way to protect the public from future damages is by considering the watershed fully developed in formulating run-off rates pursuant to N.J.A.C. 7:13-2.3.

135. COMMENT: Stormwater management plans and maintenance of stormwater facilities are necessary. The state should develop a storm water maintenance manual. (3)

RESPONSE: The Department concurs that regional stormwater management plans, including maintenance of related facilities, is needed. At this time the State has no plans to develop a maintenance manual but will consider the suggestion.

136. COMMENT: N.J.A.C. 7:13-2.8(b)3 requires that stormwater systems be designed so that there is no degradation of water quality below the Department's Water Quality standards. How does an applicant know whether a system will comply with these standards? (3)(17)

RESPONSE: N.J.A.C. 7:13-2.8(b) has been clarified on adoption to require that water quality in the watercourse not be further degraded using the requirements of the Surface Water Quality Standards, N.J.A.C. 7:9B, as a guide. To determine compliance, an applicant must first evaluate the project site to see what type of pollutants can be expected to be in the stormwater runoff, then compare that with the pre-development runoff to see if there is any change that will further degrade the water quality. If there is, then a system must be designed to reduce the impact.

137. COMMENT: The commenter applauds the variety of stormwater management measures listed in N.J.A.C. 7:13-2.8. Identifying and evaluating specific structural and non-structural measures is particularly useful to the public and applicants alike. Requiring maintenance of stormwater management facilities is also to be commended. Maintenance is critical to the success of structural measures. (16)

RESPONSE: The Department acknowledges these comments in support of the rule.

138. COMMENT: N.J.A.C. 7:13-2.8(a)l requires that the pre-project construction peak flow rate and velocity of receiving watercourse is not increased at or "downstream" of the point of discharge. The applicant has no control of points that are downstream of his or her discharge especially if there are other discharge points involved. (17)

RESPONSE: The applicant does have control over the rate and volume of stormwater that is discharged from his or her site and it is this flow which should be controlled so as not to increase flood elevations or velocities that could negatively impact other property owners downstream. Other dischargers will have to meet the same requirements. N.J.A.C. 7:13-2.8(a)1 has been revised on adoption to clarify the discharge requirements.

139. COMMENT: The Department should delete the requirement at N.J.A.C. 7:13-2.8(a)1ii to design the stormwater system so that the post-project construction peak runoff rate for the two year storm event is 50 percent of the pre-project peak runoff rate and the post-development peak runoff rate for the 10 and 100 year storm events are 75 percent of the pre-project construction peak runoff rate. In addition to being very costly, this requirement is not authorized by statute nor is it consistent with the Stormwater Management Regulations. (17)

RESPONSE: Studies performed by Somerset County to obtain this data on percent reductions showed that the requisite increase in basin size was approximately 10 to 12 percent. However, the necessary size increase could be controlled by better land use management such as leaving more open (pervious) and vegetated areas as well as clustering development. Thus, the cost of a larger basin to meet these requirements can be minimized.

The Flood Hazard Area Control Act charges the Department with regulating construction and land uses in the flood plain in order to safeguard the public from the hazards associated with flooding. Accordingly, the requirement to which the commenter objects is consistent with the Act. It is also consistent with amendments that the Department will be proposing to the Stormwater Management Regulations.

140. COMMENT: The requirement at N.J.A.C. 7:13-2.8(a)3 that cultivated land must have been cultivated uninterruptedly for 10 years prior is unreasonable and should be modified. The Department should allow for normal crop rotation that includes fields being laid fallow for a year or so. (17)

RESPONSE: Normal crop rotation, including leaving a field fallow for one season, will meet the requirement, since in such a case the land is being actively used for cultivation.

141. COMMENT: The Department should delete N.J.A.C. 7:13-2.8(b) which requires stormwater management systems to reduce total suspended solids (TSS) to the maximum extent possible. This is onerous and unclear. The Department should specify compliance standards and should state that the use of any one of the recommended Best Management Practices will comply with the TSS requirement. Also the Surface Water Quality Standards at N.J.A.C. 7:9B allow for in-stream TSS concentrations of 25 mg/l for trout production and trout maintenance streams and 40 mg/l for non-trout streams. Wastewater treatment plants are only designed for 83 percent removal of TSS, not "the maximum extent possible." (17)

RESPONSE: The standard for TSS removal for water quality set by the U.S. Environmental Protection Agency is 80 percent of the expected annual loading. However, while many water quality computer models and general sediment transfer equations can show that the 80 percent

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reduction is met, many of the assumptions made in those models are unrealistic. Therefore, while the data from the models are a good estimate of what may happen, they cannot be relied upon absolutely. Therefore, the Department has attempted to be flexible by requiring that TSS be removed "to the greatest extent possible." The EPA also allows for a project to match pre-TSS and post-TSS loadings with no reductions. In these rules, the Department chose a more realistic approach of requiring that TSS be removed "to the maximum extent possible." This approach would allow for a project to provide less than the 80 percent reduction and still be acceptable.

142. COMMENT: Will the use of artificial wetlands pursuant to N.J.A.C. 7:13-2.8(d)1 result in transition area requirements? (17)

RESPONSE: The requirements for obtaining a Freshwater Wetland Permit are not affected in any way by these rules. However, the freshwater wetland program is considering a maintenance General Permit which would allow for the continual maintenance of the basin.

143. COMMENT: The requirement in N.J.A.C. 7:13-2.8(d)1iii for artificial wetlands to have a surface area of at least three percent of the total area of the contributing watershed is onerous and will discourage the use of this technique. What is the Department's rationale for using this criteria? (17)

RESPONSE: This requirement has been clarified upon adoption to state that the artificial wetland should be three percent of the area contributing flow into the artificial wetland and not the total contributory drainage area of watercourse. The three percent figure was based upon the standards developed and in use in Maryland, and which are being used as a model for developing standards in New Jersey.

144. COMMENT: Where does the applicant obtain guidelines for "avoiding thermal stratification" in wet ponds/retention basins as set forth in N.J.A.C. 7:13-2.8(d)2iii? (17)

RESPONSE: The guidelines are provided in the Surface Water Quality Standards at N.J.A.C. 7:9B.

145. COMMENT: What is meant by "non-intrusive exotic vegetation" in N.J.A.C. 7:13-2.8(d)3iv? (17)

RESPONSE: Non-intrusive exotic vegetation refers to non-native plant species with a low reproductive threshold. These species are specified because they are readily out-competed by native vegetation during ecological succession at the site.

146. COMMENT: The reference to three foot vertical separation distance between the bottom of the basin and the seasonal high water table in N.J.A.C. 7:13-2.8(d)5 should be deleted and replaced by two feet since the proposed three foot separation distance is contrary to the stormwater management regulations and is unnecessarily restrictive; two feet is sufficient. What is the Department's rationale for imposing this additional one foot distance? (17)

RESPONSE: The three foot vertical separation is applied to infiltration basins to minimize the potential for contamination of groundwater and, therefore, of potable water sources. The Department has determined that the potential for contamination warrants a three foot separation distance for infiltration basins.

147. COMMENT: The prohibition against transferring the maintenance responsibility to individual property owners in residential subdivisions in N.J.A.C. 7:13-2.8(e)1 should be deleted. This type of restriction does not belong in these standards. Additionally, there may be situations where this arrangement is both preferable and practical. (17)

RESPONSE: This restriction was placed in the rule because the Department believes that it is beyond the average individual homeowner's means to effectively maintain the types of systems that must be installed to manage stormwater at a residential subdivision.

148. COMMENT: Overall, the stormwater management techniques listed in N.J.A.C. 7:13-2.8 are too restrictive. Rather, the Department should simply reference the Best Management Practices Manual since it was prepared with much input from the professional community. (17)

RESPONSE: The techniques described in this rule conform with the Best Management Practices Manual as well as with the amendments being prepared to the Stormwater Management Regulations, N.J.A.C. 7:8.

149. COMMENT: The Department acknowledges in N.J.A.C. 7:13-2.8 that the proposed stormwater management standards increase the cost of stormwater management techniques and require that developers devote larger land areas to stormwater control. Has the Department studied the economic impacts of this rule? If so, what increases in land area and costs are predicted? Also, what is the scientific basis for requiring either that pre-construction volume and rate of runoff for two, 10, and 100-year storms not be exceeded or that the preconstruction peak for the two year storms be reduced by 50 percent and the pre-construction peak rate for 10 and 100 year storms, reduced by 25 percent? (18)(19)

RESPONSE: Somerset County prepared computer models of watercourses in the State for the purpose of determining what the effect there be if those basins were allowed to be fully developed under the current requirements of holding pre-peak and post-peak runoff rates the same from individual sites. The model showed that flood elevations downstream increased because of increased volumes of runoff reaching the watercourses. Further modeling determined that in order not to increase flooding downstream, it was necessary to hold the post-construction peak runoff rate to 75 percent of the pre-construction peak rate for the 10 and 100-year rainfalls, and 50 percent of the two-year event. The models also determined that in order to implement the peak reductions proposed, detention basins approximately 10 to 12 percent larger than what is currently required would be needed. Increased land use and costs will result from this increase in the size of the basins required but could be reduced or eliminated if a project is designed to minimize the potential stormwater runoff. It is not possible to quantify the expected economic impacts of these requirements because the developer can, to some extent, mitigate them.

Increased volumes of stormwater generated by development will result in flooding downstream if not properly controlled. If no regional stormwater plan to control the increased volumes of stormwater is implemented, the Department requires the applicant to show that there is no increase in the volume and rate of runoff from the site. This is important because if there is no increase in the volume or rate of stormwater leaving the site, there will be no impact to the receiving watercourse. The Department also requires a reduction of the flow rates leaving the site for the two, 10 and 100 year storms based upon the work of Somerset County described above. These increases in volume occurred because current policy does not account for the volume and timing of stormwater being added to the flood wave moving down the watercourse. By reducing the rate of runoff, the watercourse should be able to convey the additional volume of stormwater without raising the flood elevations downstream.

150. COMMENT: It appears that the new stormwater management standards at N.J.A.C. 7:13-2.8 have to be implemented through municipal ordinances. If that is correct, the Department should notify municipalities of the new regulations. (18)

RESPONSE: The standards are being implemented through the State stream encroachment permitting process under these rules, and not through municipalities. If the municipalities decide to amend their ordinances to coincide with these standards, they may do so.

151. COMMENT: N.J.A.C. 7:13-2.8(a)1 requires that stormwater runoff discharges be controlled so that the preconstruction peak flow rate and velocity of the receiving water is not increased at or downstream of the point of discharge.

The rules proposed for repeal prohibit the alteration of the flow path of the receiving watercourse. Velocity of the receiving waters can only be affected by a change in the slope of the watercourse profile, a change in the section of the watercourse, or a change in the quantity of water. Since applicants will be prohibited from altering either the profile or cross-section of a watercourse, and the prohibition against increasing runoff after development will ensure the quantity of water from a proposed development will not increase, the velocity will not be affected and should be eliminated from this provision.

Further, the Soil Erosion and Sediment Control certification process addresses the stability of the receiving channel and any necessary energy dissipation measures. (19)

RESPONSE: N.J.A.C. 7:13-2.8(a)1 has been clarified on adoption to delete the velocity requirement. The Department agrees that by requiring that the peak flow rate not be exceeded, in effect, the velocity cannot be increased.

152. COMMENT: N.J.A.C. 7:13-2.8(a)1i requires that the volume as well as the rate of runoff be controlled to the preconstruction condition. Greater land area for infiltration or containment is needed to achieve this standard, if it can be met at all on some sites. At the same time, infiltration basins are discouraged in the environmental standards. Property owners who have not been able to construct approved projects will find themselves having to redesign and possibly reduce development yields to comply. This imposes further costs on a stressed development industry. (19)

RESPONSE: Increased volumes of stormwater generated by development will result in flooding downstream if not properly controlled.

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Therefore, if no regional stormwater plan to control the increased volumes of stormwater is implemented, the Department rules state that one of two requirements must be met. The first, which is the subject of this comment, is that the applicant show that there is no increase in the volume and rate of runoff from the site. This condition will usually only apply to sites where vegetation removal and increases in impervious area are minimal, rather than to sites where substantial development is proposed. Infiltration basins, which theoretically could achieve this situation for developments, are discouraged because the soil conditions in most of the State will not support infiltration and because the failure rate of the infiltration basins that have been built has been extremely high.

153. COMMENT: N.J.A.C. 7:13-2.8(c) states that "Development within the jurisdiction of this chapter shall incorporate land uses and best available technology (such as cluster land development, minimum site disturbance, open space acquisition, use of street flow from streets and parking areas, protection of wetlands, steep slopes and vegetation)." The commenter strongly objects to this provision, which should be deleted in its entirety. It is far beyond the purview of the Flood Hazard Area Control Act to mandate particular site design concepts or impose provisions which fall appropriately under the zoning power of the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. (19)

RESPONSE: The Flood Hazard Area Control Act charges the Department "to adopt, amend or repeal rules and regulations and to issue orders concerning the making, rebuilding or renewing of any structure or alteration and development or use of land." In addition to the Flood Hazard Area Control Act, this rule was also adopted under the authority of the Water Pollution Control Act and the Department of Environmental Protection Act of 1970. The authority to control water quality in stormwater runoff is taken from these two laws. The land use alternatives stated in this section minimize the volume of runoff which, in turn, addresses flooding and water quality concerns. Therefore, the alternatives listed are well within the jurisdiction of the Department under this program.

154. COMMENT: N.J.A.C. 7:13-2.8(d) sets forth some of the techniques which are available to meet the environmental standards for stormwater management. Artificial wetlands, wet basins/retention basins and detention basins are listed as being "encouraged." The rules should be clear in stating that the list of encouraged techniques is not presented in a hierarchical manner, that is that artificial wetlands are not preferred over wet basins. The commenter assumes that any one of the "encouraged" techniques will be equally acceptable. In addition, biofilters and water quality swales should be encouraged along with wetlands, wet basins and detention basins. Further, it should be stated that any artificial wetlands created under this chapter shall be classified as "ordinary wetlands" pursuant to the Freshwater Wetlands Protection Act. (19)

RESPONSE: The listing of methods presented in N.J.A.C. 7:13-2.8(d) is not meant to be hierarchical or all inclusive. The list is only meant to provide examples of methods that can meet the Department's requirements. The Department will accept methods not listed if these methods can be shown to be effective at removing TSS. The subsection has been clarified on adoption to better describe the Department's intent in promulgating the list.

The "encouraged" methods are those which the Department has found to be the most effective, and which will be accepted as satisfying the stormwater management standards if they are designed according to the requirements. The "discouraged" methods will not usually of themselves satisfy the standards of this section and therefore are not as acceptable as the "encouraged" methods. However, if the "encouraged" methods are not feasible, then the "discouraged" methods, when used in combination with other methods, may be acceptable.

The Department has not listed biofilters and swales as "encouraged" because they are effective only for small areas with little to no impervious area. They are best used in conjunction with the "encouraged" methods to reduce the TSS loading reaching the basins or wetlands. The Department will accept these methods as the sole management practice on a case by case basis if it can be demonstrated that they are effective for the proposed project.

155. COMMENT: At N.J.A.C. 7:13-2.8(b) the proposed rules require compliance with the State's Surface Water Quality Standards and a reduction of TSS "to the maximum extent possible." Therefore, it is unnecessary and overly restrictive for an applicant to follow the design standards set forth in N.J.A.C. 7:13-2.8(d), particularly for artificial wetlands, wet basins and detention basins. It should be up to the applicant to design the system to meet the specific requirements for a project, and the DEP to review the design for compliance with water quality goals. The design standards should be eliminated. (19)

RESPONSE: The design criteria for the water quality measures were put into N.J.A.C. 7:13-2.8(d) to clarify what the Department is looking for and to standardize the design criteria. The Department will accept other measures if the applicant can demonstrate that equal protection will thereby be provided.

156. COMMENT: Requiring that a stormwater facility maintenance plan be recorded upon the deed of record in N.J.A.C. 7:13-2.8(e) is inappropriate. Deed restrictions are generally used to describe and restrict certain specific uses which can occur on a piece of property. Maintenance activities do not fall into this category. This provision will create confusion regarding the marketability of title and should be eliminated. The fact that Stream Encroachment Permits are already recorded should be sufficient. (19)

RESPONSE: A deed provides information to an owner regarding restrictions as well as obligations associated with the property. Therefore, a maintenance obligation of this magnitude should be recorded to inform the prospective owner of his or her responsibilities prior to purchase. Since maintenance of the stormwater management system is paramount to keeping the system working effectively, it is of the utmost importance that someone be made responsible for maintenance. If this is the responsibility of an individual lot owner, the owner has the right to know this in advance of purchasing the land. The best mechanism to do this is through a deed restriction. The Department does not agree that this will create confusion regarding marketability of title.

157. COMMENT: "Vegetation removal and replacement at least once a year" of artificial wetlands in N.J.A.C. 7:13-2.8(e)3iii should be revised to "removal and replacement of dead vegetation at least once a year." (19)

RESPONSE: This rule requires removal of all vegetation each year to discourage the growth of woody species and promote the growth of herbaceous species. Removing only the dead vegetation would allow the woody vegetation to remain and eventually change the nature of the wetlands.

158. COMMENT: N.J.A.C. 7:13-2.8(e)5 requires water quality monitoring of wet ponds. These requirements are expensive, time consuming, vague (with respect to water quality monitoring), and have limited usefulness. Further, by requiring the monitoring of such things as fish populations and vegetative growth, it implies creation of an aquatic ecosystem. This is beyond the purpose of a wet basin which is to regulate stormwater and control water quality. (19)

RESPONSE: Wet ponds/retention basins can be designed to meet the requirements of this section without creating an aquatic ecosystem. However, the Department recommends that these systems be designed as aquatic ecosystems because such ecosystems are more efficient in removing pollutants and controlling mosquitoes and are often more aesthetically pleasing.

The monitoring requirement in N.J.A.C. 7:13-2.8(e)5 has been revised on adoption to reiterate the applicability of the rule and to require monitoring for only three years, which should be sufficient time to evaluate if the wet pond/retention basin is functioning as intended.

159. COMMENT: The Flood Hazard Area Control Act (N.J.S.A. 58:16A-50) authorizes the DEP to promulgate "rules and regulations and to issue orders concerning the development and use of land in any delineated floodway which shall be designed to preserve its flood carrying capacity and to minimize the threat to the public safety, health, and general welfare." The rules proposed for repeal apply to "all stream encroachments within the flood hazard area and 100-year flood plains within the state of New Jersey at locations having a drainage area of over 50 acres and all Projects of Special Concern." The proposed rules would also apply to stormwater management facilities located outside the flood plain but which discharge into the flood plain. Such facilities would have to meet specific criteria regarding discharge rate and quality, maintenance, and character.

The Department should eliminate the rules pertaining to stormwater discharges from stormwater management facilities outside the flood plain. The Department should retain the present jurisdiction, which requires the facility itself to be located within the flood plain (in accordance with Flood Hazard Area Control Act). (5)(21)

RESPONSE: The Flood Hazard Area Control Act charges the Department "to adopt, amend or repeal rules and regulations and to issue orders concerning the making, rebuilding or renewing of any structure or alteration and development or use of land," in the flood fringe area as well as the floodway. However, in addition to the Flood Hazard Area

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Control Act, these rules were also adopted under the authority of the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., and the Department of Environmental Protection Act, N.J.S.A. 13:1D-1 et seq., pursuant to which the Department regulates water quality in stormwater runoff. However, since the Flood Hazard Area Control Act is the primary enabling authority for the rules, the Department limits its review under the stream encroachment program to only those projects in or discharging into the flood plain because such projects contribute both to the flooding potential and degradation of water quality in the watercourses.

160. COMMENT: The rules proposed for repeal require all stormwater management facilities located in the flood plain to comply with the DEP's stormwater management regulations (N.J.A.C. 7:8). The proposed rules include separate stormwater management regulations, which differ from those at N.J.A.C. 7:8. The Flood Hazard Area Control Act Rules should remain unchanged with regard to stormwater management. This will allow future changes to Stormwater Management Regulations to be automatically incorporated. (4)(5)(21)

RESPONSE: The Stormwater Management Regulations at N.J.A.C. 7:8 do not adequately control stormwater to prevent downstream flooding or to protect water quality. The stormwater management methods outlined in the new Flood Hazard Area Control Rules are consistent with the changes the Department expects to propose in the Stormwater Management Regulations at N.J.A.C. 7:8. However, since the Stormwater Management Regulations amendments are not yet ready for proposal, the Department decided to incorporate the necessary basic standards into these rules. It is envisioned that once the Stormwater Management Regulations amendments are adopted, amendments to these rules will be proposed to comport with them.

161. COMMENT: The storage requirements that will result from compliance with N.J.A.C. 7:13-2.8 are not practical for linear developments such as public roads. The constraints associated with roadways are quite different from those of typical residential or industrial developments because of limited rights of way, numerous drainage areas involved, and because nearly all of the property may be impervious. A separate section should provide realistic standards for roadways. (24)

RESPONSE: The Department recognizes the problems associated with this type of project and has added an exemption at N.J.A.C. 7:13-2.8(a)5 for road projects that is similar to the exemption already provided for such projects from the fill requirements of these rules. See N.J.A.C. 7:13-2.14(a)7 and 2.15(a)3.

162. COMMENT: N.J.A.C. 7:13-2.8(e) is written for a typical "block" development and contains requirements that are not practical for linear developments such as public roadways. The need to record a maintenance plan upon the property's deed is not necessary for a public project and will be difficult to accomplish. Replacing vegetation at least once a year is excessive, and could lead to sediment and erosion problems. "Artificial" should not be used to describe constructed wetlands. The requirements to annually monitor wet ponds/retention basins are vague and will provide information of minimal usefulness. Depending on when and how the dissolved oxygen, vegetation, and fish populations are analyzed, an annual monitoring report will not be a reliable indicator of the quality of the pond/basin and is unnecessary. Emphasis should be placed on designing and constructing these facilities in accordance with the current best management practices and standards, rather then collecting useless data. (24)

RESPONSE: N.J.A.C. 7:13-2.8(e) has been revised on adoption to exempt any system being maintained by a public entity from the requirement of recording the maintenance plan on the deed of record. The Department's intent in requiring the plan to be recorded is to advise any future property owner of the owner's maintenance responsibilities. Since public properties with this type of infrastructure on them usually remain in public ownership, this is not a concern.

Removal and replacement of vegetation every year prevents the growth of woody vegetation and removes vegetation that has absorbed pollutants, which prevents those pollutants from being reintroduced into the system as the vegetation decays. Such removal generally involves mowing the area and removing the cuttings. Soil erosion should not be a problem.

N.J.A.C. 7:13-2.8(e)5 has been revised to require monitoring only for wet ponds/retention basins located in or discharging to the waters that the Department believes require extra precaution to preserve water quality.

163. COMMENT: The proposal does not clearly state the design standards for water quality facilities. (4)

RESPONSE: N.J.A.C. 7:13-2.8(b) has been clarified on adoption to require that water quality in the watercourse not be further degraded, using the requirements of the Surface Water Quality Standards at N.J.A.C. 7:9B as a guide.

164. COMMENT: N.J.A.C. 7:13-2.8(a) (stormwater management-engineering standards) is confusing. The Department seems to intend that the site of the outflows will have to be such that no increases are created anywhere downstream or, alternatively, that site outflows must be designed to be less than the pre-construction flows. (4)

RESPONSE: The commenter is correct. The intent is to require that the system be designed either so that there are no increases in flow downstream or so that the post-construction runoff is reduced from the pre-construction runoff. The subsection has been revised on adoption to clarify the requirement.

165. COMMENT: N.J.A.C. 7:13-2.9, Channel modification duplicates the role of the Soil Conservation Districts. This rule should refer to the Soil Conservation Districts and their standards. (8)

RESPONSE: N.J.A.C. 7:13-2.9(b)1 has been clarified on adoption to refer to the Standards for Soil Erosion and Sediment Control in New Jersey.

166. COMMENT: N.J.A.C. 7:13-2.9 allows channel modification only if necessary to control existing flooding that threatens lives and property unless otherwise approved by the DEP. This would make minor channel modifications necessary for site expansions, hydraulic improvements, etc. more difficult. The commenter recommends applying the proposed "threat to lives or property" criteria only to channels with viable and valuable environmental character. The Department should allow channels with minimal environmental value (for example, degraded, urban, man-made, or artificially lined channels and drainage ditches) to be relocated to meet land use needs of owners. (5)(21)

RESPONSE: The rule allows channelization when the Department determines that the effects of channelization are offset by the resulting restoration or improvement of the natural characteristics of the nearby environment. This provision allows the Department to take into account the environmental value of the existing site, which satisfies the commenter's concern without need for the language suggested.

167. COMMENT: Proposed N.J.A.C. 7:13-2.9(c) (channel modifications-environmental standards) requires reconstruction of aquatic habitat damaged or destroyed during channel modifications. Reconstruction would include replication of such existing characteristics as percent meandering, bottom substrate type, pool/riffle ratio, stream width, and stream gradient. This would appear to make any channel modification project extremely difficult, if not impossible. The Department should eliminate the proposed requirement for channels modified to protect lives or property. The value of such protection will normally outweigh lost environmental value. Instead, the rules should require only that a modified channel incorporate environmental features to the greatest extent practicable, affordable, and in keeping with existing stream corridor. (5)(21)

RESPONSE: The Department intends with this section to require the reconstruction of the channel only when a watercourse is channelized, not whenever there is channel disturbance. N.J.A.C. 7:13-2.9(c)1 has been clarified on adoption to reflect this intent by changing "channel modification" to "channelization."

168. COMMENT: N.J.A.C. 7:13-2.10(b)5 (underground utilities in the flood plain) requires that manholes located in the flood plain shall be flush with the ground and have a watertight cover. This is fine for sanitary lines but not necessary for a stormwater line. (3)

RESPONSE: N.J.A.C. 7:13-2.10(b)5 has been clarified on adoption to require watertight covers only for sanitary sewer lines, since the potential for polluting the watercourse is much less likely to occur if the stormwater lines overflow than if the sanitary lines overflow.

169. COMMENT: At N.J.A.C. 7:13-2.10, Underground utilities in the flood plain, and 2.11, Above ground utilities in the flood plain, the Department should adopt a permit-by-rule for these activities to simplify the administrative process for both the Department and the regulated community. (17)

RESPONSE: The Department has been looking into the possibility of permits-by-rule for several aspects of the stream encroachment program. Amendments to the rules will be proposed if the Department determines such permits-by-rule are appropriate.

170. COMMENT: The existing Dam Safety legislation and standards are adequate for the purpose of regulating dams. Further regulation under the Flood Hazard Area Control Act Rules N.J.A.C. 7:13-2.12, Dams, is redundant, unnecessary and not cost effective. If the Dam Safety regulations need to be updated with respect to environmental assessments then the appropriate changes should be proposed in the

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Dam Safety regulations, so that the requirements are adopted as appropriate to the unique nature of a dam project. (5)(9)(15)(17)(18)(21)

RESPONSE: The Department intended with these new rules to eliminate overlapping reviews by more than one regulatory program if the same aspects of the same project are reviewed by the Stream Encroachment program.

N.J.A.C. 7:13-2.12, Dams, excludes an engineering review for those dams which have received a Dam Safety Permit pursuant to N.J.A.C. 7:20. An engineering review is therefore required only for those that do not require a Dam Safety Permit. On adoption this section is clarified to specifically reference the Dam Safety Standards and the classes of dams for which an engineering review is not required under these rules. However, N.J.A.C. 7:13-2.12 does provide that the environmental requirements of this chapter apply to all dams constructed within the jurisdiction of this chapter. Since construction, reconstruction or elimination of a dam may have serious environmental impact upon to watercourses and flood plains, this requirement ensures that these environmental concerns are addressed through the permit review process.

171. COMMENT: The commenter supports N.J.A.C. 7:13-2.12, Dams, because not all dams will need a stream encroachment permit. Only one permit should be required. (12)

RESPONSE: The Department acknowledges this comment in support of the rule.

172. COMMENT: N.J.A.C. 7:13-2.12, Dams, severely limits the ability of engineers to properly maintain dams. Many times a dam has open waters behind it which occasionally become wetlands due to lack of maintenance. The control of dams has historically been the jurisdiction of the Division of Dam Safety. It is redundant to have another program in the Department reviewing environmental issues with respect to dams. This would mean that an application would have to be submitted both to Dam Safety and the Land Use Regulation Program of the DEP prior to any work being done.

Although it is absolutely essential that the DEP regulate dam construction and maintenance, this program is being adequately administered under the current Dam Safety regulations. (23)

RESPONSE: As previously explained in the responses to Comments 6 and 170, the Department's intent is to only apply the engineering standards of this rule to the dams that are not reviewed by the Dam Safety Section and to apply the environmental standards to all dams. Most environmental issues dealing with dam construction or repair will be addressed by the Dam Safety Section and therefore will not require dual permit applications to both the Dam Safety Section and the Stream Encroachment Program. Therefore, N.J.A.C. 7:13-2.12 will not "severely limit" dam maintenance.

With regard to the commenter's example about disturbance to freshwater wetlands, if freshwater wetlands are being disturbed by the dam construction or repair, then dual permits (Dam Safety and Freshwater Wetlands) will be required because the Freshwater Wetlands Protection Act is the only legal authority for the review of impacts to freshwater wetlands.

173. COMMENT: The Dam Safety Standards at N.J.A.C. 7:20 provide that if the Department feels there is an adverse environmental impact, an environmental review will have to be done and a dam judged on those grounds. N.J.A.C. 7:13-2.12(c) seems to complicate the process. (4)

RESPONSE: As explained in the responses to Comments 6 and 170 above, N.J.A.C. 7:13-2.12 states that the environmental requirements of this chapter apply to all dams constructed within the jurisdiction of this chapter. Since construction, reconstruction or elimination of a dam may have serious adverse environmental impacts on watercourses and flood plains, this requirement ensures that these environmental concerns are addressed through the permit review process.

174. COMMENT: At N.J.A.C. 7:13-2.13(a)2 (requirements for structures) the phrase "pursuant to the standards for Soil Erosion and Sedimentation control" should be added. (8)

RESPONSE: N.J.A.C. 7:13-2.13(a)2 has been clarified reference the Standards for Soil Erosion and Sediment Control in New Jersey.

175. COMMENT: At N.J.A.C. 7:13-2.13(a), a provision should be added to exempt the replacement of public bridges and culverts from the requirement to pass the regulatory flood without overtopping the road in order to be consistent with other sections of the proposed rules. (12)

RESPONSE: The Department believes that N.J.A.C. 7:13-2.16, Bridges and culverts, adequately defines the conditions for allowing overtopping of structures. It cross-references the access requirements of N.J.A.C. 7:13-2.13.

176. COMMENT: The commenter commends the Department for addressing residential development in the access provisions of N.J.A.C. 7:13-2.13(a)5. (3)

RESPONSE: The Department acknowledges this comment in support for the rule.

177. COMMENT: N.J.A.C. 7:13-2.13(a)8 (requirements for structures), requiring applicants who are proposing to locate recreation areas and non-residential parking lots in areas that may be inundated by floods to post signs in a prominent location that the area is subject to flooding, should be deleted. During times of flood it is unlikely that persons would be utilizing recreation areas or parking lots due to the obvious threat from the flooding. (17)

RESPONSE: While it unlikely that these areas will be in use during a flood, it is not impossible, particularly in the case of parking areas. This new section extends the requirement for a warning sign to parking areas in addition to recreation areas, as was required by the now repealed rules.

178. COMMENT: A new level of review is imposed in N.J.A.C 7:13-2.13, Requirements for structures. The Department is authorized to address only flood storage issues. Structural requirements regarding risk to life and property are wholly within the jurisdiction of the Uniform Construction Code (UCC) and are more appropriately left to building permit review. If the Department seeks to dictate structural requirements for buildings within the flood plain, the appropriate course of action is to petition the Department of Community Affairs to amend the UCC. (19)

RESPONSE: This rule does not propose a new level of review. The repealed rules specifically required that "all proposed structures must be designed and anchored to prevent collapse, lateral movement and buoyancy." This new section clarifies to what level that protection needs to be provided. The UCC already contains similar language so the requirements here should already have been met in the design.

179. COMMENT: We support changing the date establishing the existing ground surface from 1929 to January 31, 1980 in N.J.A.C. 7:13-2.14(a)1. (12)

RESPONSE: The Department acknowledges this comment in support of the rule.

180. COMMENT: We support the continuation of the waiver from the 20 percent net fill requirements for Federal, State, County and municipal road and bridge projects in N.J.A.C. 7:13-2.14(a)7. (12)

RESPONSE: The Department acknowledges this comment in support of the rule.

181. COMMENT: The exemption from the 20 percent net fill requirements in N.J.A.C. 7:13-2.14(a)7 for highway jobs or county road jobs needs to be clarified. The exemption should be entire; if the Department wants land dedicated, the regulations should so state. (3)

RESPONSE: The exemption requirements in this new rule are reduced from those in the now repealed rule. The repealed rule required that the applicant demonstrate that there was no feasible alternative (to lessen the degree of non-compliance) before an exemption could be granted. This requirement often forced applicants to explore acquiring land adjacent to the site. The new rule only requires minimization of fill to the greatest extent possible. This does not involve acquiring or dedicating land.

182. COMMENT: The commenter objects to the exception to the 20 percent fill rule in N.J.A.C. 7:13-2.14 for Federal, State, county or municipal highway or road projects because of limited rights of way. Government should make a greater effort to comply with the 20 percent fill rule. (16)

RESPONSE: The 20 percent net fill rule is intended to preserve flood storage volume of the flood fringe area on a site to lessen the impacts on downstream flooding. The loss of storage area causes a greater volume of water to be handled by the floodway, which can result in increased velocities in the channel and increased flood elevations downstream where there is an obstruction to flow such as a bridge, culvert, or any constriction in the flow path. However, the need to preserve flood storage volume through the 20 percent net fill rule does not apply to bridges and culverts because they act as control points which restrict the flow rate. A bridge or culvert which is inadequate to pass the flood flows could be put in with 100 percent fill within the right-of-way, and yet create many times the volume of storage that was lost due to the placement of fill and actually reduce the flow rate passing the structure. Conversely an inadequate bridge or culvert could be removed creating

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more storage within the right-of-way yet allowing a much greater volume of flood waters to pass and create additional flooding downstream.

Therefore, because of the unique nature of bridges and culverts, the Department is continuing to provide an exemption from the 20 percent net fill requirement for Federal, State and local road projects. The flooding issues relating to bridges and culverts are regulated in N.J.A.C. 7:13-2.16, Bridges and culverts.

183. COMMENT: At N.J.A.C. 7:13-2.14(a)1 (standards for fill within the flood plain) the Department should not penalize landowners whose property was filled prior to 1984 when the 20 percent fill regulations were adopted by applying the 20 percent fill standard to these properties. The reference date should be May 21, 1984, rather than January 31, 1980. (17)

RESPONSE: The repealed rule did not set any cutoff date for what fill was to be considered when evaluating the 20 percent net fill requirements. The intent of that rule was to include all fill ever placed on the site. However this proved impractical in implementation and the Department instituted a policy of regulating any fill placed after 1929, which was the year that the stream encroachment program began. This has been the standard for the past ten years.

In reviewing this policy, the Department concluded that using 1929 as a benchmark was unreasonable because fill placed outside of the channel was not regulated by the stream encroachment program in 1929. Since the Department assumed formal jurisdiction over the 100-year flood plain and the flood hazard area on January 31, 1980 when revisions to the Flood Hazard Area Control Act became effective, the Department decided to require an applicant to consider only fill placed after January 31, 1980, for the purposes of addressing the 20 percent net fill rule.

While the 20 percent net fill requirement was adopted in May 1984, the Department does not believe that any applicants are being penalized by using the January 31, 1980 reference date since the previous policy required applicants to account for all fill dating back to 1929. Moreover, the rules adopted in 1984 implemented the statutory changes that became effective on January 31, 1980.

184. COMMENT: At N.J.A.C. 7:13-2.14(a)2, rather than require the applicant to submit engineering plans and calculations to demonstrate that the 20 percent net fill limit has not been exceeded, the Department should simply accept the computer plans (for example, Agtec). Nothing further should be required. (17)

RESPONSE: Engineering plans showing proposed grading changes are necessary for more than just the net fill calculations. The Department has and will continue to accept computer models for verification of fill calculations. However, the Department will not accept the output of a computer model as sole proof of compliance with the 20 percent net fill rule. Just as with hydraulic models (N.J.A.C. 7:13-2.18(b)3), if the model is familiar to the Department, it will be accepted provided all input as well as output is included so that the information can be evaluated. If the Department is not familiar with the program, then the program documentation along with the input and output must be submitted for evaluation.

185. COMMENT: N.J.A.C. 7:13-2.14(a)7 allows exemptions from the 20 percent net fill requirements for Federal, State, county or municipal road projects. This provision should be expanded to apply to other types of projects (for example, residential) since the public good is well served by both types of exemptions. (17)

RESPONSE: This exemption is granted because of the limited rights-of-ways for public entity projects and the fact that there is a public need for the project. Builders of residential projects are not hampered by limited rights-of-ways and have more options by which they can comply with the 20 percent net fill requirement. Furthermore, unlike many public entity road projects, it is not always necessary that an internal road network in a residential subdivision cross a watercourse.

186. COMMENT: Please clarify N.J.A.C. 7:13-2.14(a)9. (17)

RESPONSE: If any dikes, levees, floodwalls or other structures, not approved as flood control projects, prevent flood waters from entering areas that previously acted as a flood storage areas, the volume of the area will be considered as fill since the volume of flood storage has been lost just as if the area had been filled. N.J.A.C. 7:13-2.14(a)9 was modified on adoption to make this clarification.

187. COMMENT: The commenter objects to N.J.A.C. 7:13-2.14, Standards for fill within the flood plain which now defines January 31, 1980 (the effective date of the Flood Hazard Area Control Act) as the date to be used when accounting for fill. Previously, the DEP required that the applicant account for all fill placed on a site after 1929, the year the stream encroachment program began. It is not completely true that reliable records dating back to that time are usually not available. The record is often in the fill itself.

The commenter questions whether a developer should be allowed place an additional 20 percent of fill on land already filled (possibly without a permit). Where previously placed fill cannot be verified, what can be done?

Where previous fill is obvious and was probably placed without a permit, the proposed change appears to be a giveaway to unscrupulous land developers. Such laxity in Flood Hazard Area Control Rules is unjustified. (2)(11)

RESPONSE: Previously, the Department had decided upon 1929 as a benchmark because that is the year that the stream encroachment program began. In the Department's experience, trying to obtain records of fill activity back to 1929 has proven nearly impossible. Borings at the site to determine if fill has been placed is possible, but cannot specifically pinpoint when the fill was placed; furthermore, not all sites have been filled with construction debris.

The Department started regulating the 100-year flood plain in the early 1970's to coincide with the Federal Flood Insurance Program. However, the formal authority for the Department to regulate the 100-year flood plain was provided by the amendments to the Flood Hazard Area Control Act effective on January 31, 1980. The majority of the fill placed in the flood plain prior to January 31 1980, therefore was legally placed.

Perhaps the wisest use of the land in the flood plain is to preserve it in its natural state; however the Legislature enacted the Flood Hazard Area Control Act to regulate construction in or immediately adjacent to the flood plain.

188. COMMENT: N.J.A.C. 7:13-2.14(a)1 (regarding 20 percent net fill in the flood fringe) should be clarified to read: "for regulated activities proposed in the flood fringe area, the volume of net fill to be placed on that portion of the applicant's property within the flood fringe area is limited to 20 percent of the total volume of flood storage on that portion of the property." (19)

RESPONSE: N.J.A.C. 7:13-2.14(a)1 has been revised on adoption to more clearly state the 20 percent net fill restriction applicable in the flood fringe.

189. COMMENT: The Department should consider expanding the area of the Passaic River basin where the no net fill rule should apply in N.J.A.C. 7:13-2.15. The area should include the Highlands Area and all of the Central Basin in order to protect water resources in those areas and to protect the Lower Valley from further increases in flooding. (16)

RESPONSE: While preserving flood storage capacities is extremely important, the zero net fill provision, in order to work as anticipated, assumes that there will be no increase in future runoff, which can only be achieved by prohibiting development within the entire watershed. Expanding the scope of the Central Passaic Basin would not protect the lower valley, and could cause increased flooding, because if the rule were applicable to the entire watershed, fill could be removed from the headwater areas where there is no flooding problem and brought down to the lower reaches where there is a problem. The situation would be worsened but the requirements of the rule would be satisfied. The zero net fill requirement as applied under the repealed rules and these new rules works because of the boundaries established for the basin. Since there are no large areas from which to obtain fill, applicants are forced to balance fill within their site.

190. COMMENT: What is the rationale for the March 25, 1977 reference date for the ground surface in N.J.A.C. 7:13-2.15(a)2i? (17)

RESPONSE: March 25, 1977, was the effective date of the Commissioner's administrative order imposing the zero net fill requirement in the Central Passaic Basin.

191. COMMENT: N.J.A.C. 7:13-2.16(c)1 which requires that new bridges or culverts span the flood plain is unworkable since virtually no culvert will span the entire flood plain. (7)

RESPONSE: This section expresses the Department's preference that, if feasible, a new road crossing should span as much of the flood plain as possible so as to minimize the disturbance to the channel and overbanks. Obviously, a culvert can not meet this criteria and should not have been included. N.J.A.C. 7:13-2.16(c)1 has been revised on adoption to refer to crossings instead of bridges and culverts.

192. COMMENT: Bridge replacements should be held to the same 0.2 foot rise as all other developments. Thus N.J.A.C. 7:13-2.16(b)2 should be revised or eliminated. (7)

RESPONSE: When development is proposed along a stream the applicant usually establishes a floodway which, theoretically, will preserve

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the flood carrying capacity of the watercourse and not increase the upstream water surface elevation by more than 0.2 feet, if no obstructions to flow are constructed in that floodway. If more work in this area were proposed after the completion of the project, then the applicant would have to abide by the same floodway and not calculate another floodway allowing for another 0.2 foot rise over the original 0.2 foot rise allowed originally.

Bridges and culverts are control structures which control the flood flows much more effectively than a floodway. If a structure were constructed allowing it to increase the upstream flood elevation by 0.2 foot, the effect of allowing a replacement to be designed to raise the flood elevation another 0.2 foot would yield a 0.4 foot rise. Therefore, the Department is imposing a no-rise restriction for replacement structures. However, the replacement structure may further increase the flood elevations upstream so long as all affected property owners consent(see N.J.A.C. 7:13-2.18(a)).

193. COMMENT: N.J.A.C. 7:13-2.16(b)2ii should be revised to allow the applicant to break a "HEC-2" run at the bridge or culvert if the structure can be modeled using FHA Highway Culvert Charts. The starting water surface elevation (WSEL) at the upstream face of the culvert can be set to the WSEL calculated using the charts. The charts are more conservative than HEC-2 since the charts assume zero energy for the velocity of the stream. (7)

RESPONSE: The Department agrees that breaking the model run and analyzing the structure separately is an acceptable option. This section has been revised on adoption to clarify that this type of analysis will also meet the Department's requirements.

194. COMMENT: N.J.A.C. 7:13-2.16(b)4 (bridges and culverts) states that channel transitions in excess of 100 feet in length upstream or downstream of the proposed bridge or culvert are considered channel modification and must meet the requirements of N.J.A.C. 7:13-2.9. This is arbitrary; the length should be based on actual hydraulic models. (8)

RESPONSE: Experience has proven that very few bridges and culverts have required more than 100 feet of channel transition unless the watercourse is being channelized for reasons other than the placement of the bridge or culvert. The 100 foot length is only the limit above which the more stringent channel modification standards are applied. The actual length of the transition area must be designed in accordance with accepted practice.

195. COMMENT: N.J.A.C. 7:13-2.16(c)5 (bridges and culverts-environmental standards) states that where the applicant proposes to place a natural substrate over the concrete floor of an oversized culvert, the applicant must provide calculations to show that the substrate will remain stable. Unless this substrate is riprap or perhaps something similar to geoweb, there is no way an engineer can realistically provide calculations showing stability. The fill at the bottom of the box culvert is usually washed out during the first storm. This practice is a major contributor to erosion and sedimentation problems. (8)

RESPONSE: The standard practice for construction of oversized culverts has always been to place the invert of the culvert one foot below the invert of the stream and then place fill in the culvert to bring the invert up to match that of the stream. Therefore, N.J.A.C. 7:13-2.16(c)5 has been clarified upon adoption to specify that the culvert should be one foot below the design grade so that the backfill material can be placed above the concrete floor and flush with the upstream and downstream inverts. In this way the material will not be washed out unless the downstream channel erodes.

196. COMMENT: N.J.A.C. 7:13-2.16(b)2ii (bridge and culvert replacements) should allow an applicant to increase downstream flood elevations if the applicant receives permission from the property owner or obtains an easement. (12)

RESPONSE: Pursuant N.J.A.C. 7:13-2.18, Impacts to other properties, provision is made to permit a project which may exceed the limits imposed for raising flood elevations if affected property owners accept the liability for increased flooding and resulting damages. It should be noted, however, that when opening up a bridge or culvert the increases in flooding can occur almost anywhere downstream, not just immediately downstream of the structure.

197. COMMENT: For bridge replacements that do not increase flood elevations but overtop the road, written acknowledgment of responsibility should not be required in N.J.A.C. 7:13-2.16(b)3. A county does not want to assume additional responsibility for bridges that were built in accordance with flood plain laws of the past. Public projects should be exempt from this requirement. (12)

RESPONSE: The regulation has been clarified upon adoption to require landowners or public entities, as the case may be, to assume responsibility only for the damage to the bridge or culvert caused by overtopping by the regulatory flood. Since the water elevations upstream and downstream from the structure are calculated knowing overtopping will occur and the structure itself meets the requirements in (b)3ii and 3iii, the public is adequately protected from flooding damages in such cases. The rule only seeks to compel bridge and culvert owners to acknowledge that they bear responsibility for damage to the structure in the event of overtopping. Contrary to the Commenter's assertion, the rule does not require a public entity to ensure that older structures shall not be overtopped. In-kind replacement of structures does not require a permit under the rules. However, a stream encroachment permit to modify an existing structure which is currently overtopped by the regulatory flood cannot be issued until the landowner or public entity, as the case may be, acknowledges responsibility for damage to the entire structure due to overtopping by the regulatory flood. The Department notes that since Federal and State roadways are considered emergency evacuation routes, bridges on such roads must be designed to rise above the regulatory flood and not be overtopped.

198. COMMENT: The requirement in N.J.A.C. 7:13-2.16(c)1, that new bridges and culverts span what may be a very broad flood plain will impose increased costs on public and private applicants. The regulation should provide criteria for determining whether spanning the whole flood plain would make the project "prohibitively expensive" to construct. (19)

RESPONSE: As explained in the response to Comment 191 above, this section expresses the Department's preference that a bridge should span as much of the flood plain as possible so as to minimize the disturbance to the channel and overbanks; it has been clarified on adoption.

As for the determination of what makes a design that would span the entire flood plain "prohibitively expensive," each projects is unique because of the particular need for and the particular site conditions of the project. While it is always possible to span the flood plain with a structure, the Department recognizes that such a structure may not always be cost effective. Therefore, the rule gives the applicant an opportunity to determine how much of the flood plain, if any, can be spanned and to justify the economic considerations underlying that decision to the Department.

199. COMMENT: At N.J.A.C. 7:13-2.16(c)5 (bridges and culverts-environmental standards) the avoidance of standard box culverts in trout-associated waters is justifiable where trout are actually present. However, it is not reasonable in light of the broad definition proposed for "trout-associated." The rule should apply only to trout production and trout maintenance watercourses. (19)

RESPONSE: The limits of trout production and maintenance waters do not remain constant and are constantly changing based upon the conditions present in the watercourse. The Department has included those areas upstream of these waters in defining "trout associated" watercourses because, with proper management, these watercourses have the potential of becoming trout production or maintenance waters, and the Department does not wish to limit that potential by allowing the placing of structures that may block trout. The Department does not believe that it is unreasonable to prohibit the use of standard box culverts upstream of trout associated watercourses, especially since the Department has been promoting alternative designs for many years in all areas where fish passage is required.

200. COMMENT: N.J.A.C. 7:13-2.16(b) allows no increase in upstream 100-year water surface elevation for replacement bridges but does allow a 0.2 foot rise for new bridges. This is confusing, unfair, and may be onerous, particularly since public bridge projects are replacements. The Department should retain equal increase allowances for both new and replacement bridges. (5)(21)

RESPONSE: The now repealed regulations did not address allowable increases in the flood elevations caused by the construction of bridges and culverts. Bridges and culverts are control structures which control the flood flows much more effectively than a floodway. If a structure were to increase the upstream flood elevation by 0.2 foot, the effect of allowing a replacement to be designed to again raise the flood elevation 0.2 foot would be a 0.4 foot rise. Therefore, the Department is imposing a no-rise restriction for replacement structures.

201. COMMENT: At N.J.A.C. 7:13-2.16(c), the requirement for new bridges and culverts to span flood plains is unreasonable, and will result in a considerable expenditure of time and effort to justify that the cost

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of such a span is prohibitively expensive. This section is also inconsistent with the engineering standard in N.J.A.C. 7:13-2.16(b) in which a 0.2 foot increase in the upstream water surface elevation is allowed. The requirement that new bridges and culverts span the flood plain should be eliminated. (24)

RESPONSE: As explained in the responses to Comments 191 and 200 above, N.J.A.C. 7:13-2.16(c) expresses the Department's preference that a bridge should span as much of the flood plain as possible so as to minimize the environmental disturbance to the channel and overbanks; it has been clarified on adoption.

The engineering standard in N.J.A.C. 7:13-2.16(b)1 ensures that any new structure does not increase flood elevations upstream of the structure by more than 0.2 feet: it applies no matter what type of structure is proposed or what the span of that structure is. Thus, the two requirements can easily be applied simultaneously since they are implemented for different reasons and do not conflict.

202. COMMENT: The commenter supports the engineering standards at N.J.A.C. 7:13-2.16(b). The rule recognizes that replacing a bridge or culvert is not as simple as just hydraulically and hydrologically taking the old one out and putting the new one in. (4)

RESPONSE: The Department acknowledges this comment in support of the rule.

203. COMMENT: DEP should prohibit placement of new septic systems in the flood fringe at N.J.A.C. 7:13-2.17. (16)

RESPONSE: The Standards for Individual Subsurface Sewage Disposal Systems, N.J.A.C. 7:9A, establish the Department's standards for septic systems and more effectively address these issues. Therefore, N.J.A.C. 7:13-2.17 does not address whether or not a septic system can be placed in the flood fringe. It merely provides that, if a septic system is proposed, it must comply with N.J.A.C. 7:9A.

204. COMMENT: At N.J.A.C. 7:13-2.18, Impacts to other properties, the Department might want to include the U.S. Department of Agriculture, Soil Conservation Service's TR20 and WSP2 as a standard model along with the U.S. Army Corps of Engineers HEC-2 and HEC-1 models already specified. (8)

RESPONSE: The computer models have been added to N.J.A.C 7:13-2.18(b)3 as suggested since they are as acceptable as the HEC models.

205. COMMENT: N.J.A.C. 7:13-2.18(a), which allows a project to be built if upstream and downstream property owners accept liability for damages is unrealistic over time. (16)

RESPONSE: The Department has always accepted written acknowledgments from affected property owners when evaluating proposed projects that do not meet program standards. The Department does not consider this unrealistic over time, since once the property owner accepts the liability and the construction is performed, the situation becomes an existing condition of which any future buyer should be aware before purchasing the property. The Department cannot deny permits on the speculative basis of potential objections from future property owners.

206. COMMENT: N.J.A.C. 7:13-2.18(a)2 (impacts to other properties) should be modified to allow a portion of a proposed project to be located on a property other than that owned by the applicant as long as permission from the adjacent property owner is obtained. (17)

RESPONSE: The Department has in the past accepted such written permission and has revised N.J.A.C. 7:13-2.18(a)2 on adoption to prohibit work on adjacent property unless specific written consent from the affected property owner is obtained and provided to the Department.

Subchapter 3—General Environmental Standards:

207. COMMENT: N.J.A.C. 7:13-3.1(b)2 requires compliance with all applicable environmental statutes, regulations and ordinances. Does this mean applying for separate permits, or can all permits issued by the Land Use Regulation Program fall under one application? (10)(14)

RESPONSE: At the present time, each permit program administered by the Land Use Regulation Program requires a separate application to be filed for each permit requested. If all the applications are filed together, the Program will review them together and issue one permit, if possible, combining all the permits.

208. COMMENT: Under N.J.A.C. 7:13-3.1(b)3 the Department will not approve any regulated activity that is likely to adversely affect the biota of the stream. This is vague and should be clarified. (3)

RESPONSE: Because it is impossible to foresee every conceivable impact that may occur from regulated activities, this wording is appropriate. Some of the impacts which will be considered to adversely affect the watercourse biota are listed for guidance.

209. COMMENT: The commenter objects to the concept of "minimization" of environmental damage or pollution used in N.J.A.C. 7:13-3.1(b). "Prevention" should be the goal and should be so stated. (16)

RESPONSE: The only way to prevent environmental damage or pollution is by totally prohibiting construction. Construction will always damage the environment to some degree or produce some form of pollution. The stream encroachment program is charged with regulating construction in the flood plain; it cannot prohibit all construction. Therefore, the rules require minimization of environmental damage or pollution.

210. COMMENT: The commenter fully supports aspects of this rule that protect wetlands, stream and stream bank biota, threatened and endangered species. These environmental protection aspects of the regulations should be given equal weight to flood prevention considerations. (16)

RESPONSE: The Department acknowledges this comment in support of the rule. The engineering and environmental standards of this rule are given equal consideration in that if a proposed project does not meet both sets of standards, the permit application will be denied.

211. COMMENT: N.J.A.C. 7:13-3.1(b)1 should be deleted in its entirety since it imposes impossibly onerous and unclear requirements on applicants by requiring them to describe short and long term environmental impacts as well as cumulative impacts on the environment. What criteria will the Department use to review this information and how will an applicant know whether the information submitted is sufficient? (17)

RESPONSE: Because of the wide variety of projects for which permits are sought under these rules, it is impossible to list all conceivable impacts that might be attributable to each project and provide the criteria the commenter seeks. N.J.A.C. 7:13-3.1(b)1 contemplates that the applicant will describe what the site will be used for and how the proposed project will affect the environment in the short term and in the future. A full environmental impact statement is not required for any project under these rules. At a minimum, the applicant should address all standards set forth in these rules when describing the environmental impacts. If the site or proposed activity is unique in some aspect, the Department may require additional information.

212. COMMENT: The Department should delete most of N.J.A.C. 7:13-3.1(b)3 with the exception of the reference to threatened and endangered species of plants and animals. The remainder of the items mentioned do not fall within the purview of the Flood Hazard Area Control Act. (17)

RESPONSE: The Flood Hazard Area Control Act does not address any environmental issues, including threatened and endangered species. The authority to look at these items comes from the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., and the Department of Environmental Protection Act of 1970, N.J.S.A. 13:1D-1 et seq., under which this rule is also adopted. Such concerns have been reviewed under the stream encroachment program for decades.

213. COMMENT: The applicability of separate environmental standards for bridges, culverts, dams, and structures is unclear. Are they in addition to proposed General Environmental Standards (subchapter 3) or in place of them? (5)(21)

RESPONSE: Subchapter 3 states the general environmental standards that apply to all projects. The environmental standards listed in subchapter 2 relate directly to the specific types of project therein and are in addition to the standards established in subchapter 3.

214. COMMENT: N.J.A.C. 7:13-3.2, Protection of near stream vegetation, states that access roads to work sites shall not be constructed within areas under the jurisdiction of this chapter. The Freshwater Wetlands Protection Act regulations provide for the use of temporary roads, wood matting/recycled tires or high flotation equipment when siting aerial utility structures in wetlands. Use of the above options with Best Management Practices, that is, replanting, should be allowed when only one-time access is needed to site a pole in a "buffer" area. (1)(17)

RESPONSE: The Department did not intend that this section should apply to all vegetation within the jurisdiction of this chapter. The Department intended to continue the protection of vegetation within 25 feet of the top of bank and within 50 feet of the top of bank in certain areas, as was required under the repealed rule. The Department also acknowledges that there are some circumstances where access through these smaller 25 or 50 foot areas cannot be avoided. Therefore, N.J.A.C. 7:13-3.2(a) was modified on adoption to clarify the area covered by this subsection and to remove the strict prohibition of access roads in that area.

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215. COMMENT: N.J.A.C. 7:13-3.2(a) requires applicants to address the effects of the removal of vegetation on water quality and the effects of sedimentation or erosion on the biota of the watercourse. The Department should defer to the Soil Conservation Districts (SCDs) regarding the effects of sediment or erosion on the biota. (8)

RESPONSE: The SCDs are charged with preventing soil erosion. However, while some SCDs will consider the effects on the biota of the watercourse, it is not one of the goals of the legislation governing SCDs. Some methods of stabilization allowable under the Standards for Soil Erosion and Sediment Control in New Jersey, N.J.A.C. 2:90, are not the best methods for protecting the biota of the watercourse. Therefore, the Department believes that it is appropriate to retain this requirement but will continue to work closely with the SCDs to avoid conflicting requirements.

216. COMMENT: N.J.A.C. 7:13-3.2(a) (protection of near watercourse vegetation) requires the applicant to submit a plan to "compensate" for disturbances of vegetation within "areas under the jurisdiction of this chapter." What does the Department intend by the word "compensate"? Is mitigation intended? (5)(17)(19)(21)

RESPONSE: Near-stream vegetation is extremely important in preserving water quality. Compensation can take the form of replanting disturbed areas and providing a stormwater system that provides an equal or better method of water quality treatment than the lost vegetation. Compensation in this context does not mean creating an equal area of similar vegetation in another location.

217. COMMENT: N.J.A.C. 7:13-3.2(a) prohibits disturbance of vegetation within areas subject to the jurisdiction of these rules (in other words, flood hazard areas, flood plains and between 25 feet and 50 feet from the channel bank), unless the applicant shows there is no alternative to such disturbance. What is the scientific basis for this? Also, please describe what the Department means by "compensate or cure the effects of the disturbance" and give some examples of what this means. (5)(18)(21)

RESPONSE: As explained in the response to Comment 214 above the Department has modified N.J.A.C. 7:13-3.2(a) to narrow the areas to which this section applies. As used in this rule "compensate" requires the applicant to replace the functions that the lost vegetation performed by providing water quality protection measures on-site. The vegetation close to the bank filters stormwater and provides stability against erosion. These aspects can be compensated for through the use of the stormwater management measures mentioned in N.J.A.C. 7:13-2.8, or through proper soil erosion and sediment control techniques. However, while there are means for compensating for the loss of this vegetation the Department believes it is still more important to protect existing vegetation because the vegetation usually provides for better water quality protection than man-made systems.

218. COMMENT: Identifying areas where vegetation will be disturbed under N.J.A.C. 7:13-3.2(a) is difficult, particularly during the planning stages. (5)(21)

RESPONSE: The Department did not intend to extend this rule to cover all vegetation within the jurisdiction of this chapter and has, upon adoption, revised this section to only apply within 25 feet or 50 feet of the top of bank. In light of this clarification, the areas covered under this rule are easily definable, even during the planning stages.

219. COMMENT: N.J.A.C. 7:13-3.2, Protection of vegetation, is confusing because the disturbance of vegetation appears to be a regulated use, whereas N.J.A.C. 7:13-1.3 indicates that vegetation disturbance, such as forestry and maintenance, are non-regulated use. This should be clarified, especially as it relates to maintaining clear zones for roadways and airports. (24)

RESPONSE: The vegetation disturbance considered a non-regulated use under N.J.A.C. 7:13-1.3 is associated with agricultural land uses where the disturbance is controlled, where it is part of an overall management plan, and where the land remains essentially vegetated and will not adversely affect the water quality in the watercourse. In this light, the maintenance of clear zones for roadways and airports would be considered a non-regulated use provided they were legally constructed and that no expansions beyond the original design were involved. N.J.A.C. 7:13-3.2 is meant to protect the vegetation within 25 or 50 feet of the top of bank in order to protect the water quality in the stream. N.J.A.C. 7:13-3.2(a) was modified on adoption to clarify that this section only applied to the 25 or 50 foot setback and not the entire site.

220. COMMENT: The stream encroachment regulations should be refined to ensure that they complement the Soil Erosion and Sediment Control program rather than duplicate it. This is the opportunity to clarify what the stream encroachment regulations stipulate as they refer to soil erosion and sediment control. In particular, N.J.A.C. 7:13-3.3, Soil erosion and sediment control, should just refer to the State Soil Erosion and Sediment Control program in the Department of Agriculture rather than stipulate aspects of soil erosion and sediment control. This would simplify the existing redundancy among regulations.

RESPONSE: N.J.A.C. 7:13-3.3 is retained, with minor clarifications, from the repealed rule. The Department believes that the stream encroachment regulations do complement the Soil Erosion and Sediment Control program because not all the projects that are reviewed by the stream encroachment program require review by the Soil Conservation Districts (SCDs) and, while both have the ultimate goal of establishing a stable condition, the Department has certain environmental concerns that are not SCD mandates. In many cases the SCD approval will satisfy the Department's concerns. However, simply referring the review entirely to the SCD would not be entirely consistent with the statutory mandates of the stream encroachment program.

221. COMMENT: Please define "exempt public entity" as used at N.J.A.C. 7:13-3.3(d) (10)(14)

RESPONSE: Exempt public entity means any of the municipalities or the New Jersey Department of Transportation to which the authority to review soil erosion and sediment control plans has been delegated pursuant to the Soil Erosion and Sediment Control Act of 1975, N.J.S.A. 4:24-42 et seq.

222. COMMENT: Soil erosion and sediment control is governed by specific legislation and regulations. Instead of confusing the issue by providing additional requirements within the proposed regulation, all matters dealing with soil erosion and sediment control should be dealt with pursuant to N.J.S.A. 4:24-42 et seq. and N.J.A.C. 2:90. If that statute and regulation are inadequate to deal with the flood hazard area changes, then they should be modified accordingly. (5)(21)

RESPONSE: As explained in the response to Comment 220 above, N.J.A.C. 7:13-3.3 has been retained, with minor clarifications because, while both have the ultimate goal of establishing a stable condition, the Department has certain environmental concerns that are not SCD mandates.

223. COMMENT: The required implementation sequence and schedule in N.J.A.C. 7:13-3.3(c)4 and 5 may be difficult to comply with. (5)(21)

RESPONSE: The standards to stabilize disturbed areas within 48 hours of disturbance in N.J.A.C. 7:13-3.3(c)4 and 5 are carried over from the repealed rule. The purpose of requiring stabilization within 48 hours is to prevent the introduction of sediment into the watercourse. Compliance with these standards has not been problematic and therefore the Department does not believe it appropriate to relax them.

224. COMMENT: The Department requires under N.J.A.C. 7:13-3.4(e) that any mitigation carried out onsite or offsite shall be on private property and prohibits future development on the mitigation site. An exemption should be provided for mitigation which may be sited within utility corridors over which many utilities retain only an easement from a private property owner. Within these existing corridors, multiple lines are sited, currently maintained or planned for in the future, a standard that the Board of Regulatory Commissioners (now the Board of Public Utilities) urges power companies to follow and the public strongly supports. To limit future use of a right-of-way is inconsistent with this policy and unfair to the property owner on whose property a pole is located. Additionally, maintenance of existing lines or siting of new lines or access roads in existing corridors requires only minimal and temporary disturbance and is easily mitigated, as has been documented to the satisfaction of the Department. Most important, utility companies must not be limited in providing scheduled or emergency maintenance on existing lines. Mitigation will always be provided, but restoration of electric service is the primary goal in all cases. (1)

RESPONSE: For the purposes of this chapter, mitigation means that a disturbed area will either be restored or a system will be provided to replace the onsite benefits lost as a result of the disturbance. N.J.A.C. 7:13-3.4(a) was clarified to reflect this intent. In the case of utility rights-of-way this section will be satisfied by replacement of disturbed vegetation. The Department will not require the restriction of access to or future use of the right-of-way.

225. COMMENT: N.J.A.C. 7:13-3.4(b) (mitigation) requires mitigation to be performed following activities that temporarily disturb the environment. Since mosquito control agencies' operations utilize low ground pressure equipment and adhere to established Best Management practices, and any disturbances are only minor and temporary, it would

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appear to be an unnecessary and costly burden to require county agencies to file mitigation plans. In most cases, county stream cleaning projects restore areas previously impacted and degraded by off-site construction and/or development. The commenter opposes mitigation as a condition for permits for minor stream cleaning or restoration. (10)(14)

RESPONSE: As explained in the response to Comment 224 above, mitigation for the purpose of this chapter means that a disturbed area will either be restored or a system will be provided to replace the onsite benefits lost as a result of the disturbance. N.J.A.C. 7:13-3.4(a) was clarified to reflect this intent. In the case of temporary disturbances, this section will be satisfied by replacement of disturbed vegetation. Most mosquito control projects will meet this criteria by restoring the area. The mitigation plan submitted to the Department may be in the form of a statement identifying the disturbance and corrective measures to be taken, if any, which should not be costly.

226. COMMENT: What is being mitigated at N.J.A.C. 7:13-3.4(c) (mitigation)? Wetlands fall under the Freshwater Wetlands Protection Act. If it is vegetation, how many places are available for mitigation which do not have some type of vegetation growing? This seems to be a "Catch 22" situation. (12)

RESPONSE: For the purpose of this chapter, mitigation means that a disturbed area must be restored or a system must be provided to replace the onsite benefits lost as a result of the disturbance.

The Stream Encroachment Program regulated wetland areas in the flood plain prior to the enactment of the Freshwater Wetlands Protection Act (FWPA), including requiring mitigation on a two to one ratio. When the FWPA was enacted the Stream Encroachment Program relinquished jurisdiction over those wetland areas that were covered under the FWPA. When these rules were first proposed there were still some wetland areas that were exempt from review under the FWPA so the mitigation requirements that were being applied to wetland areas were included in this section. However, after these rules were proposed the Department assumed the regulatory authority over all wetlands from the Federal Government under the Clean Water Act, except those in the Hackensack Meadowlands Development Area. Since the Freshwater Wetlands Program now has regulatory authority over virtually all wetlands in the State, the Department does not see any reason to mitigate wetland areas under the stream encroachment program. Therefore, on adoption, N.J.A.C. 7:13-3.4(a) and (b) were clarified to reflect the intent that mitigation now involves only the restoration of disturbed areas and N.J.A.C. 7:13-3.4(c) was deleted because there is no circumstance other than wetland restoration that the Department required creation of like areas.

227. COMMENT: Federal, State, County and Local governments should be exempt from the requirements of N.J.A.C. 7:13-3.4, Mitigation. (12)

RESPONSE: The main objective of this requirement is protection of water quality. Therefore, the Department does not agree that it is appropriate to exempt government projects.

228. COMMENT: N.J.A.C. 7:13-3.4, Mitigation, should be deleted since the Department does not have this authority under the Flood Hazard Area Control Act nor does it make sense. For those projects within the flood plain, it makes no sense to destroy habitat as a condition to a stream encroachment project. Outside of the flood plain, the commenter does not see the benefit of mitigation for a stream encroachment within the flood plain. All natural resources have environmental benefit and there does not appear to be any net gain to the environment from this proposed mitigation. Why is the Department requiring mitigation which in some cases may result in cutting down a forest in order to put in a field? Is this the Department's intent? (17)

RESPONSE: The authority to regulate various environmental provisions was explained in detail in the response to Comment 3 above.

Furthermore, as explained in the response to Comment 226 above, this section was revised on adoption to only require restoration of disturbed areas and to eliminate the requirement for creation of vegetated areas to replace disturbed areas.

229. COMMENT: When the Department refers to minimizing adverse environmental impacts arising from construction and use of the proposed "project" in N.J.A.C. 7:13-3.4, Mitigation, is it referring to the stream encroachment specifically and not the entire land development project located outside of the flood hazard area or flood plain? Please clarify. (18)

RESPONSE: By minimizing the adverse environmental impacts of the construction and use of the proposed project, the Department means any environmental impacts to the area within the flood plain and to the impacts to water quality from waters discharged directly into the flood plain. N.J.A.C. 7:13-3.4(a) was revised on adoption to reflect this.

230. COMMENT: The requirement at N.J.A.C. 7:13-3.4(c) that any disturbed area which cannot be restored be mitigated at a ratio of 2:1 is excessive. Since all stream encroachment projects will have to meet the stringent stormwater management controls described in these regulations, no purpose is served by requiring the applicant to create new areas with natural resources similar to the areas disturbed by the stream encroachment project. Please explain the scientific basis for this proposed mitigation requirement. (18)

RESPONSE: As explained in the response to Comment 226 above, N.J.A.C. 7:13-3.4(c) was deleted on adoption.

231. COMMENT: N.J.A.C. 7:13-3.4 provides for mitigation in connection with areas disturbed or destroyed by construction of a project. To the extent that this section and any other section in the regulations refers to "project" as opposed to "delineated floodway" or "area inundated by the 100 year design flood of any Non-delineated stream, " it is without statutory authority. (19)

RESPONSE: The Flood Hazard Area Control Act requires the Department "to adopt, amend or repeal rules and regulations and to issue orders concerning the making, rebuilding or renewing of any structure or alteration and development or use of land," in the flood hazard area of delineated streams and the 100-year flood plain of non-delineated streams. However, in addition to the Flood Hazard Area Control Act, this rule was also adopted under the authority of the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., and the Department of Environmental Protection Act of 1970, N.J.S.A. 13:1D-1 et seq., which established the Department. The authority to require environmentally protective measures is taken from these two acts. However, since the Flood Hazard Area Control Act is the primary enabling statute, the Department, under the stream encroachment program, limits its review to only those projects in or adjacent to the flood plain because such projects contribute to the flooding potential and degradation of water quality in our watercourses.

Furthermore, as explained in the response to Comment 226 above, N.J.A.C. 7:13-3.4 was revised to reflect the assumption of regulatory power for freshwater wetlands from the Federal Government under the Clean Water Act.

232. COMMENT: The feasibility of mitigation for areas disturbed or destroyed by construction of a project is dubious. Because the proposed regulations require mitigation for loss of any area destroyed by a project and use of climax habitats is prohibited, an applicant who destroys a grassy or shrub area, for example, is in the impossible position of having to create twice as much grassy area as was destroyed within a non-climax habitat, for example, a grassy area.

In addition, the proposed requirement has no de minimis or general permit type provisions, elevating flood plain areas above the ecological status of wetlands. This has clearly not been authorized by the Legislature. This entire section should be deleted. (19)

RESPONSE: As explained in the response to Comment 226 above, N.J.A.C. 7:13-3.4 was revised to reflect the assumption of regulatory power for freshwater wetlands from the Federal Government under the Clean Water Act.

While these rules do not provide for general permits, N.J.A.C. 7:13-1.3 lists many types of projects which are non-regulated because of their minimal impacts on flooding and the environment.

233. COMMENT: N.J.A.C. 7:13-3.4(a) requires applicants to take all measures necessary to minimize disturbance to natural areas and to either restore such areas to their pre-construction condition or, if that is not possible, to provide mitigation for such disturbed areas. In addition, the rules would require mitigation for disturbance occurring anywhere on the entire project site, not just that portion that requires the stream encroachment permit. These requirements appear to exceed the Act's scope. (5)(20)

RESPONSE: As explained in the response to Comment 226 above, N.J.A.C. 7:13-3.4 was revised to reflect the assumption of regulatory power for freshwater wetlands from the Federal Government under the Clean Water Act.

The authority to regulate various environmental provisions was explained in detail in the response to Comment 3 above.

234. COMMENT: N.J.A.C. 7:13-3.4, Mitigation, bears a strong resemblance to the freshwater wetlands mitigation requirements. However, unlike the wetlands requirements, it is not clear as to what flood plain functions and values are supposed to be mitigated, especially at a ratio of two acres to one. The proposal states that productivity models can be used to justify a ratio of less than 2:1, but to our knowledge, there are no such models that have been developed. Furthermore, this proposed mitigation section effectively eliminates the value of the 20

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percent rule, and instead, will result in an applicants having to double the flood plain area that is affected. Considering the proposal to greatly expand the area considered flood plain by requiring that full development of the watershed be assumed, these new regulations will significantly increase the cost of implementing most road and bridge projects.

The proposal to provide mitigation should be eliminated because it is inconsistent with other rules, will greatly increase the cost of projects, and for most road and bridge improvements, will be extremely difficult to comply with. (24)

RESPONSE: As explained in the response to Comment 226 above, N.J.A.C. 7:13-3.4 was revised to reflect the assumption of regulatory power for freshwater wetlands from the Federal Government under the Clean Water Act.

235. COMMENT: We object to N.J.A.C. 7:13-3.4, Mitigation. This rule would require applicants to "restore vegetation, habitats, and land and water features to their pre-construction condition" and require applicants to replace areas "unavailable for restoration (such as when a structure is placed upon them or they are paved)." This rule makes sense in undeveloped areas but is not appropriate in developed areas where it may be impossible to determine the "pre-construction condition." A proposed development within an already disturbed area should not be subject to any mitigation requirements and the proposed rules should be clarified. Also, the statutory basis requiring applicants to restore "land features" is flawed. DEP fails to provide any link of land features with the cited statutory authority. (25)

RESPONSE: As explained in the response to Comment 226 above, N.J.A.C. 7:13-3.4 was revised to reflect the assumption of regulatory power for freshwater wetlands from the Federal Government under the Clean Water Act.

References in this rule to pre- and post-construction mean the applicant's proposed construction. "Pre-construction" condition in N.J.A.C. 7:13-3.4(a) means the condition of the land before the proposed activity is constructed. The Department will not require an area to be restored to its pristine condition unless the work performed on the site was done without a permit and the work cannot meet the requirements of this chapter.

The Department does not agree that this rule should not apply to previously disturbed sites since, as the commenter points out, it is not always easy to identify such sites. While construction will destroy a portion of the environment, it is unrealistic to assume that any construction in an area automatically destroys all environmental benefits of the area. Prior disturbance to an area only emphasizes the importance of preserving those functions performed by the remaining natural areas. Therefore, the requirement for mitigation, as clarified upon adoption, will continue to apply to disturbed areas.

Existing land features such as depressions, hills, and hedgerows directly affect flow path for stormwater runoff and thereby affect the rate and volume of stormwater runoff, which can lead to increased flooding downstream of the site. Furthermore, these land features can provide habitat for wildlife which would be displaced if the features were changed. Therefore, the Department believes it appropriate to require that land features be preserved where possible.

236. COMMENT: N.J.A.C 7:13-3.5, Projects along trout associated watercourses, needs to be addressed by both the New Jersey Department of Agriculture and the DEP particularly since the Department does not approve an applicant's erosion and sediment control plan. In fact, this rule stipulates practices that can cause soil erosion and sediment problems. (8)

RESPONSE: The Department agrees that it must coordinate and cooperate with the Department of Agriculture in order to integrate proper soil erosion and sediment control with the environmental concerns of the stream encroachment program. The Department's experience has been that the primary goal of the Department of Agriculture is the stability of the site. The goal of the stream encroachment program is the minimization of flood damages to public and private property and the environment caused by construction, including damages caused by erosion. Certain practices acceptable to the Department of Agriculture may not consider all potential environmental damages of concern to DEP. The Memorandum of Agreement signed by both Departments in 1990 was the first attempt to incorporate DEP environmental concerns into the Department of Agriculture's permit review. The Department believes that this rule is necessary because differences in the goals of the Agriculture Department and DEP remain. The text of this rule is carried over from the repealed rule with the exception of a few minor wording changes.

The Department is not sure which portion of the rule the commenter believes would promote erosion. The Department invites the commenter to bring to its attention any provision of this rule that conflicts with the Department of Agriculture's requirements for soil erosion and sediment protection, so the conflict can be eliminated.

237. COMMENT: N.J.A.C. 7:13-3.5, Projects along trout-associated watercourses, prohibits the washing of construction equipment in trout-associated watercourses or in areas where wash water would drain as surface runoff into such watercourses. This rule should be deleted since "trout-associated watercourses" is an over-inclusive term. Please indicate what percentage of State waterways are not trout associated. (17)

RESPONSE: This rule is necessary to preserve water quality in trout associated watercourses since the trout fisheries resource is extremely sensitive to changes in water quality. Petroleum products and other material washed off construction equipment will flow downstream and adversely affect the trout resource.

The Department does not know what percentage of the watercourses in the State are trout-associated because the classification of trout watercourses is constantly changing based on new information and surveys. However, trout streams are located predominantly in the northwest counties of New Jersey in an area that constitutes approximately 20 percent of the area of the State.

238. COMMENT: Please indicate what percentage of watercourses are located less than one mile upstream from trout-associated watercourses. Is the Department taking jurisdiction of these areas including a 50 foot buffer on these watercourses even though they are outside of the flood plain? (17)

RESPONSE: The Department has for many years recognized the importance of upstream areas to the trout fishery resources in the State and has regulated them more stringently than non-trout watercourses. For example the Freshwater Wetland Protection Act (N.J.S.A. 13:9B-1 et seq.) classifies wetlands draining into these areas as Exceptional Resource Value wetlands.

The authority to regulate 50 feet back from the top of bank along trout streams comes from the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. The 50 foot set-back to protect vegetation is carried over from the repealed rules. It represents a compromise, since studies have shown that the 50 foot set-back does not encompass nearly enough area to fully protect the water quality in watercourses.

239. COMMENT: What criteria will the Department use in N.J.A.C. 7:13-3.5(d)2iii to determine whether an "unacceptable risk for excessive delay to school buses or vans" is present? (17)

RESPONSE: This rule applies to roadway projects which are performed along routes taken by school buses or vans to transport students to or from school. The "unacceptable risk" for excessive delay "evaluates" whether or not the project will close these routes during the school year and if there is an alternative route around the project site. This rule would not usually come into play unless there is a bridge or culvert involved in the roadway project and there is not another crossing of the watercourse for a mile or so either upstream or downstream.

240. COMMENT: N.J.A.C. 7:13-3.5(a) regulates removal of trees and shrubs within 50 feet of the top of a bank of trout associated watercourses. To the extent such areas are not located within a delineated floodway or 100 year flood area of a non-delineated stream, This rule is without statutory authority. (19)

RESPONSE: The requirement to preserve vegetation within 50 feet of the stream bank is to protect water quality in the watercourse. Fifty feet is actually inadequate; studies show that a zone of vegetation up to 300 feet is required to effectively remove particulates and other pollutants from the runoff. However, the Department chose not to expand its existing jurisdiction and retain the 50 foot jurisdictional limit established under the repealed rule. The authority to protect water quality comes from the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.

241. COMMENT: N.J.A.C. 7:13-3.5(d) is another use of the extensive definition of "trout-associated" water sources which poses an unwarranted burden. Restrictions on construction schedules should only apply along trout production or trout maintenance watercourses where a floodway or flood plain is present. By imposing the restrictions up to one mile upstream of trout-associated waters, where the definition of "trout-associated waters" itself encompasses waters up to a mile upstream of trout waters and all unnamed tributaries flowing into trout-associated waters, the reach of the regulation is almost unlimited, involving very minor streams and channels that do not warrant State protection. (19)

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RESPONSE: As noted in the response to Comment 238, above, the Department has long recognized the importance of upstream areas in maintaining water quality downstream in the trout production and maintenance areas. While the inclusion of tributaries in the definition of trout associated watercourses is new in this rule, the Department has been applying these standards to these areas for several years. The definition was modified on adoption to remove the arbitrary distinction between "unnamed" and "named" streams, and to clarify that the tributaries of concern are those that flow into the trout production and trout maintenance waters. Timing restrictions are imposed on a case-by-case basis depending on the specifics of the site. Thus the Department does not anticipate any changes in existing review procedures and requirements as a result of the new rule.

242. COMMENT: The timing restrictions in N.J.A.C. 7:13-3.5(d)1 and 3.6 are confusing and inconsistent because the first paragraph in N.J.A.C. 7:13-3.5(d) together with N.J.A.C. 7:13-3.5(d)1 states that regulated activities which could cause sediment or turbidity are prohibited within 50 feet of the top of bank, whereas subparagraph (d)1iv states that all construction activity should be suspended from March 15 through June 15 along trout-stocked waters. The commenter considers the prohibition of all construction activity during certain times to be unnecessary, and suggests that this be revised to allow construction work to occur as along as there is no impact upon the water body. With adequate soil erosion and sediment control measures, construction can occur adjacent to trout streams without affecting water quality. Most bridge projects require at least one full construction season (10 months) to complete, and these timing restrictions will require the work to extend over another year. This will add to the expense of completing the project, delay the completion of necessary public safety improvements, and greatly inconvenience the public if detours are involved. In addition, if the work is already underway and has to stop because of these restrictions, the disturbed construction area could be subject to increased erosion during the period when no work can be performed. It would be preferable to allow the work to be completed and stabilized as expeditiously as possible. Structural steel, guide rail installation, electrical, and so on can be done without affecting the waterbody. (24)

RESPONSE: These requirements are not new and have been in effect since before the repealed rules were adopted. This section does not prohibit all construction, only construction which, as indicated in N.J.A.C. 7:13-3.5(d) will introduce sediment or increase the turbidity in the watercourse. The Department allows construction to continue as long as an applicant can show that no sediment will be introduced into the watercourse, or that the disturbance is minimal, or that timing of construction cannot be shifted in certain circumstances.

243. COMMENT: Tidal portions of Rancocas Creek could be liberally construed to include tributaries in N.J.A.C. 7:13-3.6(a)1ii. The commenter suggests a definable limit along Rancocas Creek, that is, Turnpike Bridge. Also, liberal interpretation of time limits on work will produce an extreme hardship on Burlington County as it will essentially limit bridge reconstruction projects to July and August. Construction from December 1st to March 31st is extremely difficult and expensive. Finally there should be a provision permitting construction within 50 feet of the banks during the prohibited period if certain protective measures are employed. (12)

RESPONSE: The Department did not intend at N.J.A.C. 7:13-3.6 to totally prohibit construction but to only prohibit the introduction of sediment into the specified watercourses during the specified periods, similar to the restrictions at N.J.A.C. 7:13-3.5 for trout watercourses. N.J.A.C. 7:13-3.6(a) and (b) above has been revised to prohibit only the introduction of sediment or to prohibit any other activity that will increase the turbidity of the watercourse and interfere with fish passage. This would include allowing work within 50 feet of the top of bank if it could be shown that the work would not introduce sediment into the stream. Along tidal and tidally influenced areas this concern will be addressed under the Waterfront Development Program and not these rules.

244. COMMENT: N.J.A.C. 7:13 3.6(c)1 requires that watercourse cleaning projects are to be constructed so that low-flow water depth is at least as deep as in the existing channel or 10 inches deep, whichever is less. This appears to mean that any stream cleaned in the State that is more than 10 inches deep will have to be filled in! The commenter assumes this is a misstatement. It may help to include the rationale behind the proposed rules. Then the language may become self-evident. (14)

RESPONSE: The intent of N.J.A.C. 7:13-3.6(c)1 was to provide for low-flow fish passage. The rule has been revised on adoption to require that the depth of water in the new or modified watercourse channel be at least as deep as the existing channel.

245. COMMENT: N.J.A.C. 7:13-3.6(c)2 states that no delegated agency may grant exceptions for the minimum depths of flow through bridges and culverts or in modified channels. Why not? (14)

RESPONSE: Due to the serious potential for damage to the State's fisheries resources, the Department retains sole authority to grant exceptions for deviations from the minimum depths of flow through bridges and culverts or modified channels. The public interest in preserving the State's fisheries is best served by allowing the Department to determine the impacts of proposed exceptions on the fisheries resources based upon its long-standing expertise in these matters.

246. COMMENT: Does the Department intend to impose 25 foot setback requirements around ponds and lakes containing the fish species listed in N.J.A.C. 7:13-3.6(b)? These setbacks are beyond the Department's jurisdiction. (17)

RESPONSE: The 25 foot setback would apply around ponds or lakes which contain the fish species listed in the rule because the sediment will have the same affect on the fish in the pond or lake as it would in any other watercourse. The Water Pollution Control Act grants the Department ample authority to protect the water quality and fisheries resources in ponds and lakes as provided in this rule.

247. COMMENT: Although N.J.A.C. 7:13-3.7(d) requires mitigation of acid soils exposed by proposed regulated activity, the practice has always been handled by the Soil Conservation Districts (SCDs), rarely by the Department. The Memorandum of Agreement between DEP and the Department of Agriculture stipulates that the SCDs will oversee the mitigation of acid soils since SCDs are the only entity that can realistically mitigate acid soil. (8)

RESPONSE: The Memorandum of Agreement stipulates that the SCDs will, as necessary, monitor all acid soil mitigation for stream encroachment permits and report non-compliance to the Department. While, the SCDs are better equipped to performing this activity, the authority to require the mitigation is still under the authority of the stream encroachment regulations. It is beyond the scope of this revision to transfer the regulation of acid soils to the Soil Conservation Districts. Therefore, this section will remain in the rule. The Department is open to discussions regarding the transfer of the responsibility for the regulation of acid soils.

248. COMMENT: The Department should delete the requirement in N.J.A.C. 7:13-3.7(g) for special laboratory analysis of potential acid soils in order to determine more information about its characteristics because this requirement is very expensive and unnecessary. If an applicant can determine in advance where these soils are (and there are maps available) and takes the precautions that are outlined in the Technical Manual, then there is no need to perform these expensive tests. (17)

RESPONSE: This requirement is carried over from the now-repealed rule and has not resulted in excessive costs to permittees, to the Department's knowledge. While there are maps available showing the approximate areas of acid producing soils, these maps are not highly accurate. The only sure way of telling whether or not a soil is acid-producing is by testing.

249. COMMENT: N.J.A.C. 7:13-3.7(d) (projects exposing deposits of acid-producing soils) states that the exposure of acid-producing soils will require a site evaluation by a "professional" and, perhaps a special laboratory analysis of the soils. Although the qualifications for this "professional" are not specified, a specialized consultant should not be needed for all projects located in the large geographic area where acid-producing soils could be found. Similarly the special laboratory tests should not be required for all projects located within this geographic area. The commenter is concerned that a "professional" consultant report and the laboratory analysis will become a standard requirement for all applications located within the listing geological formations, and suggests that the criteria for requiring the professional report and laboratory tests be explicitly defined. (24)

RESPONSE: This provision has been in the regulations since 1984. The Department has never required that testing be done if the applicant is already aware that the site contains acid soils. Engineers and consultants working in such areas are clearly aware of their responsibility for mitigating the effects of acid leaching, and this rule does not change that responsibility. However, an applicant with a project in an area that is known to have such soils that does not provide information with the application regarding acid soils will be required to perform appropriate testing to establish whether such soils exist on-site and how the exposure of such soil will be mitigated.

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250. COMMENT: Does N.J.A.C. 7:13-3.8, Freshwater wetlands, mean that if a county mosquito control agency meets the requirements of this rule, that a Freshwater Wetlands permit will be issued along with the Stream Encroachment Permit without having to file a separate freshwater wetland permit? Was not this the idea behind combining all the permit authority into one regulatory element? (10)(14)

RESPONSE: The Land Use Regulation Program is responsible for administering both the stream encroachment and freshwater wetlands programs. Since both programs have separate rules, a separate application for each program must be submitted. However, if both applications are submitted together the Land Use Regulation Program will review them simultaneously and issue one permit if possible.

As stated in the response to Comment 6 above, N.J.A.C. 7:13-3.8 was revised to reflect the State's assumption of regulatory authority for freshwater wetlands from the Federal Government under the Clean Water Act.

251. COMMENT: The commenter questions the need for a separate wetlands rule, N.J.A.C. 7:13-3.8. Why not refer instead to the FWPA rules at N.J.A.C. 7:7A? (3)(26)

RESPONSE: As stated in the response to Comment 6 above, N.J.A.C. 7:13-3.8 was revised to reflect the State's assumption of regulatory authority for freshwater wetlands from the Federal Government under the Clean Water Act.

252. COMMENT: N.J.A.C. 7:13-3.8 should be deleted since it is inconsistent with the Freshwater Wetlands Protection Act, which does not require mitigation for the use of general permits. There is no need for these regulations to contain requirements regarding freshwater wetlands since they are found in the Freshwater Wetlands Protection Act Regulations which supersede these regulations on that matter. Additionally, mitigation cannot be required if an applicant is exempt from the Freshwater Wetlands Act. (17)(19)

RESPONSE: As stated in the response to Comment 6 above, N.J.A.C. 7:13-3.8 was revised to reflect the State's assumption of regulatory authority for freshwater wetlands from the Federal Government under the Clean Water Act.

253. COMMENT: N.J.A.C. 7:13-3.8, Freshwater wetlands, would prohibit wetlands disturbance over 0.25 acres. This rule should be changed to state that if the applicant can meet the requirements for any general permit under the Freshwater Wetlands Protection Act rules, that encroachment over 0.25 acres of wetlands is permitted. (18)

RESPONSE: As stated in the response to Comment 6 above, N.J.A.C. 7:13-3.8 was revised to reflect the State's assumption of regulatory authority for freshwater wetlands from the Federal Government under the Clean Water Act.

254 COMMENT: N.J.A.C. 7:13-3.8, Freshwater wetlands, should be consistent with the requirements of the Freshwater Wetlands Protection Act in regards to the use of general permits and the need to mitigate for the loss of ordinary wetlands. Also, through the use of several general wetland permits, it may be possible to avoid mitigation for a loss of one acre. (24)

RESPONSE: As stated in the response to Comment 6 above, N.J.A.C. 7:13-3.8 was revised to reflect the State's assumption of regulatory authority for freshwater wetlands from the Federal Government under the Clean Water Act.

255. COMMENT: The commenter objects to incorporating a non-permitting program such as Threatened and Endangered Species (N.J.A.C. 7:13-3.9) into the flood hazard regulations. The primary intent of the Flood Hazard Area Control Act is to minimize potential on-site and off-site damage to public and private property caused by development in a flood plain. There is no reason to incorporate in these rules another program that has no direct applicability to the intent of these regulations. (1)

RESPONSE: As stated in the response to Comment 3 above, the Department has ample authority under the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. and the Department of Environmental Protection Act of 1970, N.J.S.A. 13:1D-1 et seq. to protect threatened and endangered species through these rules.

256. COMMENT: In N.J.A.C. 7:13-3.9(a) (threatened and endangered species) the phrases "living in areas" and "adversely affected" must be clarified. Does the Department mean within the flood hazard area, buffer zone, one mile, two miles? What constitutes "resting"? Is a one-time stop-over (one hour, one day) during a seasonal migration result in that site becoming a documented habitat? (1)

RESPONSE: N.J.A.C. 7:13-3.9(a) has been revised on adoption to apply only to populations of threatened and endangered species "documented" (by the Natural Heritage Program) in areas under the jurisdiction of this chapter, which means it applies only to endangered species "documented" in the areas identified in N.J.A.C. 7:13-1.3 Applicability. A one-time time stop-over during a seasonal migration could result in an area becoming a documented habitat, if that area is unique in the region and its loss would seriously affect the life cycle of the species involved. At the present time, there is only one area so documented and that is located outside the jurisdiction of this chapter. The review of threatened and endangered species under this chapter will focus on those species dependent on the flood plain area for their survival, as it has in the past.

257. COMMENT: N.J.A.C. 7:13-3.9 effectively requires every stream encroachment applicant to perform a threatened and endangered species survey of the stream encroachment area. This is a particularly burdensome and expensive requirement, particularly for smaller projects. The rule should be changed to allow the applicant to rely upon the Natural Heritage Database Reports and to supplement that data at the applicant's option. (1)(18)(25)

RESPONSE: The Department did not intend to require a survey for every application submitted. A new N.J.A.C. 7:13-3.9(b) has been added upon adoption to require a survey only when the Department has knowledge of **documented** species and habitats, and to add a reference for obtaining information from the Natural Heritage Program.

258. COMMENT: There is no justification for requiring such detail under N.J.A.C. 7:13-3.9(b)2 through 6 for determining impacts to rare and endangered species, particularly for minor projects or projects located in urbanized/developed areas. Information such as temperature, wind direction on the day a rare and endangered species survey is conducted, acreage per habitat, sex and age of species is totally irrelevant to determining proper engineering design to minimize downstream flooding. Under the recently amended Coastal Zone Management Rules, N.J.A.C. 7:7E, this level of detail is not required. The Department must provide consistency in implementing similar programs. The Department is attempting to use this program to force an applicant to develop information for the Department to enhance it's inventory for future regulatory purposes. (1)(10)(14)

RESPONSE: The authority to regulate threatened and endangered species is derived from the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. The level of information required in this rule is necessary to determine whether the population is native, in which case the Department will protect the area, or if the population is migratory, in which the Department may not protect the area if other areas exist which can serve the same function. Either way, this information is relevant to the engineering design in order to develop an environmentally sound project. This is not an attempt to force an applicant to develop the Department's inventory for future regulatory purposes. Rather, it formalizes requirements that have been implemented as part of the stream encroachment program for many years. It was not the Department's intent to require every applicant to perform a survey, only those for whose proposed projects there is reasonable evidence that such a species is present. To this end N.J.A.C. 7:13-3.9(a) has been clarified upon adoption to specify documented species and habitats, and to add a reference to the Natural Heritage Program.

259. COMMENT: It appears that the Department will not issue a permit for a regulated activity if it adversely affects species of threatened or endangered plants (apparently including those listed in N.J.A.C. 7:5C-5.1) despite the fact that the enabling legislation, the Endangered Plant Species List Act, P.L. 1987,c.56, does not contain such enforcement authority. The Department should limit the rule only to those animals and plant species that are on the Federal Endangered Species List or, as an alternative, those animal and plant species that are regulated under the State's Freshwater Wetlands Protection Act. By expanding this rule to include all of the plant species listed pursuant to the Endangered Plant Species List Act, the Department is inviting administrative problems, given the limitations on the agency's resources. To complicate the issue, the Stream Encroachment Program is subject to the 90-Day Construction Permit Law which will likely result in a logjam. (17)(19)

RESPONSE: The Endangered Plant Species List Act sets up an inventory of endangered and threatened plants which merit protection throughout the State rather than a regulating program. It is thus appropriate to identify these species as worthy of protection under these rules if they are found in an area under the jurisdiction of this chapter.

The stream encroachment program formerly regulated all water-dependent threatened and endangered species, regardless of which list a species was on. The fact that there are separate Federal and State lists

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indicates that there are special concerns within the State that do not affect the rest of the country. It would be irresponsible for a State agency not to recognize the State lists and thus ignore species protection concerns unique to New Jersey.

The Freshwater Wetlands Protection Act does not give the Department the authority to regulate plants unless they are federally listed because that Act was enacted prior to the Endangered Plant List Act. Additionally, the Freshwater Wetlands Program concentrates on species found in wetlands. The stream encroachment program is not limited to those species because its jurisdiction includes non-wetland areas. Therefore, the Department will not limit jurisdiction to the Federal lists or the species that the Freshwater Wetlands Program protects.

The Department does not anticipate any difficulties implementing this rule. Threatened and endangered species protection was a concern of the stream encroachment program even prior to the adoption of the rules in 1984. This section formalizes the concerns and procedures that are implemented in practice by the Department as part of the stream encroachment permit review.

260. COMMENT: The criteria for requiring professional endangered and threatened species surveys in N.J.A.C. 7:13-3.9 should be explicitly defined so that they are not made a standard requirement on all permit applications. (24)

RESPONSE: As stated in the response to Comment 257 above, the Department does not intend to require a survey on every project.

261. COMMENT: The commenter's experiences with the New Jersey Natural Heritage (NJNH) Database have shown that the database is often antiquated. It should be updated to reflect current conditions. The commenter also recommends that DEP institute a policy whereby data requests to the NJNH program be answered within 30 days. (25)

RESPONSE: While this comment is beyond the scope of this proposal, the Land Use Regulation Program has referred this comment to the NJNH program in the Department.

Subchapter 4 Application Procedure for Stream Encroachment Permits

262. COMMENT: The commenter objects to the level of detail required for submission of all applications in N.J.A.C. 7:13-4.1, particularly the environmental reports. For minor projects, for example, construction of a small building or electrical substation, there appears to be no justification for requesting such detail, and requiring a multi-disciplinary approach in some cases. Such a requirement will significantly increase the cost of the project and require a potential lengthy data collection period, which may jeopardize financial loan commitments. The Department must draw a distinction between major and minor "environmental impact" projects as it had previously for Projects of Special Concern (PSC). Small-scale construction activities in urbanized/developed/paved areas such as expansion of an existing substation by adding a transformer or capacitor bank should not be subject to such monumental data collection requirements. (1)(17)(19)(25)

RESPONSE: The only new requirement at N.J.A.C. 7:13-4.1 is the environmental report to which the commenter objects. The "project of special concern" (PSC) in the repealed rule did distinguish between levels of environmental impacts. However, the Department had to evaluate every project, major or minor, to determine whether or not it was a PSC. The information necessary to make this determination usually had to be requested from the applicant, and its piecemeal production not only delayed permit issuance but also became in essence an informal environmental report prepared by the applicant.

The Department's intent in requiring an environmental report in this rule is to have applicants address the same environmental issues they have always addressed but to do so while preparing the permit application instead of later, piecemeal, during the Department's review. By enumerating the various types of information that should be provided "to the extent required to meet the requirements of this chapter," the Department intends that the report will address only those environmental concerns pertinent to a specific site. For example in the case of adding a transformer to an existing substation, the environmental report requirement will be satisfied by a statement that the project site is fully developed and that the construction of the proposed transformer will not disturb any natural areas.

263. COMMENT: By using the word "shall" at N.J.A.C. 7:13-4.1(j) when referring to the environmental report there is no room for discretion by the Department. For simple stream cleaning projects, this is prohibitively time-consuming when many of the items are not relevant. A complete environmental report as stated will require hiring consultants because most public agencies do not retain an interdisciplinary staff. For those which do, there would be no time to do any other work except prepare Stream Encroachment Permit applications. It would also appear to negate the option of applying for several watercourses under N.J.A.C. 7:13-2.5(b). (10)(14)

RESPONSE: As explained in the response to Comment 262 above, the Department's intent in requiring an environmental report in this rule is to have the applicant address environmental issues while preparing the permit application and address only those environmental concerns pertinent to a specific site.

264. COMMENT: An environmental report should be required only if deemed necessary at the pre-application conference, not when it is intuitively obvious that such a report would have no benefit. (12)

RESPONSE: The Department will assist the applicant in determining which elements of the environmental report are necessary if requested to do so at a pre-application conference. As explained in the response to Comment 262 above, the Department's intent in requiring an environmental report in this rule is to have the applicant address environmental issues while preparing the permit application and address only those environmental concerns pertinent to a specific site.

265. COMMENT: It is unclear at what the Department is requesting in N.J.A.C.7:13-4.1(l). Is it sufficient for the permit applicant to simply address the criteria in the permit requirements? Please clarify. (17)

RESPONSE: N.J.A.C. 7:13-4.1 sets forth the information required for an administratively complete permit application. This does not necessarily mean that the application meets the technical criteria set forth in this chapter, only that there is enough information for the Department to start reviewing the proposed project. N.J.A.C. 7:13-4.1(l) provides that if the application lacks any of the required information described in N.J.A.C. 7:13-4.1, the application will be considered incomplete and returned to the applicant. If such an application is accepted for review, it will be denied unless the missing information and any additional technical information requested by the Department are submitted.

266. COMMENT: The environmental report requirements in N.J.A.C. 4.1(j)1 and 2 refer to changes on the "site." Analysis of impacts should be limited to activities in the "regulated area." Similarly, the analysis of detention basins required under N.J.A.C. 7:13-4.1(j)5 should be clarified to encompass only those basins placed in the "regulated area."(19)

RESPONSE: N.J.A.C. 7:13-4.1(j)1, 2 and 5 have been revised on adoption as suggested to clarify that the environmental analysis need only address those issues in areas under the jurisdiction of this chapter.

267. COMMENT: N.J.A.C. 7:13-4.1(f) requires a Soil Erosion and Sediment Control Plan in an application for a permit under this chapter. Projects which do not require a Soil Conservation District or authorized municipal approval should not be required to submit a soil erosion and sediment control plan to NJDEP. This requirement can be satisfied by applicable notes on the engineering drawings demonstrating best management practices for soil erosion, as is currently required. The authority of managing soil erosion and sedimentation control should be retained by the soil conservation districts and not DEP. This assumption of jurisdiction by the DEP will further confuse applicants and also be repetitive when applicable. (25)

RESPONSE: The requirements for a soil erosion and sediment control plan are set in N.J.A.C. 7:13-3.3, and are carried over from the repealed rules. The Department will continue to accept notes on the submitted plans as well as an approval from the local Soil Conservation District as satisfying the requirement for obtaining a soil erosion and sediment control plan.

268. COMMENT: N.J.A.C. 7:13-4.2, Notice, states that no notices are required unless: (a) the project is classified as a major project, (b) the project is located along trout-associated watercourses, (c) the project exposes acid-producing soils (d) the applicant is requesting a hardship exemption or (e) the applicant is requesting an appeal. Since all stream cleaning and mosquito control projects are classified as minor, this appears to conflict with N.J.A.C. 7:13-2.5. (10)(14)

RESPONSE: The notification required in N.J.A.C. 7:13-2.5(e) is required only when watercourse cleaning projects performed for mosquito control purposes do not meet the requirements of this chapter and the mosquito control agency is seeking an exemption under N.J.A.C. 7:13-2.5(e). This provision, in essence, allows a hardship waiver based upon the need to control mosquitoes without having the applicant go through the more rigorous and formal requirements of N.J.A.C. 7:13-4.8. Therefore, N.J.A.C. 7:13-2.5(e) does not conflict with N.J.A.C. 7:13-4.8. Similar notice is required for road projects seeking an exemption from the 20 percent or zero percent net fill requirements of N.J.A.C. 7:13-2.14(a)7 and 2.15(a)3.

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269. COMMENT: The proposed notice requirements at N.J.A.C. 7:13-4.2(a) are too onerous. Applicants should only be required to notice adjacent property owners. (17)

RESPONSE: With the exception of adding the local construction official, these are the same notice requirements that have been in effect for the past 10 years. The types of projects that require that notice be provided have the potential to affect areas beyond the adjacent properties. The notice is necessary in order to inform all affected parties of the pending project and to allow them the opportunity to comment.

270. COMMENT: The requirement that a notice be sent to "any other agencies or bodies as requested by the Department or the county," at N.J.A.C. 7:13-4.2(a)5 should be deleted. It is onerous and unnecessary. (17)

RESPONSE: The Department considers this provision necessary since some projects, either by their type or location, bring them under the jurisdiction of other agencies. It is important for the comprehensive review of the application that these agencies be notified and presented with the opportunity to comment. For example, if the project is proposed on or near lands preserved under the Green Acres Program, the Department would require that the Green Acres Program be sent a notice. It would be onerous and unnecessary to require all applicants to notify the Green Acres Program, but it is not onerous and unnecessary if the project will affect a Green Acres Project. The Department also notes the this requirement has been in effect for 10 years.

271. COMMENT: The commenter supports N.J.A.C. 7:13-4.3, Pre-application conferences. However, the Department should include members of the public in the application process as early as possible. Such a "conference" meeting (not a hearing) should be scheduled as soon after the pre-application conference as possible. Early examination of permit needs and site conditions by all interested parties facilitates the application and review process. (16)

RESPONSE: The Department acknowledges the comment in support of the rule. The purpose of the pre-application conference is to advise the applicant of the Department's permit requirements. It is not intended to be a fact-finding meeting. While the Department agrees that it is better to hear objections to an application as early in the process as possible, it would be extremely onerous and time consuming to do so in the manner the commenter suggests. Additionally, the Department cannot always identify all the persons who would want to be involved. The Department will continue to hold the pre-application conference with the applicant alone and to respond to the comments from interested parties submitted after the application is accepted for review.

272. COMMENT: An application checklist should be provided to the applicant at the pre-application conference. This will expedite administrative completeness review upon formal submission of the application. (19)

RESPONSE: An engineering as well as an administrative completeness checklist for stream encroachment permits are a standard component of the application package. An application package is usually provided at the pre-application conference unless it is plain that no application will be filed.

273. COMMENT: N.J.A.C. 7:13-4.4, Over-the-counter permits, authorizes one day permit processing for certain minor applications to the Program as per the 90-Day Construction Permit Rules, "Department workload permitting." This service should either be offered by the Department at all times, or not at all. The "workload permitting" caveat makes it difficult to plan and schedule projects dependent on such processing. (1)(6)

RESPONSE: The over-the-counter permit concept as used in the stream encroachment program requires that the applicant make an appointment to bring in the application and if the application is found complete and is minor in nature, the permit will be issued in one day. If there is a problem, the application reverts to a 90-day permit.

Ten years ago the workload for the Department staff increased to the point where a one-day review was not possible without creating a backlog for the review of other pending applications. While the workload has decreased slightly since that time, program staffing has also been reduced and is expected to be further reduced in the near future which will make it even more difficult to perform over-the-counter reviews. The provision has been retained so that the Department may issue over-the-counter permits if and when feasible.

274. COMMENT: N.J.A.C. 7:13-4.6, Emergency permits should state that the Department is allowed to issue emergency permits to protect the health, welfare, and safety of the public. If accidents are occurring at certain intersections, improvements to eliminate these accidents should be allowed under an emergency permit. Also, if a culvert collapses and causes long or dangerous traffic detours, an emergency permit should be issued to replace the culvert. (12)

RESPONSE: The purpose of this chapter is to protect the health, welfare, and safety of the public. N.J.A.C. 7:13-4.6(a) for emergency permits is intended for those projects which need to be performed immediately to protect the public or restore services such as a culvert collapse, where immediate action is needed to replace the structure. Projects such as intersection redesigns are not performed immediately upon occurrence of a problem. These types of projects involve detailed design and planning before construction. While they are definitely of public concern, they do not constitute emergencies. There is time to design such projects to conform to the requirements of this chapter.

275. COMMENT: N.J.A.C. 7:13-4.7(a) (permit application review procedures) states that upon receiving application for a Stream Encroachment permit the Department may accept the application as complete for review, classify the application as incomplete and request additional information from the applicant or classify the application as incomplete and return the submission package to the applicant without filing. This rule should be expanded to clearly stipulate under what conditions an application is retained or returned. (6)(17)

RESPONSE: The application package for a stream encroachment permit contains an administrative and engineering completeness checklist. If all information requested on these checklists is submitted, then the application will be accepted for review. If the information is not received, the application will be rejected. As a courtesy to the applicant, the Department will request additional information if it is minor in nature and can easily be corrected, such as a forgotten signature or an incorrect fee. If the requested information is not received in 30 days the application will be returned to the applicant.

The Department has found it necessary to reject applications and return them to protect the applicant. In the past, the Department received complaints from applicants whose consultants increased their fees claiming that the Department asked for additional information after the application was submitted, when the consultant knowingly submitted an incomplete application. While not all consultants are guilty of this practice, it occurred frequently enough to cause the Department to reject applications outright unless only minor revisions were necessary.

276. COMMENT: N.J.A.C. 7:13-4.7(f) should be revised to allow extension of permits beyond five years without the need for application for a new permit. Some projects may, by their extent and nature, take more than five years to complete, or even to start, as in the case of a major flood control project. Such renewal after five years could be subject to meeting new requirements, but a totally new application should not be required.

If construction has started and has proceeded in the year preceding expiration of the five years, the renewal should be automatic, as long as construction is continuously pursued. To stop a project under active construction is unwise and can result in an extreme hardship for the applicant and to the construction contractor. (15)

RESPONSE: N.J.A.C. 7:13-4.7(f) states that stream encroachment permits may not extend beyond five years since this is the maximum life of the permit set under the 90-Day Construction Permit Rules. If at the end of the five years the applicant has not completed the work he/she will have to submit for a new permit. The five year limit was set to allow the Department to reevaluate the project under any new laws or rules that may have been promulgated in that time, therefore no automatic extension will be incorporated into the rules. However, the stage of construction and reliance on the original permit will be taken into account in the review for the new permit.

277. COMMENT: The commenter opposes N.J.A.C. 7:13-4.7(f) which establishes that a permit is valid for five years. This rule should mirror the Municipal Land Use Law which gives an applicant a three year approval with two, one-year extensions. (16)

RESPONSE: Previously stream encroachment permits were issued for two-years with provisions to extend them in one-year increments up to the maximum five years allowed under the 90-day Construction Act. However, when the stream encroachment program was brought into the Division of Coastal Resources, the decision was made to issue the permits for the full five years to be consistent with the other programs administered by the Division. Thus, this rule codifies the practice that has been in effect for several years.

278. COMMENT: In N.J.A.C. 7:13-4.7(a), please clarify the meaning of 20 "State working days." Is this equivalent to "private work days"? (17)(25)

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RESPONSE: "State working days" are days on which State employees are required to work, excluding State holidays.

279. COMMENT: The notice requirement in N.J.A.C. 7:13-4.7(b) should specify that it only applies to major projects for linear facilities. Additionally, any attempt to require a notice beyond that which appears in a newspaper is burdensome, especially if the aboveground structures are not in the flood plain. The applicant should also be given the option of either placing a notice in the newspaper or noticing property owners who are adjacent to that portion of the affected property which is within the flood plain. (17)

RESPONSE: The commenter's statement appears to be referring to N.J.A.C. 7:13-4.2(b), not N.J.A.C. 7:13-4.7(b). The Department wishes to point out first of all that the notice requirements of N.J.A.C. 7:13-4.2(a) do not only apply to major projects, they also apply to projects along trout associated watercourses, to projects exposing acid-producing soils and to projects requesting a hardship exemption. The Department realizes that for a linear development the time and cost of notifying all adjacent property owners in accordance with the requirements of N.J.A.C. 7;13-4.2(a) could be substantial. N.J.A.C. 7:13-4.2(b) is intended to allow the applicant proposing to construct a linear facility within the jurisdiction of this chapter which would require notices pursuant to N.J.A.C. 7:13-4.2(a), the choice of notifying all property owners within 200 feet of the property line/right-of-way or place an add in a local and a regional newspaper. The Department is requiring notice to adjacent property owners for aboveground structures because the aboveground structures are more likely to affect the adjacent property owners than a buried pipeline. Since the newspaper notices will substantially reduce the number of notices required to be sent by the applicant, the Department does not believe that requiring specific notices for aboveground structures will be burdensome. N.J.A.C. 7:13-4.2(b) has been revised on adoption to clarify that its notice requirements apply only to those projects located within the jurisdiction of this chapter and which would require notification pursuant to N.J.A.C. 7:13-4.2(a).

280. COMMENT: That N.J.A.C. 7:13-4.7(c) allows the Department to request further information once the initial application has been declared complete. This rule is contrary to the directives from the Legislature in the recent Environmental Management Accountability Plan, N.J.S.A. 13:1D-102, that requires the Department to utilize a checklist to determine completeness. This rule also suggests that the Department may not be reviewing the initial applications as carefully as it should be. (17)

RESPONSE: N.J.A.C. 7:13-4.7(c) refers to those revisions requested after the application is accepted as administratively complete for review. The initial review for completeness is not an evaluation of the project, and accepting an application as complete does not mean that the project is in conformance with the regulations.

The initial review of an application is a cursory review to see if the required information was submitted so that the project reviewer can evaluate the essential aspects of the project. The stream encroachment program has included engineering and administrative checklists in the application packages for several years. Even with the checklists, many applications come in deficient.

Once an application is considered complete for review it is assigned to a project officer for a thorough review. If, during this review the Department were not allowed to ask for revisions then the only other option would be to deny the application. For example, the detailed review of the hydrology or hydraulics indicate that the design engineer made the wrong assumptions or used the wrong values in his/her calculations; or the submitted plans might not back up the calculations or might be drawn incorrectly; or if the review might turn up the possibility of threatened and endangered species or the presence of acid producing soils. Most applicants prefer that the Department ask for revisions during this phase if the revisions can be made during the time remaining in the 90-day review period, rather than automatically deny the application.

281. COMMENT: Can public entities apply for hardship waivers pursuant to N.J.A.C. 7:13-4.8? (10)(14)

RESPONSE: Any applicant, public or private, may file for a hardship waiver if the applicant feels that it can meet the requirements.

282. COMMENT: Requests from five members of the public should not be needed for the Department to hold a public hearing in N.J.A.C. 7:13-4.8(b). The Department can decide when it is appropriate to conduct a public hearing. (12)

RESPONSE: The Department can decide, based on the facts of a case, whether or not to hold a public meeting to discuss a project regardless of the number of comments received. However, since the purpose of the stream encroachment program is the protection of the public, the Department believes that if at least five members of the public express concern with a proposed activity then it is appropriate to hold a hearing to hear those concerns.

283. COMMENT: N.J.A.C. 7:13-4.8(b), which requires a mandatory public hearing on a hardship waiver if at least five members of the public request a hearing, should be deleted as unnecessarily onerous. Rather, the rule should be similar to N.J.A.C. 7:7-4.5 of the revised Coastal Permit Program Rules which provides that the Department may in its discretion hold a nonadversarial public hearing for a permit when the Department determines that additional information is necessary to assist its review and that this information can best be obtained by providing an opportunity for a public hearing. The Department may initiate such a public hearing on its own or in response to public requests identifying specific issues which the Department believes warrant a public hearing. (17)

RESPONSE: The repealed rule allowed a fact-finding meeting to be held when requested or needed. This implied that if just one member of the public requested a meeting it was to be granted. The new rule allows the Department the discretion to evaluate comments received by up to four members of the public to see if a meeting is required. However, if the Department feels that it is warranted, a meeting can still be held even if only one member of the public requests it.

This is done as much in the applicant's interest as in the public interest. The public hearing allows all parties to express and discuss their concerns, and in many cases a compromise acceptable to all parties can be developed. The Department's experience has been that allowing the public to participate in this manner during the review process reduces the number of appeals filed after the permit is issued.

284. COMMENT: N.J.A.C. 7:13-4.8(e)3 requires an analysis of the consistency between the proposed project and goals, objectives and limitations of the comprehensive land use plan and flood plain program applicable to the area. Please clarify. (17)

RESPONSE: The intent of this rule is for the applicant to evaluate the project with respect to existing development in the area. For example, is the proposed development consistent with existing development or is the applicant proposing to site a commercial area in the middle of a residential area? This type of information will assist the Department in determining whether the area was developed consistent with the flood plain characteristics or was developed randomly. This information is very important when considering an application for a hardship waiver from the requirements of this chapter.

285. COMMENT: Please explain what is meant by N.J.A.C. 7:13-4.8(e)7 which requires a statement concerning the current and post-construction land use and value assuming the hardship waiver is granted, including a present-worth cost benefit analysis, and the same analysis assuming denial of the hardship waiver. (17)

RESPONSE: This rule requires that the applicant submit a statement indicating what the value of the land would be if developed as proposed, and the value and use of the land if the hardship waiver is not granted.

286. COMMENT: N.J.A.C. 7:13-4.9(a), which states that only items already approved on the original permit may be modified, is inconsistent with N.J.A.C. 7:13-2.5(b), which states that additional watercourses, not included in the original permit, may be added during the life of the permit through an application to modify the permit. (14)

RESPONSE: N.J.A.C. 7:13-4.9(a) has been revised upon adoption to allow an exception for the addition of watercourses to a watercourse cleaning permit as a modification and thus eliminating the inconsistency.

287. COMMENT: Please clarify N.J.A.C. 7:13-4.9 to identify items that do not need to be formally approved but for which notice of a change must be submitted to the Department. (3)

RESPONSE: Any changes to Department-approved plans must be acknowledged in writing by the Department so that the permit may be formally amended to refer to the correct construction drawings. If these changes do not affect any of the work regulated pursuant to this chapter, then there will be no fee as required by the 90-Day Construction Act, N.J.S.A. 13:1D.

288. COMMENT: How can N.J.A.C. 7:13-4.10 allow third parties to appeal permit decisions since the Legislature recently passed a law that prohibits this activity (P.L. 1993,c.359)? (17)

RESPONSE: N.J.A.C. 7:13-4.10 has been amended upon adoption at subsections (a) and (e) to conform with the new law.

Subchapter 5 Implementation

289. COMMENT: N.J.A.C. 7:13-5.1(b) does not conform with the N.J.S.A. 58:16A-55.3 which allows municipalities to grant development

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approvals conditioned upon the later issuance of stream encroachment permit by DEP. N.J.A.C. 7:13-5.1(b) requires that the stream encroachment permit be issued prior to the municipal development approval. (18)
RESPONSE: Development approvals granted by municipalities that are conditioned upon obtaining other approvals, such as a stream encroachment permit, are technically not valid until such other approvals are obtained. Therefore, the grant of a conditional approval meets the requirements of this rule and has always been acceptable to the Department. N.J.A.C. 7:13-5.1(b) has been clarified upon adoption to emphasize this point.

290. COMMENT: N.J.A.C. 7:13-5.1(b) should be deleted. It is an attempt to place the Stream Encroachment Program above the Municipal Land Use Law, by precluding site plan or subdivision approval until a Stream Encroachment Permit is granted. A developer will normally seek local Municipal Land Use Law approval as a first step, as the project is moot without it, and redesigns commonly occur during the local review process. A standard condition in local resolutions of approval is the securing of all other Federal, State, county and local approvals required. All those approvals must be provided to the municipality before receipt of the building permit. Building permit requirements and Department enforcement powers prevent unauthorized stream encroachments. The proposed regulation will force applicants to design projects at risk in order to make a stream encroachment application, with possible redesign in the local process. (19)

RESPONSE: This requirement is specifically set forth in the Flood Hazard Area Control Act, and is retained from the now-repealed rule. As written, only a municipality can violate this rule. In practice this rule requires only that approvals made pursuant to the Municipal Land Use Law for projects under the jurisdiction of this chapter must be conditioned upon obtaining a permit from the Department. Unfortunately, the Department has brought enforcement actions against municipalities for violating this provision in the past when municipalities knowingly approved and allowed construction within the flood plain without requiring a Stream Encroachment Permit.

The argument that requiring a stream encroachment permit first will lead to redesign when seeking local approval can as easily be turned around. That is, if local approval were obtained first, then redesign might be required during the review of the stream encroachment permit. It would be more prudent for the developer to identify all the regulatory constraints and possible conflicts during the design phase and incorporate them into the initial design rather than submit a design and wait to see what changes each agency requests to meet the respective regulatory requirements.

291. COMMENT: N.J.A.C. 7:13-5.2, Creation of a county water resource association, permits the creation of a county water resource association to discuss and coordinate county flood control and water management programs. This is an outdated idea to anyone who is interested in the improvement of water resources because county governments are politically influenced. Watershed associations on the other hand provide the best comprehensive regional water management plans because they are diligent and uncorrupted. County governments are hardly in a position to deal with water problems that cross county lines. Watershed associations deal with problems that cross county lines. In addition, county projects tend to be political favors which contribute to water problems rather than solve them, to everyone's detriment. Why should State regulations encourage the existence of governmental entities of the types that subjugate water resources into perpetual "ditchhood?" (2)(11)

RESPONSE: The Flood Hazard Area Control Act, N.J.S.A. 58:16A-55.5, provides for the creation of a county water resources association and for the delegation of the Department's authority to approve flood control and water management projects in accordance with this rule. The decisions made by this association are reviewed by the Department. If the association does not act in accordance with the chapter, the delegated powers will be revoked. To date, this provision has been used only to delegate authority to the Monmouth County Waterways Association to review and approve watercourse cleaning projects.

292. COMMENT: N.J.A.C. 7:13-5.3, proposed for repeal, should be retained. Counties should be able to continue to approve their projects (major and minor projects with drainage shed areas less than 150 and 320 acres respectively). This provision has worked well in the past and saved the county significant time and money. (12)

RESPONSE: N.J.A.C. 7:13-5.3 is not proposed for repeal. The commenter is referring to N.J.A.C. 7:13-2.5 of the repealed rule, which was discussed in the response to Comment 10 above.

293. COMMENT: N.J.A.C. 7:13-5.3(a) states that the Department may delegate the permitting authority for stream encroachment review to county agencies. However, N.J.A.C. 7:13-2.16(c)3ii and 3.6(c)2 do not allow a delegated agency to consider exemptions to the low flow fish passage requirements and N.J.A.C. 7:13-5.3 does not allow the delegated agency to review any applications filed by a State agency. The definition for "delegated agency" allows for the Department to delegated its power to approve or disapprove certain classes of applications under this chapter or enforce certain provisions of this chapter. Are there any other classes of applications which cannot be delegated? (14)

RESPONSE: The three cases cited by the commenter are the only types of projects that cannot be delegated to a county agency in accordance with the procedures outlined in this rule.

Summary of Agency-Initiated Changes:

At N.J.A.C. 7:13-1.2, cross-references to the Surface Water Quality Standards are corrected to reflect the recodification of the standards to N.J.A.C. 7:9B.

Throughout the rules, "and Energy" is deleted from references to the Department, reflecting the 1994 reorganization and redesignation of the Department.

At N.J.A.C. 7:13-1.2, a definition for "fish habitat enhancement device" was added to correspond with the addition of "fish habitat enhancement devices" as a non-regulated use in N.J.A.C. 7:13-1.3(e)2x and xi, which change is explained below.

At N.J.A.C. 7:13-1.2, the definition for "threatened and endangered species" was amended to reference N.J.A.C. 7:25-4.17 in addition to N.J.A.C. 7:25-4.13. This change was made because N.J.A.C. 7:25-4.13 only identifies endangered species and not the threatened species. N.J.A.C. 7:25-4.17 identifies threatened species.

N.J.A.C. 7:13-1.3(e)2x and xi, which deal with fish habitat enhancement devices, were added to list of non-regulated uses since they will meet the criteria in N.J.A.C. 7:13-1.3(e) and the Department has traditionally allowed the placement of fish habitat enhancement devices without a permit. N.J.A.C. 7:13-1.3(e)2x refers to devices placed in lakes, ponds, reservoirs and impoundments, while subparagraph (e)2xi refers to devices placed in watercourses.

At N.J.A.C. 7:13-2.1(a), "streams" was changed to "flood plain" to accurately reflect the exemption of N.J.A.C. 7:13-1.3(b).

At N.J.A.C. 7:13-2.3, "Department of Environmental Protection" was inserted in the address for obtaining flood profiles and mapping.

At N.J.A.C. 7:13-2.8(a)4, "to" was removed in order to correct the grammar and clarify the statement.

At N.J.A.C. 7:13-2.8(d)2i, an exception was added to disallow detention/retention basins constructed on-channel in trout production, trout maintenance and anadromous fish watercourses where such construction is discouraged as it would harm or block indigenous fish populations. This restriction is because basins in trout production or trout maintenance waters will increase water temperature, which would harm the indigenous fish population (that is, designated uses in Surface Water Quality Standards N.J.A.C, 7:9B). In addition, if a structure is built to create a retention basin it may block trout spawning movements and, on anadromous fish streams, block anadromous fish pathways. In both cases other regulations or law would be violated (that is, N.J.A.C. 7:13-2.12(c); 7:7E-3.5, and N.J.S.A. 23:5-29.1).

At N.J.A.C. 7:13-2.8, various grammar and spelling errors were corrected.

At N.J.A.C. 7:13-2.8(e)5, "temperature" was added to the list of monitoring parameters since temperature is the most basic of the specifically noted water quality criteria.

At N.J.A.C. 7:13-2.9(a), a grammatical error was corrected.

N.J.A.C. 7:13-2.14(a)9 and 10 were modified to correct "twenty" to "20" when referring to the 20 percent net fill requirement, and to correct grammar.

N.J.A.C. 7:13-2.16(b) was revised to change "one hundred year" flood to "regulatory" flood to be consistent with usage elsewhere in the rules and to correct grammar.

N.J.A.C. 7:13-2.16(b)3iii was revised to correct an internal cross-reference.

N.J.A.C. 7:13-3.1(b)3 was revised to correct a spelling error.

N.J.A.C. 7:13-3.3(c)3 was clarified to require that in addition to sediment control practices being left in place, they should also be maintained.

At N.J.A.C. 7:13-3.3(d), grammar was corrected.

N.J.A.C. 7:13-3.5(j) is a clarified restatement of the requirements proposed in N.J.A.C. 7:13-3.6(c). It is being reiterated in this section

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to emphasize the importance that the Department places on low flow fish passage and to clarify any misconception that these requirements may not apply to trout associated waters. The language at N.J.A.C. 7:13-3.6(c) was clarified to better state the intent of the Department. These two provisions are substantively identical

At N.J.A.C. 7:13-4.8(e)7, a grammatical error was corrected.

Executive Order No. 27 Statement

These new rules are not adopted under the authority of or in order to implement, comply with or participate in any program established under Federal Law. The new rules are also not adopted under the authority of a State Statute that incorporates or refers to Federal law, Federal standards or Federal requirements. Accordingly, Executive Order No. 27 (1994) does not require a comparison with Federal Law.

Full Text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus*;** deletions from proposal indicated in brackets with asterisks *[thus]*):

CHAPTER 13
FLOOD HAZARD AREA CONTROL

SUBCHAPTER 1. GENERAL PROVISIONS

7:13-1.1 Purpose and Scope

(a) The general purpose of this chapter is to control development in areas within the jurisdiction of this chapter in order to avoid or mitigate the detrimental effects of development upon the environment and the safety, health and general welfare of the people of the State.

(b) Areas subject to inundation by flood waters are called flood plains. For the purpose of this chapter flood plains are divided into two classes, delineated and non-delineated.

1. Delineated flood plains have been established and officially adopted ("delineated") by the State of New Jersey. Each flood plain has been divided into a floodway and a flood fringe area. The procedure for delineating flood plains is established by N.J.S.A. 58:16A-52.

2. Other flood plains, and the watercourses that create them, are referred to as non-delineated.

(c) The specific intent of this chapter is to minimize potential on and off site damage to public or private property caused by development which, at times of flood, subject structures to flooding and increase flood heights and/or velocities both upstream and downstream. These rules are also intended to safeguard the public from the dangers and damages caused by materials being swept onto nearby or downstream lands, to protect and enhance the public's health and welfare by minimizing the degradation of water quality from point and non point pollution sources and to protect wildlife and fisheries by preserving and enhancing water quality and the environment associated with the flood plain and the watercourses that create them.

(d) Without proper controls, development in the flood plain and the watercourses that create them may adversely affect the flood carrying capacity of these areas, subject new facilities to flooding, reduce natural flood storage that the flood plain provides, increase the volume of storm water runoff, degrade the water quality of the receiving water body, and result in increased sedimentation, erosion or other environmental damage. Any development in areas regulated by this chapter must conform to criteria which, as outlined in this chapter, depend upon the characteristics of the area and the type of activity involved.

(e) The rules in this chapter govern minimum standards for development within areas within the jurisiction of this chapter. The Department shall administer permits pursuant to this chapter, except as provided in N.J.A.C. 7:13-5.3.

7:13-1.2 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

"Acts" means the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., and N.J.S.A. 13:1D-1 et seq.

"Alteration" means any manmade changes to lands located within the jurisdiction of this chapter.

"Anadromous fish" means fish which travel from salt water to fresh water or up waterways to spawn.

"Applicant" means a person who submits an application for a permit or other decision from the Department under this chapter.

"Application" means a completed CP-1 form along with the appropriate fee, plans, supporting calculations and reports as required by this chapter.

"Bank" means the inclined sides of the channel.

"Bed" means the floor of the channel.

"Cascades" means sections of beds consisting primarily of bedrock, with little rubble, gravel, or other such material present. The current is usually more swift than in riffles.

"Category One waters" means those waters designated in the tables in N.J.A.C. *[7:9-4.15(c)]* ***7:9B-4.15(c)*** through (h) for the purposes of implementing the Antidegradation Polices in N.J.A.C. *[7:9-4]* ***7:9B-4***. These waters may include, but are not limited to:

1. Waters originating wholly within Federal, interstate, State, county, or municipal parks, forests, fish and wildlife lands, and other special holdings that have not been designated as FW1 in N.J.A.C. *[7:9-4]* ***7:9B-4***;

2. Waters classified as FW2 Trout Production waters and their tributaries;

3. Surface waters classified as FW2 Trout Maintenance or FW2 nontrout that are upstream of waters classified as FW2 Trout Production;

4. Shellfish waters of exceptional resource value; or,

5. Other waters and their tributaries that flow through, or border, Federal, State, county or municipal parks, forests, fish and wildlife lands, and other special holdings.

"Central Passaic Basin" means the flood plain along:

1. Central Passaic River: Extending from Little Falls at Beatties Dam upstream to Route 202 in Bernards and Harding Townships;

2. Pompton River: Entire river;

3. Ramapo River: Extending from its confluence with the Pompton River upstream to Pompton Lakes Dam;

4. Pequannock and Wanaque Rivers: Extending from their confluence with the Pompton River upstream to Paterson-Hamburg Turnpike;

5. Dead River: Extending from its confluence with the Passaic River upstream to Liberty Corner Road in Bernards Township;

6. Harrison Brook: Extending from its confluence with the Dead River upstream to Lake Road in Bernards Township;

7. Rockaway River: Extending from its confluence with the Passaic River upstream to the Jersey City Reservoir (Boonton Reservoir);

8. Whippany River: Extending from its confluence with the Passaic River upstream to Route 10;

9. Black Brook: entire reach; and

10. Beaver Dam Brook: Including East and West Ditches from Pompton River to Jacksonville Road in Lincoln Park.

"Channel" means the well-defined bed and banks of a watercourse which confine and conduct flowing water continuously or intermittently.

"Channelization" means any artificial reconstruction of the bed and/or banks such as by straightening, lining, deepening or piping.

"Commissioner" means the Commissioner of the Department of Environmental Protection *[and Energy]*.

"Dam" means any artificial dike, levy or other barrier together with appurtenant works, which is constructed for the primary purpose of impounding water on a permanent or temporary basis, that raises the water level five feet or more above its usual mean low water height when measured from the downstream toe-of-dam to the emergency spillway crest or in the absence of an emergency spillway, to the top of dam. Low dams raise the water level less than five feet.

"Delegated agency" means a county agency to which the Department has delegated its power to approve or disapprove certain

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classes of applications under this chapter or enforce certain provisions of this chapter.

"Department" means the New Jersey Department of Environmental Protection *[and Energy]*.

"Detention basin" means an impoundment area created by constructing an embankment, excavating a pit or both for the purpose of temporarily storing storm water.

"Development" means any construction activity or other manmade land disturbance.

"Encroachment Line" means a line, described by metes and bounds, which defines the boundary between the floodway and flood fringe area in a non-delineated flood plain and customarily marks the limit of fill to be placed in a delineated flood plain.

"Erosion" means detachment and movement of soil or rock fragments by water, wind, ice or gravity.

"Excavation" means removal or recovery, by any means whatsoever, of minerals, mineral substances or organic substance, other than vegetation, from the water, land surface or beneath the land surface, whether exposed or submerged.

"Fill" means any material placed or deposited within the flood plain or the watercourses that create them which will displace floodwaters.

"Fish habitat enhancement device" means a device consisting of deflectors, low-flow channel structures, mud sills, boulders, felled shoreline trees, tire structures, brush, rubble reefs, or spawning/nursery structures as developed and approved by the Department.

"Flats" means sections of channel with current too slow to be classified as riffle and too shallow to be classified as a pool. The bottom usually consists of sand or finer materials.

"Flood carrying capacity" means the ability of a watercourse or flood plain to transport flood waters, as determined by its shape, cross-sectional area, bed slope, coefficient of hydraulic friction, and upstream and downstream channel configurations, as used in accepted engineering practices.

"Flood damage potential" means the susceptibility to damage by potential floods at that site, as well as a given site's potential to increase off-site flooding.

"Flood fringe" means that portion of the flood plain outside of the floodway or encroachment lines.

"Flood hazard area design flood" means the flood used in State Adopted Flood Studies. It is the flood resulting from the 100-year flood discharge increased by 25 percent.

"Flood hazard design elevation" means the elevation of the flood hazard area design flood.

"Flood plain" means the area inundated by the regulatory flood including the watercourse that creates it.

"Flood proofing" means any combination of structural and nonstructural design features, additions, changes, or adjustments to structures which reduce or eliminate flood damage to real estate or improved real property, structures and their contents.

"Floodway" means the channel and portions of the flood plain adjoining the channel which are reasonably required to carry and discharge the regulatory flood. For the purpose of this chapter the term floodway shall refer to both the delineated floodway on State Adopted Studies and the area between the encroachment lines located on both sides of a non-delineated watercourse.

"Fluvial flood" means a flood which is caused entirely by runoff from rainfall in the upstream drainage area and is not influenced by the tide or tidal surge.

"Freshwater wetland" or "wetland" means an area that is inundated or saturated by surface water or ground water 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, however, that the Department, in designating a wetland, shall use the three-parameter approach (that is, hydrology, soils and vegetation) enumerated in The Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989), and any subsequent amendments thereto.

"FW" means the general surface water classification applied to fresh waters in the Department's Surface Water Quality Standards, N.J.A.C. *[7:9-4]* ***7:9B***.

"FW1" means the waters designated as FW1 in the Department's Surface Water Quality Standards, N.J.A.C. *[7:9-4]* ***7:9B***.

"FW2" means the general surface water classification applied in the Department's Surface Water Quality Standards, N.J.A.C. *[7:9-4]* ***7:9B***, to those fresh waters that are not designated as FW1 or Pinelands waters.

"Hazardous materials" means those materials as defined by or pursuant to the Spill Compensation and Control Act, N.J.S.A. 58:19-23.11 et seq., or pollutants as defined by the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.

"Low water" means the water level characteristic of a channel during low flow conditions.

"Major project" means that class of project defined as major in the 90-Day Construction Permit Rules (N.J.A.C. 7:1C).

"Manual" means the latest version of the Technical Manual for this chapter published by the Department.

"Minor project" means that class of project defined as minor in 90-Day Construction Permit Rules (N.J.A.C. 7:1C).

"Mitigation" means activities carried out in order to compensate for loss or disturbance of the environment caused by regulated activities and may include restoration, creation, enhancement or donation of land of appropriate environmental characteristics.

"Net fill" means the volume of fill ***which will displace flood waters*** left after the total volume of cuts***, which will provide additional flood storage,*** made on the project site has been subtracted from the total volume of fill ***which will displace flood waters*** placed on the project site.

"90-Day Construction Permit Rules" means the rules appearing in N.J.A.C. 7:1C.

"Non-regulated use" means any use not subject to the provisions of this chapter.

"Non-trout waters" means the non-trout waters identified in the Department's Surface Water Quality Standards (N.J.A.C. *[7:9-4]* ***7:9B***).

"Obstruction" means, but is not limited to, any structure, fill or other material placed in the flood plain which may impede, retard, or change the direction of the flow of water either by itself or by catching or collecting debris carried by such water or that is placed where the flow of water might carry the same downstream and constitute a hazard to life or property.

"One hundred-year flood" means a flood that is estimated to have a one percent chance, or one chance in a hundred, of being equaled or exceeded in any one year.

"Perennial watercourse" means any watercourse mapped as perennial on either the 7½ inch topographic maps published by the U.S. Geological Survey or the detailed map sheets in County Soil Surveys published by the U.S. Department of Agriculture, Soil Conservation Service, unless site specific information to the contrary is presented to and accepted by the Department.

"Permit" means a permit issued by the Department to engage in activities regulated under this chapter.

"Person" means corporations, companies, associations, societies, firms, partnerships and joint stock companies, as well as individuals, the Federal government, the State, and all political subdivisions of the State or any agencies or instrumentality thereof.

"Pools" means sections of channel which are deeper and have appreciably slower current than areas immediately upstream or downstream. The bed is usually a mixture of silt and coarse sand; the water depth usually exceeds two feet.

"Prohibited use" means a use which fails to comply with the requirements of this chapter and which shall not be allowed except in the case of exceptional and undue hardship as defined in N.J.A.C. 7:13-2.2.

"Public hearing" means a public meeting convened to allow the public to comment on the project proposed in the application.

"Regulatory flood" means the 100-year flood along non-delineated watercourses or the flood hazard area design flood along delineated watercourses.

"Riffles" means sections of a channel containing gravel or rubble in which surface water is at least slightly turbulent and current is swift enough that the surface of the gravel and rubble is kept fairly free from sand and silt.

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"Retention basin" means an impoundment area with a permanent pool made by constructing an embankment, or excavating a pit, or both for the purpose of temporarily storing storm water.

"Soil Conservation District" means a political subdivision of the State of New Jersey authorized under N.J.S.A. 4:24-1 et seq.

"Solid waste" means garbage, sludge, refuse, trash, rubbish, debris or other discarded materials.

"State Soil Conservation Committee" means the agency created pursuant to N.J.S.A. 4:24-1 et seq.

"Stream encroachment" means any manmade alteration, construction, development or other activity within the areas within the jurisdiction of this chapter.

"Stream Encroachment Permit" means a permit issued by the Department, or delegated agency under the provisions of the Acts.

"Structure" means any assembly of materials above or below the surface of land or water including, but not limited to, buildings, fences, dams, fills, levees, bulkheads, dikes, jetties, embankments, causeways, culverts, roads, railroads, bridges and the facilities of any utility or governmental agency. Trees and vegetation are not structures.

"Threatened or endangered species" means those species of animals listed pursuant to "The Endangered and Nongame Species Conservation Act," N.J.S.A. 23:2A-1 et seq., identified in N.J.A.C. 7:25-4.13, ***and 7:25-4.17,*** and those species of plants identified in the Endangered Plant Species List, N.J.A.C. 7:5C-5.1.

"Tidal flood" means a flood caused by the tide backing up a channel.

"Trout-associated watercourses" means watercourses that are:

1. Trout production waters;
2. Trout maintenance waters;
3. Non-trout waters upstream from trout production waters (with or without intervening trout maintenance waters);
4. Non-trout waters less than one mile upstream from trout maintenance waters that are not upstream from trout production waters; or
5. *[Unnamed tributaries]* ***Tributaries*** flowing into *["Trout Associated"]* ***trout production or trout maintenance*** waters which will take the classification of the waters they flow into.

"Trout maintenance waters" means the trout maintenance waters identified in the Department's Surface Water Quality Standards (N.J.A.C. *[7:9-4]* ***7:9B***).

"Trout production waters" means the trout production waters identified in the Department's Surface Water Quality Standards (N.J.A.C. *[7:9-4]* ***7:9B***).

"Trout stocked waters" means waters that are stocked with trout by the Department's Division of Fish, Game and Wildlife, as listed in N.J.A.C. 7:25-6 and amendments thereto as adopted by the New Jersey Fish and Game Council.

"Upstream/downstream" refers to direction with respect to a fixed point in a waterway.

"Watercourse" means a path which conveys surface water runoff. Flow paths with a total contributory drainage area less than 50 acres must have definable bed and banks to be considered a watercourse.

7:13-1.3 Applicability

(a) All development within the larger of the following areas shall require a permit under this chapter unless specifically exempted as provided in this chapter:

1. The flood plain, as defined at N.J.A.C. 7:13-1.2;
2. Twenty-five feet back from the top of the channel bank; or
3. Fifty feet back from the top of the channel bank along waters

i. Containing deposits of acid-producing soils as defined in N.J.A.C. 7:13-5.10;

ii. Classified as Category One, FW-1 ***trout-associated, or***, FW-2*[, or]* trout-associated;

iii. Which are a critical part of the habitat supporting a threatened or endangered species of plant or a current population of any species of threatened or endangered animal on a permanent or temporary basis, for any purpose such as resting, breeding or feeding, during any portion of its life-cycle; or

iv. Located within documented, historic habitat for threatened or endangered species of animals, which habitat remains suitable for breeding, resting or feeding by those species of animal during any portion of its life-cycle.

(b) New Jersey's geography and location along the Atlantic coastline subjects the State to both tidal and fluvial flooding. The effects of development on flood elevations vary depending on the type of flooding and the area in which it occurs. For the purpose of this chapter, three areas of concern have been identified based on the type of flooding and the impact of development in that particular area. These areas are as follows:

1. Tidal: Tidal flooding is the result of higher than normal tides which in turn inundate low lying coastal areas. The 100-year tidal flood elevation will not be affected by development. Therefore, certain areas in which the regulatory flood is the 100-year tidal flood will not be regulated under this chapter. The elevation of the 100-year tidal flood, which varies along the coast, can be obtained from the Department.

i. Tidal water bodies not regulated under this chapter shall include, but not be limited to, the Atlantic Ocean and all water bodies named on the U.S. Geological Survey 7½ inch topographic maps as "bays," "canals," "coves," "guts," "harbors," "inlets," "sounds," "thorofares," and "channels," except for: the portion of the Delaware River near Camden called "Back Channel," all man-made lagoons and canals and all sections of the "Intracoastal Waterway."

ii. The lower reach of a watercourse that flows into a tidal water body will be subject to the same flooding characteristics as the tidal water body. Subparagraph (b)1ii(1) through (16) below identifies reaches along specific watercourses that will be considered tidal for the purposes of this chapter and, therefore, not regulated under this chapter. Along those watercourses not specifically identified in (b)1ii(1) through (16) below that flow into tidal waterbodies listed in (b)1 above, the reach between the mouth of the watercourse and the closer of either the first bridge or culvert upstream or the point upstream where the regulatory flood exceeds the 100-year tidal elevation will be considered a tidal water body for the purposes of this chapter and, therefore, not regulated under this chapter.

(1) Arthur Kill (Middlesex Co./Union Co.): entire reach;

(2) Comptons Creek (Monmouth Co.) Raritan Bay to Campbell Avenue;

(3) Deal Lake (Monmouth Co.) Atlantic Ocean to Wickapecko Drive;

(4) Hackensack River (Hudson Co.) Newark Bay to the Pulaski Skyway;

(5) Hudson River (Bergen Co./Hudson Co.);

(6) Manasquan River (Monmouth Co./Ocean Co.): Atlantic Ocean to Route 70;

(7) Metedeconk River (Ocean Co.): Barnegat Bay to Route 70;

(8) Navesink River (Monmouth Co.): Shrewsbury River to Coopers Bridge;

(9) Passaic River (Essex Co./Hudson Co.) Newark Bay to the Pulaski Skyway;

(10) Raritan River (Middlesex Co.): Raritan Bay to The New Jersey Turnpike;

(11) Shark River (Monmouth Co.): Atlantic Ocean to confluence with Laurel Gully Brook;

(12) Shrewsbury River (Monmouth Co.): Sandy Hook Bay to Seven Bridge Bay;

(13) Waretown Creek (Ocean Co.) Atlantic Ocean to Route 9;

(14) Whale Brook (Middlesex Co./Monmouth Co.): Raritan Bay to Route 35;

(15) Wreck Pond (Monmouth Co.) Atlantic Ocean to Route 71; and

(16) All tidal watercourses flowing into Raritan Bay, north of Route 36 in Monmouth County.

2. Tidally influenced: Tidally influenced areas are subject to both tidal flooding and flooding caused by the tidal wave traveling up a watercourse. Since the Department is concerned with environmental impacts in the flood plain and obstructions to flow in the floodway produced by development in these areas the engineering standards for the flood fringe will not apply in these areas.

3. Fluvial: Fluvial flooding is the result of storm water runoff which exceeds the capacity of the watercourse to carry the flow

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without endangering life or property. In this area, development may affect upstream and/or downstream flood elevations by increasing or decreasing obstructions to flow. Therefore, in this area, all of the requirements of this chapter shall apply.

(c) This chapter shall not apply to development along the Delaware and Raritan Canal except insofar as such activities affect watercourses that flow into, over, under, or parallel to the canal.

(d) This chapter shall not apply to lands that are regulated pursuant to "The Wetlands Act of 1970," N.J.S.A. 13:9A-1 et seq. or to lands located within tidally influenced flood plains that are regulated pursuant to the Waterfront and Harbor Facilities Act, N.J.S.A. 12:5-1 et seq. or the Coastal Area Facilities Review Act (CAFRA), N.J.S.A. 13:19-1 et seq.

(e) Non-regulated uses in the floodway are as follows:

1. For purposes of this section, non-regulated uses are uses which are not prohibited in N.J.A.C. 7:13-2.2, and which:

i. Do not further obstruct flood flow, or in any way reduce the cross-sectional area of the floodway open to the flow of water during the regulatory flood, unless the obstruction will be insignificant, such as the those activities listed in (e)2 below;

ii. Do not require the erection of structures, except as specifically noted in (e)2 below;

iii. Do not require channel modification or relocation;

iv. Do not alter the cross-sectional area of a water-control structure such as a bridge, culvert or dam that is open to flood waters during the regulatory flood;

v. Do not increase off-site flood damage potential by raising flood elevations off of the property on which the use is proposed by more than two-tenths of a foot or 2.4 inches;

vi. Do not adversely affect those areas described in (a) above;

vii. Do not cause or contribute to a violation of any applicable State water quality standard or otherwise adversely affect water quality; and

viii. Are undertaken with the land owner's express written permission.

2. Non-regulated uses which satisfy the conditions of (e)1i and ii above may include, but are not limited to:

i. Lawns, gardens and areas specifically designed and intended for use by children;

ii. Areas specifically marked and designated for private and public recreation such as: playing fields with backstops and/or open bleachers, picnic grounds, swimming areas, parks, wildlife and nature preserves, game farms, hunting and fishing areas, boat launching ramps constructed at or below grade, shooting preserves, bicycle paths, hiking and horseback riding trails, as well as in ground swimming pools ***and associated fences for public safety provided that the pool is*** constructed at or below existing grade ***and that the fence is open to allow flood waters to pass through it, is no higher than the minimum height required by the BOCA construction code for a fence around a pool, and is placed so as to minimize the obstruction to flow to the maximum extent possible***;

iii. Hand removal of debris along a reach of the watercourse, or the removal of individual major obstructions in the channel, such as a fallen tree or other large or heavy object, such as abandoned vehicles, furniture or other trash that cannot be removed by hand. No equipment shall be allowed in the channel unless specifically approved in writing by the Department;

iv. Open decks attached to residential structures, properly anchored in accordance with the Uniform Construction Code and all applicable local building codes;

v. Minor repair, maintenance or replacement-in-kind of existing roads, bridges, culverts, gauging structures (including weirs) or retaining walls which will not change the cross-sectional area open to flow during the regulatory flood or increase the footprint of the structure;

vi. Agriculture uses such as general cultivation, pasture, grazing, outdoor plant nurseries, horticulture, viticulture, forestry, sod farming, wild crop harvesting and on-going farming operations;

(1) Specific soil conservation practices such as terracing, construction of diversions, subsurface tile drainage and the construction of grassed waterways and dug ponds will be considered non-regulated uses only when approved in writing by the appropriate County Soil Conservation District Office and the local U.S.D.A. Soil Conservation Service;

vii. Docks and boathouses along bodies of water labeled as a lake, reservoir or pond on the USGS Quadrangle Maps that are built on pilings and remain open underneath to allow water to pass freely. For boathouses the floor must be above the regulatory flood elevation;

viii. Utility poles or towers which cannot be located outside of the floodway. Poles and towers must be properly anchored to withstand the structural loads and stresses (both hydrostatic and hydrodynamic) from flooding equal to the regulatory flood elevation; *[and]*

ix. Utilities "jacked" under watercourses that do not disturb the channel*[.]**;*

x. Placement of fish habitat enhancement devices in lakes, ponds, reservoirs and impoundments performed by or approved by the Division of Fish, Game and Wildlife, Bureau of Freshwater Fisheries, in the Department; and

xi. Placement of in-stream fish habitat enhancement devices acceptable to the Land Use Regulation Program in the Department as performed by or approved by the Division of Fish, Game and Wildlife Bureau of Freshwater Fisheries, in the Department.

3. Irrigation head gates along watercourse banks are non-regulated uses when approved in writing by a County Agriculture Agent pursuant to N.J.A.C. 7:20A-1.

(f) Non-regulated uses in the flood fringe are as follows:

1. For the purpose of this section, non-regulated uses are land uses within flood fringe areas which:

i. Do not further reduce the volume of flood storage available, unless the reduction will be insignificant and offset by the benefits to the public health, safety and welfare such as those activities listed in (f)2 below;

ii. Do not require any hydrologic or hydraulic calculations to determine the impact;

iii. Do not adversely affect those areas described in (a) above;

iv. Do not cause or contribute to a violation of any applicable State water quality standard or otherwise adversely affect water quality; and

v. Are undertaken with the land owner's express written permission.

2. Non-regulated uses which satisfy the conditions of (f)1 above may include the following and other uses similar in character and environmental impact:

i. Residential and commercial: Improvements such as lawns, play areas specifically designed for use by children, gardens or landscaping; fences; anchored dog houses; auxiliary utility buildings up to 100 square feet; pole barns which shall remain permanently open on all sides, driveways at grade, barbecue pits, open decks attached to residential structures and one or more additions to an owner occupied single-family residential structure up to a total of 300 square feet;

ii. Private and public recreation: Areas specifically marked and designated as: playing fields or courts including backstops and/or open bleachers, bicycle paths, picnic grounds, swimming areas, parks, wildlife and nature preserves, game farms, hunting and fishing areas, boat launching ramps constructed at grade, shooting preserves, hiking and horseback riding trails, driving ranges, archery ranges, target ranges, trap and skeet ranges, fish hatcheries; anchored auxiliary utility buildings up to 100 square feet as well as fences and in-ground and above-ground pools provided that they do not displace more than 100 cubic yards of flood plain storage;

iii. Agriculture: General cultivation, pasture, grazing, fences, irrigation, outdoor plant nurseries, horticulture, viticulture, forestry, sod farming, wild crop harvesting, on-going farming operations, and registered farming operations, excluding greenhouses and all other structures related to any of the foregoing uses.

(1) Specific soil conservation practices such as terracing, construction of water diversions, subsurface drainage and the construction of grassed waterways and dug ponds will be considered non-regulated uses only when approved in writing by the appropriate County Soil Conservation District Office;

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(2) Plastic covered greenhouses and other auxiliary utility buildings constructed without permanent foundations and anchored, pursuant to the Uniform Construction Code and all applicable local building codes, and fences associated with agricultural uses.

iv. Utility poles and towers; and

v. Roadway repairs and maintenance that will not raise the existing road grade.

(g) Persons may submit a request for a written jurisdictional determination pursuant to this section. A request for a jurisdictional determination shall contain a complete description of the work proposed and an engineering site plan showing the described work as well as existing and proposed topography. If the Department determines that it has jurisdiction over the proposed work, a permit pursuant to this chapter shall be obtained before any work commences.

7:13-1.4 Construction

(a) The provisions of this chapter shall be liberally construed to permit the Department to fulfill its statutory obligations.

(b) The Commissioner may amend, repeal or rescind this chapter or any part thereof in conformance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

7:13-1.5 Program Information

Information and forms relating to permits under this chapter may be obtained from:

Department of Environmental Protection
[and Energy]
Land Use Regulation Program
CN 401
Trenton, New Jersey 08625
(609) 292-1235

7:13-1.6 Other State statutes, rules and regulations

The powers, duties, and functions vested in the Department under the provisions of the Acts or the provisions of this chapter, shall not be construed to limit in any manner the powers, duties, and functions vested therein under any other provision of law or regulation except as specifically set forth in this chapter.

7:13-1.7 Severability

If any section, subsection, provision, clause or portion of these rules or the application thereof to any person or circumstance is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of these rules and their application to persons and circumstances other than those to which they have been held invalid shall not be affected thereby.

SUBCHAPTER 2. PROJECT STANDARDS

7:13-2.1 General

(a) The engineering standards of this subchapter will only apply along watercourses within the jurisdiction of this chapter that have a total contributory drainage area greater than 50 acres.

1. The engineering standards for development in the flood fringe area will not apply to tidally-influenced *[streams]* ***flood plains*** as described in N.J.A.C. 7:13-1.3(b).

(b) The environmental standards of this subchapter will apply along all watercourses under the jurisdiction of this chapter regardless of the drainage area except along manmade, but not manaltered, watercourses with a total contributory drainage area less than 50 acres.

7:13-2.2 Prohibited uses

(a) The following are prohibited uses in floodways:

1. The addition of any fill, new structures or fences which would raise the existing grade of the receiving area and/or create an obstruction to flow, except as provided in (b) below;

2. The addition of any solid or hazardous waste or pollutant;

3. The discharge, processing, storage or disposal of pesticides, domestic or industrial wastes, radioactive materials, petroleum products or other hazardous materials except as specifically authorized by law and pursuant to permits, licenses and grants from all authorities with jurisdiction over such activities;

4. The storage of materials or equipment;

5. The construction of individual subsurface sewage disposal systems; and

6. The construction of off-channel detention/retention basins.

(b) Exceptions to (a)1 above are as follows:

1. Land uses existing prior to *[(the effective date of these new rules)]* ***March 20, 1995*** which were in conformance with all relevant laws and regulations when the use commenced or which have subsequently been specifically and plainly permitted or approved since then pursuant to all applicable Federal, State or local laws may be maintained. Such uses may be expanded or enlarged only if:

i. No further obstruction to flow is created;

ii. The lowest floor elevation of any structure that is expanded is at or above the regulatory flood elevation;

iii. The structure is flood proofed or treated to minimize future flood damage;

iv. The owner submits an application for a permit under this chapter together with drawings of the proposed changes and the application is approved by the Department; and

v. Calculations are submitted to the Department which prove that new structures, alone or in combination with existing structures, are designed, connected and anchored to resist impact from debris, flotation, collapse or permanent lateral movement caused by expected structural loads and stresses (including both hydrostatic and hydrodynamic loads) from flooding to the regulatory flood elevation. Calculations shall be certified as true and accurate by a New Jersey licensed engineer or architect.

2. Structures (or portions thereof) constructed prior to *[(the effective date of the new rules)]* ***March 20, 1995*** which were constructed in accordance with all relevant laws and regulations in effect at the time of their construction or which have subsequently been specifically and plainly permitted or approved since then pursuant to all applicable Federal, State or local laws and which were damaged by flooding or any means other than flooding may be restored provided that:

i. The restored structure will not create a larger obstruction to flow than the original structure;

ii. The lowest finished floor elevation of the restoration is at or above the regulatory flood elevation, where feasible;

iii. The work done is flood proofed or similarly treated to minimize future flood damage;

iv. The owner submits an application for a permit under this chapter together with drawings of the proposed reconstruction and the application is approved by the Department; and

v. The structures are designed, connected and anchored to resist impacts from water and debris, flotation, collapse or permanent lateral movement due to structural loads and stresses (both hydrostatic and hydrodynamic) from flooding equal to the regulatory flood elevation, where feasible. Calculations shall be certified as true and accurate by a New Jersey licensed engineer or architect.

3. Sanitary landfills constructed prior to (the effective date of these new rules) and constructed in accordance with all relevant laws and regulations in effect at the time of construction or which have subsequently been specifically and plainly permitted or approved since then pursuant to all applicable Federal, State or local laws may be expanded vertically provided that:

i. No horizontal expansion is made;

ii. The side slopes of the landfill are not steeper than a ratio of two horizontal to one vertical;

iii. Soil erosion and sediment control measures in accordance with the requirements of this chapter are taken;

iv. The flood damage potential is not increased; and

v. The other applicable provisions of law are complied with.

(c) The following are prohibited uses in the flood fringe:

1. The disposal or storage for any period of time of pesticides, industrial, hazardous or solid wastes, radioactive materials, petroleum products or other hazardous materials, which could during the regulatory flood enter the flood waters and endanger the public health, safety and welfare. Wastewater and water treatment plants to be located in the flood fringe shall comply with the requirements of this chapter.

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7:13-2.3 Regulatory flood

(a) The regulatory flood for delineated watercourses is the flood hazard area design flood. This flood represents the 100-year flood flow increased by 25 percent to allow for future development in the drainage basin. Flood profiles, mapping and the corresponding computer models for delineated watercourses may be obtained *[from the Department]* by contacting:

Department of Environmental Protection
Flood Plain Management
501 East State Street
CN-401
Trenton, New Jersey 08625
(609) 292-2296

(b) The following pertain to non-delineated watercourses:

1. The volume of flood waters and the resulting flood elevations are increased as a drainage basin is developed. The State delineations account for this increased flooding by adding an additional 25 percent to the calculated 100-year flood discharge. Therefore, in order to properly carry out the intent of the Acts and protect life and property in or near the flood plain, the regulatory flood flows along non-delineated streams shall be calculated assuming that the entire contributory drainage area is fully developed in accordance with the current zoning plan, to the maximum impervious cover allowed thereunder, and in accordance with applicable storm water management regulations.

2. The Flood Insurance Program, administered by the United States Federal Emergency Management Agency (FEMA), classifies flood plain areas in a manner similar to the State of New Jersey and publishes Flood Insurance Rate Maps as well as Floodway Maps for individual municipalities that are in the program. However, since the FEMA maps only reflect the 100-year flood plain at the time of the study and did not anticipate future development in the drainage basin, they can not be used to establish the regulatory flood elevation for the purposes of this chapter unless it can be demonstrated to the satisfaction of the Department that the FEMA study reflects full development in the Drainage basin or that there is a viable basin-wide storm water management system in place that will not increase the peak flows developed by the FEMA study.

(c) *[All projects shall be designed so that they do not increase the flood damage potential during the regulatory flood or any lower-frequency level of flood (such as the two or 10-year floods) in either delineated or nondelineated flood plains.]* ***Structures that span the flood plain and/or act as control structures for the watercourse, such as bridges, culverts or low dams, shall be designed so that any increase in flood elevations, upstream or downstream, will not subject existing residential or commercial buildings to increased flood damages during floods of lesser frequency than the regulatory flood.***

1. For example, water-control structures constructed onstream to impound water for flood control or other purposes may *[not significantly affect]* ***reduce*** the 100-year flood elevation but can significantly increase the lesser-frequency floods such as the two or 10 year floods. ***Another example is an adequate culvert which is overtopped during the regulatory flood but not during lesser frequency floods. Replacing this structure with a larger structure may not affect the regulatory flood elevation but can significantly increase flood elevations downstream during lesser frequency floods.*** Since the lesser-frequency floods are more likely to occur, projects such as these can significantly increase the flood damage potential in *[the]* ***a developed*** area *[and must meet design requirements of this section]*.

7:13-2.4 Establishment of flood plain limits and encroachment lines on non-delineated watercourses

(a) The boundaries of the flood plain along non-delineated watercourses shall be established by a standard step backwater analysis using the flow rate developed assuming full development of the contributory drainage area.

(b) The encroachment lines shall be set anywhere outside of the floodway, which is established through equal conveyance reduction calculations, using the flood elevation determined by the standard *[stop]* ***step*** backwater analysis described in (a) above and the specific site cross-sections. The allowable rise in water surface shall be no more than two-tenths of a foot.

7:13-2.5 Watercourse cleaning

(a) Watercourse cleaning permits shall be issued for projects which involve the removal of accumulated material from the channel by mechanical means, only if there is a demonstrated need for the removal of the material that cannot be met, remedied or addressed by other means and the following environmental standards are met:

1. Only accumulated silt, sediment or debris found in the channel may be removed from the watercourse. Removal shall not extend beyond or below the natural channel. Removal of material below the natural watercourse channel shall be considered a channel modification and subject to the requirements of N.J.A.C. 7:13-2.9;

2. Spoils shall be disposed of in accordance with all Federal, State and local laws;

3. The use of heavy equipment within the channel shall be avoided to the greatest extent possible;

4. Disturbance to near-stream vegetation shall be minimized to the greatest extent possible;

5. Cleaning shall not adversely affect the fisheries resources or any species of threatened or endangered species; and

6. Cleaning shall not adversely affect the habitat of any species of Threatened or Endangered animal or plant, whether currently occupied or documented, historic habitat.

(b) *[Public entities]* ***An applicant*** may apply for a cleaning and maintenance permit for portions of any watercourse under their jurisdiction. Upon application, the permit may allow for the initial cleaning and subsequent maintenance of the cleared channel for the five year life of the permit provided that the requirements of (a) above are satisfied. Additional watercourses, not included in the original permit, ***that are on the applicant's private property covered by the original permit or under the jurisdiction of the applicant that applied for the original permit,*** may be added during the life of the permit through an application to modify the permit pursuant to N.J.A.C. 7:13-4.9 provided that the requirements of (a) above are satisfied.

(c) The required information for the watercourse cleaning application is the same as that outlined in N.J.A.C. 7:13-4.1. In addition, the application shall contain the following:

1. A narrative which:

i. Describes the project area including the specific points of access to the watercourse;

ii. States why the project is required and its specific objectives;

iii. Specifies the methods of excavation and types of equipment to be used on each segment of the watercourse; and

iv. Specifies the methods and locations of spoil disposal and the methods of soil erosion and sediment control to be used during the project;

2. Color photographs of the areas of the watercourse(s) to be cleaned and of the access points; and

3. Plan drawing(s) of sufficient scale, but no greater than one inch = 200 feet, showing the exact limits of work for each reach of the watercourse affected and cross-sections showing the material to be removed. All specific snags, rocks, logs, sand bars, etc., to be removed must be identified on the plan.

i. When a Mosquito Commission is the applicant, drawings may be signed by the Mosquito Commission superintendent.

(d) Spoil disposal methods and soil erosion and sediment control techniques shall comply with the provisions of this chapter.

(e) Projects intended solely for mosquito control ***that exceed the criteria in (a) above*** shall be granted by the Department if the applicant meets the following criteria:

1. The applicant has *[complied with the notice requirements of]* ***provided notice as required for a hardship exemption under*** N.J.A.C. 7:13-4.2;

2. In the case of projects of significant public interest, the applicant has convened a public hearing informing the public of the purpose and scope of the project and responding to public comment;

3. The applicant has demonstrated that no reasonable alternative exists whereby the objectives of the project can be satisfied;

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4. The applicant has demonstrated that the adverse environmental impacts of the project will be minimized; and

5. *[In cases where the applicant is the county mosquito control agency or Federal government, such agencies submit]* ***The applicant submits*** individual, site-specific project proposals to the Administrator of the State Office of Mosquito Control Coordination, and the Administrator determines that the project is necessary to control a documented mosquito problem to existing residents.

7:13-2.6 Excavation

(a) Engineering and environmental standards for excavation are as follows:

1. All projects involving permanent excavation within the flood plain shall not have cut faces at slopes steeper than a ratio of two horizontal to one vertical.

2. Excavation projects shall not be so deep as to affect any wells in the surrounding areas or to cause any ground water pollution.

3. The Department may set special conditions concerning the character, excavation methods, and disposal sites of any excavated materials as required to ensure the safety of persons and property affected by the excavation.

7:13-2.7 Disposal of spoils

(a) Engineering standards for disposal of spoils are as follows:

1. Disposal of spoils is prohibited within the floodway of any flood plain under the jurisdiction of this chapter, except for watercourse cleaning projects approved by the Department.

2. Any material permitted by the Department to be disposed of in the flood fringe area shall be spread evenly to a depth specified in writing by the Department and shall not inhibit the positive drainage of the area.

3. Where watercourse cleaning spoils feasibly cannot be removed from the site, a description of the method of on-site disposal shall be indicated on the plan. The Department may set special conditions concerning excavation methods, contents and disposal sites of any excavated materials as required to ensure the safety of persons and property affected by the project.

(b) Environmental standards for disposal of spoils are as follows:

1. No spoils shall be placed within 25 feet of the top of bank or within the area described in N.J.A.C. 7:13-1.3(a)3, except for watercourse cleaning projects approved by the Department. The natural characteristics of this 25 or 50 foot area shall be preserved to the greatest extent possible, with selective tree removal permitted only when absolutely necessary. Brush and trees that when measured 4.5 feet from the ground are less than four inches in diameter may be selectively and sparingly cleared to provide access to the watercourse or site.

2. Spoil material shall be stabilized within 48 hours of its placement according to the "Standards for Soil Erosion and Sediment Control," N.J.A.C. 2:90. Details of the methods of stabilization selected by the applicant shall be included on the plans submitted to the Department.

(c) In the case of projects performed by Mosquito Commissions for the sole purpose of mosquito control, the disposal of spoils will be reviewed pursuant to the requirements of N.J.A.C. 7:13-2.5(e).

7:13-2.8 Stormwater management

(a) Engineering standards for stormwater management are as follows:

1. *[Stormwater runoff discharges within the regulatory jurisdiction of this chapter resulting from the development of the site, for the two, 10 and 100 year storm events shall be controlled so that the pre-project construction peak flow rate and velocity of the receiving watercourse is not increased at or downstream of the point of discharge.]* If a regional stormwater management plan for the watershed containing the watercourse affected by the development has been developed, the applicant shall design the project and its management of stormwater to conform to that regional plan. If no regional stormwater management plan has been developed, *[the applicant shall]* ***any stormwater discharge within the jurisdiction of this chapter shall be controlled so that*** either:

i. *[Show through a hydrologic and hydraulic analysis of the subject site that the]* ***The*** volume ***of stormwater discharged from the site*** and ***the*** rate of runoff from the two, 10 and 100 year storm events for the post-construction site conditions does not exceed the pre-construction volume and rate of runoff; or

ii. *[Design the stormwater system so that the]* ***The*** post-*[project]* construction peak runoff rate for the two year storm event is 50 percent of the pre-*[project]* construction peak runoff rate and the post-development peak runoff rate for the 10 and 100 year storm events are 75 percent of the pre-project construction peak runoff rate.

2. The design storms used to achieve the required level of site runoff control described above shall be defined as either the 24-hour storm using the rainfall distribution recommended by the U.S. Soil Conservation Service, or as the total rainfall uniformly distributed throughout the critical storm duration as determined by the Modified Rational Method. A 20 acre drainage area limit shall be used for the Modified Rational Method *[unless otherwise stipulated by the Department]*.

3. For the purposes of choosing runoff coefficients, all lands in the site shall be assumed, prior to development, to be "in good hydrologic condition" if the lands are pastures, lawns or parks, "with good cover" if the lands are woods, or "with conservation treatment" if the land is cultivated, regardless of conditions existing at the time of computation. For land to be considered cultivated, it shall have been used for such purposes uninterruptedly for a period of at least 10 years prior to the time of computation. If such uninterrupted use has not occurred or cannot be satisfactorily documented, woods shall be assumed to be the redeveloped land condition. In computing pre-project construction runoff, all significant land features, such as ponds, depressions or hedgerows which increase the ponding factors shall be accounted for.

4. The applicant shall provide plans and calculations to the Department which *[to]* show that the discharge attributable to the proposed project will not cause erosion along the flow path between the outfall and the receiving waterbody. All storm water discharge paths shall be stabilized in accordance with the criteria in N.J.A.C. 7:13-3.3.

5. An exemption from the discharge reduction requirements of this section will be allowed for Federal, State, county or municipal highway or road projects that cannot meet the requirement due to limited right-of-way, provided that the applicant demonstrates to the Department's satisfaction that:

i. There is a need for the project which cannot be accomplished by any other means; and

ii. The project has been designed so that stormwater runoff is minimized to the greatest extent possible.*

(b) Environmental standards for stormwater management area as follows:

1. Stormwater systems whose discharges come under the jurisdiction of this chapter shall be designed to reduce, to the maximum extent possible, the total suspended solids (TSS) generated by the development for storm events up to the water quality design storm, and to retain as closely as possible the pre-project construction hydrologic conditions on the site.

2. The water quality design storm shall be defined as either 1.25 inches of rainfall falling uniformly in two hours or the one year 24 hour storm using the U.S. Soil Conservation Service type III rainfall distribution. Due to the relatively small amount of rainfall produced by the design storms, a separate and accurate determination of the runoff from the pervious and impervious areas of the site shall be provided to ensure curve numbers that produce an *[inaccurate]* ***accurate*** calculation of peak rate of runoff.

3. Stormwater systems shall be designed so that there is no degredation of water quality ***in the receiving watercourse.*** *[below the]* ***The*** Department's Surface Water Quality Standards, N.J.A.C. *[7:9-4]* ***7:9B, shall be used as a guidelines for this determination****.

(c) Development within the jurisdiction of this chapter shall incorporate land uses and best available technology (such as cluster land development, minimum site disturbance, open space acquisition, use of sheet flow from streets and parking areas, protection of wetlands, steep slopes and vegetation) in their design in order

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to minimize the volume of stormwater and TSS generated, maintain on-site infiltration, simulate natural drainage systems and minimize the discharge of pollutants to ground or surface waters.

(d) The following list of stormwater management techniques and design conditions are some of the techniques available for meeting the requirements of (b) above. ***The methods are identified as either encouraged or discouraged based on their individual effectiveness. Otherwise, the order of the list does not imply that any one method is favored over another.*** These techniques may be used, depending on the site conditions and type of development, alone or in combination. Other stormwater management techniques may be used if it can be shown to the Department's satisfaction that they satisfy the requirements of (a) and (b) above.

1. The use of artificial wetlands is encouraged by the Department provided that:

i. *[The water depth in the wetlands is less than one foot (six inches is optimal), except as noted in (d)1vi below]* ***Where feasible, the wetlands should be created around a standing pool of water at least 6 feet in depth***;

ii. At least one-half of the perimeter of the water area is graded to form a 10 to 20 foot wide shallow bench for aquatic emergents;

iii. The surface area of the artificial wetlands is at least three percent of the total area *[of the]* contributing *[watershed]* ***flow into the artificial wetland***;

iv. Vegetation is commercial wetland plant stock, either live plants or dormant rhizomes, instead of transplants from existing wetlands areas or seeding;

v. At least two hardy and rapid colonizing indigenous primary wetlands species are planted over 30 percent of the total shallow water area. Each species shall be planted in three or four monospecific stands with individual plants spaced two to three feet apart. Up to three less aggressively colonizing secondary wetlands species shall be randomly distributed in clumps around the perimeter of the marsh; and

vi. At least 25 percent of the total surface area of a basin designed exclusively to act as a shallow marsh is open water with a depth of at least two feet in order to provide habitat for waterfowl and other marsh birds.

2. The use of wet ponds/retention basins is encouraged by the Department provided that:

i. Such basins are not located within the floodway of the watercourse unless they are constructed on-channel ***except in trout production, trout maintenance and anadromous fish watercourses where such construction is discouraged as it would harm or block the passage of indigenous fish populations***;

ii. The volume of the permanent pool is at least three times the volume of the expected runoff from the water quality design storm, or the detention times listed in (a) above are met;

iii. The pool is shallow enough to avoid thermal stratification and deep enough to minimize algal blooms and resuspension of decomposing organics and other previously deposited materials;

iv. The flow from the contributory drainage area is sufficient in dry weather to maintain the permanent pool during the summer months and prevent stagnation;

v. The configuration of the permanent pool promotes maximum sedimentation and minimizes plug flow;

vi. Where feasible, native fish stock is used to control mosquitoes; and

vii. When discharging into a trout associated watercourse, there are no adverse effects to the fish resulting from differences in temperature between the discharge and the waters in the receiving watercourse.

3. The use of detention basins is encouraged by the Department provided that:

i. The basin is not located within the floodway of the watercourse;

ii. Beginning at the time of peak storage in the basin for the water quality design storm, no more than 90 percent of the total peak storage volume is released over an 18 hour period for residential developments or over a 36 hour period for commercial developments. The rate of release shall be as uniform as possible;

iii. The minimum outlet diameter, width or height is three inches. If this minimum outlet size does not allow for the detention times required in (d)3ii above, then alternative techniques for the removal of TSS prior to discharge into the basin shall be provided; and

iv. The species of native or non-intrusive exotic vegetation used in the basin is *[an]* approved by the Department and the appropriate County Soil Conservation District.

4. If the Department determines that the techniques noted in (d)1, 2 and 3 above are not feasible or justified, then the use of stabilized, vegetated or biofilter swales is permissible provided that:

i. The water velocity does not exceed two feet per second (FPS) to allow for settlement of TSS during the water quality design storm. The slope shall not be less than 0.5 percent so that positive drainage is maintained. The swale shall be of sufficient length to allow for settlement of TSS taking into consideration the velocity, depth of flow and expected loading of TSS;

ii. Where feasible, vegetation shall be used in the swale to filter out the TSS and to provide a secondary treatment by absorption of pollutants leached into the soil. Vegetation used in the swale shall be native or non-intrusive exotic species approved by the County Soil Conservation District; *[and]*

iii. If the swale is designed to provide infiltration, the soil texture shall be sand, loamy sand or sandy loam as defined by the U.S. Department of Agriculture and there shall be a minimum of three feet separation between the bottom of the swale and the seasonal high water table*[.]**;*

iv. The swale shall be used internally within the stormwater collection system and in conjunction with other methods such as vegetated filter strips to increase their effectiveness; and

v. Vegetated swales shall not be used to provide water quality treatment below the final discharge of the stormwater collection system, unless it is shown to the Department's satisfaction that there is no other feasible method of providing for water quality within the site. If the Department allows a vegetated swale below the final discharge, then the length of the swale shall be maximized to the extent possible under the site condition.

5. The use of infiltration basins is discouraged because of their high failure rate. However, if the Department determines that the techniques in (d)1, 2, and 3 above are not feasible or justified they will be permitted provided that:

i. There is at least three feet or more vertical separation between the bottom of the basin and the seasonal high water table;

ii. The soil texture is sand, loamy sand or sandy loam as described by the U.S. Department of agriculture;

iii. No topsoil is placed in the basin;

iv. The basin bottom is scarified after the basin is formed, after which no other construction within the basin may occur;

v. The entire volume of runoff generated by the water quality design storm is contained in the basin and recharged into the ground within 72 hours; and

vi. A backup drainage system is provided to handle the excess flows from the basin in the event of a basin failure.

6. The use of sediment traps and oil/grease separators is strongly discouraged because of their limited capacity and the high degree of maintenance required to keep them operational. However, if the Department determines that there are absolutely no other feasible alternatives, the Department will allow them provided that the drainage areas served are less than one-tenth of an acre in size and the applicant's comprehensive maintenance plan is approved by the Department.

7. The use of porous asphalt pavement is discouraged due to problems with maintenance and continued functioning. However, if the Department determines that there are absolutely no other feasible alternatives, the Department will allow its use provided that:

i. The soil beneath the pavement is sand, loamy sand or sandy loam as defined by the U.S. Department of Agriculture;

ii. The porous pavement is buffered with vegetative screening to prevent the intrusion of aeolin sand and silt;

iii. The permittee undertakes a strict maintenance schedule including but not limited to vacuum sweeping on a weekly basis and high pressure water washing on a monthly basis;

iv. The porous pavement is used in light traffic areas subject to automobiles only and is marked by a sign restricting traffic to only passenger vehicles;

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v. No asphalt sealer is used; and

vi. No sand is used during periods of snow and ice.

8. The use of underground basins and perforated pipes for the purpose of infiltration is strongly discouraged because of restricted access which discourages proper maintenance. However, if the Department determines that there are absolutely no other feasible alternatives, the Department will allow their use provided that:

i. The soil in the area is sand, loamy sand or sandy loam as defined by the U.S. Department of Agriculture; and

ii. Runoff is filtered to remove TSS prior to discharge into the basin or pipe.

(e) Maintenance shall be required as part of all stormwater management plans. Specific maintanence techniques and schedules shall be provided ***for*** each type of system used on the site. ***If maintenance of the system will be the responsibility of a person other than a State, county or municipal agency, then*** *[The]* ***the*** maintenance plan approved by the Department shall be recorded upon the deed of record for the property.

1. The maintenance plan shall include the name address and telephone number of the party or parties responsible for long term maintenance. Documentation of their assumption of this responsibility shall be submitted to the Department as part of the permit application. The transfer of maintenance responsibility to individual property owners in residential subdivisions is prohibited except through a homeowners association agreement.

2. Written maintenance and repair records for all *[storwater]* ***stormwater*** management systems shall be maintained for at least five years by the person(s) identified in (e)1 above and shall be provided to the Department upon request.

3. Maintenance of artificial wetlands shall include, but not be limited to:

i. Documented visual inspection of all components of the system at least once every six months;

ii. Documented removal of silt, litter and other debris from all catch basins, inlets and drainage pipes at least once every six months or upon noticeable buildup; and

iii. *[Vvegetation]* ***Vegetation*** removal and replacement at least once a year.

4. Maintenance of detention basins shall include, but not be limited to:

i. *[Ddocumented]* ***Documented*** visual inspection of all components of the system at least once every six months;

ii. Documented removal of silt, litter and other debris from all catch basins, inlets and drainage pipes at least once every six months or upon noticeable buildup;

iii. Documented maintenance, including grass cutting, and necessary replacement of all landscape vegetation within the basin at least once a year; and

iv. Documented aeration of basin bottoms at least once a year and scraping and replanting at least once every five years to prevent the sealing of the basin bottom.

5. Maintenance of wet ponds/retention basins***, located within or discharging to the waters listed in N.J.A.C. 7:13-1.3(a)3i, ii, iii and iv,*** shall include, but not be limited to, annual, documented monitoring of water quality, dissolved oxygen, vegetative growth***, temperature*** and fish population***, for a period of three years to ensure that the wet pond/retention basis is working as intended*.**

7:13-2.9 Channel modification

(a) Channelization of an existing watercourse or watercourse relocation is prohibited except where necessary to control existing flooding and/or erosion which threatens life or property or in cases ***in*** which the Department determines that the effects of channelization are offset by the resulting restoration or improvement of the natural characteristics of the nearby environment.

(b) Engineering standards for channel modifications are as follows:

1. When change in the watercourse channel is proposed, the applicant shall submit plans reflecting the manner in which the channel shall be stabilized at the point of each change to ensure that no erosion occurs at either high or low flows. If a change in slope causes a hydraulic jump to occur just downstream of the constructed area, the applicant shall submit plans describing methods to protect the integrity of the downstream channel. ***The methods for stabilization shall be in accordance with the "Standards for Soil Erosion and Sediment Control in New Jersey" or the latest amendment thereto, N.J.A.C. 2:90.***

2. If the channel modification results in a reduction of the water surface, the change in the volume of flood storage in the flood fringe shall be considered as fill for the purposes of this chapter.

(c) Environmental standards for channel modification are as follows:

1. Reconstruction of aquatic habitat damaged or destroyed during *[channel modifications]* ***channelization*** is required (N.J.A.C. 7:13-3.4) whether or not the watercourse is trout-associated. This includes***,*** but is not limited to***,*** replication of aquatic characteristics such as percent meandering, bottom substrate type, pool/riffle ratio, stream width, depth and gradient, and the placement of habitat enhancement devices within the watercourse. Provision for Fish Passage (N.J.A.C. 7:13-3.6(c)) is required, as is vegetative bank stabilization to reestablish any near-watercourse habitats damaged or destroyed as a result of the construction of the project.

7:13-2.10 Underground utilities in the flood plain

(a) Underground utilities include, but are not limited to, electric cables, telephone cables, sanitary sewer lines, water lines, gas mains, petroleum pipelines, and other pipes carrying various types of materials.

(b) Engineering standards for underground utilities in the flood plain are as follows:

1. The top of pipe or encasement shall be at least three feet below the invert of the watercourse. In special circumstances, such as hard rock bottoms, this may be reduced with the approval of the Department.

2. Sanitary sewer, petroleum product and gas lines shall be encased in six inches of concrete or a larger steel pipe for protection. A stainless steel plate, at least one-quarter inch thick, may be substituted for the top six inches of encasement if three feet of vertical clearance cannot be achieved. The encasement requirement may be waived by the Department if a minimum of four feet of cover is maintained for as long as the crossings are in use.

3. The crossing shall be horizontal under the watercourse, and the pipe or encasement shall extend a minimum of 10 feet beyond the top of banks. This requirement may be modified by the Department for good cause shown by the applicant in cases in which the modification shall pose no additional risk to life or property either alone or taken in conjunction with the rest of the project.

4. The inclined leg of the crossing shall not be steeper than a ratio of one vertical to two horizontal, except as modified in writing by the Department for good cause shown by the applicant and in cases in which the modification shall pose no additional risk to life or property either taken alone or in conjunction with the rest of the project.

5. If manholes are to be located in the flood plain, the top of the manhole shall be flush with the ground***.*** *[and]* ***Sanitary sewer lines*** shall have a watertight cover.

6. For large or tidal watercourses, a cable may be laid directly on the watercourse bed. The cable shall be laid with slack so as to be readily moveable.

7. Utilities crossing over or under a piped reach of stream or culvert do not need to be encased but shall maintain a minimum one foot vertical distance above or below the pipe or culvert.

(c) Environmental standards for underground utilities in the flood plain are as follows:

1. The width of trenches for installation of underground utilities shall be limited to the minimum necessary to permit installation. Upon installation of the utility, trenches outside the channel shall be backfilled to the pre-excavation ground elevation and planted with native species of vegetation. Trenches within the channel shall be backfilled to the pre-excavation ground elevation and stabilized in a manner that will mimic the characteristics and nature of the natural channel as closely as possible.

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7:13-2.11 Aboveground utilities in the flood plain

(a) Engineering standards for aboveground utilities in the flood plain are as follows:

1. Cables or pipes may be attached to a bridge at a point above the lowest member crossing the watercourse. However, if cables or pipes are located on the outside of a structure, the crossing shall be located on the downstream face of the structure, when at all possible. If the crossing must be located on the upstream face of the structure, the crossing shall be protected from damage due to impact with debris in the event of a flood.

2. Cables or pipes shall not be installed within a culvert or bridge opening except upon a determination by the Department that no other feasible location exists.

3. Crossings of cables or pipes over areas within the jurisdiction of this chapter shall be at least one foot above the regulatory flood elevation and shall be protected to prevent damage from impact with floating debris.

[4. Electric and telephone aerial crossings shall be designed to withstand flood flow forces and erosion and shall be located outside the floodway unless the Department determines that no other location is available.]

7:13-2.12 Dams

(a) All dams and structures related thereto proposed to be located in areas under the jurisdiction of this chapter shall meet the standards in this section.

(b) Engineering standards are as follows:

1. Dams *[constructed across a watercourse regulated under this chapter]* ***classified as Class I, II or III under the Dam Safety Standards, N.J.A.C. 7:20,*** which have received a Dam Safety Permit shall not be subject to any engineering review under this chapter.

2. The structural stability of dams is regulated pursuant to the Safe Dam Act, N.J.S.A. 58:4-1 et seq., and will not be reviewed under this chapter. All other applicable engineering standards of this chapter shall apply.

3. For the purpose of this chapter, off-channel dams and the resulting impoundments shall be considered as fill if constructed in the flood plain.

4. Any backwater created by an off-channel dam shall be contained within the applicant's property unless written consent is obtained from all affected property owners. The applicant shall advise the Department and all affected property owners of the anticipated effects of such backwater on both surface water and ground water.

(c) Environmental standards are as follows:

1. The environmental standards of this chapter shall apply to all dams proposed for construction in areas within the jurisdiction of this chapter.

2. It is unlawful to construct a dam in any water of this State which is a runway for migratory fish without installing a fish ladder or other contrivance to permit a fish to pass the dam in either direction (see N.J.S.A. 23:5-29-1).

i. The determination of whether a watercourse is currently a runway for migratory fish is made by the Division of Fish, Game and Wildlife during the Department's review of an application for a permit under this chapter. Applicants are encouraged to discuss the matter with this program and the Division of Fish, Game and Wildlife prior to filing any application.

3. Low dams across trout-associated watercourses shall not be allowed unless the applicant demonstrates and the Department determines that there is a legitimate need for the dam that cannot be accomplished in another fashion with less impact upon the environment.

7:13-2.13 Requirements for structures

(a) Engineering standards for structures proposed to be located in areas within the jurisdiction of this subchapter are as follows:

1. All structures proposed to be located in areas within the jurisdiction of this chapter shall be designed, connected and anchored to resist flotation, collapse or permanent lateral movement due to structural loads and stresses (including hydrostatic and hydrodynamic) produced by flooding equal to the regulatory flood elevation, and the freeze/thaw cycle of the soil.

2. All structures within the channel shall be designed, connected and anchored to resist undermining caused by stream bed erosion ***and shall be designed in accordance with the "Standards for Soil Erosion and Sedimentation Control in New Jersey" or the latest amendment thereto, N.J.A.C. 2:90***.

3. All hospitals, clinics, nursing homes, schools of any sort, day care centers, hotels, private residences and similar buildings which are proposed in areas under the jurisdiction of this chapter shall be elevated so that the lowest floor, including any basement, is at or above the regulatory flood elevation. This requirement applies to buildings proposed to be located on lands previously in the flood plain but legally filled after January 31, 1980, and raised above the regulatory flood elevation.

4. Any hospital, clinic, school of any sort, nursing home, day care center, hotel or other similar facility proposed to be built in, or which will require access through, areas under the jurisdiction of this chapter shall have at least one driveway or access route elevated to or above the regulatory flood elevation.

5. All proposed residential developments or subdivisions proposed to be built in, or which will require access through, areas under the jurisdiction of this chapter and which create more than one new residence shall, where feasible, have at least one driveway or access route at or above the regulatory flood elevation. If such a route is not feasible, then all on-site roads, parking areas and driveways shall be constructed at or above the regulatory flood elevation to the extent possible.

6. Driveways within the jurisdiction of this chapter which serve only one single-family residence shall be elevated at or above the regulatory flood elevation except as provided below. In the event the applicant homeowner or builder, as the case may be, refuses to comply with this requirement, the applicant shall acknowledge, in writing, the fact that the driveway may be inundated by floodwaters and damaged or destroyed, and said applicant shall cause the Deed of Record for that residence to state that the driveway is subject to flooding and at what frequency storm the driveway will be inundated.

7. Except as stated below, all commercial and industrial structures, including water supply and wastewater treatment facilities proposed to be located in areas under the jurisdiction of this chapter, shall be elevated so that the lowest floor, including any basement, is at or above the regulatory flood elevation.

i. The Department may exempt structures from this requirement upon written application by the owner or builder providing all evidence needed for the Department to reasonably conclude that raising the structure is economically or physically impracticable and that said structures is flood proofed up to the regulatory flood elevation.

ii. The applicant shall submit a plan or document from a licensed professional engineer or architect certifying that the design described on the plans submitted to the Department conforms with the requirements of (a)7i above.

8. Recreation areas and non-residential parking lots proposed to be located within the jurisdiction of this chapter may be inundated by floods if the applicant demonstrates that no undue risk is posed to persons or property thereby and the applicant and/or owner posts a sign in a prominent location that the area is subject to flooding.

9. Applications for projects containing vertical retaining walls extending four feet or more above the watercourse bed or ground elevation at the base of the wall shall include a stability analysis of the wall calculated by a New Jersey licensed professional engineer.

7:13-2.14 Standards for fill within the flood plain

(a) Engineering standards for fill within the flood plain are as follows:

1. There shall be no fill in the floodway except as provided in N.J.A.C. 7:13-1.3(e). For regulated activities proposed in the flood fringe area, the volume of net fill to be placed on an applicant's property ***located in the flood fringe between the existing ground surface as of January 31, 1980, and the elevation of the regulatory flood*** is limited to 20 percent of the total volume of flood storage on that portion of the property *[located in the flood fringe which

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located in the area between the existing ground surface as of January 31, 1980, and the elevation of the regulatory flood]*.

2. The applicant shall submit engineering plans and calculations which demonstrate that the 20 percent net fill limit in (a)1 above shall not be exceeded as a result of any activity undertaken in connection with the proposed project.

3. All fill shall be graded in a manner so as not to adversely affect overland drainage flows.

4. Fill shall be placed so that slopes are not steeper than a ratio of two horizontal to one vertical.

5. Fill shall be compacted and stabilized in accordance with the "Standards for Soil Erosion and Sediment Control in New Jersey" or the latest amendment thereto, N.J.A.C. 2:90.

6. When a permit allows the placement of fill, any subsequent subdivision of that property shall not increase the total amount of fill allowable under the previous permit. Additional fill may be placed on the newly-divided property only to the extent that the total amount of fill under the previous permit has not been exceeded.

7. An exemption from the 20 percent net fill requirements of this section will be allowed for Federal, State, county or municipal highway or road projects that cannot meet the requirement due to limited right-of-way, provided that the applicant demonstrates to the Department's satisfaction that:

i. There is a need for the project which can not be accomplished by any other means; and

ii. The project has been designed so that the total volume of fill is minimized to the greatest extent possible.

8. The 20 percent net fill requirement is not applicable to projects whose primary purpose, according to the Department, is for flood control and have been so approved by the Department.

9. In cases where dikes, levees, floodwalls or other structures not approved as flood control projects by the Department impede the entry of flood waters into an *[enclosed space]* ***area that previously acted as a flood storage area***, the volume of the *[enclosed space]* ***flood waters displaced*** shall be considered as solid fill for purposes of calculating compliance with the *[twenty]* ***20*** percent net fill requirement.

10. When proposed channel modifications will lower the pre-project construction water surface, the Department shall consider the volume of flood storage lost as solid fill for the *[purposes]* ***purpose of*** calculating compliance with the *[twenty-]* ***20*** percent net fill requirement.

7:13-2.15 Additional requirements for fill in the Central Passaic Basin

(a) Engineering standards for fill in the Central Passaic Basin are as follows:

1. In addition to the requirements of N.J.A.C. 7:13-2.14, any application proposing to place fill within the Central Passaic Basin shall create a volume of flood storage within the Central Passaic Basin equal in volume to the amount of fill proposed.

2. Flood storage can be created by:

i. Excavating an area in the Central Passaic Basin between the ground surface as of March 25, 1977, and the higher of the mean low water level of the adjacent watercourse or the seasonally-adjusted high groundwater level. The excavation area shall be graded so that flood waters will freely enter and exit; or

ii. Completely removing fill and/or structures legally placed or constructed in the flood plain after March 25, 1977 so that flood waters may freely enter and exit.

3. An exemption from the zero net fill requirements of this section will be allowed for Federal, State, county or municipal highway or road projects that cannot meet the zero net fill requirement due to limited right-of-way, provided that the applicant demonstrates to the Department's satisfaction that:

i. There is a need for the project which can not be accomplished by any other means; and

ii. The project has been designed so that the total volume of fill proposed is minimized to the greatest extent possible.

4. The requirements of this section are not applicable to projects whose primary purpose, according to the Department, is for flood control and have been so approved by the Department.

5. In cases where dikes, levees, floodwalls or other structures not approved as flood control projects by the Department impede the entry of flood waters into an enclosed space, the volume of the enclosed space shall be considered as solid fill for the purposes of calculating compliance with the zero net fill requirement.

6. In order for the Department to approve any application proposing a net increase of fill in the Central Passaic Basin, a Stream Encroachment Permit for the corresponding excavation of material must have already been issued or, applied for and approved concurrently with the application made under this chapter.

7. No fill shall be placed within the Central Passaic Basin pursuant to any permit issued by the Department until the applicant has commenced creation of the flood storage mandated under the permit.

7:13-2.16 Bridges and culverts

(a) Applications to construct bridges and culverts across watercourses will be reviewed in accordance with the criteria set forth in this section.

(b) Engineering standards are as follows:

1. New bridges and culverts that are not replacements or repairs shall be designed so that they will not increase the upstream water surface elevation off of the *[applicants]* ***applicant's*** property by more than two-tenths of a foot during the *[100-year]* ***regulatory*** flood. The applicant shall submit a standard step backwater analysis for existing and post-construction conditions in the affected watercourse to determine upstream flood impact of any new bridge or culvert.

i. The standard step analysis for existing conditions shall be calculated starting from the next control point downstream or if no control point is available, several hundred feet downstream with at least five cross-sections included before reaching the structure in question and continue upstream to at least the next upstream property or right-of-way limit.

ii. The post-construction standard step backwater analysis shall begin at the upstream face of the new structure using a starting water surface elevation calculated by a separate analysis of the bridge or culvert.

iii. If flood elevations are being calculated by a computer model based on the standard step backwater analysis, such as a HEC-2 model, then the bridge or culvert should be coded into the model as "recommended" in the model's documentation. If a computer model other than HEC-2 is used, complete documentation for the assumptions made by the model shall be submitted with the application, unless the Department advises the applicant that it is familiar with the model.

2. Replacements or repairs of bridges and culverts shall be designed so that:

i. If the size of the area open to the passage of floodwaters is decreased as a result of the construction of the structure, there shall be no increase to the upstream water surface outside the applicant's property during the regulatory flood. A standard step backwater analysis shall be performed for existing and post-construction conditions in the affected watercourse to determine the change in upstream water surfaces as a result of the construction of the proposed project. The analysis shall begin at the upstream face of the structure using a starting water surface elevation obtained through a separate analysis of existing and post-construction conditions of the affected watercourse.

ii. If the size of the area open to the passage of floodwaters is increased as a result of the construction of the proposed structure, the structure shall be designed so that the flow rate through the structure will not increase so as to cause increased flooding downstream off of the applicant's property during the regulatory flood. Documentation, which may include a detailed routing of the affected watercourse, shall be submitted to the Department to show that there is no downstream increase in flooding due to the increased area open to floodwaters. The routing shall continue to the next downstream control point.

iii. If flood elevations are being calculated by a computer model such as HEC-1 (routing) or HEC-2 (standard step), then the bridge or culvert should be coded into the model as "recommended" in

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the model's documentation ***or the model may be stopped at the downstream face of the structure and resumed upstream of the structure with a water surface elevation calculated by a separate analysis of the structure***. If a computer model other than HEC-1 or HEC-2 is used, the applicant shall submit to the Department complete documentation for all the assumptions made by the model unless the Department advises the applicant that it is familiar with the model.

3. Bridges and culverts, whether new or replacement, may be designed to be overtopped during the regulatory flood provided that:

i. The applicant and landowner, as the case may be, submits to the Department a written acknowledgement of responsibility for *[all direct and indirect]* damage to *[property on which the structure is placed arising from inundation of]* the structure *[or property]* by flood waters;

ii. The structure is designed to remain stable and resistant to erosion during the regulatory flood; and

iii. The structure meets the criteria above in *[(a)]****(b)***1 and 2 as well as the access requirements set forth in N.J.A.C. 7:13-2.13.

4. Channel transitions in excess of 100 feet in length upstream or downstream of the proposed bridge or culvert shall be considered channel modifications and shall meet the requirements of N.J.A.C. 7:13-2.9.

(c) Environmental standards are as follows:

1. New *[bridges and culverts]* ***crossings over a watercourse*** shall span the flood plain unless the applicant demonstrates to the Department's satisfaction that such a design would be prohibitively expensive to construct and that no additional significant risk is created to persons or property downstream as a result of construction of the proposed design, considering the ability of the structure to withstand the regulatory flood.

2. Channel transitions shall be minimized to the greatest extent possible.

3. Applicants seeking to construct any bridge or culvert, whether new or replacement, shall provide fish passage as described in N.J.A.C. 7:13-3.6(c) through the culvert itself and within the upstream and downstream channel transition areas for those watercourses that are currently populated by fish on a seasonal or permanent basis or which are likely to be so inhabited in the future.

i. Any channel created or modified as a result of construction of any bridge or culvert shall be designed and constructed so that during low flow conditions the water depth therein is at least as deep as in the existing channel *[or no less than 10 inches deep, whichever is less,]* except as provided in (c)3ii below;

ii. Exceptions to the requirement in (c)3i above shall not be granted by any agency designated by the Department to supervise any aspect of the permiting or construction of any structure pursuant to this chapter. Requests for exemption from the requirements of section (c)3i above shall be submitted to and granted by the Department if:

(1) The existing channel does not allow for the upstream passage of fish during low-flow conditions; or

(2) Fish passage in the particular channel segment is irrelevant because of upstream or downstream conditions unfavorable to fish passage; or

(3) Other conditions such as public need or extreme hardship make this requirement impracticable.

4. Maintenance of the existing watercourse bed shall be a priority in project design.

5. The use of standard box culverts in trout associated waters, in waters used by Anadromous fish, and in warm-water game fish waters shall be avoided and alternative methods shall be utilized where at all practicable. Alternative methods can include spanning the watercourse bed and watercourse banks, construction of an arched culvert where the existing watercourse bed remains undisturbed, and the use of an oversize culvert installed ***one foot*** below ***design*** grade with the natural substrate replaced over the concrete flooring ***and flush with the upstream and downstream watercourse inverts***. Where the applicant proposes to place a natural substrate over the concrete floor of an oversize culvert, the applicant shall provide calculations to show that the substrate will remain stable.

7:13-2.17 Sewage disposal requirements in the flood fringe

Individual or community subsurface sewage disposal systems within the flood fringe area shall be constructed in accordance with Department's Standards for Individual Subsurface Sewage Disposal Systems, N.J.A.C. 7:9A.

7:13-2.18 Impacts to other properties

(a) Unless the owners of property located either upstream and/or downstream of the project site accept liability for any damages or inconveniences that may occur as a result of the proposed project and written proof of such an agreement is presented to the Department, the applicant shall design and construct the project so that the following conditions are satisfied:

1. The project shall not increase the flood elevation upstream or downstream of the property on which the project is located by more than two-tenths of a foot if the applicant's property includes the flood plain on both sides of the water body, or by more than one-tenth of a foot if the applicant's property is only on one side of the waterbody.

i. This limitation shall not apply to replacement bridges or culverts, which must be designed so that there is no increase to the flood elevation upstream from the project;

2. No portion of the proposed project shall be located on property other than that owned by the applicant ***unless specific written consent from the property owner to perform the work and accepting liability for any damages or inconveniences that may occur as a result of the work is presented to the Department***; and

3. The project is designed so that a concentrated flow of storm water is not discharged across properties adjacent to those owned by the applicant.

(b) The applicant shall provide the Department with calculations describing both existing and post-construction flood elevations on the subject property and adjacent properties upstream and downstream of the proposed project.

1. The applicant shall submit a standard step backwater analysis to the Department to show the impacts to upstream flood elevations from the regulated activities. The analysis shall extend at least 100 feet beyond the applicant's upstream property limit.

2. The applicant shall submit a detailed stream routing analysis to the Department to show impacts to downstream flood elevations from the regulated activities. The analysis shall extend at least 100 feet beyond the applicant's downstream property limit.

3. If the applicant chooses to rely upon a computer model other than HEC-1***, TR-20, WSP2*** or HEC-2 for any portion of the application to the Department, the applicant shall include all supporting documentation describing the assumptions underlying each model or computer program used, unless the Department advises the applicant that it is familiar with each computer model the applicant has submitted.

SUBCHAPTER 3. GENERAL ENVIRONMENTAL STANDARDS

7:13-3.1 General

(a) The standards of this subchapter apply along all watercourses under the jurisdiction of this chapter regardless of the drainage area, except along man-made, but not man-altered, watercourses with a total contributory drainage area less than 50 acres or as otherwise indicated in this subchapter or expressly waived by the Department pursuant to the provisions of this chapter.

(b) Minimization of environmental damage shall be as follows:

1. The applicant shall describe to the Department all steps taken by the applicant to minimize pollution, impairment or destruction of the environment within the areas under the jurisdiction of this chapter, during both construction and operation of the project, describing short and long-term environmental impacts and describing the cumulative impacts of each upon the environment.

2. All projects regulated under this chapter shall be designed in accordance with Federal, State and local statutes, regulations, and ordinances.

3. The Department will not approve any regulated activity which it determines is likely to significantly and adversely *[effect]* ***affect***

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the biota of the watercourse or its water quality including, but not limited to, adverse effects on potable water supplies, flooding, drainage, channel stability, threatened and endangered species of plants and animals or upon their current or documented historic habitats, navigation, energy production, municipal, industrial or agricultural water supplies and fisheries.

7:13-3.2 Protection of near watercourse vegetation

(a) Trees, shrubs, grasses, and other existing vegetation located within *[the areas under the jurisdiction of this chapter]* ***25 feet of the top of the channel bank, or within 50 feet of the top of the channel bank in the areas listed in N.J.A.C. 7:13-1.3(a)3,*** shall not be disturbed unless an applicant has demonstrated to the satisfaction of the Department that there is no alternative to the proposed project design which will eliminate or further minimize the disturbance and the applicant has submited a plan to compensate or cure the effects of the disturbance which is acceptable to the Department. Among other environmental factors, the applicant shall address the effects of the removal of vegetation on water quality and the effect of sedimentation or erosion on the biota of the watercourse. Trees shall be left standing, and bushes and stumps shall not be removed, except as expressly allowed by the Department. Access roads to work sites shall not be constructed within the areas *[under the jurisdiction of this chapter]* ***specified above unless no feasible alternative to such an access road exists***.

(b) Vegetative debris from construction shall not be disposed of in the floodway. This prohibition shall not apply to vegetative mulches applied for soil erosion and sediment control or for agricultural purposes. However, waste mulch not serving to control erosion or sediment shall not be disposed of in channels.

7:13-3.3 Soil erosion and sediment control

(a) All applications for permits pursuant to this chapter shall describe soil erosion and sediment control measures to control and minimize disturbance of any surface area under the jurisdiction of this chapter during construction and use of the proposed structure.

(b) In planning soil erosion and sediment control measures, applicants for permits under this chapter shall be guided by the latest revised version of the "Standards for Soil Erosion and Sediment Control in New Jersey" promulgated by the New Jersey State Soil Conservation Committee pursuant to the Soil Erosion and Sediment Control Act of 1975 as amended, N.J.S.A. 4:24-42 et seq. and N.J.A.C. 2:90. The Department recommends the use of Geotechnical materials to stabilize disturbed areas, whenever possible.

(c) The applicant shall meet the following additional soil erosion and sediment control requirements:

1. The area of soil disturbance shall be no larger than that which is absolutely necessary for the construction of the project;

2. Applicants shall provide the Department with soil disturbance plans which minimize the exposure of soils to erosion to the greatest extent possible;

3. If erosion and sediment control measures such as diversions, sediment basins, or sediment barriers (the purpose of which is to divert surface runoff before it reaches exposed soil or to intercept sediment eroded from exposed soil) are part of the erosion and sediment control plan for the project, such measures shall be implemented prior to any major soil disturbance or in their Department approved sequence with respect to other phases of the project in order to minimize sediment delivery to waterways. All soil erosion and sediment control practices shall be left in place ***and maintained*** until the soil is stabilized by vegetation or engineering measures;

4. Disturbed soil on the banks of waterways shall be protected within 48 hours of disturbance by rip-rap, sandbags, sod, or Department-approved mulch netting, as conditions warrant, in accordance with the "Standards for Soil Erosion and Sediment Control."

i. Asphalt or other liquid binders shall not be applied for the purpose of anchoring mulch along the banks of a watercourse.

ii. Neither calcium chloride nor any spray-on adhesive shall be applied for dust control along the banks of a watercourse;

5. In areas where vegetative methods (including "mulch only") are relied upon for erosion and sediment control without down-slope controls to intercept sediment (such as sediment basins or sediment barriers), the applicant shall seed, mulch, or place sod within 48 hours of soil exposure in accordance with the "Standards for Soil Erosion and Sediment Control." Seeding shall always be accompanied by mulching and adequate watering.

i. If weather conditions are unfavorable for successful seeding, sod placement or the establishment of vegetation, the area shall be mulched within 48 hours of soil exposure in accordance with the "Standards for Stabilization with Mulch Only" in the "Standards for Soil Erosion and Sediment Control."

ii. In areas without downslope sediment controls, slopes exceeding 15 percent gradient shall be protected within 48 hours of soil exposure by special treatment, such as water diversion berms, sodding or Department-approved mulch netting, in accordance with the "Standards for Soil Erosion and Sediment Control"; and

6. Sediment-laden water ("pumpage") from the dewatering of trenches or other excavations shall not be pumped directly into waterways or wetlands without treatment except as expressly approved by the Department.

i. Pumpage shall be piped to sediment basins or sediment barriers that meet the "Standards for Soil Erosion and Sediment Control." Mechanical filtration or sedimentation devices shall be used to minimize the discharge of sediment into waterways.

ii. Pump intakes shall be placed near the water surface to minimize the sediment content of pumpage.

iii. Upon good cause shown by the applicant why the foregoing requirements cannot feasibly be met, the Department may permit pumpage to be spread onto land located as far from the watercourse bank as possible, provided that the applicant avoids damage to trees not approved for removal by the Department.

(d) When ***a*** Soil Conservation District or exempt public entity certifies that a sediment and soil erosion plan meets both the "Standards for Soil Erosion and Sediment Control in New Jersey" and the additional requirements contained in this section, the Department or designated agent shall accept this certification as proof that the plan satisfies the requirements of this section.

7:13-3.4 Mitigation

(a) As a condition to the issuance of all permits under this chapter, permittees are required to take all measures necessary to minimize adverse environmental impacts ***to the receiving watercourse and areas under the jurisdiction of this chapter*** arising from the construction and use of the proposed project, and to restore ***temporarily disturbed*** vegetation, habitats, and land and water features to their pre-construction condition, and to prevent sedimentation and erosion to the greatest extent possible. The applicant shall submit a plan for the review and approval of the Department by which the applicant shall restore any area temporarily disturbed *[and replace any area destroyed]* by the construction *[or operation]* of the proposed project with vegetation of equal or higher quality than that which existed on the site before construction, whether said disturbance *[or destruction]* was approved by the Department pursuant to a permit under this chapter, or not.

(b) Mitigation described in (a) above shall be performed *[prior to or concurrently with the activities that will permanently disturb the environment, and]* immediately after activities that will temporarily disturb the environment.

[(c) The permittee shall restore disturbed areas at a ratio of one to one. Under no circumstances shall the mitigation area be smaller than the disturbed area. The permittee shall create or replace areas totally destroyed and unavailable for restoration (such as when a structure is placed upon them or they are paved) at a ratio of two acres created to one acre destroyed unless the applicant can prove to the Department through the use of productivity models or other similar studies, that creation of a lesser area will provide natural resources of a quality higher than the resources destroyed. The permittee shall monitor the site to ensure that all site plantings survive at least one full year after planting and shall replace all plantings which fail within that time with a plant of identical quality and environmental value which must also survive for one full year after it is planted. Creation of habitats from other existing-climax habitats is prohibited.]

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*[(d)]***(c)* The Department shall not consider a mitigation proposal in determining whether an applicant should be awarded a permit, but it shall require mitigation as a condition of any permit it awards under this chapter.

*[(e) Any mitigation approved by the Department at a site other than the project site shall be located on private property and used with the express written permission of the landowner. No future development will be permitted on any mitigation site without a permit issued pursuant to this chapter.

(f) Mitigation required as a result of projects undertaken by the Federal, State and local government shall be exempt from the requirements of (e) above.

(g) For every mitigation plan authorized under this chapter, an applicant shall execute a Department-approved conservation easement and place a restriction on the deed for the subject parcel prohibiting any and all regulated activities in the area mitigated by the permittee. The wording of the restriction shall be approved by the Department and shall run with the land and be binding upon all affected landowners and their successors-in-interest. When mitigation has been planned as part of the regulated activity, the permit will not become effective until the deed restriction is registered with the county clerk.]*

7:13-3.5 Projects along trout associated watercourses

(a) The removal of trees and shrubs within 50 feet of the top of bank of a trout-associated watercourses is prohibited unless the applicant demonstrates that there is absolutely no other alternative to the removal of the vegetation in order to accomplish an essential part of the project. If the Department allows the removal of trees and shrubs, the applicant shall remove such vegetation from the most northerly or easterly bank of the watercourse affected by the project, rather than the southerly or westerly bank, unless expressly approved by the Department in writing.

(b) Construction equipment shall not be placed or operated in a trout-associated watercourse unless the Department issues a written determination that certain specific uses are absolutely necessary to accomplish an essential aspect of the project. Fording watercourses with construction equipment is permitted only where the watercourse bottom is firm, the approaches are stable, and such activity does not create bank erosion not already described by the applicant and incorporated into the applicant's erosion and sediment control plan already approved by the Department.

1. The Department may require the applicant to construct temporary bridges or culverts if equipment crossings of watercourses are necessary in areas which fail to meet the requirements of the preceding section.

2. All crossings of watercourses shall be made at right angles to the watercourse and the applicant shall take all measures necessary to ensure that no petroleum products or sediment is washed into the watercourse as a result of the crossing.

3. Any watercourse bank that is disturbed shall be stabilized within 48 hours in accordance with the requirements of this chapter in order to minimize the potential for erosion.

(c) Construction equipment shall not be washed in trout-associated watercourses or where wash water would drain as surface runoff into such watercourses.

(d) Unless modified with the express written approval of the Department, any development proposed in areas under the jurisdiction of this chapter which, in the opinion of the Department, could introduce sediment into the watercourse or which could cause an increase in the natural level of turbidity in the watercourse shall comply with the following requirements:

1. All regulated activities located within 50 feet of the top of bank along trout associated watercourses *[or on waters less than one mile upstream from trout associated watercourses authorized pursuant to this chapter]* ***which would introduce sediment into the watercourse or otherwise increase the turbidity in the watercourse*** are prohibited during the following periods critical to spawning along such waters as identified in the Department report, "Classification of New Jersey Waters as Related to Their Suitability for Trout":

i. Brook Trout/Brown Trout Production Watercourses: September 15 through March 15 inclusive;

ii. Rainbow Trout Production Watercourses: February 1 through April 30, inclusive;

iii. Projects authorized pursuant to this chapter which are located along trout production watercourses shall suspend all construction activity during the period of September 15 through March 15, inclusive;

iv. Projects authorized pursuant to this chapter which are located along trout-stocked watercourses, or one mile or less upstream from trout-stocked and trout maintenance watercourses shall suspend all construction activity during the period of March 15 through June 15, inclusive.

2. Upon application by the permittee, the Department may specifically modify the requirements above for the following reasons:

i. Cases in which the Department determines that the likelihood of particular types of damage to trout-associated watercourses from the particular activity proposed by the permittee during the period of low flow in the June 1 through June 15 period would be less than the likelihood of particular types of damage arising from such activities in these watercourses at higher flows during other periods of the year;

ii. In cases where the combined effect of compliance with this subsection, N.J.A.C. 7:13-3.6(a) and 3.6(b) would restrict construction to less than 183 days of a calendar year, the applicant shall describe for review and approval by the Department those specific steps to be implemented to minimize the impact of construction activity upon the affected watercourse and upon approval of such a plan the Department shall allow construction activity to continue for no more than 183 days of each year on the days specified in the applicant's plan; and

iii. In cases which the Department determines that construction must be undertaken during non-school periods in order to avoid unacceptable risk or excessive delay to school buses or vans.

(e) The mining of bottom material from a trout-associated watercourse is prohibited. This does not prohibit the incidental use or sale of watercourse bottom material removed during the course of Department-approved channelization, watercourse cleaning or other regulated activities authorized by the Department and performed for purposes other than mining.

(f) Where logs or boulders create pools or riffles that provide fish habitat, removal of such logs or boulders is prohibited unless the Department determines that their removal is necessary to accomplish an essential aspect of the project.

(g) Channelization of trout-associated watercourses is prohibited unless the Department determines that:

1. There is a compelling public need for the proposed project greater than the need to preserve the natural condition of the channels of such watercourses and that need cannot be met by essentially similar projects in the region which are under construction or expansion or which have already received the necessary governmental permits and approvals and the project cannot be accomplished in a less-destructive manner; and

2. The project meets the requirements of (h) and (i) below.

(h) Any application for channelization of a trout-associated watercourse shall include a map of the existing watercourse channel that identifies the location, dimensions and area of cascades, riffles, flats and pools, except as follows:

1. Channel modification directly and inextricably linked to the construction or maintenance of bridges or culverts, including transition zones up to 100 feet upstream or downstream from such bridges or culverts;

2. Minor bank re-establishment or bank protection projects limited to 100 feet of channel length; or

3. Other projects which require 100 feet or less of channel modification including, but not limited to sewer headwalls, sewer outlet works, sewer outlet diffusers, minor water intake facilities and channel crossings of utilities.

(i) A new or modified channel of a watercourse shall be designed and constructed in such a manner as to duplicate or preserve the pre-construction character of the channel including proportion of shading, pools, flats, riffles and cascades and, particularly in the case of trout associated watercourses, areas for fish cover and shelter.

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***(j) Channel modifications at bridges and culverts (including the upstream and downstream transition zones), channelization projects, watercourse cleaning projects, and other channel modifications (excluding dams) shall comply with the following fish passage requirement;**

1. Any new or modified channel of a watercourse shall be designed and constructed so that, during low-flow conditions, the water depth is at least as deep as in the pre-construction channel unless the Department allows an exception to this requirement pursuant to (j)2 below.

2. No exception to (j)1 above shall be allowed by any delegated agency. The Department will allow an exception to (j)1 above if:

i. The pre-construction channel does not allow for the upstream passage of fish during low-flow conditions;

ii. Conditions upstream or downstream of the channel modification are unfavorable to fish passage; or

iii. The Department determines that other circumstances, such as public need for the project or exceptional and undue hardship for the applicant, warrant such an exception.*

7:13-3.6 Projects affecting other fish resources

(a) Construction *[activity]* ***activities that would introduce sediment into the watercourse or otherwise increase the turbidity in the watercourse*** within 50 feet of the banks of watercourses which support anadromous fish are prohibited during the following *[dates]* ***periods***:

1. For projects on waters identified as anadromous migratory pathways (watercourses): April 1 to June 30, inclusive; and

2. For projects on waters used by American Shad for migrations on the Delaware River System:

i. Mouth of bay to Delaware Memorial Bridge and tidal Maurice River: March 1 through June 30 and October 1 through November 30;

ii. Delaware Memorial Bridge to New York State line and the tidal portions of Rancocas and Raccoon Creeks: April 1 through June 30 and September 1 through November 30;

iii. Timing restrictions for formerly-native or introduced fish species, such as, but not limited to, the Atlantic Salmon, Chinoock Salmon, or Coho Salmon which may or will in the future be reintroduced to State waters, will be developed as those species become established.

(b) Construction *[activity]* ***activities which would introduce sediment into the watercourse or otherwise increase the turbidity in the watercourse,*** within 25 feet of the banks of waterbodies identified as supporting warm-water fish including but not limited to smallmouth bass, largemouth bass, pickerel, walleye and yellow perch shall be prohibited during the following *[dates]* ***periods***:

1. Waterbodies supporting general game fish: May 1 to June 30 inclusive;

2. Waterbodies supporting pickerel: Ice Out to April 30 inclusive; and

3. Waterbodies supporting walleye: March 1 to May 30 inclusive.

(c) Channel modifications at bridges and culverts (including their upstream and downstream transition zones), channelization projects, watercourse cleaning projects, and other channel modifications (excluding dams) shall comply with the following fish passage requirements:

1. Any new or modified channel of a watercourse shall be designed and constructed *[in such a manner]* so that, during low-flow conditions, the water depth is at least as deep as in the *[existing]* ***pre-construction*** channel *[or 10 inches deep, whichever is less,]* unless the Department *[determines in writing that the project cannot be constructed or redesigned to fulfill its intended use without modification of this requirement]* ***allows an exception to this requirement pursuant to (c)2 below***.

2. *[Exceptions to the requirement i]* ***No exception to*** (c)1 above shall not be *[granted]* ***allowed*** by any delegated agency ***.****[, but may be considered by the Department]* ***The Department will allow an exception to ()1 above*** if:

i. The pre-construction channel does not allow for the upstream passage of fish during low-flow conditions;

ii. *[Fish passage in the particular channel segment in its pre-construction condition is irrelevant because of upstream or downstream conditions]* ***Conditions upstream or downstream of the channel modification are*** unfavorable to fish passage; or

iii. The Department determines that other circumstances such as public need for the project or exceptional and undue hardship *[compel waiver of this requirement]* ***for the applicant warrant such an exception***.

(d) Channelization of watercourses supporting the fisheries resources described in this section is prohibited unless the Department determines that:

1. There is a compelling public need for the proposed project greater than the need to preserve the natural condition of the channels of such watercourses and that need cannot be met by essentially similar projects in the region which are under construction or expansion or which have already received the necessary governmental permits and approvals and the project cannot be accomplished in a less-destructive manner; and

2. The requirements of (e) and (f) below are met.

(e) Any application for channelization of a watercourse which supports the fisheries resources described in this section shall include a map of the existing watercourse channel that identifies the location, dimensions and area of cascades, riffles, flats and pools, except as follows:

1. Channel modification directly and inextricably linked to the construction or maintenance of bridges or culverts, including transition zones up to 100 feet upstream or downstream from such bridges or culverts;

2. Minor bank re-establishment or bank protection projects limited to 100 feet of channel length; or

3. Other projects which require 100 feet or less of channel modification including, but not limited to sewer headwalls, sewer outlet works, sewer outlet diffusers, minor water intake facilities and channel crossings of utilities.

(f) The new or modified channel of a watercourse shall be designed and constructed in such a manner as to duplicate or preserve the pre-construction character of the channel including proportion of shading, pools, flats, riffles and cascades and areas for fish cover and shelter.

7:13-3.7 Projects exposing deposits of acid-producing soils

(a) The requirements of this section apply only to deposits of acid-producing soils that are sometimes found in the following Coastal Plain geologic formations:

1. Raritan Formation;
2. Magothy Formation;
3. Merchantville Formation;
4. Woodbury Clay;
5. Englishtown Sand;
6. Marshalltown Formation;
7. Navesink Formation;
8. Red Bank Sand; and
9. Kirkwood Formation.

(b) The map showing the general location of these deposits can be found in the Technical Manual.

(c) The requirements of the section are applicable to projects under the jurisdiction of this chapter which shall affect deposits of acid-producing soil, whether or not encroachments are classified as "major" or "minor" in the 90-Day Construction Permit Rules (N.J.A.C. 7:1C).

(d) Where it is known in advance that deposits of acid-producing soils would be exposed by the proposed regulated activity, the application for a permit under this chapter shall include a written site evaluation prepared by a professional which identifies the extent of exposure, the applicant's plan to mitigate the impacts of such exposure, and the result of the special laboratory analysis of the soils, if required by (g) below.

(e) If, after the Department determines an application under this chapter complete for review, the Department or the applicant determines that deposits of acid-producing soils would be or have been exposed by the regulated activity, the Department may, time permitting, permit the applicant to amend the application by submitting

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a site evaluation and mitigation plan as described above within a time stipulated in writing by the Department, or deny the application on its merits. Ammended applications may be submitted in accordance with N.J.A.C. 7:13-4.7(g).

(f) If construction activity (pursuant to a permit issued under this chapter or otherwise) reveals deposits of acid-producing soils not described to the Department in an application for a permit to conduct regulated activities at the location containing such soils, the Department shall order the permittee, or other person as the case may be, to desist from further exposure of acid-producing deposits and to apply Department-specified mitigation measures to deposits already exposed, pending the Department's review and approval of a site mitigation and evaluation plan, and an application for a permit under this chapter, as the case may be.

(g) Special laboratory analysis requirements are as follows:

1. If the Department determines that deposits of acid-producing soils have been or will likely be exposed as a result of regulated activities proposed by an applicant, or as a result of activities undertaken by a permittee or undertaken illegally by a person who has not yet applied for a permit under this chapter, and the Department determines that it requires more information about characteristics of such deposits to approve or disapprove an application to conduct such regulated activities, the Department may require the permittee, or applicant as the case may be, to include in its site evaluation and mitigation plan the following chemical analysis of samples of deposits taken from pre-construction borings along the relevant sections of the watercourse channel or flood plain as stipulated by the Department. The following tests shall be performed by a State-certified Laboratory, using methods specified in the Technical Manual:

i. pH;

ii. Cation exchange capacity;

iii. Exchangeable cation content;

iv. Potential acidity; and

v. Extractable metals (Fe, Al, Mn, Cu, Zn, Ni, Cr, Cd, Pb) and sulfate.

2. The Department may also require laboratory analysis of physical characteristics of the soil. These chemical and physical tests shall be performed by a State-certified laboratory employed by the permittee or the applicant, as the case may be, in accordance with procedures specified by the Department in the Technical Manual. In the event an order has been issued stopping activities regulated pursuant to this chapter, no such activity may commence until the Department reviews the test results required under this section and approves an application under this section including the site evaluation and mitigation plan.

(h) When acid-producing deposits are to be or have been exposed, mitigation measures shall be taken by the person engaging in the regulated activity, including:

1. Minimizing the area and time of exposure of acid-producing soils;

2. Minimizing the spread or mixing of acid-producing soils onto or into soil free of such deposits and controlling the disposal of such deposits inside or outside the flood plain;

3. Covering deposits of acid-producing soils with limestone and non-acid-producing soil to permit the establishment of vegetation; and

4. Providing prompt, temporary and permanent stabilization of areas where acid-producing soils are exposed.

(i) When acid-producing soils are exposed within a watercourse channel or along watercourse banks within the jurisdiction of this chapter as the result of activities regulated under this chapter, the person engaging in such activities shall undertake mitigation measures in order to:

1. Minimize the area and time of exposure;

2. Neutralize acid generated in the brief period of exposure; and

3. Keep post-construction oxidation rates from exceeding pre-exposure oxidation rates.

7:13-3.8 Freshwater wetlands

(a) Any disturbance of the vegetation or soil of more than one-quarter acre of freshwater wetlands located within the jurisdiction of this chapter *[and]* contiguous to the watercourse constitutes a significant and adverse impact on the biota of the watercourse. A permit application which proposes such a disturbance shall not be approved by the Department unless the applicant demonstrates to the Department's satisfaction that:

1. The disturbance is absolutely necessary to construct the project or that the project cannot be redesigned to reduce or eliminate the disturbance and still meet the objective and purpose of the project; and

2. That effective measures shall be taken by the applicant to mitigate or replace wetlands to be disturbed or destroyed with wetlands of the same or higher quality.

(b) This section shall apply only to those areas located within the Hackensack Meadowlands Development Area.

7:13-3.9 Threatened and endangered species

(a) In addition to the other requirements set forth in this chapter, the Department shall issue a permit for an activity regulated under this chapter only if the activity will not adversely affect populations of species of threatened or endangered plants or animals *[living]* ***documented*** in the areas under the jurisdiction of this *[capter]* ***chapter which are critically dependent on the watercourse to survive,*** and will not adversely affect their habitats located within the jurisdiction of this chapter, which habitats are either currently occupied by species of threatened or endangered plants or animals, or which are documented, historic habitat for threatened or endangered species of plants or animals and which remain suitable for breeding, resting, or feeding by those species of animal during any portion of their life-cycle. ***A survey for threatened and endangered species may be required if the proposed project will disturb an area documented to contain a threatened and endangered species, or nearby areas in which the habitat that can support these species is present. Persons seeking information pertaining to threatened and endangered species occurrences on or near a project site may contact the "Natural Heritage Program", CN 404, Trenton, N.J. 08625-0404 (fee required).***

(b) Those persons undertaking threatened and endangered plant or animal surveys/assessments on behalf of an applicant for a permit under this chapter shall possess the education and experience in wildlife biology, zoology or botany necessary to perform the required surveys/assessments. The Department may request additional information and/or surveys/assessments if it finds the surveys/assessments inadequate or that the minimum data have not been supplied. Threatened and endangered species surveys/assessments shall include the following data:

1. The name and address of all persons participating in the survey, the date and time of the investigation including total number of hours spent by each individual specifically for species observation, and the number of observers present on the site at any one time, including their location on the site relative to one another;

2. The site conditions during the survey and observation, that is, precipitation, wind speed and direction, and temperature, artificial or natural noises, nearest human activity or development to site, aside from the observers listed in (b)1 above;

3. The method and specifics of species sightings, indicating whether the subject was sighted directly or identified by call, track, scat, remains or other indirect evidence of presence, the date and time of each such sighting or discovery of evidence, and the relative age and condition of any indirect evidence observed and its location on the property. If the species is observed directly, note the number of individuals, activity of each when observed, each individual's sex and age, location of each individual observed on or near the project site, as the case may be, and the distance between the animals and the observer at each sighting;

4. A description of the techniques and methodology(s) employed by the observer during the site investigation;

5. The acreage of the surveyed area and breakdown of acreage as per habitat/cover type shown on the USGS *[Quad]* ***Quadrangle*** map and NWI maps with site boundaries delineated;

6. A description of each habitat and cover type on site including vegetation, hydrology, soils and natural communities. These habitats shall be assessed for suitability and compatibility to the life history

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of the target species. If no target species are observed, a discussion of the site's suitability for the species shall be provided.

(c) If, while reviewing the merits of an application deemed complete for review without a threatened and endangered species survey/assessment, the Department determines that the project or its construction would significantly damage or destroy threatened and endangered plants or animals or their current or historic habitats the Department shall, time permitting, either request the applicant to submit a threatened and endangered species survey to the Department within the time stipulated by the Department in accordance with the criteria outlined in (b) above or deny the application on its merits. Amended applications may be submitted pursuant to N.J.A.C. 7:13-4.7(g).

SUBCHAPTER 4. APPLICATION PROCEDURE FOR STREAM ENCROACHMENT PERMITS

7:13-4.1 Required information for all applications submitted to the Department

(a) The standard application form, CP-1, shall be completed by the applicant or the applicant's authorized agent including all signatures and seals. Notarization is not necessary.

(b) The Engineering Data Sheet shall be completed and all required information for the type of project shall be supplied along with a copy of the completion check list and, where applicable, a copy of any pre-application conference minutes.

(c) The fee as required by the 90-Day Construction Permit Rules (N.J.A.C. 7:1C) shall be included with all applications for permits.

(d) Certification of notification required by N.J.A.C. 7:13-4.2 shall be submitted.

(e) Six sets of plans prepared in accordance with the requirements of this chapter outlined on the Engineering Data Sheet shall be submitted.

(f) A Soil Erosion and Sediment Control Plan shall be submitted.

(g) Two sets of color photographs showing the work area shall be submitted.

(h) Except for applications by public entities which have asserted the right of eminent domain, the applicant shall provide evidence of easements or other property owner's permission for any work outside the applicant's property or which will physically affect properties not owned or controlled by the applicant.

(i) Any application made pursuant to this chapter affecting any land within the Pinelands Area as defined in N.J.S.A. 13:18A-11 is not complete for review until the applicant submits to the Department a Certificate of Filing, a Certificate of Compliance or an Resolution of Approval from the Pinelands Commission for the proposed development and proposed activities on that land.

(j) Three copies of an environmental report bound or in loose-leaf form, on 8½ by 11 inch paper shall be submitted to the Department. All maps, plans and aerial photographs shall contain a north arrow, graphic scale, date of preparation, name of author, and source of information. The report shall contain a detailed environmental inventory and assessment which describes and documents in narrative and map form (including Soil Conservation Service soil maps) possible short and long term effects of each proposed activity upon the site as well as upon adjacent areas upstream and downstream. To the extent required to meet the requirements of this chapter, the report shall include:

1. A description of the scope and nature of the proposed activity including reasons why the proposed structures and their location are the most appropriate for the site and why they minimize to the greatest extent possible any adverse affects upon the pre-construction character of the site ***located within the jurisdiction of this chapter***. The report shall also describe and analyze alternatives to the proposed activity, including the no-build option;

2. Temporary and permanent physical changes to the site which would result from the proposed activity and the impact of these changes on the *[project site]* ***areas within the jurisdiction of this chapter*** and the adjacent properties, including details regarding:

i. The effect of the project on public health, safety, and welfare; water quality and quantity; flood storage; existing and potential water uses; parks and/or preserves; vegetation, wildlife, and fisheries, including threatened and endangered species;

ii. All measures to be taken during construction and thereafter to reduce detrimental on-site and off-site effects of both construction and use of the structure in question; and

iii. Adverse environmental impacts which cannot be avoided or mitigated;

3. Project location using the State plane coordinate system;

4. For encroachments along trout-associated watercourses, the environmental report shall identify:

i. The method for disposing of sediment-laden pumpage from dewatering operations;

ii. Channel segments along which trees or shrubs shall be removed; and

iii. Places where construction vehicles shall operate on the banks of trout-associated watercourses and the physical character of the watercourse bed at such places;

5. For all proposed detention and retention basins ***under the jurisdiction of this chapter***, the applicant's environmental report shall address the effects of the basin on the watercourse habitat (that is, what plants and animals will be disturbed or displaced, the degree of destruction or disturbance and how these effects shall be mitigated or remedied by the applicant), and whether or not the basin will contribute to or constitute a breeding habitat for mosquitoes;

6. A site evaluation and mitigation plan for acid-producing soils, where applicable;

7. A threatened and endangered animal and plant survey or habitat suitability assessment; and

8. An Environmental Report, prepared using an interdisciplinary approach, containing the identity and qualifications of the persons who prepared each element of the report. References to data, reports or treatises not contained completely in the Environmental Report shall be cited throughout the text as appropriate, and in a consistent manner. Complete copies of all documents cited in the report shall be made available to Department personnel, at the applicant's expense, upon reasonable advance notice.

(k) If applicable, the application shall include the date on which the proposed application was preconferenced with the Department pursuant to N.J.A.C. 7:13-4.3, and the name of the Department personnel who preconferenced the application.

(l) Any application which does not contain the information required in this section fshall be considered incomplete and ineligible for review, or alternatively, shall be denied.

7:13-4.2 Notice

(a) The applicant shall provide notice to those persons described in (a)1 to 5 below, of the filing of an application for a permit under this chapter for projects considered a major project under the 90-Day Construction Permit Rules (N.J.A.C. 7:1C), for projects along trout associated watercourses, for projects exposing acid-producing soils, for projects requesting a hardship exemption and for an appeal of the Department's decision on an application deemed complete for review. The notice shall include a description of the nature and location of the proposed project, data on the application (a copy of the CP-1 form will be acceptable to fulfill these requirements) and a request that written comments be sent to the Department at the address stipulated in N.J.A.C. 7:13-1.5. The notice shall be sent to the following agencies and individuals:

1. The municipal planning board, engineer, construction official, environmental commission and clerk's office of the municipality in which the project is located. Also the municipality across the watercourse and the municipality next downstream on both sides of the waterway, if within one mile of the project must be notified;

2. All property owners within 200 feet of the legal boundary of the property or properties on which the project shall be constructed;

3. The county planning board, county engineer, county environmental commission and county mosquito control commission;

4. The local county Soil Conservation District; and

5. Any other agencies or bodies as requested by the Department or the county.

(b) If the proposed project is a linear facility such as a pipeline or road of more than one-half mile ***within the jurisdiction of this**

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chapter and requires notices pursuant to (a) above*, instead of notifying all property owners within 200 feet of the property lines, the applicant may instead give public notice of the filing of the application in at least one newspaper of local circulation and one newspaper of regional circulation in the municipality in which the property on which the proposed project is located. In addition, notice shall be given to the owners of all real property within 200 feet of any above-surface structure related to the linear facility, such as pumping stations, treatment plants, power substations, grade separated interchanges or similar structures (not including utility support structures or conveyance lines) ***which are also located within the jurisdiction of this chapter***.

7:13-4.3 Pre-Application conference

(a) A pre-application conference is not required of the applicant but is highly recommended. Department staff will advise the applicant of the areas in which the project may or may not comply with the requirements of this chapter, but under no circumstances shall any discussion at such a meeting compel or estop the Department from approving or denying any application submitted to it for a permit under this chapter.

(b) Pre-application conference requests shall be made in writing by the applicant or its authorized agent and directed to the chief of the region in which the proposed project shall be located at the address stipulated in N.J.A.C. 7:13-1.5. The request shall include sufficient maps, plans, photographs, surveys or other related information to allow the Department to identify major areas of concern under the regulations which might apply to the project.

(c) All applications for permits submitted as a result of such conferences shall list the date of the conference(s) and parties present at each such conference.

(d) A pre-application conference may also be used to deliver an application to the Department to be checked for administrative completeness.

(e) If the proposed project will require other permits from the Department, it is strongly recommended that the applicant first contact the Office of Permit Information and Assistance before filing any single permit application in order to properly coordinate the entire permitting process.

7:13-4.4 Over-the-counter permit processing

One day permit processing is available for certain minor applications to the extent provided for in the 90-Day Construction Permit Rules (N.J.A.C. 7:1C), Department workload permitting.

7:13-4.5 Optional Soil Conservation District review

Certain farming practices which would otherwise constitute regulated activities may be reviewed by the local Soil Conservation District as authorized by the agreement between the Department and the State Soil Conservation Committee in September 1978, entitled "Stream Encroachment Permit Procedures for Soil Conservation District Projects" and any subsequent amendments thereto. A recommendation of approval from the Soil Conservation District under the authority conferred upon the District in this agreement and the engineering plans relied upon by the District in making its recommendation shall be forwarded to the Department.

7:13-4.6 Emergency permit

(a) The Department may issue an emergency permit for a regulated activity only if:

1. Severe environmental degradation will occur or an undue and immediate risk of loss of life or substantial loss of property is more probable than not if the permit is not granted; and

2. There is a high probability that the anticipated threat or loss will occur before the Department can review an application and issue a permit under procedures otherwise required by the Acts, this chapter and other applicable State laws.

(b) The emergency permit shall incorporate the regulatory standards and criteria for non-emergency uses to the greatest extent permissible under the circumstances unique to the site.

(c) Persons applying for an emergency permit shall:

1. Inform the Department by telephone (and if possible facsimile letter) of the nature and extent of work to be performed, the nature and reason for the emergency, the period of time the applicant knew of the circumstances which underlie the emergency, the precise location of the proposed work, the identity of the property owner and whether said owner has given his or her permission for the work to be done;

2. Expeditiously perform the emergency work permitted authorized by the program Administrator or his or her acting designate and advise all planning boards, authorities and nearby property owners, as described in N.J.A.C. 7:13-4.2(a), of the work as soon as possible. The applicant shall also immediately advise the Administrator if the work authorized shall not be done and the reasons why. A verbal permit shall be verified by the Department in writing. Under no circumstances shall the Department or its personnel be liable for any damage to property or loss of life incurred by the applicant or any other nearby property owner as a result of the emergency work authorized under this section; and

3. Upon completion of the work in accordance with the Department's instructions, the applicant shall file a complete application with appropriate fees and "as-built" drawings for Department review to determine if modifications which may include mitigation or stabilization measures are required under this chapter. Upon completion of the review, a formal permit will be issued.

7:13-4.7 Permit application review procedures

(a) Within a maximum of 20 State working days following the date of receipt of an application for a permit under this chapter (other than an emergency permit), the Department shall:

1. Accept the application for filing, assign an agency project number to it, classify the application complete for review and proceed to review it on the merits;

2. Accept the application for filing, assign an agency project number to it, but classify the application as incomplete and request in writing that the applicant submit within a specific period of time specific information to assist the Department in its review of the substantive merits of the application. In such cases, the application will not be considered complete for substantive review until all the information requested by the Department has been received; or

3. Return the application without filing, explaining why it is unacceptable for review, and return the filing fee (if any) if the applicant advises the Department that it does not intend to reapply.

(b) Following the assignment of the agency project number, a report of the "20-day" status of the application pursuant to (a) above will be published in the DEPE Bulletin.

(c) If, while reviewing the merits of an application deemed complete for review, the Department determines that further information is required from the applicant to assess the accuracy of statements in the application or to otherwise determine whether the proposed regulated activity complies with these rules, the Department may, time permitting, permit the applicant to amend the application by submitting this additional information within a specified time, or, deny the application on its merits. Amended applications for permits may be submitted pursuant to (g) below.

(d) The Department will mail a letter granting or denying applications within 90 days of receipt of a complete application or the application will be automatically approved, subject to any standard conditions that apply to the type of development involved.

(e) The Department will grant a one-time 30-day extension of time to the 90-day review period if agreed to by both the applicant and the Department, provided that the applicant or the Department requests, from the other, such an extension either by telephone or in writing prior to the expiration of the 90-day review period. Telephone applications for an extension made by an applicant must be made to the Region head in charge of such applications at the Department or his or her designated agent.

(f) Permits under the jurisdiction of this chapter are valid for five years. If no construction has begun at the end of the five years, application for a new permit is required if the applicant still wishes to undertake the project. The project shall comply with the requirements in effect at the time the newest application for a permit is deemed complete for review. If construction has begun but has not been completed at the end of five years, construction shall cease until the Department has reviewed the applicant's application for

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a new stream encroachment permit. In that application, the project shall be revised to the greatest extent possible to meet the regulatory requirements in effect at that time.

(g) In the event of a Department denial of an application under this chapter or an applicant's withdrawal of such a permit application, the applicant may, only once, submit an amended application for reconsideration or an amended application containing a request for a hardship waiver under N.J.A.C. 7:13-4.8, one or the other, within one year of the date of the Department denial and have the previously submitted fee credited to the new application. Additional applications for reconsideration, additional amended applications or requests for hardship waivers shall require the regulatory processing fee in order to be accepted for filing by the Department.

7:13-4.8 Hardship waivers

(a) A waiver from strict compliance with the requirements of this chapter may be granted by the Department for any of the following reasons:

1. Cases in which the Department determines that there is no feasible and prudent alternative to the proposed project, including the no-action alternative, which would avoid or substantially reduce any anticipated adverse effects and where the waiver is consistent with the reasonable requirements of the public health, safety and welfare;

2. Cases in which the Department determines that the costs of strict compliance are unreasonably high in relationship to the benefits achieved by strict compliance; or

3. Cases in which the Department and applicant agree to alternative requirements that, in the judgment of the Department, provides better protection to the public health, safety and welfare.

(b) A public hearing concerning the waiver application shall be required upon request by the Department or at least five members of the public.

(c) Except as otherwise provided in this chapter, a delegated agency may grant waivers in accordance with this subsection. Where granted, such waivers are subject to the appeal procedures in N.J.A.C. 7:13-4.10.

(d) In order for the Department to grant a hardship waiver, the applicant shall demonstrate the following:

1. That by reason of the extraordinary or exceptional situation or condition of the property, the strict enforcement of this chapter would result in exceptional and undue hardship upon the applicant in question;

2. That the waiver will not substantially impair the appropriate use or development of adjacent property and will not pose a threat to the environment or public health, safety and general welfare; and

3. That the exceptional or undue hardship claimed as grounds for the waiver has not been created by the applicant or persons under his or her control.

(e) The applicant shall submit with an application for a hardship waiver as much of the following information as is relevant to the project:

1. A plan for flood proofing the structure to be constructed, the implementation of which shall be a condition of the waiver;

2. Proof that appropriate steps shall be taken to anchor structures as mandated by the Uniform Construction Code and local building and construction codes in order to prevent flotation, collapse, or lateral movement;

3. An analysis of the consistency between the proposed project and the goals, objectives and limitations of the comprehensive land use plan and flood plain program applicable to the area;

4. Proposed routes to and from the property during floods;

5. The projected height, velocity and duration of the flood waters expected at the site during the regulatory flood;

6. The type of soil(s) at the proposed site;

7. A statement concerning the current and post-construction land use and value assuming the waiver is granted, including a present-worth cost benefit analysis, and the same analysis assuming denial ***of*** the hardship waiver;

8. A description of the existing development in the area and the impact of the proposed work on that development;

9. Evidence that the project will not distort or reduce the affected watercourse's flood carrying capacity so as to cause significant flooding problems both upstream and downstream from the proposed project;

10. An analysis of the extent to which the sediment regime and water quality of the watercourse will be affected by the proposed waiver; and

11. A description of the potential effects of the project upon the environment, assuming the waiver is granted.

(f) The applicant shall also submit proof of public notice for consideration for a hardship waiver as required by N.J.A.C. 7:13-4.2.

(g) The applicant shall submit the request for a waiver along with the appropriate documentation to the Department.

1. The Department shall notify the applicant of the results of its review within 90 days of the receipt of an application deemed complete for substantive review by the Department.

2. Before making a decision on a request for a waiver of strict compliance, the Department may request the applicant to provide additional information and/or documentation as provided in N.J.A.C. 7:13-4.7(a).

(h) The denial of a waiver shall be without prejudice. However any additional application for relief under this section shall be accompanied by a new fee in order to be accepted for filing by the Department.

(i) A hardship waiver granted pursuant to this section does not relieve the applicant from obtaining any other approvals, certifications or permits required by Federal, State or local law.

7:13-4.9 Permit modification procedures

(a) There shall be no modifications to Department-approved plans or any permit condition without the express written permission of the Department. Six sets of plans accompanied by a letter requesting the modification and a fee as specified in the 90-Day Construction Permit Rules (N.J.A.C. 7:1C) are required to apply for modification of a permit condition or any approved plan. ***Except for additional watercourses added to watercourse cleaning permits pursuant to 7:13-2.5(b),*** *[Only]* ***only*** items already approved on the original permit may be modified.

(b) Modifications to Department-approved projects that will affect the hydraulic capacity of the watercourse shall not be considered or approved by the Department under this section. Such modifications must be contained in a new application for a new Permit and must comply with the regulations in effect on the date that the new permit application is deemed complete for review.

7:13-4.10 Appeal procedure to the Department

(a) ***Subject to the limitation on third-party hearing rights specified in (e) below,*** *[Any]* ***any*** person who considers himself or herself aggrieved by the approval or denial of an application for a permit may, within 10 days of publication of notice of the decision in the DEPE Bulletin, or within 10 days of publication of notice of the decision by the permittee pursuant to (b) below, whichever occurs first, direct a written request for a hearing to the Office of Legal Affairs, ATTENTION: Adjudicatory Hearing Requests, Department of Environmental Protection *[and Energy]*, CN 402, Trenton, New Jersey 08625-0402.

1. The written request for a hearing on appeal shall include the appropriate agency project number and, where the appeal is taken by someone other than the applicant, evidence that a copy of the written request for hearing an appeal has been mailed to the applicant/permittee.

2. Within 14 days of the date on which the initial request for a hearing was postmarked, the person appealing the decision shall submit an additional statement describing, in detail, how that person is aggrieved by the decision, and which findings of fact and conclusions of law are being challenged.

(b) A permittee may publish notice of the Department's final decision in a newspaper of Statewide circulation and a newspaper of regional circulation which includes the municipality in which the project site is located. The permittee shall provide a copy of the Department's decision to any person who requested such notice by certified mail. The Department shall maintain a list of such

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newspapers and a list of all persons who have requested notice of the decision.

(c) Pending appeal of the Department decision and the Commissioner's final decision on the appeal, a person may apply to the Commissioner for a stay of the issuance of a permit by written request and for good cause shown therein. The Commissioner may stay the issuance of the permit upon such terms and conditions as the Commissioner may deem proper in his or her sole discretion. The request for stay of issuance of the permit shall be made within 21 days of the issuance of the Department approval of the permit application.

(d) Where a request for a hearing concerning a Department decision on a permit application has been granted by the Department, the request shall be referred to the Office of Administrative Law for a fact-finding hearing if required pursuant to the Administrative Procedure Act (N.J.S.A. 52:14B-l et seq.), after which, the Commissioner shall issue a final decision adopting, rejecting or modifying the findings of fact and conclusions of law of the administrative law judge, within the time frame specified in N.J.S.A. 52:14B-10.

(e) Nothing in this section shall be construed to provide a right to an adjudicatory hearing in contravention of N.J.S.A. 52:14-3.1 through 3.3 (P.L. 1993, c.359).

7:13-4.11 Permit application review by delegated agencies

When authority to approve certain types of regulated activities is delegated in writing by the Department to another agency under provisions of this chapter and the Acts, that agency shall apply the standards and criteria of this chapter to all matters arising under the jurisdiction of this chapter which have been delegated to that agency.

SUBCHAPTER 5. IMPLEMENTATION

7:13-5.1 Consistency with other requirements in permit review

(a) A permit under this chapter is expressly conditioned upon the permittee complying with all other applicable Federal, State and local statutes, rules and regulations, orders, standards, plans, and ordinances which may apply to the work necessary to accomplish the proposed project, and obtaining all other permits, licenses or approvals required for the work which is a part of the proposed project. The issuance of a permit pursuant to this chapter shall not obligate the Department to grant or deny an application by the permittee for any other license, permit or approval issued by the Department.

(b) In cases where the Department has not delegated authority under N.J.A.C. 7:13-5.3, no local agency or employee thereof shall grant any application for development as defined in the "Municipal Land Use Law" (N.J.S.A. 40:55D-1 et seq.) for an activity regulated under this chapter until an application for a permit under this chapter has been approved by the Department. ***The Department will consider this provision satisfied if the local approval is conditioned upon obtaining a permit under this chapter.***

7:13-5.2 Creation of a county water resources association

The governing body of any county may, by ordinance or resolution, as the law may provide, create a county water resources association to discuss and coordinate county flood control and water management programs, to advise the county governing body on these issues and to undertake any other such duties concerning water management as the county governing body may legally delegate to it by ordinance or resolution. Members of this Association shall be appointed by the county governing body and may include the chief administrative officer or executive of any county planning agency, county engineer's office, county utility authority, county health department, county mosquito commission, county soil conservation district, county parks agency and any other person with relevant experience or training.

7:13-5.3 Delegation of power to counties

(a) Except as otherwise expressly provided in this chapter, the Department may delegate its authority to review and decide any application made to it pursuant to this chapter as well as its power to enforce any aspect of its legal obligations arising under the Acts to a county governing body which shall expressly agree to accept such designation, and follow the rules stated herein, and which, in the Department's judgment, retains those employees with professional training and education capable of properly administering the provisions of this chapter.

1. A county wishing to apply for authority to issue permits pursuant to the provisions of this chapter or to undertake enforcement of any of the provisions of this chapter shall submit a written request to the Department and specifically describe those aspects of the permitting and enforcement authority of the Department under this chapter which it wishes to assume. The county shall also submit evidence of a formal approval by the county governing body agreeing to apply for delegation of the authority or obligations described in the application and agreeing to adopt, in the event the request is granted, an ordinance or resolution containing all provisions of this chapter relevant to the duties and obligations to be assumed by the county. The request shall also describe in detail the personnel, physical resources and source and amount of funding by which the county shall fulfill the obligations the county wishes to assume.

2. A county to which permitting authority or enforcement obligations have been delegated pursuant to this subsection shall preserve, for the Department review, all documents, plans, maps, memoranda and notes as necessary which document that it has discharged its delegated duties in accordance with the applicable provisions of this chapter.

3. The Department shall review the county records pertaining to all duties delegated to the county under this subsection at least once every 365 days after the date of the formal delegation of duties to the county, and may at any time revoke such delegation if, in the judgment of the Department, the county has failed to properly administer powers delegated to it, which may include a failure to maintain the records stipulated in (a)2 above.

4. The county governing body to which permitting functions under this chapter have been delegated shall not charge fees in excess of those promulgated by the Commissioner pursuant to N.J.S.A. 13:1D-33.

(b) The Department shall not delegate the powers to review or decide any application for a permit pursuant to this chapter filed by a State agency.

7:13-5.4 Penalties

Any person who violates a provision of this chapter shall be subject to penalty and injunctive relief, as applicable, pursuant to N.J.S.A. 58:16A-63 and 58:10A-1 et seq.

SUBCHAPTER 6. (RESERVED)

SUBCHAPTER 7. DELINEATED FLOODWAYS

(OAL NOTE: The text of adopted N.J.A.C. 7:13-7.1 includes no changes from N.J.A.C. 7:13-7.1 currently in the New Jersey Administrative Code. Given the extensive text of these rules, its text is not reproduced as part of this adoption, but may be found in the New Jersey Administrative Code.)

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(a)

WATER SUPPLY ELEMENT

Water Supply Allocation Rules

Readoption with Amendments: N.J.A.C. 7:19

Readoption and Recodification with Amendments: N.J.A.C. 7:19A-1 through 7 recodified as N.J.A.C. 7:19-10 through 17, and N.J.A.C. 7:19B recodified as N.J.A.C. 7:19-9

Adopted New Rules: N.J.A.C. 7:19-8 and 18

Adopted Amendments: N.J.A.C. 7:14-8.1, 8.3, 8.4 and 8.15

Proposed: December 19, 1994 at 26 N.J.R. 4912(a).
Adopted: February 24, 1995 by Robert C. Shinn, Jr., Commissioner, Department of Environmental Protection.
Filed: February 24, 1995 as R.1995 d.162, **with substantive changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 58:1A-1 et seq., 58:2-1 et seq., 58:4A-1 et seq., 58:11-59 et seq., 58:12A-1 et seq.
DEP Docket Number: 49-94-11/18.

Effective Date: February 24, 1995, Readoption;
March 20, 1995, Amendments, New Rules and Recodification.
Expiration Date: February 24, 2000, N.J.A.C. 7:19;
April 27, 1999, N.J.A.C. 7:14.

On December 19, 1994 the New Jersey Department of Environmental Protection ("Department") proposed to readopt with amendments its rules governing Water Supply Allocation and recodify with amendments its rules governing Emergency Allocation Procedures. The proposal also included new rules regarding areas of critical water supply concern, and consolidated penalty provisions.

Notification was mailed November 30, 1994 to each of the 750 permittees and 800 registrants regulated by these rules. The notification was published in the Atlantic City Press, Courier Post, Star Ledger, and Trenton Times on December 15, 1994. A public hearing was held on January 6, 1995. Eight members of the public attended, but none testified.

Summary of Hearing Officer's Recommendations and Agency Response:

Richard H. Kropp, the Department's Chief of the Bureau of Water Allocation, served as the hearing officer at the January 6, 1995 public hearing. After the public hearing, the hearing officer recommended that the Department proceed with the readoption with amendments. The Department accepts the recommendation.

A copy of the record of the public hearing which includes the hearing officer's report is available upon payment of the Department's normal charges for copying. Persons requesting copies should contact:

Janis E. Hoagland, Esq.
Department of Environmental Protection
Office of Legal Affairs
CN 402
Trenton, NJ 08625

Summary of Public Comments and Agency Responses:

The following is a list of the persons and their affiliation who submitted written comments related to the proposed readoption with amendments:

1. Carol Kiger Allen, Association of Environmental Authorities
2. Hal Bozarth, Chemical Industry Council of New Jersey
3. Robert A. Briant, Jr., Utility and Transportation Contractors Association of New Jersey
4. Patricia Buchinsky, Jersey Central Power & Light Company
5. Susan E. Craft, Burlington County Office of Land Use Planning
6. Jane Dobson, Hannoch Weisman
7. Marty Judge, Drinker Biddle and Reath
8. Ross Kushner, East Jersey Chapter Trout Unlimited
9. Maria Laurino, United Water Resources
10. Brian Murphy, Mayor, Township of Aberdeen
11. George Nimmo, North Jersey Chapter Trout Unlimited
12. John Schettini, Sybron Chemicals, Inc.
13. Kathy White, Lions Head South Association, Inc.

The Department has given due consideration to all comments received. The various suggestions did not support substantive changes to the rules, but did point out areas which required clarification. The changes made on adoption are discussed in the responses to comments and in the Summary of Agency-Initiated Changes.

The comments and the Department's responses are summarized below. The number(s) in parentheses after each comment identified the respective commenter(s) listed above.

General

1. COMMENT: Many of the proposed changes will increase the program's effectiveness and eliminate undue and undesirable hardships on the regulated community. (1, 4)

RESPONSE: The Department acknowledges this comment in support of the rules.

2. COMMENT: The Department is to be commended for combining the rules for water allocation, drought and critical area management, small water company consolidation, and enforcement into a comprehensive rule. (1)

RESPONSE: The Department acknowledges this comment in support of the rules which are intended to facilitate effective and efficient management of the State's water resources without placing an undue burden on the regulated public.

3. COMMENT: The effect of proposed bills pending in the State Legislature upon the water supply allocation procedures which affect water purveyors should be addressed in the rules. (1)

RESPONSE: Until such time as a bill becomes law the Department is not authorized to implement its provisions unless the Department has adequate authority under current statutory authority.

N.J.A.C. 7:19-1.3 Definitions

4. COMMENT: The definition of "water supply allocation permit" clarifies when a permit is needed, making it easier for potential new permittees to determine the applicability of these rules for their projects. (4)

RESPONSE: The Department acknowledges this comment in support of the rules.

N.J.A.C. 7:19-1.4 Applicability

5. COMMENT: N.J.A.C. 7:19-1.4(a), which requires permits for any person with multiple diversion sources, cumulatively diverting 100,000 gallons of water per day should only apply if the diversion sources are part of an interconnected system, as the objective of the water diversion regulations is to provide the Department with oversight to prevent adverse impacts upon water resources and other permittees. (9)

RESPONSE: An impact upon water resources is not due to the interconnection of diversion sources but to the total diversion from the resource, whether it is from a single source, multiple diversion sources, or multiple diversion sources which are part of an interconnected system. This requirement is not new; it was recodified from N.J.A.C. 7:19-3.8(e).

6. COMMENT: Requiring permits for multiple diversion sources, cumulatively diverting 100,000 gallons of water per day, which are not part of an interconnected system will place inordinate administrative and financial burdens on small water purveyors. (9)

RESPONSE: This requirement has been in the water allocation rules since they were first adopted in 1983 and has been recodified from N.J.A.C. 7:19-3.8(e). The amount of administrative work and financial costs will not depend upon whether the diversion sources are interconnected or not, but will depend upon the number of diversion sources and the amount of water diverted. Currently, numerous permittees have multiple non-interconnected diversion sources. The Department has not been advised by these permittees that their permits create an exceptional administrative or financial burden and any such burden is considered necessary due to the impact on the aquifer and other permittees. See also the response to Comment 5 above.

N.J.A.C. 7:19-1.5 Major and minor permit modifications

7. COMMENT: The delineation of the two categories of permit modifications and the specific procedures to follow for each, specified at N.J.A.C. 7:19-1.5, will be useful to the regulated community and will also ease the burden on the Department. (4)

RESPONSE: The Department acknowledges this comment in support of the rules.

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N.J.A.C. 7:19-1.6 Diversion source categories and requirements

8. COMMENT: A passing flow should be established for the city of Newark's Oak Ridge Reservoir as there are no means for maintaining bypass flows during valve replacement. The reservoir has been drawn down below the spillway level and will refill without allowing any water to flow into the Pequannock River. During the recent dam repair work the flows in the Pequannock were the lowest observed by trout fishermen. Therefore a seven cubic foot per second passing flow should be established as specified by the Department's Division of Fish, Game and Wildlife to protect the existing trout population. (8, 11)

RESPONSE: A passing flow has already been established for the city of Newark's reservoir system at the Macopin Dam which is downstream of the Oak Ridge Reservoir. A passing flow is established as a permit condition in a water supply allocation permit in accordance with N.J.A.C. 7:19-1.6(e) for new or modified surface water diversions. In this case, the passing flow condition existed in the permit and will be retained upon renewal. An increase in passing flow would reduce the yield of the reservoir system. Since Newark's allocation is being fully utilized this would be a reduction of allocation which can only be done in areas of critical water supply concern and only when the safe yield of the resource is being exceeded. Neither of these holds true in this case, and the Water Supply Management Act contains no statutory authority for reducing a permittee's allocation for the purpose of enhancing local fisheries. The Division of Fish, Game and Wildlife has no statutory authority to establish passing flow requirements.

9. COMMENT: The sealing of any inactive well not used for three or more years in N.J.A.C. 7:19-1.6(a)3 is not appropriate for wells where there is an anticipated future use. (6)

RESPONSE: The Department agrees, and pursuant to N.J.A.C. 7:19-1.6(a) places those wells which do have a future intended use on inactive status. This has been the Department's historic practice.

N.J.A.C. 7:19-2.2 Application requirements for water supply allocation permits

10. COMMENT: The permit application requirements should be greatly simplified in form and in content. (13)

RESPONSE: The Department has substantially reduced the application requirements with these amended rules. N.J.A.C. 7:19-2.2(e) reduces the scope of mapping required with the application, while N.J.A.C. 7:19-2.2(i) provides exemptions on the submission of conservation plans, and old N.J.A.C. 7:19-2.3 and 2.4 which required additional submissions for public water supplies have been eliminated from the rules altogether. To reduce the requirements further would jeopardize the proper management of the State's water resources.

11. COMMENT: It seems unnecessary to require information such as longitude/latitude, site elevation, MA7CD10, requested passing flow, nearest USGS gaging station, flow at gage and other technical information and a technical report with maps, hydrological calculations, charts, etc. for permit applications for existing wells. (13)

RESPONSE: Not all of this information pertains to wells or would be required in a permit application for a well. Passing flow, gaging information, and MA7CD10 are required for determining the impacts of surface water diversions upon a surface water source. The other information the commenter points to is necessary to accurately determine the impacts of a ground water diversion upon the ground water resource and other users of that resource. The Department encourages applicants to contact the Bureau of Water Allocation to set up a preapplication meeting (see N.J.A.C. 7:19-1.9). A preapplication meeting is useful to clarify what information a particular applicant must provide.

N.J.A.C. 7:19-2.3 Application requirements for temporary dewatering permits

12. COMMENT: N.J.A.C. 7:19-2.3 should contain language which clearly states that the owners of construction projects and other facilities which require temporary dewatering permits have the responsibility of obtaining the permits. (3)

RESPONSE: The Department has historically required that the owners of projects and utilities requiring temporary dewatering permits obtain the permits. In order to clarify this, the Department has added the following sentence at the end of N.J.A.C. 7:19-2.3(a): "The applicant for a temporary dewatering permit shall be the project owner or utility responsible for the construction and not the contractor."

N.J.A.C. 7:19-2.7 Public notice and preliminary decision

13. COMMENT: The proposal requires permit renewals to be subject to public notice and public comment and is not appropriate. (6)

RESPONSE: The Department has historically required public notice only for new or modified permit application. Since the wording in N.J.A.C. 7:19-2.7(a) as proposed did not make this clear, the Department is modifying the wording in the subsection so that it applies only to applications for new permits and major modifications of permits. In order to prevent confusion with the hearing provided for in N.J.A.C. 7:19-2.5(d), that subsection is also being modified upon adoption to indicate that the permittee may request a hearing if the Department proposed on permit renewal to reduce the permittee's allocation.

N.J.A.C. 7:19-2.13 Request for adjudicatory hearing

14. COMMENT: Third party appeals of the Department's decisions should not be eliminated from the rules in N.J.A.C. 7:19-2.13 and 7.4. (7, 9)

RESPONSE: As noted in the proposal Summary, the Department did not intend to eliminate third party appeals but to limit them to those specifically required by constitutional or State law, pursuant to N.J.S.A. 52:14B-3.1 through 3.3. Accordingly, N.J.A.C. 7:19-2.13(a) and (h) and N.J.A.C. 7:19-7.4 have been modified on adoption to restore their applicability to persons other than permit applicants, that is, third parties, subject to the statutory limitation. N.J.A.C. 7:19-2.13(d) has been modified to delete the words "the applicant," since third parties as well as applicants requesting a hearing must comply with the information requirements of subsection (d). (This does not represent a new requirement, since, under the previous rules, N.J.A.C. 7:19-2.15(e) had provided that the Department could deny the hearing request of an applicant or an "interested party" who failed to provide the information required by subsection (d).) A provision at N.J.A.C. 7:19-2.13(d)5 has been added to require that a person other than an applicant (that is, a third party) who believes himself or herself to be aggrieved by a permit decision must provide the constitutional and statutory grounds for the hearing request and documents supporting the assertion of those grounds. This will ensure that the Department is provided with sufficient information for its determination of the third party hearing request.

15. COMMENT: Proposed N.J.A.C. 7:19-2.13(f) and (g) regarding the denial of adjudicatory hearing requests based upon a permit condition contained in a previous permit and not objected to previously, or based upon a permit condition requested by the applicant, should be deleted. A permit condition may prove disadvantageous or unreasonable over time or when viewed with the permit as a whole and therefore the permittee may seek its deletion. (4, 9)

RESPONSE: If an applicant believes that a condition in an existing permit needs to be changed, the applicant must raise the issue regarding that condition during the application process for permit renewal or permit modification. If this issue is not raised during the application process a hearing request based upon that issue will be denied. The public comment period prior to a public hearing, the public hearing, and the comment period following a public hearing provide adequate time for a permittee to review proposed permit conditions and to discuss them with the Department to resolve outstanding issues prior to permit issuance. An adjudicatory hearing should not be necessary. A permittee that finds a permit condition has become unreasonable over time may seek to change that permit condition through a permit modification pursuant to N.J.A.C. 7:19-1.5(a)7 and N.J.A.C. 7:19-2.2.

N.J.A.C. 7:19-2.14 Permit conditions

16. COMMENT: Establishment of permit conditions should be done as a specific determination and not by way of general rulemaking. (6)

RESPONSE: The Department has historically established permit conditions based upon the specifics of each individual application. N.J.A.C. 7:19-2.14 is a listing of conditions which might apply to a permit if the site specific details of the permit warrant their inclusion.

17. COMMENT: The 10 year permit term established in N.J.A.C. 7:19-2.14(a)1 should be the minimum and not the maximum, as long term financing may be dependent upon having diversion privileges for the period of the financing. (9)

RESPONSE: The maximum 10 year permit term represents an increase in permit term of between three to six years from the terms established by the previous rules. N.J.A.C. 7:19-2.2(f)5 provides for longer permit terms in the situations cited by the commenter.

18. COMMENT: N.J.A.C. 7:19-2.14(a)4, which requires all diversion sources to have totalizing flow meters and have the meters calibrated every five years, will cause unnecessary expense, is unreasonable, and requires the purchase of two meters for each well to allow for calibration. Therefore, meters should not be required for small systems with small wells. (9)

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RESPONSE: Metering of diversion sources and meter calibration is necessary to obtain an accurate accounting of the amounts of water actually being diverted so that the water resources in a region are not over-stressed or depleted. N.J.A.C. 7:19-2.14(a)4iii provides relief in instances where the use of a totalizing flow meter would be unreasonable. The Department does not require two meters for each well. The diversion may be estimated based upon the pump running time during calibration of the meter.

19. COMMENT: The five year verification of the accuracy of the method used for determining diversion quantity in N.J.A.C. 7:19-2.14(a)5 could be very costly for large cooling water flows. (4)

RESPONSE: The Department recognizes the concerns of the commenter. Pursuant to N.J.A.C. 7:19-2.14(a)5, the Department expects to work with permittees to find a reasonable method to estimate the diversion quantities. Similarly, the Department will work with permittees to find reasonable calibration methods tailored to the needs of the individual permittees.

20. COMMENT: N.J.A.C. 7:19-2.14(a)15, authorizing the reversion of diversion privileges back to the State if they are not used, raises the issue of property rights which are protected by State and Federal law and cannot be taken without just compensation. (6)

RESPONSE: N.J.S.A. 58:1A-6(a)1 provides the statutory authority to limit diversion privileges to the extent currently exercised, subject to contract, or as reasonably required for a demonstrated future need. Furthermore, N.J.S.A. 58:1A-2 declares that the water resources of the State are public assets of the State held in trust for its citizens, with the ownership of these assets being in the State as the trustee for the people.

21. COMMENT: The words "legal and proper" should be inserted before the word "users" in N.J.A.C. 7:19-2.14(a)11 dealing with the mitigation of adverse impacts caused by a permittee upon another user of the resource, so that mitigation would only be required for other diversion permit holders. (9)

RESPONSE: This condition is intended to provide relief for any person whose ability to obtain water from the resource is impacted as a result of a new or changed diversion activity by a permittee. The Department therefore declines to make the suggested change.

22. COMMENT: In N.J.A.C. 7:19-2.14(a)15, the word "utilized" implies that a temporary failure to use diversion privileges will cause the permittee to forfeit them. Other wording should be used. (9)

RESPONSE: The Department agrees. The Water Supply Management Act states, at N.J.S.A. 58:1A-7(b), that the quantity of water may be limited to that "currently diverted, subject to contract, or reasonably required for a demonstrated future need." N.J.A.C. 7:19-2.14(a)15 has been clarified on adoption by replacing the word "utilized" with the wording from the Act.

N.J.A.C. 7:19-2.17 Short term water use and dewatering permits-by-rule

23. COMMENT: The two categories of permits-by-rule, for short-term water use and temporary dewatering from confined areas, will ease the burden on the regulated community, simplify the permitting process, and reduce the level of Departmental oversight. (4)

RESPONSE: The Department acknowledges this comment in support of the rules.

N.J.A.C. 7:19-3.5 Fees for water allocation permits

24. COMMENT: Initial fees for new applications should only be applicable for new well drillings and not wells which are already in existence and which have a State well drilling permit. (13)

RESPONSE: A well permit is issued for the construction of a well. Each well permit notes that the permit "conveys no rights, either expressed or implied, to divert water." Once a diversion is in excess of 100,000 gallons of water per day, the Water Supply Management Act requires that a water supply allocation permit be obtained. The "initial fee" is assessed for processing the application to divert water in excess of 100,000 gallons per day.

N.J.A.C. 7:19-4.6 Calculation of fees

25. COMMENT: A passing flow should be established for the Pequannock River at the Oak Ridge Dam in N.J.A.C. 7:19-4.7. (8, 11)

RESPONSE: Passing flows are recodified from N.J.A.C. 7:19-4.7 to N.J.A.C. 7:19-4.6 in the proposal. The historic passing flows listed therein are used solely in the calculation of excess diversion fees. The Newark reservoir system is considered a single diversion source and for this system the passing flow has been established at the Macopin Dam which is the most downstream point in the reservoir system. See also the response to Comment 8 above.

26. COMMENT: The rates for excess diversion fees should be increased. (8)

RESPONSE: The fee rates are set by statute at not less than $1.00 nor more than $10.00 per million gallon on a proportional basis relative to the amount of water in the stream and cannot be increased by rule. The actual fee is determined based upon the formula contained in the rules at N.J.A.C. 7:19-4.6(d). See also N.J.S.A. 58:2-2.

N.J.A.C. 7:19-8.2 Designation of areas of critical water supply concern

27. COMMENT: Aquifer pollution as it is applied to areas of critical water supply concern in N.J.A.C. 7:19-6.5(a)3 should be defined as salt water intrusion, as contaminants are a treatment issue. (9)

RESPONSE: The Department assumes the commenter is referring to N.J.A.C. 7:19-8.2(a)3. N.J.S.A. 58:1A-6(b) requires that where a significant threat to the long-term integrity of a water supply source is identified, the area must be designated an area of critical water supply concern. While many contaminants are treatable, the Department is attempting to contain contaminants and prevent their spread into areas of an aquifer which are not yet contaminated.

N.J.A.C. 7:19-8.3 Management of water allocations within areas of critical water supply concern

28. COMMENT: In N.J.A.C. 7:19-8.3(a), allowing only "existing diversion sources" in developing an alternative water supply source utilizing artificial recharge is unduly restrictive. (5)

RESPONSE: The Department agrees and has deleted the word "existing" from N.J.A.C. 7:19-8.3(a)3v on adoption. Artificial recharge facilities may include existing or new facilities. It was not the Department's intent to restrict articificial recharge to just existing sources.

29. COMMENT: The transfer of water allocation privileges between permittees must be allowed, and permittees must also be allowed to select their own alternative water supplies. (2)

RESPONSE: The Department supports the transfer of diversion privileges, provided that the transfer is not closer to the salt front in the aquifer or further degrade the condition of the water supply source. Permittees are required to select their own alternative water supplies in accordance with N.J.A.C. 7:19-8.3(d).

N.J.A.C. 7:19-8.5 Water Supply Critical Area II

30. COMMENT: In N.J.A.C. 7:19-8.5(b)3, why must a purveyor with sources in both the depleted and threatened zones utilize the year with the largest combined allocation in calculating its reduced allocation as this could possibly result in a smaller base allocation, if another year had larger withdrawals from the threatened zone? (5)

RESPONSE: The Department intended that, for withdrawals for permittees with sources in both the depleted and threatened zones, a single year would be used in determining the base allocation. Accordingly, N.J.A.C. 7:19-8.5(b)3 has been modified to eliminate the language which limited this determination to the single year with the largest combined withdrawals from the depleted and threatened zones.

31. COMMENT: The Department should not allow conservation credits to be sold, leased, or transferred from their geographic location, as it was clearly the intent of the Act to provide conservation credits to those purveyors who would be unduly threatened from a reduction in water supply based upon the purveyor's record of voluntary conservation. It was not the intent of the Act to give such purveyors additional water allocation to sell or transfer. (5)

RESPONSE: The Department acknowledges this comment in support of the rules and notes that N.J.A.C. 7:19-8.5(d)3 does prohibit the sale, lease, or transfer of conservation credits.

32. COMMENT: N.J.A.C. 7:19-8.5(d)3 contains language prohibiting the transfer of conservation credits which was not contained in the July 1993 amendments to the Act. This language lessens the value of these credits. (12)

RESPONSE: The statute only allows for the transfer of water allocation credits not water conservation credits. Water conservation credits are applicable to only one permittee and are granted so as to not penalize that permittee for implementing water conservation practices prior to the designation of areas of critical water supply concern. Conservation credits allow the permittee to divert additional water because of the previous investment the permittee made to implement conservation measures. This reduces the likelihood that the permittee must undertake additional investment to obtain alternative water supplies.

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33. COMMENT: It is inequitable to prohibit an industry's ability to transfer water conservation credits (N.J.A.C. 7:19-8.5(d)3). (2)

RESPONSE: Only conservation credits are prohibited from being transferred. An industry can transfer its base allocation exclusive of the conservation credits. See also responses to Comments 31 and 32 above.

34. COMMENT: The term "local use" as it is used in N.J.A.C. 7:19-8.5(d)4 is contradictory as the person passing water through an interconnection would be unlikely to have the franchise rights for the adjoining purveyor, and the language is not in conformance with the enabling legislation. (5)

RESPONSE: N.J.A.C. 7:19-8.5(d)4 has been changed upon adoption to delete the restriction that the transfer of additional volumes be for local use only, in order to make the provision consistent with the Act.

N.J.A.C. 7:19-8.6 Base allocation transfers

35. COMMENT: In N.J.A.C. 7:19-8.6(a) the word "and" should be replaced with "or," as this would allow individuals that do not have access to viable alternative supplies to obtain water allocation credits. (12)

RESPONSE: The Department intended to allow the transfer of base allocations to areas of anticipated growth or to areas where alternative supplies of water are not available. N.J.A.C. 7:19-8.6(a) has been modified upon adoption as suggested by the commenter in order to provide the needed flexibility for the transfer of base allocations.

36. COMMENT: A time period should be established for the review and approval of base allocation/water credit transfers. (5)

RESPONSE: N.J.A.C. 7:19-8.6(c) refers the applicant for transfer to N.J.A.C. 7:19-8.7 which indicates that such transfers will be handled through the permit modification process at N.J.A.C. 7:19-2.2, and 2.5 through 2.10, which have established time frames for review and approval of materials submitted.

37. COMMENT: The wording in N.J.A.C. 7:19-8.6(d) appears to leave open the possibility of a long-term lease, and a long term lease of 10 to 20 years should be allowed. (10)

38. COMMENT: The word "interim" in N.J.A.C. 7:19-8.6(d) should be defined. (10)

RESPONSE: Allowing the use of leased base allocations until a Department approved alternative is available (interim) allows a permittee to comply with the rules until its dependable long term alternative water supply is available. Leasing provides no guarantee of a future water supply except to the highest bidder at the time of a lease renewal. While this may provide profitable for the lessor, the lessee might end up without adequate water supplies if it was not the high bidder. Such an outcome would not be in the public interest. The Department is modifying this subsection to clarify when leasing could be approved.

39. COMMENT: The commenter supports the Department's finding in N.J.A.C. 7:19-8.6(d) that the leasing of base allocation should not be permitted except as an interim measure. Such an agreement would encourage investment of the lessee in a venture with no guarantee of future water supply, which in turn would put pressure on the County Water Allocation Credit Exchange and/or the Department to provide for additional allocation. This would be contrary to the intent of the enabling legislation. (5)

RESPONSE: The Department acknowledges this comment in support of the rules.

40. COMMENT: In N.J.A.C. 7:19-8.6(e) why is the person transferring (sending) the base allocation the applicant for base allocation transfer rather than the person receiving the base allocation? (5)

RESPONSE: The Department requires the transferring (sending) party to be the applicant so that the sender analyzes its own demands to ensure that it will retain adequate water to meet future demand.

N.J.A.C. 7:19-8.7 Base allocation and water supply allocation credit transfer program

41. COMMENT: The "assessment" of impact of a transfer of base allocation on the water resources and other users required in N.J.A.C. 7:19-8.7(a)3 should be no more stringent or burdensome than that currently required for existing permit modification requests. (5)

RESPONSE: The Department agrees. The receiving party, the permittee to which the base allocation is transferred, will at most be required to obtain a major permit modification in accordance with N.J.A.C. 7:19-1.5(a) if the transfer will result in a new source, increased pumping capacity or an increase in monthly allocation. Otherwise, the transfer will be considered a minor modification in accordance with N.J.A.C. 7:19-1.5(b).

42. COMMENT: The wording in N.J.A.C. 7:19-8.7(b)3 is unduly restrictive in not allowing transfers of allocation credits within a critical area in instances when the transfer may benefit the aquifer, the purveyors and the general public without degrading the condition of the aquifer. (2, 5, 12)

RESPONSE: The Department agrees. The language in the proposal makes it appear that there are three separate requirements to meet in N.J.A.C. 7:19-8.7(b)2, 3, and 4. The intent is to prevent the transfer of base allocation when the transfer would result in additional pumpage which is either closer to the salt water interface or at a lower potentiometric surface at a location that will degrade the condition of the aquifer. The Department is modifying the subsection so that it is not unduly restrictive in the transfer base allocations.

Summary of Agency-Initiated Change:

At N.J.A.C. 7:19-13.3(b)1, the Department is extending the exception to the adjustable water use ban to allow the watering of sod at commercial sod farms and of nursery stock at nurseries and retail outlets. This change is consistent with the State's current Drought Emergency Plan.

Executive Order No. 27 Statement

These readopted rules and adopted amendments and new rules are not adopted under the authority of or in order to implement, comply with or participate in any program established under Federal law, nor are they adopted under the authority of a State statute that incorporates or refers to Federal law, Federal standards, or Federal requirements. Accordingly, Executive Order No. 27 (1994) does not require a comparison with Federal law.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 7:19.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

7:14-8.1 Authority and purpose

(a) The purpose of this subchapter is to establish a civil administrative penalty policy governing the uniform assessment of civil administrative penalties. This subchapter shall also govern the Department's assessment of civil administrative penalties for violations of the Water Pollution control Act, N.J.S.A. 58:10A-1 et seq., including violation on any rule or regulation, water quality standard, effluent limitation, administrative order or permit issued pursuant to the Water Pollution Control Act, violation of the rules governing laboratory certification and standards of performance, N.J.A.C. 7:18, and for violations of the Act Concerning Pretreatment of Industrial Wastewater, N.J.S.A. 58:11-64 et seq.,the Water Supply and Wastewater Operators' Licensing Act, N.J.S.A. 58:11-64 et seq., and N.J.S.A.58:10A-21 et seq. (also known as the New Jersey Underground Storage of Hazardous Substances Act). In addition, this subchapter shall govern the Department's administrative assessment of costs pursuant to N.J.S.A. 58:10A-10d(1)(c). This subchapter shall also govern the procedure for requesting an adjudicatory hearing on a notice of civil administrative penalty assessment or an administrative order.

(b)-(e) (No change.)

7:14-8.3 Procedures for assessment, payment and settlement of civil administrative penalties, and affirmative defenses

(a) To assess a civil administrative penalty under the Water Pollution Control Act, the New Jersey Underground Storage of Hazardous Substances Act, and the Water Supply and Wastewater Operators' Licensing Act, the Department shall notify the violator by certified mail (return receipt requested) or by personal service. This Notice of Civil Administrative Penalty Assessment shall:

1.-4. (No change.)

(b)-(i) (No change.)

7:14-8.4 Procedures to request an adjudicatory hearing to contest an administrative order, a notice of civil administrative penalty assessment or a notice of civil administrative cost assessment; procedures for conducting adjudicatory hearings

(a) To request an adjudicatory hearing to contest an administrative order, a notice of civil administrative penalty assessment, or a notice of civil administrative cost assessment issued pursuant to

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the Water Pollution Control Act, the New Jersey Underground Storage of Hazardous Substances Act, or the Water Supply and Wastewater Operators' Licensing Act, the violator shall submit the following information in writing to the Department at Office of Legal Affairs, ATTENTION: Adjudicatory Hearing Requests, Department of Environmental Protection and Energy, CN 402, Trenton, New Jersey 08625-0402:

1.-9. (No change.)

(b)-(c) (No change.)

7:14-8.15 Water Supply and Wastewater Operators' Licensing Act civil administrative penalties

(a) The Department may assess a civil administrative penalty of not more than $5,000 per day for each violation of each provision of the Water Supply and Wastewater Operators' Licensing Act including, but not limited to, a violation of any rule, license, or administrative order issued pursuant thereto.

(b) The Department shall consider each violation of each provision of the Water Supply and Wastewater Operators' Licensing Act, or any rule, license or administrative order adopted or issued pursuant thereto, as a separate and distinct violation. Each day during which a violation continues shall constitute an additional, separate and distinct offense subjecting the violator to the penalty schedule set forth in (c) below.

(c) The Department shall assess a civil administrative penalty for each violation of each provision of the Water Supply and Wastewater Operators' Licensing Act and each violation of each provision of any rule, administrative order, permit or license as follows:

1.-3. (No change.)

(d) (No change.)

(e) The Department shall assess a civil administrative penalty against each violator who submits inaccurate information or who makes a false statement, representation or certification in any application, record or other document required to be submitted or maintained under the Water Supply and Wastewater Operators' Licensing Act, or who fails to submit or maintain any application, record, or other document required to be submitted or maintained under the Water Supply and Wastewater Operators' Licensing Act, or who falsifies, tampers with or renders inaccurate any monitoring device or method required to be maintained by the Water Supply and Wastewater Operators' Licensing Act, or the Water Supply Management Act. Each day, from the day of submittal of the false or inaccurate information to the Department to the day of receipt by the Department of a written correction of the inaccurate information or falsified statement, shall constitute an additional, separate and distinct violation. The Department shall determine the amount of the civil administrative penalty based on the conduct of the violator as follows:

1.-3. (No change.)

(f) (No change.)

7:19-1.1 Scope and authority

(a) This chapter shall constitute the Department's rules governing the establishment of privileges to divert water, the management of water quantity and quality, the issuance of permits, and the handling of drought warnings, water emergencies and water quality emergencies considered severe enough to constitute water emergencies pursuant to N.J.S.A. 58:1A-1 et seq., the Water Supply Management Act; N.J.S.A. 58:2-1 et seq., commonly known as the Excess Diversion Act; N.J.S.A. 58:12A-1 et seq., the Safe Drinking Water Act; N.J.S.A. 58:11-59 et seq., commonly known as the Small Water Company Takeover Act; and N.J.S.A. 58:4A-4.1 et seq., commonly known as the Subsurface and Percolating Waters Act. This chapter establishes the schedule and reporting procedures that persons having the capability to divert more than 100,000 gallons of water per day shall follow in order to establish their privilege to divert water and obtain a Water Supply Allocation Permit, a Temporary Dewatering Permit or a Water Use Registration. In addition, this chapter prescribes the application, review, notification and hearing procedures for establishing those privileges.

(b) This chapter also establishes the procedures for determining, assessing and collecting excess diversion fees; contract review and approval; areas of critical water supply concern; and water emergency allocation.

7:19-1.2 Construction

(a) This chapter shall be liberally construed to permit the Department to discharge its statutory functions under N.J.S.A. 58:1A-1 et seq., the Water Supply Management Act; N.J.S.A. 58:2-1 et seq., commonly known as the Excess Diversion Act; N.J.S.A. 58:12A-1 et seq., the Safe Drinking Water Act; N.J.S.A. 58:11-59 et seq., commonly known as the Small Water Company Takeover Act; and N.J.S.A. 58:4A-4.1 et seq., commonly known as the Subsurface and Percolating Waters Act.

(b) (No change)

7:19-1.3 Definitions

The following words and terms, when used in N.J.A.C. 7:19-1 through 4 and 7 though 17, shall have the following meanings, unless the context clearly indicates otherwise. The definitions applicable to N.J.A.C. 7:19-5 and 6 are set forth at N.J.A.C. 7:19-5.2 and 6.2, respectively.

...

"Adjustable water use ban" means the prohibition or restriction of adjustable water uses.

"Adjustable water uses" means those water uses which may be reduced during times of drought warning or water supply emergency. Various examples of adjustable water uses are contained in N.J.A.C. 7:19-13.3.

"Adverse impact upon wells" means an impaired pumping rate or a required change in the construction of a well affected by lowered water levels or any impairment of water quality.

"Annual fee" means a fee charged each calendar year during the period of validity of a permit, regardless if water is diverted from sources included in that permit.

"Applicable water purveyors" means all public-community water systems serving those areas in which Phase II of a water emergency has been initiated.

...

"Aquifer" means any subsurface water-saturated zone which is significantly permeable so that it may yield sufficient quantities of water from wells or springs in order to serve as a practical source of water supply.

"Aquifer storage and recovery well" or "ASR well" means a well which is utilized to store potable water in an aquifer during periods of low water demand and then recover the water for potable purposes during periods of high water demand.

"Area of critical water supply concern" or "critical area" means a region of the State where excessive water usage or diversion presents undue stress, or wherein conditions pose a significant threat to the long-term integrity of a water supply source, including a diminution of surface water due to excess groundwater diversion.

"Base allocation" means the permittee's portion of the safe or dependable yield for the affected water resource within an area of critical water supply concern.

"Capability to divert 100,000 gallons of water per day" means having the equipment or diversion structure with the hydraulic capacity to pump or divert 100,000 gallons per day of ground or surface water; for pumping equipment, the hydraulic capacity is equivalent to 70 gallons per minute.

"Certified diversion" means a diversion used for agricultural or horticultural purposes for which a water usage certification has been obtained pursuant to N.J.A.C. 7:20A.

"Chairman" means the Chairman of the Water Emergency Task Force who shall be designated by the Commissioner.

...

"Confined aquifer" means an aquifer which contains groundwater under pressure between or below relatively impermeable or significantly less permeable material so that the water surface rises above the top of the aquifer in a well which derives its water from that aquifer.

"Consumptive use" means any use of water diverted from surface or ground waters other than a nonconsumptive use as defined below in this section.

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"Customer of record" means any person, corporation, company, partnership, firm, association, political subdivision of the State, and any state or interstate agency or Federal agency receiving water service from an applicable water purveyor.

...

"Dewatering" means the diversion of ground water on a temporary basis from wells, wellpoints, excavations or sumps in order to facilitate construction.

"Diversion source" means the source from which water is diverted.

...

"Drought" means a condition of dryness due to lower than normal precipitation, resulting in reduced stream flows, reduced soil moisture and/or a lowering of the potentiometric surface in wells.

"Drought coordinator" means the individual designated by the Commissioner who is responsible for the administration and enforcement of N.J.A.C. 7:19-9 through 17.

"Drought warning" means the status declared by the Department, pursuant to N.J.A.C. 7:19-9.5, where there exists a relative lack of precipitation or a lower than normal storage of water supplies.

"Emergency response plan" means the document submitted by each water purveyor to the Department outlining the actions it will take to assure water supply during a water emergency.

"Emergency well" means a well which is maintained for an unplanned and/or unexpected use, such as fire protection or failure of another well.

"Excess diversion" means the amount of water diverted from streams and lakes with outlets for the purpose of public water supply in excess of the free allowance.

"Excess diversion fee" means the amount charged each person for its annual excess diversion or for the diversion from subsurface, well or percolating water supplies, where the State's right of eminent domain was used to condemn the water supply.

"Facility" means a structure or infrastructure designed and built for a specific purpose.

"Free allowance" means, for the purpose of calculating the excess diversion fee, the amount of water diverted from streams and lakes with outlets for the purpose of public water supply in an amount equal to 100 gallons daily for each inhabitant of the municipality or municipalities supplied, as shown by the census of 1905, or equal to such greater amount being legally diverted on June 17, 1907. Free allowances have been established in N.J.A.C. 7:19-4.8.

"Inactive well" means a well which is not presently being used but which is being held in abeyance for future use.

"Industrial users" means those non-residential users excluding multiple dwellings and health care facilities.

"Initial fee" means the fee charged by the Department for the review of an application for a new water supply allocation or temporary dewatering permit.

"Lawful entry" means an entry by the Commissioner into any building, place, or premise pursuant to N.J.S.A. 13:1D-1 et seq. and otherwise provided by law, ordinance, regulation, order, permit, or agreement.

"Local use" means the utilization of the privilege to divert water to supply those areas contained within a purveyor's franchise area, or supply area, as approved by the Department in accordance with this chapter.

"Local water emergency" means there exists or impends, within a purveyor's service area, a water supply shortage and/or water quality emergency which significantly impacts the purveyor's ability to meet water demands.

"Modification fee" means the fee charged by the Department for the review of an application for a major modification of a permit.

"Nonconsumptive use" means the use of water diverted from surface or ground waters in such a manner that it is returned to the surface or ground water at or near the point from which it was taken without substantial diminution in quantity or substantial impairment of quality.

"Non-residential users" means all water users other than residential users.

"Normal water rates" means the prevailing retail rates which were charged by the applicable water purveyors and which were in effect immediately preceding the declaration of a water emergency.

"Operating order" means structurally competent and equipped with a functioning pump or surface water intake.

"Passing flow requirement" means the volume of water required to be maintained at a selected point in the stream to promote water quality conditions after consideration of the needs of downstream users.

"Permit" means a water supply allocation permit or temporary dewatering permit.

...

"Phase" means the particular level of water emergency severity.

"Phase I" means the first stage of a water emergency during which available water supply levels are determined to be below normal and bans on adjustable water uses may be instituted.

"Phase II" means the second stage of a water emergency during which a more substantial threat to the public health and welfare exists and a specified reduction in water use may be mandated.

"Potentiometric surface" means an imaginary surface which represents the static head of water, relative to sea level, in a well constructed in an aquifer.

...

"Purveyor" or "water purveyor" means any person who owns or operates a public water supply.

...

"Residential users" means all users of water who reside in a single family home serviced with one meter, or in a multiple unit dwelling with no more than four units serviced with one meter. Where residential and non-residential users are serviced with the same meter, the users shall be classified as non-residential users.

"Safe or dependable yield" or "safe yield" or "dependable yield" means that maintainable yield of water from a surface or ground water source or sources which is available continuously during projected future conditions, including a repetition of the most severe drought of record, without creating undesirable effects, as determined by the Department in accordance with this chapter.

"Saline water" means water containing a chloride concentration in excess of 250 mg/L.

"Salt water" means water containing a chloride concentration in excess of 10,000 mg/L.

"Temporary dewatering permit" means a document issued by the Department to those persons intending to divert, for construction purposes, 100,000 or more gallons of water per day for more than 30 days in a consecutive 365 day period which allows the permittee to temporarily divert water at a rate which may exceed the natural replenishment of the water resource.

"Unconfined or semi-confined aquifer" means an aquifer that is either exposed to atmospheric pressure or bounded by layers of materials which do not serve as an effective barrier to water migration.

"Undiminished return" means, for the purpose of determining fees, the return of diverted surface or ground water to or near the point from which it was taken without substantial diminution in quantity.

"Violator" means any person whom the Department asserts has violated the Act or any rules issued pursuant to the Act.

"Water" or "waters of the State" means all surface water or ground water in the State.

"Water Conservation and Drought Management Plan" means the plan governing actions to be taken by a permittee under a drought warning or in a water emergency, and the permittee's ongoing effort to conserve water.

"Water emergency" means a declaration by the Governor, upon a finding by the Commissioner, that there exists or impends a water supply shortage and/or water quality emergency of a dimension which significantly impacts water supply and, thereby, endangers the public health, safety or welfare in all or part of the State.

"Water emergency fund" means that repository of all sums collected by the applicable water purveyors pursuant to the water

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emergency surcharge schedule which are in excess of the amounts which would have been collected under normal water rates.

"Water emergency surcharge schedule" means the rate schedule for the retail costs of water supplies which shall be utilized by applicable water purveyors, as provided by rule, in the event of a water emergency.

"Water Emergency Task Force" or "Task Force" means that State body consisting of inter-agency representatives whose purpose is to assist the Commissioner in the formulation of policy and make recommendations to the Commissioner during a water emergency. The Task Force shall be composed of representatives of the following agencies: the Department of Environmental Protection, the Department of Commerce and Economic Development, the Department of Education, the Department of Labor, the Department of Law and Public Safety, the Department of Community Affairs, the Board of Public Utilities, the Department of Agriculture, the Department of Health, the Department of Treasury, and other agencies as designated by the Commissioner.

"Water resource" means any river, stream, lake, pond, aquifer, other underground source, or other water body which may be diverted.

"Water supply allocation permit" means the document issued by the Department to a person granting that person the privilege, so long as the person complies with the conditions of the document, to divert 100,000 or more gallons of water per day for more than 30 days in a consecutive 365 day period, for any purpose other than agricultural or horticultural purposes.

"Water supply critical aquifer" means an aquifer within an area of critical water supply concern where there may be either insufficient water supply, shortage of ground water by overdraft, threat of salt water intrusion or contamination, or where other circumstances exist requiring the Department to impose special water supply management provisions by rule under N.J.A.C. 7:19-8.

"Water supply system" means a physical infrastructure operated and maintained to deliver water on either a retail or wholesale basis to customers.

"Water table aquifer" means a geological formation which carries water at atmospheric pressure at the top of the saturated zone.

"Water usage certification" or "certification" means the document issued by a county agricultural agent pursuant to N.J.A.C. 7:20A to a person granting that person the privilege to divert 100,000 gallons or more of water per day from ground and surface water sources for agricultural or horticultural purposes for a five year period.

"Well" means a hole or excavation deeper than it is wide, that is drilled, bored, core driven, jetted, dug or otherwise constructed for the purpose of the removal of, investigation of, or exploration for water.

. . .

"Zone of influence" is the area of ground water which experiences an impact attributable to a pumping well.

7:19-1.4 Applicability

(a) This chapter applies to all persons holding existing permits, or diverting, having the capability to divert, or claiming the right to divert more than 100,000 gallons of water per day either from a single source or a combination of sources, and to all persons intending to divert more than 100,000 gallons of water per day except as specified below:

1. Except for N.J.A.C. 7:19-8, and as noted in N.J.A.C. 7:19-9 through 17 this chapter does not apply to diversions for agricultural or horticultural purposes as defined in N.J.A.C. 7:20A-1.3.

2. This chapter does not apply to diversions of salt water except where the Department determines that the diversion and resultant usage may affect utilization of fresh water.

3. A permit shall not be required for a person receiving water from a water purveyor or for transfers of water from a permittee within the scope of an existing permit.

4. This chapter does not apply to persons who make emergency diversions of water for periods of less than 31 days. An emergency diversion includes the taking of water for the purpose of fire fighting, flood prevention, hazardous substance and/or waste spill response, or for other emergency purposes as determined by the Department. In all cases of emergency diversion, the person responsible for the diversion shall contact the Department within 48 hours of initiation of the emergency diversion. If the emergency diversion is expected to continue for 31 days or more, then the person initiating the emergency diversion shall apply for a water supply allocation permit within 30 days after initiating the emergency diversion.

(b) N.J.A.C. 7:19-9 applies to applicable water purveyors and their customers during a water emergency. N.J.A.C. 7:19-10 through 17 are applicable to water users during a water emergency and to water purveyors when the Department has identified an area of the State or the entire State as being in a drought warning condition.

(c) A temporary dewatering permit is required for the diversion of 100,000 gallons of water per day or more for more than 30 days in a consecutive 365 day period for construction purposes when the rate of diversion may exceed natural replenishment of the water resource. Temporary dewatering permit application requirements are set forth at N.J.A.C. 7:19-2.3.

(d) A short term water use permit-by-rule is required for the diversion of 100,000 gallons of water per day or more for less than 31 days in a consecutive 365 day period. The requirements for a short term water use permit-by-rule are set forth at N.J.A.C. 7:19-2.17(a).

(e) A dewatering permit-by-rule may be applicable in place of a temporary dewatering permit if any person intends to divert more than 100,000 gallons of water per day for construction related dewatering from coffer dams or a confined area where the impacts of the dewatering are contained. The requirements for a dewatering permit-by-rule are set forth at N.J.A.C. 7:19-2.17(b).

7:19-1.5 Major and minor permit modifications

(a) A major modification of a permit shall be obtained pursuant to N.J.A.C. 7:19-2.2 for the following:

1. A change in water use from that specified in the permit, or permit application, including any increase in the amount of consumptive use of 10 percent or greater.

2. A change in the location of the wastewater discharge of the water withdrawn pursuant to the permit, if the change in location of the wastewater discharge reduces the safe or dependable yield of the water resource or affects downstream permittees.

3. The relocation of an intake or well to a site more than 100 feet from the site specified pursuant to the permit;

4. The addition of a diversion source;

5. An increase in diversion capacity which results in an increased yield from the currently permitted diversion source;

6. An increase in daily or monthly or annual allocation; and/or

7. Any other requested modification to an existing permit condition which has the potential to cause an adverse impact either upon the water resource or upon other users of that resource.

(b) A minor modification of a water supply allocation permit or temporary dewatering permit may be effected pursuant to the following:

1. A permittee shall notify the Department in writing within 30 days of any change in the permittee's name and/or mailing address. The notification shall identify the permittee's current name, permit number, and address.

2. A permittee who enters into an agreement to sell a facility for which a permit has been issued shall notify the purchaser of the facility that the purchaser must obtain prior approval of the transfer of the permit from the Department. The permittee shall provide the Department with written documentation of this notification.

i. The purchaser of the facility shall submit a request for approval of the transfer of the permit in writing to the Department, 30 days prior to the purchase. The request shall include the permit number, the seller's name and mailing address, the effective date of transfer, the purchaser's name and mailing address and telephone number of the person responsible for communicating with the Department regarding the permit, and a statement that the purchaser has reviewed the permit and agrees to comply with its terms.

3. A permittee who installs a replacement well shall notify the Department in writing within 30 days of installation. The notification shall identify the location of the existing and the the replacement well, the pump capacity and depth of the existing and the replace-

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ment well, and the well permit number and local name or identifier for the existing and replacement well. The permittee shall submit to the Department a copy of the well abandonment report pursuant to N.J.A.C. 7:9-9.1 for the replaced well within 30 days of placing the replacement well into operation.

4. A permittee seeking a minor modification other than a minor modification specified in (b)1 through 3 above shall submit written information to the Department which demonstrates to the satisfaction of the Department that the proposed modification is not a major modification pursuant to (a)1 through 7 above. The Department will either modify the permit accordingly or notify the permittee that the proposed modification is subject to the requirements of N.J.A.C. 7:19-1.5(a) and 2.2.

7:19-1.6 Diversion source categories and requirements

(a) A permittee with an inactive well who intends to use the well in the future shall request in writing that the Department place the well on inactive status within the scope of the permit and shall:

1. Submit an initial inactive well inspection report on a form provided by the Department;

2. Submit a certification form, provided by the Department, by January 31 of each year thereafter. The permittee shall certify that the well is structurally sound, is protected from vandalism and contamination, and is not a threat to public health. If the permittee operated the inactive well during the year, the total number of hours and gallons pumped shall be reported on the certification form.

3. If the Department determines pursuant to N.J.S.A. 58:4A-4.1 et seq. that the inactive well has not been in operation for three or more years or is improperly maintained so as to pose a threat to the public health or the water resource, the Department will order the permittee to have the well sealed, by a New Jersey licensed well driller who is certified to seal wells, in accordance with N.J.S.A. 58:4A-4.1 et seq. and N.J.A.C. 7:9-9.

(b) A permittee shall maintain each active well in operating order, protect the well from vandalism and contamination, have the well accessible for inspection, operate the well at least once a year and report the amount of water diverted to the Department pursuant to N.J.A.C. 7:19-2.14(a)3. Any well not maintained in accordance with this subsection shall be considered inactive and subject to the requirements in (a) above. Each active well shall be contained within the scope of the permit with an associated allocation.

(c) A permittee shall maintain each emergency well in operating order, protect the well from vandalism and contamination, have the well accessible for inspection, operate the well at least once a year and report the amount of water diverted to the Department pursuant to N.J.A.C. 7:19-2.14(a)3. Each emergency well shall be contained within the scope of the permit but without an associated allocation.

(d) A permittee shall maintain each aquifer storage and recovery well in operating order, protect the well from vandalism and contamination, have the well accessible for inspection, operate the well at least once a year and report the amount of water diverted to the Department pursuant to N.J.A.C. 7:19-2.14(a)3. Each aquifer storage and recovery well is considered an active diversion source and shall be contained within the scope of the permit with an associated allocation.

(e) A permittee shall maintain each inactive, active, or emergency surface water diversion source pursuant to the requirements of (a), (b), or (c) above, as appropriate. The Department will establish a passing flow requirement for each surface water diversion source or ground water diversion that impacts a surface water source as follows:

1. In the case of a diversion source used for public water supply, the Department will establish the passing flow requirement in accordance with the criteria set forth in N.J.A.C. 7:19-4.6(f).

2. In the case of a diversion source used for a purpose other than public water supply, the Department will establish the passing flow requirement at a level that will not reduce the passing flow below the seven day, 10 year low flow as established by the United States Geological Survey.

3. If an applicant proposes a lower passing flow requirement than that established pursuant to (e)1 or 2 above, the applicant shall submit with the permit application, pursuant to N.J.A.C. 7:19-2.2, a detailed environmental impact study which demonstrates to the satisfaction of the Department that no adverse environmental impact will occur as a result of the proposed lower passing flow requirement.

4. The Department will temporarily increase the passing flow requirement established pursuant to (e)1 or 2 above if the Department determines such an increase is warranted to preserve the water quality of the diversion source.

5. The Department will not establish a passing flow requirement for a surface water diversion source if the seven day, 10 year low flow is zero; the stream flow is intermittent; or the size or nature of the watershed is such that a passing flow requirement is impractical.

6. The permittee shall ensure that the intake structure for the surface water diversion source is designed to maintain the passing flow requirement.

(f) A person with multiple diversion sources shall obtain a permit or registration, as applicable, for:

1. A facility or group of contiguous properties under common ownership which have a combined diversion capacity of more than 100,000 gallons of water per day;

2. All diversion sources under common ownership within a single municipality or within an area two miles square which have a combined diversion capacity of more than 100,000 gallons of water per day;

3. Up to 25 wells under common ownership which are part of an interconnected system which lie within an area comprised of a square three miles on each side;

4. Water supply systems which are interconnected, jointly used and jointly operated which have a combined diversion capacity of more than 100,000 gallons of water per day and which meet the criteria of (f)2 and/or 3 above; and

5. If the combined capacity of diversions pursuant to (f)1 through 4 above is less than 100,000 gallons per day the diversions shall be combined with other diversions under common ownership so that the combined diversion capacity is more than 100,000 gallons of water per day.

7:19-1.7 Unpermitted diversions

(a) Any person presently diverting or claiming the right to divert more than 100,000 gallons of water per day and who does not hold a valid permit is subject to penalties provided for under N.J.A.C. 7:19-1.8 and shall apply for a permit immediately.

(b) (No change)

(c) Any person who holds a Water Policy and Supply Council permit that was valid prior to February 10, 1982, but who did not reestablish that privilege to divert water as of February 10, 1982, shall apply for a permit immediately in accordance with N.J.A.C. 7:19-2.2.

(d) Any purveyor who, because of a local water emergency, needs to divert water from a diversion source for which the purveyor does not have diversion privileges under a permit pursuant to this chapter shall submit a written request for approval of such diversion to the Administrator of the Water Supply Element, CN-426, Trenton, New Jersey 08625. The purveyor shall be eligible for such an approval only if the following requirements are met:

1. The purveyor and/or the local governing body, as appropriate, shall give public notice a local water emergency exists;

2. The purveyor and/or the local governing body, as appropriate, shall impose mandatory water use restrictions and properly notify its water users;

3. The purveyor shall obtain the certification of a professional engineer or the licensed operator of the public water supply that the water from the unapproved diversion source meets the primary drinking water quality standards of N.J.A.C. 7:10. The certification of the water quality test results shall be submitted to the Department's Bureau of Safe Drinking Water for review and approval;

4. The purveyor shall apply for a major modification of its permit in accordance with N.J.A.C. 7:19-2.2 within 30 calendar days of the initiation of the diversion approved pursuant to this subsection;

5. The purveyor shall apply to the Bureau of Safe Drinking Water for a water works facilities approval in accordance with N.J.A.C.

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7:10-11 within 30 calendar days of the initiation of the diversion approved pursuant to this subsection; and

6. The purveyor shall use the diversion approved pursuant to this subsection only on a last on, first off basis until the permit modification pursuant to (d)4 above and water works approval pursuant to (d)5 above are granted.

7:19-1.8 Penalties

Failure by any person to comply with any requirement of the Act including, but not limited to, a violation of any rule, license, permit, administrative order or this chapter may result in a penalty in accordance with N.J.A.C. 7:19-18.

7:19-1.9 Program information

Unless otherwise specified, any questions concerning the requirements of N.J.A.C. 7:19-1 through 4 and 7 through 18 shall be directed to the Bureau of Water Allocation, Water Supply Element, New Jersey Department of Environmental Protection, CN 426, Trenton, New Jersey 08625. Questions concerning the requirements of N.J.A.C. 7:19-5 and 6 shall be directed to the Bureau of Safe Drinking Water, Water Supply Element, New Jersey Department of Environmental Protection, CN 426, Trenton, New Jersey 08625. A Technical Manual for each of these programs is available from Maps and Publications, Bureau of Revenue, CN-417, Trenton, New Jersey 08625.

7:19-1.10 General prohibition

No person shall divert water either from a single diversion source or from combined diversion sources at a rate in excess of 100,000 gallons of water per day without obtaining a Water Supply Allocation Permit or a Temporary Dewatering Permit, a Water Use Registration, or complying with the requirements for a Short Term Water Use Permit-by-Rule or Dewatering Permit-by-Rule in accordance with this chapter or a water usage certification in accordance with N.J.A.C. 7:20A.

7:19-1.11 (No change in text.)

SUBCHAPTER 2. PERMIT AND WATER USE REGISTRATION PROCEDURES; PERMITS-BY-RULE

7:19-2.1 Scope

This subchapter prescribes the procedures which shall be followed by applicants when applying for and the Department when processing applications for water supply allocation permits and temporary dewatering permits. This chapter also prescribes the requirements for short term water use and dewatering permits-by- rule and water use registrations.

7:19-2.2 Application requirements for water supply allocation permits

(a) An applicant for a water supply allocation permit or a major modification of a water supply allocation permit shall contact the Department in accordance with N.J.A.C. 7:19-1.9 to obtain current application forms and other instructions and information necessary to file a complete application.

(b) The applicant shall follow all the instructions, complete the application forms, obtain and prepare all other documents required by the instructions, and submit the completed application, other required information, and any applicable fees required pursuant to N.J.A.C. 7:19-3 to the Department.

(c) The applicant for the diversion of ground water shall provide a discussion of the geology, hydrogeology, and the expected impacts of the diversion both on the resource and on other users of that resource. An applicant whose application includes a new well, an increase in diversion capacity, and/or an increase in monthly or yearly allocation shall conduct a hydrogeologic test in accordance with New Jersey Geological Survey Geological Survey Report GSR 29, Guidelines for Preparing Hydrogeological Reports for Water-Allocation Permit Applications, with an Appendix on Aquifer-Test Analysis Procedures (GSR 29). These guidelines can be obtained by contacting the Department in accordance with N.J.A.C. 7:19-1.9. The Department shall waive this requirement if sufficient recent hydrogeologic information is obtained by the applicant to allow a comprehensive hydrological evaluation of the impacts of the proposed diversion in accordance with N.J.A.C. 7:19-2.2(d)5. In either case, a final hydrogeologic report completed in accordance with GSR 29 is required to be submitted with the application.

(d) The applicant for the diversion of surface water shall provide information on the watershed, including:

1. Size of drainage area to the diversion point;

2. Stream water quality classification;

3. Stream flow records, including flow duration curves and hydrographs. If there are no stream flow records the applicant shall contact the Department in accordance with N.J.A.C. 7:19-1.9 to determine the procedures to be followed for obtaining stream flow records for a similar stream and adapting those records for use;

4. Upstream and downstream diversions, and discharges including the volumes and locations thereof, and any information necessary for the applicant to determine impacts; and

5. A comprehensive hydrological evaluation of the proposed diversion and a discussion of the expected impacts of the proposed diversion both on the water resource and on upstream and downstream diversions and discharges.

(e) The applicant for the diversion of water shall provide a list of the following items, along with a United States Geological Survey topographical quadrangle map with the locations of the items identified thereon:

1. All permitted or certified diversions within a one mile radius, when diversions from a water table aquifer or a pond fed primarily by ground water are proposed;

2. All permitted and certified diversions within a five mile radius when a diversion from a confined or semi-confined aquifer is proposed;

3. The proposed withdrawal site, including latitude and longitude;

4. All water supply wells not listed pursuant to (e)1 and 2 above within the zone of influence of the proposed diversion source;

5. All landfills and ground water contamination sites within twice the estimated zone of influence of the proposed diversion up to one mile; and

6. (No change.)

(f) An applicant for a permit shall provide all information which may establish:

1. That the proposed diversion is in the public interest;

2. That the diversion shall not exceed the natural replenishment or safe yield of the water resources or threaten to exhaust such waters or to render them unfit for use;

3. That the plans for the proposed diversion are just and equitable to the other water users affected thereby, and that the withdrawal does not adversely affect other existing withdrawals, either ground or surface;

4. That, in the case of a ground water diversion, the proposed diversion will not cause an increase in saline intrusion that renders the water resource unfit for use; will not spread ground water contamination; and will not interfere with any ground water remediation plan or activity;

5. If permit application is made for a period longer than that listed in N.J.A.C. 7:19-2.14(a)1, reasons why a permit of such duration is required by economic considerations, including, for example, necessity of amortizing a new investment over an extended period of time, and the public interest; and

6. That any structures required for a proposed diversion are not located within a State-designated freshwater wetland or transition area. If this is not shown by submission of a map showing those wetlands or a written statement which identifies those wetland areas, the applicant shall comply with N.J.S.A. 13:9-1 et seq. and N.J.A.C. 7:7A.

(g) The applicant shall submit any other information which substantiates the need for the proposed allocation and supports the designated choice of water resource for the allocation. For diversions for nonpotable purposes the applicant shall analyze the availability and utilization of lower quality water and provide documentation that the diversion is of the lowest acceptable quality water considering the intended use.

(h) If the applicant fails to establish any of the items required pursuant to (f) and (g) above, or if the Department determines that

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a more viable alternative source of water is available, or if the proposed diversion is not in accordance with the New Jersey Statewide Water Supply Plan, the Department will deny the application.

(i) The applicant shall submit a Water Conservation and Drought Management Plan on forms provided by the Department, unless the diversion for which the applicant seeks a permit will be used for one of the following activities:

1. Ground water remediation;
2. Sand and gravel mining; or
3. Water which is returned to its source without a substantial diminution in quantity.

(j) The applicant shall submit a summary sheet which identifies all contracts which have been entered into for the bulk sale or purchase of water in accordance with N.J.A.C. 7:19-7.3.

(k) The applicant for a water supply allocation permit shall, upon submission of an initial, renewal or modification application, sign the following certifications on the application forms:

1. "I certify under penalty of law that the information provided in this document is true, accurate and complete. I am aware that there are significant civil and criminal penalties for submitting false, inaccurate or incomplete information, including fines and or imprisonment." This certification shall be signed by the highest ranking individual at the facility with overall responsibility for that facility.

2. "I certify under penalty of law that I have personally examined and am familiar with the information submitted in this application and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant civil and criminal penalties for submitting false, inaccurate or incomplete information, including the possibility of fine and/or imprisonment." This certification shall be signed as follows:

i. For a corporation, by a principal executive officer of at least the level of vice president;

ii. For a partnership or sole proprietorship, by a general partner or the proprietor, respectively; or

iii. For a municipality, State, Federal or other public agency, by either the principal executive officer or ranking elected official.

3. Where the highest ranking corporate, partnership, or governmental officer or official at the facility required to certify pursuant to (k)1 above is the same person as the official required to certify pursuant to (k)2, only the certification in (k)1 shall be made. In all other cases, the certifications required pursuant to both (k)1 and 2 shall be made.

(l) The applicant shall submit evidence that the flow meters on all existing diversion sources have been calibrated to within five percent accuracy in the five years prior to the date of application, unless exempted under N.J.A.C. 7:19-2.14(a)4.

7:19-2.3 Application requirements for temporary dewatering permits

(a) An applicant for a temporary dewatering permit shall contact the Department in accordance with N.J.A.C. 7:19-1.9 to obtain current application forms and other instructions and information necessary to file a complete application. ***The applicant for the temporary dewatering permit shall be the project owner or utility responsible for the construction and not the contractor.***

(b) The applicant shall follow all the instructions, complete the application forms, obtain and prepare all other documents required by the instructions, and submit the completed application, other documents, required information and any applicable fees required pursuant to N.J.A.C. 7:19-3 to the Department.

(c) The applicant shall list the depth to water, the corresponding surface elevations, and the projected depths of excavations and dewatering over the work site.

(d) The applicant shall discuss the geology, hydrogeology, and the expected impacts of the proposed diversion both on the resource and other users of the water resource.

(e) The applicant shall provide a list of the following items, along with a United States Geological Survey topographic quadrangle map with the locations of the items identified thereon:

1. The proposed withdrawal site, including latitude and longitude;
2. All water supply wells within a one-quarter-mile radius; and
3. All landfills and ground water contamination sites within a one-quarter-mile radius.

(f) If dewatering will occur at a depth of greater than 50 feet, the Department may require the applicant to identify the items required pursuant to (e)2 and 3 above at a radius greater than one-quarter-mile.

(g) The applicant shall provide all information which establishes:

1. That the proposed diversion is in the public interest;
2. That the plans for the proposed diversion are just and equitable to the other water users affected thereby, and that the withdrawal does not adversely affect other existing withdrawals, either ground or surface; and
3. That the proposed diversion will not reduce the dry season flow of any river or stream so as to adversely affect the river or stream.

(h) Each applicant for a temporary dewatering permit shall, upon submission of an initial, modification or renewal application sign the certifications on the application forms in accordance with N.J.A.C. 7:19-2.2(k).

7:19-2.4 Application requirements for renewal of permits

(a) Applications for renewal of current permits shall be submitted three months prior to expiration of the current permit.

(b) Applicants for renewal of current permits shall submit appropriate application forms and other information as requested of a specific applicant by the Department for the proper implementation of the Act and this chapter. Copies of the application forms are included in the 1993 Technical Manual for Water Allocation Permits, prepared by and available from the Department in accordance with P.L. 1991, c.422 (N.J.S.A. 13:1D-111 et seq.), as updated or revised.

(c) If the permittee does not comply with (a) and (b) above, the Department may:

1. (No change.)
2. Take appropriate enforcement action including the assessment of penalties under N.J.A.C. 7:19-18; and
3. Require the permittee to file an application as a new applicant in accordance with N.J.A.C. 7:19-2.2 or 2.3 and pay the initial fee and annual fee as set forth in N.J.A.C. 7:19-3.

(d) In order to prioritize its workload, the Department may, in its discretion, grant a one-time extension of a permit for a period not to exceed one year.

(e) A current permit for which a complete renewal application package is submitted to the Department three months prior to the expiration date shall remain in effect until the Department grants or denies the renewal application.

7:19-2.5 Application review

(a) The Department will make a preliminary review of each application as follows:

1. If the application does not contain all documents and information required pursuant to N.J.A.C. 7:19-2.2 through 2.4, the Department may, at its discretion, within 20 working days of receipt of the application, return the application or advise the applicant in writing as to the additional information required to make the application administratively complete and the date by which the additional information must be received by the Department. If an application is returned, the applicant will be advised in writing as to the additional information required to make the application complete.

2. If the application contains all documents and information required pursuant to N.J.A.C. 7:19-2.2 through 2.4 and is determined to be administratively complete, the Department, within 20 working days of receipt of the application, will so advise the applicant in writing.

(b) The Department will make a technical review of each application within 20 working days after it declares the application administratively complete as follows:

1. If the application does not contain sufficient technical information as required pursuant to N.J.A.C. 7:19-2.2 through 2.4 or if the technical information requires clarification, the Department will so advise the applicant in writing and establish a date by which ad-

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ditional or clarifying information must be received by the Department. If additional or clarifying information is not received by the specified date, the Department may:

i. Return the application; or

ii. Extend the date by which the applicant must provide the additional or clarifying information; or

iii. Deny the application.

(c) The Department will perform a detailed analysis of the technically complete application and will develop a staff recommendation to issue the permit or deny the application. The staff recommendation will include any conditions to be attached to the permit if the recommendation is to issue the permit or an explanation of the reasons for denial if the recommendation is to deny the application.

(d) The Department will issue a permit renewal, with any conditions deemed appropriate by the Department, for the same allocation, except that the Department may, after notice and public hearing, if requested ***by the applicant***, pursuant to N.J.A.C. 7:19-2.7 through 2.11, reduce the allocation to that quantity currently diverted, subject to contract, or reasonably required for a demonstrated future need.

7:19-2.6 Opportunity to review application by interested parties

Once the Department determines that an application is administratively complete in accordance with N.J.A.C. 7:19-2.5(a), the application may be reviewed in person at the Department by any interested parties and copies may be obtained from the Department upon payment of the fee for duplication prescribed by law.

7:19-2.7 Public notice and preliminary decision

(a) The Department, following its determination that the application ***for a new permit or major modification of a permit*** is technically complete pursuant to N.J.A.C. 7:19-2.5(b), will:

1. Publish a notice of application for a water supply allocation permit or temporary dewatering permit in a newspaper of general circulation in the area affected by the proposed diversion. The notice shall contain:

i. A description of the proposed diversion, including but not limited to the source, location, quantity and/or allocation of water to be diverted.

ii. The date of the close of the public comment period on the application, which shall be at least 30 days from the date of publication of the notice of application for a water supply allocation permit, or at least 14 days from the date of publication of the notice of application in the case of a temporary dewatering permit or a local water emergency.

iii. A statement that written comments, arguments or objections to the application may be submitted until the end of the public comment period; and

iv. A statement that a hearing shall be scheduled if any interested party, including the applicant or the Department, so requests in writing, before the end of the comment period. The Department will provide notice of the hearing date in accordance with (d) below; and

2. Notify, in writing, the applicant, the governing bodies of municipalities and counties and water allocation permittees, certification holders, and water use registrants within a one mile radius of the diversion and officials of existing public water systems within a five mile radius of the proposed diversion. If a proposed diversion might impact upstream or downstream diversions, the Department will notify all affected governing bodies and permittees in the watershed that may be affected by the proposed diversion.

(b) Once the notice of application is published pursuant to (a)1 above, the applicant shall not make any changes to its application, which would be considered a major modification pursuant to N.J.A.C. 7:19-1.5.

(c) Between the date of publication of the notice of application and the scheduled date for the close of the public comment period, the Department will review the application and any written comments received. The Department will develop a staff recommendation to either grant or deny the application. The staff recommendation will include any conditions to be attached to the permit if the recommendation is to issue the permit or an explanation of the reasons for denial if the recommendation is to deny the application. The staff recommendation will be mailed to the applicant to be commented on or objected to approximately 14 days prior to the close of the public comment period, and will be available at the Department for public review during this period.

(d) If the Department does not receive a request for a hearing on the application pursuant to (a) above, the Department will issue a permit or deny the application.

(e) If the Department does receive a request for a hearing on the application pursuant to (a) above, the Department will:

1. Schedule a public hearing, publish a notice of hearing on the application in a newspaper of general circulation in the area affected by the proposed diversion that is the subject of the application at least 30 days prior to the hearing on an application for a water supply allocation permit or 14 days prior to the hearing in the case of an application for a temporary dewatering permit or a local water emergency; and

2. Notify, in writing, the applicant, governing bodies of municipalities and counties and water allocation permittees, certification holders and water use registrants within a one mile radius of the diversion and officials of existing public water systems within a five mile radius of the proposed diversion. If a proposed diversion might impact upstream or downstream diversions, the Department will notify all affected governing bodies and permittees in the watershed.

(f) The notice of hearing in (e) above shall contain:

1. A description of the application;

2. The hearing date and location; and

3. A statement that written comments, arguments or objections to the application may be submitted to the Department until the close of business on the day on which the hearing is held or to the hearing officer at the public hearing.

7:19-2.8 The public hearing

(a) (No change.)

(b) The Department will designate a hearing officer to preside at the public hearing.

(c) At the public hearing, the Department will present the staff recommendation to issue a permit or deny the application.

Recodify existing (b)-(c) as (d)-(e) (No change in text.)

(f) The Department will certify the costs of publication of the notice of application and notice of hearing, and all costs of the stenographic record to the applicant. The applicant shall pay the costs as billed by the Department by the specified due date. Payment in full of these costs shall be a condition of the final permit.

7:19-2.9 Final staff review and Hearing Officer's Report

(a) The Department will review the hearing transcript in conjunction with the application and written comments timely received and will develop, if necessary, an addendum to the staff recommendation prepared pursuant to N.J.A.C. 7:19-2.7(c). The Department will forward the addendum to the hearing officer.

(b) The hearing officer shall review the application, comments received, the hearing transcript, the staff recommendation, and addendum, if any. The hearing officer shall prepare and submit written findings and recommendations in the form of a Hearing Officer's Report to the decision maker for a final decision on the application for a permit.

7:19-2.10 Decision making

(a) The decision maker shall review the staff recommendation and addendum, if any, and the Hearing Officer's Report and set forth in the Decision Maker's Statement the decision to issue a permit or deny the application. If the decision is to issue a permit, the Decision Maker's Statement shall include any conditions to be attached to the permit.

(b) The decision maker may review any other documents submitted during the review process and will use his or her professional judgment when making a decision.

(c) The permit shall be issued or denied after the Decision Maker's Statement has been issued and all applicable fees have been paid.

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7:19-2.11 Notification of decision

The applicant shall be notified in writing of the Department's decision to issue a permit or deny the application. In addition, all persons who testified at the public hearing, or who provided written comments or requested notification of the decision on the permit application, shall be notified by letter of the decision.

7:19-2.12 Record of decision

(a) The Department shall maintain for each application a record that consists of the following:

1. The application documents;
2. Staff recommendation and addendum, if any;
3. The Hearing Officer's Report and hearing transcript;
4. The Decision Maker's Statement;
5. Written comments received; and
6. The permit or letter of denial.

(b) (No change.)

7:19-2.13 Request for adjudicatory hearing

(a) An applicant ***or any person, subject to the limitation on third party appeal rights set forth in P.L. 1993, c.359 (N.J.S.A. 52:4B-3.1 through 3.3),*** who believes himself or herself to be aggrieved, with respect to decisions made by the Department regarding any permit, permit condition, or application denial may contest the decision and request a contested case hearing pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and the New Jersey Uniform Administrative Procedure Rules N.J.A.C. 1:1, if the Department:

1. (No change.)
2. Revokes, withdraws or modifies a previously issued approval;
3. Denies a contract for the sale of water under N.J.A.C. 7:19-7; or
4. Issues a permit with conditions that the applicant considers unreasonable.

(b) Requests for a contested case hearing shall be submitted to:

Office of Legal Affairs
ATTENTION: Adjudicatory Hearing Requests
Department of Environmental Protection
CN 402
Trenton, New Jersey 08625-0402

(c) (No change.)

(d) All requests for a contested case hearing shall be submitted *[by the applicant]* in writing to the Department and shall contain:

1.-2. (No change.)

3. A brief and clear statement of specific facts describing the Department decision being appealed, as well as the nature and scope of the interest of the requester in such decision; *[and]*

4. A statement of all facts alleged to be at issue and their relevance to the Department decision for which a hearing is requested. Any legal issues associated with the alleged facts at issue must also be included*[.]***; and***

5. In the case of a person who believes himself or herself to be aggrieved, the constitutioal and statutory grounds entitling the person to a hearing and all documents supporting such assertions.

(e) A hearing request not received within 20 days after receipt of the notification by the applicant shall be denied by the Department.

(f) A hearing request based upon a permit condition which was contained in a prior permit held by the applicant and not objected to previously or on an issue not raised by the applicant during the public comment period shall be denied by the Department.

(g) A hearing request based upon a permit condition that the applicant requested in its application shall be denied by the Department.

(h) If the applicant ***or any person requesting a hearing pursuant to (a) above*** fails to include all the information required by (d) above, the Department may deny the hearing request.

Recodify existing (g)-(h) as (i)-(j) (No change in text.)

(k) If a permittee pursues a judicial appeal of the Department's final decision on the permit, the permit as issued shall remain in effect pending a decision on said appeal.

7:19-2.14 Permit conditions

(a) Each permit shall contain specific and general conditions including, but not limited to, the following:

1. The term of the permit. The maximum term of a permit shall not exceed 10 years;
2. (No change)
3. That the monthly diversion amount be reported on a quarterly basis on forms provided by the Department. The quarters shall end on March 31, June 30, September 30, and December 31. The reports shall be submitted within 30 days after the close of the quarter.
4. That all diversion sources be equipped with totalizing flow meters which shall be calibrated at least every five years with the following exceptions:

i. Sources whose sole use is to supply water for purposes of fire protection;

ii. Sand and gravel operations using water for media transport; and

iii. Sources for which the permittee demonstrates that the installation of a totalizing flow meter is impractical or unreasonable;

5. Any permittee with a diversion source that meets the requirements of (a)4i, ii or iii above may estimate the diversion quantity using an accurate and reasonable method approved by the Department. The permittee shall verify the method for accuracy every five years;
6. Passing flow requirements for surface water sources or ground water sources that influence surface water sources;
7. That the static water levels for ground water sources be determined and reported on the quarterly diversion report pursuant to (a)3 above;
8. Allow the transfer of a permit, with the consent of the Department, but only for the identical use of the waters by the transferee;
9. That, in areas of potential for salt water intrusion, a raw water sample be tested for chloride and/or sodium concentration and the result be reported on the quarterly diversion report pursuant to (a)3 above;
10. That the permittee adopt and implement, to the satisfaction of the Department, a Water Conservation and Drought Management Plan. A Water Conservation and Drought Management Plan status report on all measures that have been implemented shall be submitted by the date specified in the permit. Any permittee not required to submit such a plan pursuant to N.J.A.C. 7:19-2.2(i) is exempt from this requirement;
11. That the permittee is responsible for mitigating adverse impacts on ground or surface waters or the users thereof caused as a direct result of their diversion;
12. That the Department may modify or revoke the permit, after notice and after hearing, if requested, for violations of permit conditions, rules adopted or orders issued by the Department, and when deemed necessary for the public interest;
13. That, if the water diverted is used for non-potable purposes, the permittee investigate the feasibility of water reuse;
14. That the water diverted be used for approved purposes;
15. That, if the authorized diversion privileges are not *[utilized]* ***currently diverted subject to contract, or reasonably required for a demonstrated future need***, they shall revert back to the State upon renewal or modification of the permit;
16. That, where a diversion may exceed the natural replenishment, the permittee may be required to install a monitoring well to document the impacts of the diversion upon the aquifer; and
17. That the Department may require a hydrogeologic test if the new diversion causes impacts which contradict the hydrogeologic information submitted with the permit application.

(b) The permittee shall allow the Department and/or its designated representative to:

1. Enter and inspect any site, building or equipment, or any portion thereof, owned or operated by the permittee, at any time, in order to ascertain compliance or non-compliance with N.J.S.A. 58:1A-1 et seq., 58:4A-4.1 et seq., 58:12A-1 et seq., these rules, or any other agreement or order issued or entered into pursuant thereto. Such right shall include, but not be limited to, the right to require the testing of any equipment at the facility, to sketch or photograph

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any portion of the site, building or equipment, to copy or photograph any document or records necessary to determine such compliance or non-compliance, and to interview any employees or representatives of the owner, operator or applicant. Such right shall be absolute and shall not be conditioned upon any action by the Department, except the presentation of approprate credentials as requested and compliance with appropriate standard safety procedures.

2. The permittee, and any employees or representatives thereof, shall assist and shall not hinder or delay the Department and/or its designated representative in the performance of all aspects of any inspection. This assistance includes allowing the Department and/or its designated representative to accompany the permittee while performing any regulated activity at a particular building or property for the purpose of inspection of those activities. During such inspection by the Department and/or its designated representative, the permittee shall operate equipment under normal routine operating conditions or under such other conditions as may be requested by the Department. The permittee shall, upon request, make available such sampling and measurement equipment to the Department as needed for the purpose of making comparative measurements.

(c) The permittee shall protect each diversion source from vandalism, tampering, and contamination at all times. Department approved protection methods include:

1. Locked well/pump house;
2. Location within a locked, secure fenced area;
3. A locked, secure hatch or cover; and/or
4. 24 hour security at the diversion.

7:19-2.15 Procedures for the recalling of a permit for modification or revocation

(a) (No change.)

(b) Prior to revoking or modifying the permit, the Department shall provide the permittee with notice and a public hearing, if requested, in accordance with the procedure set forth at N.J.A.C. 7:19-2.8.

(c) (No change.)

(d) The costs of the hearing shall be paid in accordance with N.J.A.C. 7:19-2.8(f).

(e) The hearing officer shall issue a Hearing Officer's Report in accordance with the procedures set forth at N.J.A.C. 7:19-2.9, and the decision maker shall render a decision in accordance with the procedure set forth at N.J.A.C. 7:19-2.10.

(f) The permittee shall be notified of the Department's decision in accordance with the procedure set forth at N.J.A.C. 7:19-2.11.

(g) Apermittee whose permit has been revoked or modified by the Department pursuant to this section may request an adjudicatory hearing in accordance with N.J.A.C. 7:19-2.13.

7:19-2.16 Permit cancellation

(a) A permittee may request the cancellation of its water supply allocation or temporary dewatering permit as follows:

1. If the permittee's water usage has declined below 100,000 gallons of water per day for more than 30 days in a consecutive 365 day period, the permittee shall submit to the Department a written request for the cancellation of the permit and assignment of a water use registration number in accordance with N.J.A.C. 7:19-2.18.

2. If the permittee does not intend to use a well or wells, the permittee shall submit to the Department a written request for the cancellation of the permit and shall seal any such well in accordance with N.J.A.C. 7:9-9.

3. If the permittee has no current water demand but may use its well in the future, the permittee shall submit to the Department a written request for cancellation of the permit and placement of the well on the Department's list of inactive wells.

7:19-2.17 Short term water use and dewatering permits-by-rule

(a) Any person intending to divert more than 100,000 gallons of water per day for less than 31 days within a consecutive 365 day period may be authorized for such a diversion under a short term water use permit-by-rule, provided such person:

1. Completes and submits a short term water use permit-by-rule notification on a form provided by the Department, at least 30 days prior to the initiation of the diversion. This form is included in the 1993 Technical Manual for Water Allocation Permits, prepared by and available from the Department in accordance with P.L. 1991, c.422 (N.J.S.A. 13:1D-111 et seq.), as updated or revised.

2. Repairs or replaces, as necessary, any well or surface water supply system which is damaged or goes dry, has reduced capacity or reduced water quality, or is otherwise rendered unusable as a result of the diversion authorized pursuant to this subsection; and

3. Submits a short term water use report on a form provided by the Department specifying the amount of water diverted each day during the duration of the diversion authorized pursuant to this subsection.

(b) Any person intending to divert more than 100,000 gallons of water per day for construction related dewatering may be authorized for such diversion under a dewatering permit-by- rule if the diversion is from a coffer dam or a confined area where the impacts of dewatering are contained, provided such person:

1. Submits a letter describing the proposed dewatering, its location, and the dewatering methods to be used to the Department at least 30 days prior to the initiation of the diversion; and

2. Repairs or replaces, as necessary, any well or surface water supply system which is damaged or goes dry, has reduced capacity or reduced water quality, or is otherwise rendered unusable as a result of the diversion authorized pursuant to this subsection.

7:19-2.18 Water use registration requirements

(a) Any person who presently has the capability to divert more than 100,000 gallons of water per day who diverts less than that quantity and who does not have current registration, shall immediately register with the Department on forms provided by the Department. The forms shall be completed in its entirety or the application for registration will be returned so that the applicant can provide any missing information. A site map indicating the location of each diversion source shall also be submitted. Each person who applies for registration shall list in the application the State-assigned well permit numbers pursuant to N.J.S.A. 58:4A-14. Within 20 working days following receipt of the application for registration by the Department, the Department will assign a water use registration number.

(b) Each person with a water use registration shall submit an annual report by January 31 of each year detailing metered monthly water usage for the preceding calendar year on forms provided by the Department.

(c) All diversion sources shall be equipped with totalizing flow meters, which shall be calibrated at least once every five years, within 60 days of assignment of a water use registration number by the Department or within 60 days of completion of a well, whichever occurs last. If the diversion source is used solely for the purpose of fire protection or if the registrant demonstrates to the satisfaction of the Department that the installation of a totalizing flow meter is impractical or unreasonable, the registrant may estimate diversion quantities using an accurate and reasonable method approved by the Department.

7:19-3.2 Purpose

The purpose of this subchapter is to establish fees for the water allocation program set forth in N.J.A.C. 7:19-1 and 2 based upon and not to exceed the estimated cost of processing, monitoring, administering and enforcing water supply allocation and temporary dewatering permits. The fee schedule shall be annually reviewed with respect to any changes in the costs of processing, monitoring, administering and enforcing water supply allocation and temporary dewatering permits. The expenses of public hearings to be charged to applicants by the Department pursuant to N.J.A.C. 7:19-2.8(f) shall not be included in the calculations of the fee schedule set forth in this subchapter.

Recodify existing 7:19-3.4 and 3.5 as 3.3 and 3.4 (No change in text.)

7:19-3.5 Fees for Water Allocation Permits

(a) All applicable fees shall be paid in accordance with the fee schedule established in N.J.A.C. 7:19-3.6. Any person who applies

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for a new permit or to modify an existing permit shall submit along with the application, the applicable initial or modification fee set forth in N.J.A.C. 7:19-3.6 based on the class of the allocation, listed in (d) below.

(b) Each applicant for a new permit or a major modification of a permit shall pay the appropriate annual fee upon issuance of the permit or modification as follows:

1.-4. (No change.)

(c) Any applicant who fails to complete necessary forms, fails to comply with other permit application requirements or who fails to provide information within the time frame(s) established by the Department, shall pay the annual fees which would have been due if the forms, information and application had been completed in a timely manner, except where the Department grants an extension of time prior to an associated due date.

(d) An applicant for a permit shall be placed in the appropriate class below based on the size of the allocation approved in terms of a daily average, based upon a 31 day month:

1.-6. (No change.)

(e) For the purpose of assessing fees under this subchapter, if any ground water diversion in excess of 100,000 gallons per day is included in a permit, the fee for the permit shall be computed using the ground water schedule for the total monthly allocation for all sources within the scope of the permit. A diversion from a pond fed primarily by ground water is considered a ground water diversion.

(f) Any hearing costs shall be paid in full upon issuance of the permit. If the application has been withdrawn after the public hearing or if the application is denied, the hearing costs shall be paid by the specified due date of the bill.

(g) If a water supply allocation permit application is withdrawn after the notice of application has been published, the applicant shall be responsible for payment of the cost of publication of the notice.

(h) In accordance with N.J.S.A. 13:1D-120 through 124, an applicant for a new or modified permit for which the application fee exceeds $1,000 may pay such fee in three equal installments. The first installment is due at the time the applicant submits the application for the permit. The second installment is due when the Department notifies the applicant that the permit application is administratively complete. The last installment is due when the Department takes final action on the application.

7:19-3.6 Fee schedule

(a) Fees shall be charged for permits, as applicable, pursuant to the following schedules:

Water Allocation Permit Fee Schedule

	Class 1	Class 2	Class 3	Class 4	Class 5	Class 6
1. Initial fees:						
i. Surface water diversions	$2220	$2500	$3225	$5560	$6075	$6590
ii. Ground water diversions	$2780	$3120	$4030	$6950	$7570	$8085
iii. Ground and surface water diversions in which waters are returned undiminished to the source	$1325	$1775	$2220	$2670	$3080	$3495
iv. Dewatering diversions	$2700	$2700	$2700	$6900	$6900	$6900
2. Modification fees:						
i. Surface water diversions	$1030	$1165	$1505	$2595	$3110	$3625
ii. Ground water diversions	$1295	$1455	$1875	$3240	$3755	$4270
iii. Ground and surface water diversions in which waters are returned undiminished to the source	$ 615	$ 825	$1140	$1245	$1345	$1450
iv. Dewatering diversions	$1200	$1200	$1200	$3200	$3200	$3200
3. Annual fees:						
i. Surface water diversions	$1070	$1255	$2150	$3705	$4735	$5765
ii. Ground water diversions	$1440	$1665	$2685	$4635	$5665	$6695
iii. Ground and surface water diversions in which waters are returned undiminished to the source	$ 470	$ 770	$1480	$1780	$2080	$2375
iv. Dewatering diversions	$1400	$1400	$1400	$4600	$4600	$4600

7:19-3.7 Payment of annual fee

(a) The Department will send to each permittee an invoice for the next subsequent calendar year's annual fee by December 31 of each calendar year.

(b) Each permittee shall remit the annual fee by March 1 of the calendar year for which the fee is due.

(c) Payments shall be by check or money order made payable to "Treasurer, State of New Jersey," and mailed, with the invoice, by the due date set forth in (a) above to:

Bureau of Revenue
CN 417
Trenton, New Jersey 08625

(d) For each permit issued, the Department will send the permittee an invoice for the applicable annual fee for the remainder of the year in which the permit is issued pursuant to N.J.A.C. 7:19-3.5(b). Payment shall be made by the due date specified in the invoice.

7:19-3.8 Failure to timely submit the annual fee payment

Failure to pay the annual fee by the due date established pursuant to N.J.A.C. 7:19-3.7 shall be considered a violation of the Act subject to the penalty provisions of N.J.A.C. 7:19-18. The Department shall deem such failure to pay the annual fee a voluntary termination and surrender of the permit by the permittee. Any permittee who fails to pay their annual fee by the established due date shall terminate all diversion activity as of the established due date.

SUBCHAPTER 4. PROCEDURES FOR DETERMINING, ASSESSING AND COLLECTING PAYMENTS FOR EXCESS WATER DIVERSION

7:19-4.3 (No change in text.)

7:19-4.4 Diversion reporting requirements

(a) All persons diverting water shall report the quantity diverted each month to the:

Bureau of Water Allocation
CN 426
Trenton, New Jersey 08625

(b) These reports shall be submitted in accordance with N.J.A.C. 7:19-2.14(a)3.

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7:19-4.5 Schedule for calculating and making payment of the amount due pursuant to N.J.S.A. 58:2-1 et seq.

(a) The Department shall calculate each diverter's excess diversion fee in accordance with the methodology set forth in N.J.A.C. 7:19-4.6 and certify the amount due from each diverter to the State Comptroller of New Jersey each year.

(b) The State Comptroller, through the Bureau of Revenue, shall notify each diverter of the amount it owes the State and the date on which payment is due.

(c) Payments shall be payable to the Treasurer, State of New Jersey and mailed by the due date to:

Bureau of Revenue
CN 417
Trenton, New Jersey 08625

7:19-4.6 Calculation of fees

(a) The Department shall segregate from the quarterly diversion reports those portions of the total diversion from surface water for the purpose of public water supplies subject to the charges authorized by N.J.S.A. 58:2-1 et seq.

1. The Department shall use the diversion reports of the supplier of water in cases where there is a difference between the supplier's and recipient's report on the quantity of water diverted.

(b) (No change)

(c) The Department shall determine for each purveyor the amount of water diverted n excess of the free allowance set forth in N.J.A.C. 7:19-4.8.

1. (No change.)

(d) (No change.)

(e) The passing flow requirements which apply in these calculations include, but are not limited to, the following:

Purveyor	Gaging Station	Passing Flow (cubic feet per second)
Brick Township M.U.A.	Metedeconk River near Lakewood	13.0
Elizabethtown Water Co.		
Raritan River	Passing flows maintained by N.J. Water Supply Authority	
Hackensack Water Company		
Hackensack River	Hackensack River at New Milford	12.9
Saddle River	Saddle River at Lodi	13.9
Two Bridges	Passaic River	143.3
(except when Passaic Valley Water Commission is diverting at Two Bridges, in which case passing flow will be 27.2 cfs).		
City of Jersey City	To be released from Boonton Dam to the Rockaway River	10.83[1]
Matchaponix Water Supply Co.	Matchaponix Brook	7.3
Middlesex Water Co.		
Robinson's Branch of Rahway River	Rahway River at Rahway	4.2
Raritan River	Passing flow maintained by N.J. Water Supply Authority	
New Jersey-American Water Company		
Passaic River	Passaic River at Chatham	116.0
Canoe Brook	Canoe Brook near Summit	2.12
Passaic River at Madisonville	Passaic River near Millington	10.7
Swimming River	Swimming River near Red Bank	9.4
Jumping Brook	Jumping Brook near Neptune	1.16
Shark River	Shark River near Neptune	1.9
Newark Water Dept.	Pequannock River at Macopin	12.3
City of New Brunswick	Lawrence Brook at Westons Mill	8.7
North Jersey District		
Water Supply Commission	Wanaque River at Wanaque	15.5[2]
	Ramapo River at Pompton Lakes	61.9
Two Bridges	Passaic River	143.3
(except when Passaic Valley Water Commission is diverting at Two Bridges, in which case passing flow will be 27.2 cfs).		
Passaic Valley Water Commission		
Pompton River	at Pompton Plains	92.8
Passaic River	at Little Falls	89.0
Passaic River	at Two Bridges	27.2
Rahway Water Department		
Rahway River	at Rahway	7.9
Sayreville Borough	at Duhernal Dam	Dec.-April 61.88 May-Nov. 123.78
City of Trenton		
Delaware River	at Trenton	1,131.1

[1]Subject to adjustment when flows in Beaver Brook at the outlet of Split Rock Pond are less than 1.5 cfs.

[2]Subject to reduction by the amount of flows into reservoir at Awosting less than 4.6 cfs.

(f) (No change.)

7:19-4.7 (No change in text.)

7:19-4.8 Free allowance determination

(a)-(c) (No change.)

(d) The Department has determined the following free allowances, in accordance with (a) above, for the following purveyors:

Purveyor/Division	Points of Diversion	Free Allowances (million gallons)[3]
Atlantic City Water Dept.	Absecon Creek	1,649.070
Bloomsbury Water Dept.	Musconetcong River	29.200
Branchville Water	Dept. Dry Brook	21.571
Brick Township M.U.A.	Metedeconk River	77.453
Burlington City Water Co.	Delaware River	293.387
Butler Water Co.	Apshawa Brook	139.175
Elizabethtown Water Co.	Millstone River and Raritan River	1,479.137
City of Elizabeth		2,208.579[1]
Franklin Water Dept.	Franklin Pond	58.400[1]
Hackensack Water Co.	Hackensack River Saddle River Hirschfield Brook Sparkill Brook	9,153.47[2]
Hackettstown M.U.A.	Mine Brook	94.681
Haledon Water Dept.	Oldam Brook	108.551
Jersey City Water Dept.	Rockaway River	16,542.946
Lambertville Water Co.	Tributary of Delaware River	183.084
Matchaponix Water Supply Co.	Matchaponix Brook	0
Middlesex Water Co.	Robinson's Branch Rahway River Raritan River	639.006
New Jersey-American Water Company	Buckhorn Creek Tributary	68.219
	Canoe Brook/Passaic River	782.889
	Delaware River	0
	Madisonville	64.423
	India Brook	62.926
	Swimming River	1,090.946
	Jumping River	16.813
	Shark River	140.615
Southeast Morris County M.U.A.	Harmony Creek	627.253
Newark Water Department	Pequannock River	
Newark and Belleville		13,228.208[1]
Bloomfield		425.882
North Jersey District Water Supply Comm. Including Montclair, Kearny, Glen Ridge, Bayonne and East Newark	Wanaque River Ramapo River Two Bridges	2,825.940
City of Newark		10,340.048
City of New Brunswick	Lawrence Brook	957.445
New Brunswick and Milltown		
Newton Water Co. Tributary of	Paulinskull River	161.403
Passaic Valley Water	Passaic River at	6,542.7351

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Commission	Little Falls, or Passaic River at Two Bridges	
Rahway Water Dept.	Rahway River	555.397
Salem Water Dept.	Alloway Creek	235.170
Sayreville Borough	South River	174.434
Sussex Water Dept.	Lake Rutherford	48.107
City of Trenton	Delaware River	4,923.850
United States Army, Fort Dix	Rancocas Creek	0
Naval Air Propulsion Center	Delaware River	0

[1]Subject to allocation.
[2]May include credits for releases from DeForest Reservoir.
[3]For leap year, multiply these quantities by the fraction 366/365.

7:19-4.9 (No change in text.)

7:19-4.10 Appeal procedure

Any party aggrieved by the Department's determination of its excess diversion fee may appeal the determination by submitting a letter requesting an adjudicatory hearing, pursuant to N.J.A.C. 7:19-2.13, to the Department before March 20 or 30 days after receipt of the bill whichever is later.

7:19-4.11 (No change in text.)

SUBCHAPTER 6. WATER SUPPLY MANAGEMENT ACT RULES

7:19-6.1 Scope and authority

(a)-(d) (No change.)

(e) To avoid the imposition of needless administrative burdens on water purveyors and users, only a limited number of specified requirements in this subchapter apply throughout New Jersey. Other requirements are only applicable within designated areas of critical water supply concern, where special situations require a greater degree of control to be exercised by the Department.

7:19-6.2 Definitions

The following words and terms shall have the following meanings unless the context indicates otherwise:

. . .

"Adverse impact upon wells" means an impaired pumping rate or a required change in the construction of a well affected by lowered water levels or any impairment of water quality.

. . .

"Aquifer" means any subsurface water-saturated zone which is significantly permeable so that it may yield sufficient quantities of water from wells or springs in order to serve as a practical source of water supply.

"Area of critical water supply concern" or "critical area" means a region of the State where excessive water usage or diversion presents undue stress, or wherein conditions pose a significant threat to the long-term integrity of a water supply source, including a diminution of surface water supply due to excess groundwater diversion.

. . .

"Confined aquifer" means an aquifer which contains groundwater confined under pressure between or below relatively impermeable or significantly less permeable material so that the water surface rises above the top of the aquifer in a well which derives its water from that aquifer.

. . .

"Normal demand" means the annual average daily demand during the three preceding non-drought years, including normally occurring peaks.

"Purveyor" or "water purveyor" means any person who owns or operates a public water supply.

. . .

"Unconfined" or "semi-confined" aquifer" means an aquifer that is either exposed to atmospheric pressure or bounded by layers of materials which do not serve as an effective barrier to water migration.

. . .

"Water supply system" means a physical infrastructure operated and maintained to deliver water on either a retail or wholesale basis to customers.

. . .

7:19-6.3 Determination of safe or dependable yield

(a) Each purveyor shall either accept an estimate of safe yield from surface supplies or of dependable yield of subsurface sources previously made by the Department or submit its own evaluation and estimate for the approval of the Department within one year after a written request for such an estimate by the Department.

(b) A purveyor is required to provide a safe or dependable yield of water from its own sources, which, when added to water supplies available by contract and after subtraction of water obliged to be delivered by the purveyor by contract, shall be sufficient to provide for the normal demand of its own customers.

1. (No change.)

2. Water supplies available by contract may be relied upon only if the contract is not subject to cancellation or suspension and the safe or dependable yield of the source of supply is not exceeded. Water obtainable through interconnections shall not be included unless reliable delivery is assured by contract.

3. All contracts relied upon to meet the requirement of this subsection (b) shall be subject to review and approval by the Department, in accordance with N.J.A.C. 7:19-7, to determine their compliance with the rules in this Chapter and the Act.

4. (No change.)

(c) If a determination of yield in accordance with (a) above shows that a purveyor has insufficient capacity to meet the normal demands of its customers, the purveyor shall revise existing contract arrangements to reduce system demands, as necessary, or shall immediately obtain additional water supply to increase its safe or dependable yield.

(d) If the purveyor does not comply with (c) above, the Department may order a ban on further extensions of service to new customers or expansions of service to existing customers, or the Department may order the acquisition of additional water supply capability, or both. The Department will allow reasonable time for acquisition of additional water supply.

7:19-6.5 Water conservation

(a) Unless more stringent water conservation measures are required by the Department, all public community water systems shall:

1.-2. (No change.)

3. Submit a Water Conservation and Drought Management Plan on forms provided by the Department with each initial, modification, or renewal application for a water supply allocation permit or major modification thereof, or contract approval. The Water Conservation and Drought Management Plan shall include:

i. A description of water conservation components;

ii. Interim, voluntary water use restrictions for implementation during corresponding stages of drought warning, drought emergency, precipitation deficits or reservoir storage deficits;

iii. Voluntary transfers of water via interconnections between water supply systems for use when prescribed reservoir storage level thresholds are reached;

iv. Other measures designed to reduce demand, consumption or water usage or loss, or which otherwise have the effect of maximizing water supplies during periods in which precipitation is lower than average and/or water supply storage is less than normal; and

v. For purveyors with water supply reservoirs, rule curves for reservoirs that can be used to establish storage level thresholds.

4. (No change.)

5. Require installation of water meters for all service connections. This shall not apply to fire emergency uses. Water systems with fewer than 500 service connections or systems where it is demonstrated to the satisfaction of the Department that metering is not practical may be exempted from metering if it is shown that the annual average daily water use by the system does not exceed 75 gallons per person per day.

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7:19-6.9 Operation of interconnections

(a)-(e) (No change.)

(f) Higher rates may be charged during a water emergency pursuant to N.J.A.C. 7:19-15.2.

(g) (No change.)

7:19-6.10 Administrative hearings

(a) (No change.)

(b) An adversely affected person may apply in writing to the Department for an administrative hearing before the Office of Administrative Law within 15 days of receiving an order or other final decision pursuant to N.J.A.C. 7:19-6.3(d).

(c) (No change.)

SUBCHAPTER 7. PROCEDURES FOR CONTRACT REVIEW AND APPROVAL

7:19-7.1 Purpose and scope

(a) The purpose of this subchapter is to ensure that the safe yield of a permittee's sources of supply and/or allocations are not exceeded as a result of the permittee's contractual obligations.

(b) This subchapter prescribes the procedures which shall be followed by applicants applying for approval of contracts for the sale of water.

7:19-7.2 Applicability

This subchapter applies to contract arrangements for the routine sale and purchase of water to be used by a public water supply or for the transfer of base allocations pursuant to N.J.A.C. 7:19-8. Contract arrangements for emergency purposes are excluded.

7:19-7.3 Procedures for contract approval

(a) (No change.)

(b) The applicant shall contact the Department in accordance with N.J.A.C. 7:19-1.7 to obtain application forms and other instructions necessary to file a complete application for contract approval. A complete application shall include:

1. A copy of the draft contract in final form or the executed contract in the case of existing contracts;

2. A copy of the completed contract review application form. This form is included in the 1993 Technical Manual for Water Allocation Permits prepared by and available (from the Department in accordance with P.L. 1991, c.422 (N.J.S.A. 13:1D-111 et seq.), as updated or revised.

3. A Water Conservation and Drought Management Plan, for each party to the contract, in accordance with N.J.A.C. 7:19- 6.5(a)3, if such plan was not previously filed with the Department.

(c) For new contracts, the contract and application forms shall be filed, by the party selling the water, at least two months prior to executing the contract.

(d) For any contract which is in force as of the *[effective date of this subsection]* ***March 20, 1995*** and which has not been approved by the Department pursuant to this subchapter, the party selling water pursuant to the contract shall immediately file an application and a copy of the fully executed contract with the Department.

(e) The Department, within 20 days of receipt of a complete application for contract approval will:

1. Review the application;

2. Determine whether the applicant has sufficient safe yield and adequate allocation to supply the buyer; and

3. Develop preliminary findings on the potential for the contract to be approved.

(f) The Department will provide a written copy of the preliminary findings to the applicant. The applicant shall review the preliminary findings, verify the information on existing contractual obligations and demands, and submit written comments to the Department within 20 working days from receipt of the Department's preliminary findings.

(g) Within 14 working days of receipt of the applicant's written comments on the Department's preliminary findings the Department will:

1. If the Department determines, pursuant to (e) and (f) above, that an applicant does not have sufficient safe yield and/or allocation to meet its system demands and all contractual obligations, or that the contract is not in accordance with a Department-approved regional plan developed pursuant to N.J.S.A. 58:1A-13, issue a contract denial letter to the applicant.

2. If the applicant and/or the party buying water have not filed and received approval of a Water Conservation and Drought Management Plan pursuant to (b)3 above, issue a contract denial letter to the applicant.

7:19-7.4 Appeal procedure

An applicant *[or]***,* the party buying the water ***or any person, subject to the limitations on third party appeal rights set forth in P.L. 1993, c.359 (N.J.S.A. 52:14B-3.1 through 3.3)*** who believes himself or herself aggrieved by a decision of the Department pursuant to this subchapter may request an adjudicatory hearing in accordance with N.J.A.C. 7:19-2.13.

SUBCHAPTER 8. AREAS OF CRITICAL WATER SUPPLY CONCERN

7:19-8.1 Scope and authority

This subchapter constitutes the rules governing the establishment of and management of water allocations within areas of critical water supply concern pursuant to P.L. 1993, c.202, of the Water Supply Management Act (N.J.S.A. 58:1A-1 et seq.).

7:19-8.2 Designation of areas of critical water supply concern

(a) The Commissioner shall, after notice and public hearing, designate as areas of critical water supply concern those areas in which the Department determines that adverse conditions exist, related to the ground or surface water, such that special measures are required to ensure the integrity and viability of the water supply source and to protect the public health, safety or welfare. The Department shall demonstrate that the designation is warranted through the use of a water supply availability study. The adverse conditions upon which the designation of an area of critical water supply concern is based shall include one or more of the following:

1. Shortage of surface water due to diversions from surface or ground water sources which leave insufficient surface water for permitted, certified, or registered diversions or for environmental protection purposes within a drainage area of at least 10 square miles;

2. Shortage of ground water due to diversions exceeding the long-term, safe or dependable yield of an aquifer in an area of at least ten square miles. The Department may demonstrate such a shortage by a verified mathematical ground water model, or if such a model is unavailable, by one or more of the following:

i. A progressive lowering of ground water to the extent that existing wells of 50 feet or more in depth are threatened by declining water levels or rendered inoperative;

ii. A reduction of the average potentiometric surface in a confined aquifer such that the 30 foot below mean sea level contour is within five miles of salt water or intersects the 250 part per million chloride isochlor; and/or

iii. A reduction of the average potentiometric surface in an unconfined or semi-confined aquifer to the zero foot contour (mean sea level) or lower, such that the contour line is either within five miles of salt water or intersects the 250 part per million chloride isochlor;

3. Aquifer pollution, such that actual pollution contaminates a substantial part of the aquifer or major sources of hazardous or toxic pollution may be reasonably anticipated to contaminate the aquifer; and/or

4. Location within the Delaware River Basin Commission ground water protection area as designated by the Commission, where it has been determined that adverse conditions exist.

(b) Each area of critical water supply concern designated pursuant to (a)1, 2 or 3 above shall consist of two zones: the depleted zone, which is the area adversely affected, and the threatened zone, which is a margin area, encompassing areas which may be adversely affected if present trends continue. The Department may establish different water use restrictions for the depleted zone and the threatened zone.

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(c) Those areas designated by the Department as water supply critical areas prior to the enactment of P.L. 1993, c.202, are deemed areas of critical water supply concern for purposes of this subchapter.

(d) Within areas of critical water supply concern designated pursuant to (a)4 above, the Department may institute controls and requirements only as mandated by interstate agreement unless the critical area is also a critical area designated pursuant to (a)1, 2 or 3 above. Such additional controls and requirements may include metering, additional reporting requirements, restriction of inter-basin diversions of water for water supply or wastewater discharge, restriction of consumptive uses and water quality testing of wells.

(e) Upon its determination to designate an area of critical water supply concern, the Department will issue an administrative order establishing the depleted zone and threatened zone boundaries for the area of critical water supply concern.

7:19-8.3 Management of water allocations within areas of critical water supply concern

(a) For each area of critical water supply concern designated pursuant to N.J.A.C.7:19-8.2, the Department, in consultation with affected permittees and local governing bodies, shall:

1. Study water supply availability;

2. Estimate future water supply needs;

3. Identify appropriate and reasonable alternative water supply management strategies, including, but not limited to:

i. Water conservation;

ii. Substitution of alternative water sources;

iii. Participation in a Department approved regional water supply project;

iv. Transfer of diversion rights;

v. Artificial recharge of *[existing]* diversion sources; and

vi. Substitution of water supply from a noncritical aquifer; and

4. Select and adopt water supply alternatives after notice and public hearing pursuant to N.J.A.C. 7:19-2.8 through 11.

(b) The Department will issue a Notice of Intent to Modify Permit to each affected permittee, which shall specify the water supply alternatives adopted pursuant to (a) above, each affected permittee's water use as reported pursuant to N.J.A.C. 7:19-2.14(a)3, and the steps each affected permittee shall take to comply with the area of critical water supply concern's management strategies.

(c) The Department will, after notice and public hearing pursuant to N.J.A.C. 7:19-2.8 through 2.11:

1. Modify the conditions of an existing water supply allocation permit or water usage certification in order to limit or reduce the quantity of water which may be diverted to the safe or dependable yield of the water resource, provided any reduction in diversion shall not exceed the amount necessary to reduce the total withdrawal from the aquifer to the dependable yield for the ground water diversion source, as determined by the Department;

2. Allow the permittee to transfer the diversion source location through a permit modification pursuant to N.J.A.C. 7:19-2.2; or

3. Require the permittee to use alternate sources of water.

(d) The Department shall require affected permittees to prepare and submit alternative water supply plans consistent with the alternative water supply management strategies adopted pursuant to (a)4 above. The plan shall identify the permittee's water deficit, the method by which the permittee shall obtain additional water to meet demands, and a schedule for the implementation of the alternative water supply plan.

(e) An affected permittee may only increase its base allocation in accordance with N.J.A.C. 7:19-8.6, and those persons seeking diversion privileges within an area of critical water supply concern shall do so only in accordance with N.J.A.C. 7:19-2.2 and 8.6.

(f) The Department may require, as conditions of water supply allocation permits for diversions in critical areas, measures for water conservation, metering, leak detection and control more stringent than those required as conditions in permits for diversions elsewhere in the State.

(g) Following implementation by affected permittees of the alternative water supply plan adopted pursuant to (d) above, the Department will monitor water levels and water quality within the designated critical areas to determine the effectiveness of the alternative water supply management strategies. If the Department determines that the alternatives implemented are not effective in protecting the water supply source of concern, the Department may revise the designation and impose further restrictions in accordance with this subchapter. The Department will report the results of any monitoring conducted pursuant to this subsection to all affected permittees on an annual basis.

(h) The designation of an area of critical water supply concern shall be modified or rescinded only upon the Department's determination that the adverse conditions on which the designation was based pursuant to N.J.A.C. 7:19-8.2(a) have either worsened, diminished or ceased. The Department will evaluate each critical area designation and the need for any adjustments to the alternative water supply management strategies at intervals of 10 years from the date of implementation of the permittee's alternative water supply plan.

(i) The Department will not issue new or increased diversions from affected aquifers within an area of critical water supply concern except for:

1. Temporary dewatering permits for construction related purposes in accordance with N.J.A.C. 7:19-1.4(c) and 2.3;

2. Ground water remediation in accordance with a Department-approved plan;

3. Transfer of base allocations or water credits in accordance with N.J.A.C. 7:19-8.6;

4. An interim allocation to be utilized by a permittee until an approved alternative water supply is available; and/or

5. Projects that provide recharge of the affected aquifer.

(j) The Department will not issue new or increased diversions from wells located outside the boundaries of an area of critical water supply concern that divert water from an affected aquifer and adversely affect the safe or dependable yield of the aquifer.

(k) The Department may issue an interim allocation pending completion of a Department-approved alternative water supply, if the alternative water supply is not yet available to meet demands. Such interim allocations shall be terminated when the Department approved alternative water supply is available.

7:19-8.4 Water Supply Critical Area I

(a) The Department designated Water Supply Critical Area I by administrative order on July 30, 1985. Based upon regional water supply studies substantiated by United States Geological Survey monitoring and modeling, and following public notice and public hearings, the Department determined that four aquifers, namely, the Mt. Laurel-Wenonah, the Englishtown, the Old Bridge, and the Farrington aquifers were depleted such that designation as an area of critical water supply concern was warranted. The boundary of the depleted zone of the critical area corresponds to the average potentiometric contour 30 feet below mean sea level for each affected aquifer, as published in "Water Levels in Major Artesian Aquifers of the New Jersey Coastal Plain, 1983 U.S.G.S., WRI 86-4028." The threatened zone, consisting of a three mile wide margin area, surrounds the depleted zone of each aquifer.

(b) The Department will determine base allocations within Water Supply Critical Area I in accordance with the following:

1. The base allocations from the depleted zone of the Mt. Laurel-Wenonah, Englishtown, and Farrington aquifers shall be reduced to an amount equal to $0.50 \times D83$, where D83 is the permittee's 1983 annual withdrawal in millions of gallons from the depleted zone of each of these aquifers, as reported to the Department.

2. The base allocation from the depleted zone of the Old Bridge aquifer shall be reduced to an amount equal to $0.60 \times D83$, where D83 is the permittee's 1983 annual withdrawal in millions of gallons from the depleted zone of the aquifer, as reported to the Department.

3. The base allocation from the threatened zone of the Mt. Laurel-Wenonah, Englishtown, Farrington, and Old Bridge aquifers shall be equal to T83, where T83 is the permittee's 1983 annual withdrawal in millions of gallons from the threatened zone of each of these aquifers, as reported to the Department.

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7:19-8.5 Water Supply Critical Area II

(a) The Department designated Water Supply Critical Area II by administrative order on January 15, 1993. Based upon a regional water supply study substantiated by United States Geological Survey monitoring and modeling, and following public notice and public hearings, the Department determined that the Potomac-Raritan-Magothy (PRM) aquifer system was depleted such that designation as an area of critical water supply concern was warranted. The boundary of the depleted zone of the critical area corresponds to the average potentiometric contour 30 feet below sea level for the PRM, as published in "Water Levels in Major Artesian Aquifers of the New Jersey Coastal Plain, 1983 U.S.G.S., WRI 86-4028." The threatened zone surrounds the depleted zone of the critical area.

(b) The Department will determine base allocations within Water Supply Critical Area II in accordance the following:

1. For those allocations existing on July 24, 1993 for a period of not less than 10 years from that date, the Department shall not reduce any existing allocation to an amount less than either the amount withdrawn from the depleted and/or threatened zone in 1991 or the amount determined pursuant to (b)1i or ii below, whichever is smaller.

i. The base allocation from the depleted zone shall be:

$$DZ = (0.65 \times D83) + (Dmax - D83)$$

Where DZ equals the depleted zone base allocation in millions of gallons per year (MGY); D83 is the permittee's 1983 annual withdrawal from the depleted zone of the Potomac-Raritan-Magothy (PRM) aquifer system in MGY; and Dmax is the permittee's maximum annual withdrawal in MGY from the depleted zone of the PRM aquifer system between 1983 and 1991.

ii. The base allocation from the threatened zone shall be the maximum annual withdrawal in millions of gallons per year from the threatened zone of the PRM aquifer system between 1983 and 1991.

2. The base allocation for each affected permittee with multiple, interconnected permits shall be determined using the single year in which the annual withdrawal from all diversion sources in the PRM aquifer system was greatest.

3. The base allocation for each affected permittee with diversion sources in both the depleted and the threatened zone of the PRM aquifer system shall be determined using *[the]* ***a*** single year *[with the largest combined withdrawals from the depleted and threatened zones]*.

(c) Where an affected industrial permittee demonstrates to the satisfaction of the Department that its withdrawals from the PRM aquifer system were less in 1991 than in any year between 1983 and 1990 due to economic conditions, the industrial permittee's base allocation shall be determined according to (b)1i and/or ii above and shall not be limited to the amount withdrawn in 1991.

(d) The area north of Rancocas Creek from its confluence with the Delaware River to the intersection of the southwest branch of the Rancocas Creek with State Route 38, then north of State Route 38 to the start of County Route 530, then north of County Route 530 to the intersection of County Route 530 with State Route 70 to the Burlington-Ocean county boundary is designated the Water Allocation Credit Receiving Area for Water Supply Critical Area II. Within this Water Allocation Credit Receiving Area, the following shall apply:

1. The allocation represented by one-half of the difference between the total base allocation as established pursuant to (b) above for all permittees and the total of 1991 withdrawals from the PRM aquifer system is designated water allocation credits.

2. Such water allocation credits may be transferred provided that the credits transferred are for local use only, as "local use" is defined in N.J.A.C. 7:19-1.3, and the increased diversion will not have an adverse impact upon the PRM aquifer system or other users of the system. The transfer shall be made in accordance with N.J.A.C. 7:19-8.7.

3. The base allocation of any affected permittee in the Water Allocation Credit Receiving Area who demonstrates that a net reduction in its water use over the period from 1978 to 1991, inclusive, was the result of documented water conservation efforts shall be supplemented by water conservation credits. Water conservation credits shall be equal to 50 percent of the difference between the maximum volume of water withdrawn during this period and 1991, and shall be used by the permittee to satisfy its water demands. Conservation credits cannot be sold, leased or transferred from their geographic location.

4. A supplier of an interconnected system shall have the right to obtain water allocation credits in an amount that would allow transfer of additional volumes through the interconnection provided that *[the additional volumes of water transferred are for local use only, as "local use" is defined in N.J.A.C. 7:19-1.3, and that]* such additional volumes do not exceed 50 percent of the volume transferred through the interconnection in 1991.

(e) The governing body of a county may establish a water allocation credit exchange. The water allocation credit exchange shall initially contain the water allocation credits determined pursuant to (d)1 above. The water allocation credits shall be considered a common resource, administered by the county in consultation with the Department. Any county governing body that establishes a water allocation credit exchange shall submit to the Department an implementation plan for review and approval.

(f) Water allocation credits become part of a permittee's base allocation once they are transferred from the water allocation credit exchange to the permittee. Transfers of water allocation credits from the credit exchange are subject to Department approval in accordance with N.J.A.C. 7:19-8.7.

7:19-8.6 Base allocation transfers

(a) Within areas of critical water supply concern, a permittee may transfer base allocations with the Department's approval, in order to facilitate the transfer of water to areas of anticipated growth *[and]* ***or*** areas where alternative supplies of water are not available.

(b) The base allocation from the sending party, the permittee from which the base allocation is transferred, shall be transferred to the receiving party, the permittee to which the base allocation is transferred. Upon transfer of all or a portion of the base allocation by the sending party, the diversion privileges for that permittee shall be reduced by the Department, by an amount equal to the transferred base allocation and the diversion privileges of the receiving party shall be increased by an amount equal to the transferred base allocation.

(c) A permittee proposing to permanently transfer a portion of its base allocation to another permittee may do so either in a direct transaction between the two parties or through the auspices of a county water credit exchange established pursuant to N.J.A.C. 7:19-8.5(e). The Department shall review and approve such a permanent transfer in accordance with N.J.A.C. 7:19-8.7.

(d) The Department does not consider the leasing of base allocations a viable long term water supply alternative but may consider it to be an *[interim measure]* ***acceptable short term alternative until a dependable long term alternative water supply is available***.

(e) The permittee proposing to transfer all or part of its base allocation diversion privileges must be the applicant for approval of the transfer of base allocation pursuant to N.J.A.C. 7:19-8.7.

7:19-8.7 Base allocation and water supply allocation credit transfer procedure

(a) A permittee seeking to transfer all or part of its base allocation or the permittee seeking to obtain water supply allocation credits shall submit an application to the Department which shall include the following:

1. A map showing the locations of the wells from which the base allocation is proposed to be transferred and the location of the receiving wells. Wells shall be identified by the Department's well permit number;

2. The aquifer and amount of base allocation or water supply allocation credits to be transferred;

3. An assessment of the impact of the transfer on the water resource and other users of the resource in the vicinity of receiving wells; and

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4. Information demonstrating that the sending party's demands can be met after the transfer of the base allocation.

(b) The Department shall approve, subject to other applicable requirements of this chapter, a permanent transfer of any or all of a permittee's base allocation to another permittee through a permit modification in accordance with N.J.A.C. 7:19-2.2, provided that the transfer will not result in:

1. A diversion which is from an aquifer different from that in which the sending well is located;

2. A diversion which is closer to the salt water interface*[;]***, or is at a lower potentiometric surface than the sending well, and further degrades the condition of the water supply source; and***

*[3. A diversion which is in a portion of the aquifer which has a lower potentiometric surface than the sending well;

4. A diversion which further degrades the condition of the water supply source; and]*

*[5.]***3.*** The sending party's inability to meet its water supply demands.

(c) The Department will not approve a transfer of base allocations or water allocation credits if the receiving party does not develop and implement an appropriate water conservation and drought management plan pursuant to N.J.A.C. 7:19-2.14(a)10 or if the alternative water supply plan required pursuant to N.J.A.C. 7:19-8.3(d) is not in accordance with the water supply alternatives adopted by the Department pursuant to N.J.A.C. 7:19-8.3(a)4.

(d) The receiving party's use of the water does not have to be for the same purpose as the sending party's use of the water.

(e) Any wells for which the total diversion privileges have been transferred shall be sealed in accordance with N.J.A.C. 7:9-9.

(f) If, because of the receipt of the transferred base allocation or water supply allocation credits, the receiving party would require a new diversion source, an increase in pumping capacity, or an increase in monthly and/or yearly allocation, the receiving party shall apply for a permit modification in accordance with N.J.A.C. 7:19-2.2.

(g) If the purchase of additional base allocation or water supply allocation credits is solely for the purpose of replacing water allocation reduced as a result of Department-implemented action, this will be considered a minor modification of the permit. Upon receipt of notification that the transaction has been completed, the Department will proceed in accordance with N.J.A.C. 7:19-1.5(b).

(h) If the sending party retains diversion rights in excess of 100,000 gallons per day, the reduction in allocation will be considered a minor modification of the permit. Upon receipt of notification that the transfer has been completed, the Department will proceed in accordance with N.J.A.C. 7:19-1.5(b).

7:19-8.8 Adjudicatory hearings

A permittee who believes himself or herself to be aggrieved by a decision of the Department pursuant to this subchapter may request an adjudicatory hearing in accordance with N.J.A.C. 7:19-2.13.

SUBCHAPTER 9. ESTABLISHMENT OF WATER SURCHARGE SCHEDULE

7:19-9.1 Scope and authority

This subchapter, adopted pursuant to the Water Supply Management Act, N.J.S.A. 58:1A-1 et seq., shall constitute the rules governing the establishment of a water surcharge schedule applicable during a declared state of emergency as mandated by Executive Order No. 5, signed by Governor Thomas Kean on April 27, 1982.

7:19-9.2 Purpose

The purpose of this subchapter is to establish a water surcharge schedule for the retail costs of water supplies during water emergencies, declared by the Governor of the State of New Jersey. The schedule will be utilized by all applicable water purveyors in the event of such a declared emergency.

Recodify existing 7:19B-1.5 through 1.7 as 7:19-9.3 through 9.5 (No change in text.)

7:19-9.6 Exemption from the water emergency surcharge schedule

Exemptions from water rationing requirements in this subchapter may be granted by the Department according to the procedures and standards in N.J.A.C. 7:19-10.

SUBCHAPTER 10. POWERS OF THE COMMISSIONER DURING A WATER EMERGENCY

Recodify existing 7:19A-2.1 and 2.2 as 7:19-10.1 and 10.2 (No change in text.)

7:19-10.3 Requirements placed on departments and agencies within State government

After a determination by the Commissioner and after notice to the appropriate State government body, agency, department, said body, agency, or department shall provide immediately, any information, assistance, resources and personnel as shall be necessary for the Commissioner to discharge his or her functions and responsibilities under the Act or this subchapter.

SUBCHAPTER 11. GENERAL POWERS OF THE DEPARTMENT

Recodify existing 7:19A-3.1 and 3.5 as 7:19-11.1 through 11.5 (No change in text.)

7:19-11.6 Drought warning requirements

(a) During a drought warning condition identified in accordance with N.J.A.C. 7:19-13.1(d), the Department may order water purveyors to comply with any or all of the following requirements:

1.-5. (No change.)

SUBCHAPTER 12. WATER EMERGENCY TASK FORCE

Recodify existing 7:19A-4.1 and 4.2 as 7:19-12.1 and 12.2 (No change in text.)

SUBCHAPTER 13. THE PRIORITY-BASED PHASE SYSTEM OF WATER RESTRICTIONS

7:19-13.1 Scope

(a)-(c) (No change.)

(d) Prior to actual declaration of a water supply emergency by the Governor, the Department may call for action to be taken under its non-emergency powers in order to reduce the likelihood or impact of any impending emergency. Where such situations involve a relative lack of precipitation or a lower than normal storage of water supplies, the Department may identify the affected area or the State as a whole as being in a "Drought Warning" condition. The Department shall give notice of and hold a public hearing prior to implementing any of the drought warning requirements in N.J.A.C. 7:19-11.6.

(e) Where the Delaware River Basin Commission, in accordance with its rules and procedures, declares a drought emergency based upon the storage in New York City's Delaware Basin reservoirs, thereby impacting the New Jersey portion of the Delaware Basin, the Governor may also declare a water emergency in the New Jersey portion of the Basin. The Department shall coordinate with the DRBC concerning the implementation of this subchapter and the Water Emergency Surcharge Schedule, N.J.A.C. 7:19-9.

(f) (No change.)

7:19-13.2 (No change in text.)

7:19-13.3 Phase I: Available water supply levels determined to be below normal

(a) (No change.)

(b) A ban on adjustable water uses may be instituted at this phase. Such adjustable uses include:

1. The watering of all plant growth, except commercially grown food crops***, sod at commercial sod farms and nursery stock at nurseries or retail outlets***;

2. The washing of vehicles, except by businesses engaged exclusively in car washing on site, including self-service car washes equipped with total recycle of both wash and rinse water, or in those instances where a threat to public health may exist;

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3. The washing of streets, driveways, sidewalks or paved areas;
4. The serving of water in restaurants, clubs, or eating places unless specifically requested by patrons;
5. The use of water for flushing sewers by municipalities or any public or private entity except as municipal health officials deem necessary in the interest of public health or safety;
6. The use of fire hydrants by fire companies for testing fire apparatus and for fire department drills except as the municipal governing body and the purveyor deem necessary in the interest of public safety;
7. The use of fire hydrants by municipal road departments, contractors, and all others, except as necessary for fire fighting or protection purposes;
8. The use of water for all outdoor recreational purposes;
9. The washing of buildings or other structures, except for windows; and
10. Any other uses of water as the Commissioner may designate. The Commissioner shall effect such designations by administrative order and such designations shall be effective immediately upon adoption by the Commissioner and shall be published in the New Jersey Register as soon thereafter as possible.

(c) (No change.)

(d) Any person wishing to be exempt from the ban on adjustable water uses shall file an application for a hardship exemption in accordance with N.J.A.C. 7:19-16.1.

(e) (No change.)

7:19-13.4 Phase II: Severity; substantial threat to the public health and welfare

(a) Non-residential users shall be subject to the water emergency rate schedule as provided by rule. (See N.J.A.C. 7:19-9).

(b)-(c) (No change.)

(d) Any person wishing to be exempt from the requirements of this section shall file an application for a hardship exemption in accordance with N.J.A.C. 7:19-16.2.

7:19-13.5 Phase III: Further rationing required

This stage requires further rationing of water supplies to all sectors or the selective curtailment of industrial water users in accordance with N.J.A.C. 7:19-14.

7:19-13.6 (No change in text.)

SUBCHAPTER 14. INDUSTRIAL CURTAILMENT STRATEGY

Recodify existing 7:19A-6.1 through 6.3 as 7:19-4.1 through 4.3 (No change in text.)

7:19-14.4 Submission of water supply information

Industrial users, water purveyors and other water users, shall submit to the Department, upon its request, all information relating to water consumption and employment required by N.J.A.C. 7:19-11.4, 11.5, 14.2 and 14.3.

SUBCHAPTER 15. EMERGENCY WATER TRANSFER PRICING

Recodify existing 7:19A-8.1 through 8.3 as 7:19-15.1 through 15.3 (No change in text.)

SUBCHAPTER 16. HARDSHIP EXEMPTION PROCEDURES

7:19-16.1 Application procedures for hardship exemption from the ban on adjustable water uses

(a) Any person wishing to be exempt wholly or partially from the ban on adjustable water uses may apply for a hardship exemption according to the following procedures:

1. The applicant shall submit his or her request along with full documentation supporting the request to the attention of the Water Emergency Task Force at the following address:

Water Emergency Task Force
c/o Water Supply Element
CN 426
Trenton, New Jersey 08625

2.-4. (No change.)

7:19-16.2 Application procedures for hardship exemption from the requirements of water rationing

(a) Any person wishing to be exempt from the requirements of water rationing may, within 30 days following receipt of the surcharge bill issued pursuant to N.J.A.C. 7:19-9, file an application for a hardship exemption with the appropriate water purveyor according to the following procedures:

1.-6. (No change.)

(b)-(c) (No change.)

SUBCHAPTER 17. DEPARTMENT ORDERS

7:19-17.1 Requirements for Departmental orders issued during a water emergency

(a) All Departmental orders issued pursuant to N.J.A.C. 7:19-9 through 17 will be based upon fair compensation, reasonable rate relief, and just and equitable terms.

(b) (No change.)

7:19-17.2 Appeal procedure

The party to whom an order has been issued by the Department, shall have a right to request a hearing thereon, by submitting a letter requesting an adjudicatory hearing, pursuant to N.J.A.C. 7:19-2.13, to the Department within 20 days of receipt of the order.

SUBCHAPTER 18. CIVIL ADMINISTRATIVE PENALTIES AND REQUESTS FOR ADJUDICATORY HEARINGS

7:19-18.1 Authority and purpose

This subchapter governs the Department's assessment of civil administrative penalties for the violation of any provision of the Water Supply Management Act, N.J.S.A. 58:1A-1 et seq., or any regulation, rule, permit or order adopted or issued by the Department pursuant thereto. This subchapter also governs the procedure for assessment, settlement and payment of civil administrative penalties and for requesting an adjudicatory hearing on a notice of civil administrative penalty assessment or an administrative order.

7:19-18.2 Procedures for assessment, settlement and payment of civil administrative penalties for violations

(a) To assess a civil administrative penalty under the Water Supply Management Act, N.J.S.A. 58:1A-1 et seq., the Department shall notify the violator by certified mail (return receipt requested) or by personal service. This notice of civil administrative penalty assessment (NOCAPA) shall:

1. Identify the section of the statute, rule, administrative order or permit violated;
2. Concisely state the alleged facts which constitute the violation;
3. Specify the amount of the civil administrative penalty to be imposed; and
4. Advise the violator of the right to request an adjudicatory hearing pursuant to the procedures in N.J.A.C. 7:19-18.3.

(b) Payment of the civil administrative penalty is due upon receipt by the violator of the Department's final order in a contested case, or when a notice of civil administrative penalty assessment becomes a final order, as follows:

1. If no hearing is requested pursuant to N.J.A.C. 7:19-18.3, a notice of civil administrative penalty assessment becomes a final order and is deemed received on the 21st day following receipt of the notice of civil administrative penalty assessment by the violator;
2. If the Department denies the hearing request pursuant to N.J.A.C. 7:19-18.3(b), a notice of civil administrative penalty assessment becomes a final order and is deemed received on the 21st day following receipt of the notice of civil administrative penalty assessment by the violator;
3. If the Department denies the hearing request pursuant to N.J.A.C. 7:19-18.3(c), a notice of civil administrative penalty assessment becomes a final order upon receipt of notice of such denial; or
4. If the Department grants the hearing request, a notice of civil administrative penalty assessment becomes a final order upon receipt by the violator of a final order in a contested case.

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(c) The Department may, in its discretion, settle any civil administrative penalty assessed pursuant to N.J.A.C. 7:19-18.4, 18.5 or 18.6 according to the following factors:

1. Mitigating or extenuating circumstances not previously considered in the notice of civil administrative penalty assessment pursuant to N.J.A.C. 7:19-18.4(d)7, 18.5(c)6 or 18.6(d)6;

2. The timely implementation by the violator of measures leading to compliance not previously considered in the assessment of penalties pursuant to N.J.A.C. 7:19-18.4(d)5, 18.5(c)5 or 18.6(d)5;

3. The full payment by the violator of a specified part of the civil administrative penalty assessed if made within a time period established by the Department in an administrative order and/or a notice of civil administrative penalty assessment and provided that the violator waives the right to request an adjudicatory hearing on the civil administrative penalty; and/or

4. Any other terms or conditions acceptable to the Department.

7:19-18.3 Procedures to request an adjudicatory hearing to contest an administrative order and/or a notice of civil administrative penalty assessment; procedures for conducting adjudicatory hearings

(a) To request an adjudicatory hearing to contest an administrative order and/or a notice of civil administrative penalty assessment issued pursuant to the Water Supply Management Act, N.J.S.A. 58:1A-1 et seq., the violator shall submit the following information in writing to the Department at Office of Legal Affairs, ATTENTION: Adjudicatory Hearing Requests, Department of Environmental Protection, CN 402, Trenton, New Jersey 08625-0402:

1. The name, address, and telephone number of the violator and its authorized representative;

2. The violator's defenses to each of the findings of fact stated in short and plain terms;

3. An admission or denial of each of the findings of fact. If the violator is without knowledge or information sufficient to form a belief as to the truth of a finding, the violator shall so state and this shall have the effect of a denial. A denial shall fairly meet the substance of the findings denied. When the violator intends in good faith to deny only a part or a qualification of a finding, the violator shall specify so much of it as is true and material and deny only the remainder. The violator may not generally deny all of the findings but shall make all denials as specific denials of designated findings. For each finding the violator denies, the violator shall allege the fact or facts as the violator believes it or them to be;

4. Information supporting the request and specific reference to or copies of other written documents relied upon to support the request;

5. An estimate of the time required for the hearing (in days and/or hours); and

6. A request, if necessary, for a barrier-free hearing location for physically disabled persons.

(b) If the Department does not receive the written request for a hearing within 20 days after receipt by the violator of the notice of a civil administrative penalty assessment and/or an administrative order being contested, the Department shall deny the hearing request.

(c) If the violator fails to include all the information required by (a) above, the Department may deny the hearing request.

(d) All adjudicatory hearings held pursuant to this section shall be conducted in accordance with the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

7:19-18.4 Civil administrative penalty determination; general

(a) The Department may, in its discretion, assess a civil administrative penalty pursuant to this section of not more than $5,000 per day for each violation of each provision of the Water Supply Management Act, N.J.S.A. 58A-1 et seq., or of any regulation, rule, permit or order adopted or issued by the Department pursuant thereto. The Department shall assess penalties under this section in lieu of N.J.A.C. 7:19-18.5 or 18.6 when N.J.A.C. 7:19-18.5 or 18.6 is not applicable to the violation.

(b) The Department shall consider each violation of each provision of the Water Supply Management Act, N.J.S.A. 58:1A-1 et seq., or of any regulation, rule, permit or order adopted or issued by the Department pursuant thereto, as a separate and distinct violation. If the violation is of a continuing nature, each day during which a violation continues shall constitute an additional, separate and distinct violation subjecting the violator to the penalty schedule set forth in (c) below.

(c) The Department may assess a civil administrative penalty for each violation of each provision of the Water Supply Management Act, N.J.S.A. 58:1A-1 et seq., or any regulation, rule, permit or order adopted or issued by the Department pursuant thereto at the midpoint of the following ranges except as adjusted pursuant to (d) below:

1. For the first violation of a provision, $0 to not more than $1,000;

2. For the second violation of the same provision, $0 to not more than $2,500; and

3. For the third and subsequent violations of the same provision, $0 to not more than $5,000.

(d) The Department may, in its discretion, adjust the amount determined pursuant to (c) above to assess a civil administrative penalty in an amount no greater than the maximum amount nor less than the minimum amount in the range described in (c) above, on the basis of any or a combination of the factors listed in (d)1 through 7 below. No such factor constitutes a defense to any violation:

1. The compliance history of the violator;

2. The number, frequency and severity of the violations;

3. The measures taken by the violator to mitigate the effects of the current violation or to prevent future violations;

4. The deterrent effect of the penalty;

5. The cooperation of the violator in correcting the violation, remedying any environmental damage caused by the violation and ensuring that the violation does not recur;

6. Any unusual or extraordinary costs directly or indirectly imposed on the public by the violation; and/or

7. Any other extenuating, mitigating or aggravating circumstances.

7:19-18.5 Civil administrative penalties for failure to allow lawful entry and inspection

(a) The Department may, in its discretion, assess a civil administrative penalty of $5,000 against each violator who refuses, inhibits or prohibits immediate lawful entry and inspection of any premises, building or place by any authorized Department representative.

(b) Each day, from the initial day on which the violator refuses, inhibits or prohibits immediate lawful entry and inspection by any authorized Department representative up to and including the day on which the Department receives written notification from the violator that the violator will not refuse, inhibit or prohibit immediate lawful entry and inspection, shall constitute an additional, separate and distinct violation.

(c) The Department may, in its discretion, reduce a civil administrative penalty determined pursuant to (a) on the basis of any or a combination of the factors listed in (c)1 through 6 below. No such factor constitutes a defense to any violation:

1. The compliance history of the violator;

2. The number, frequency and severity of the violations;

3. The measures taken by the violator to prevent future violations;

4. The deterrent effect of the penalty;

5. The cooperation of the violator in correcting the violation and ensuring that the violation does not recur; and/or

6. Any other extenuating, mitigating or aggravating circumstances.

7:19-18.6 Civil administrative penalties for submitting inaccurate or false information

(a) The Department may, in its discretion, assess a civil administrative penalty against each violator who submits inaccurate information or who makes a false statement, representation or certification in any application, record or other document required to be submitted or maintained under the Water Supply Management Act, N.J.S.A. 58:1A-1 et seq., or any regulation, rule, permit or order adopted or issued by the Department pursuant thereto, or who fails to submit or maintain any application, record, or other document required to be submitted or maintained under the Water Supply Management Act, N.J.S.A. 58:1A-1 et seq., or any regulation, rule,

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permit or order adopted or issued by the Department pursuant thereto, or who falsifies, tampers with or renders inaccurate any monitoring device or method required to be maintained by the Water Supply Management Act, N.J.S.A. 58:1A-1 et seq., or any regulation, rule, permit or order adopted or issued by the Department pursuant thereto at the midpoint of the ranges in (c) below except as adjusted pursuant to (d) below:

(b) Each day, from the day on which the violator submits the inaccurate information or false statement, representation or certification to the Department up to and including the day on which the Department receives a written correction of the inaccurate information or false statement, representation or certification, shall constitute an additional, separate and distinct violation.

(c) The Department shall determine the amount of the civil administrative penalty based on the conduct of the violator as follows:

1. For any intentional, deliberate, purposeful, knowing or willful act or omission by the violator, the civil administrative penalty shall be in an amount of not more than $3,000 nor less than $1,000;

2. For any unintentional but foreseeable act or omission the civil administrative penalty shall be in amount not more than $1,500 nor less than $500.00; or

3. For any other violation the civil administrative penalty shall be in an amount not more than $1,000.

(d) The Department may, in its discretion, adjust the amount determined pursuant to (c) above to assess a civil administrative penalty in an amount no greater than the maximum amount nor less than the minimum amount in the range described in (c) above, on the basis of any or a combination of the factors listed in (d)1 through 6 below. No such factor constitutes a defense to any violation:

1. The compliance history of the violator;
2. The number, frequency and severity of the violations;
3. The measures taken by the violator to prevent future violations;
4. The deterrent effect of the penalty;
5. The cooperation of the violator in correcting the violation and ensuring that the violation does not reoccur; and/or
6. Any other extenuating, mitigating or aggravating circumstances.

HEALTH

(a)

DIVISION OF HEALTH CARE PLANNING FINANCING AND INFORMATION SERVICES

Certificate of Need: Megavoltage Radiation Oncology Services

Readoption with Amendments: N.J.A.C. 8:33I

Proposed: December 19, 1994 at 26 N.J.R. 4875(b).

Adopted: February 16, 1995 by Len Fishman, Commissioner, Department of Health (with approval of the Health Care Administration Board).

Filed: February 16, 1995, as R.1995 d.146, **with substantive and technical changes** not requiring additional public notice (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 26:2H-1 et seq., specifically 26:2H-5.

Effective Date: February 16, 1995, Readoption;
March 20, 1995, Amendments.

Expiration Date: August 16, 1996.

Summary of Public Comments and Agency Responses:

A total of 11 commenters provided comments on the proposed readoption with amendments of the megavoltage radiation oncology rules. Commenters included:

Atlantic City Medical Center (ACMC)
The Cancer Center of Southern N.J. (Cooper Hospital/UMDNJ)
Chilton Memorial Hospital (CMH)
Community/Kimball Health Care System (C/KHCS)
Elizabeth General Medical Center (EGMC)
Holy Name Hospital (HNH)
Morristown Memorial Hospital (MMH)
Radiological Society of New Jersey (represented by Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone)
Saint Barnabas Medical Center (SBMC)
South Jersey Hospital System (SJHS)
University of Medicine and Dentistry of New Jersey (UMDNJ)

N.J.A.C. 8:33I-1.1 Scope and purpose

COMMENT: Holy Name Hospital considers the rules' continued emphasis on multiple unit programs as disturbing because of the absence of an all-payer system and alarmingly high cancer incidence rates. The commenter states that there are non-economic costs stemming from added physical and emotional discomfort associated with unnecessary travel that must be endured among the elderly and poor that traditionally have difficulty accessing health care. The commenter suggests consideration be given to revising the language to emphasize the real need for single unit services.

RESPONSE: Statewide megavoltage oncology resource distribution in New Jersey is extensive. There are a relatively large number of CON-approved megavoltage programs (that is, 36 programs with 59 megavoltage units) and their distribution throughout the State greatly minimizes geographic barriers to access for this service. While the majority of these programs (that is, 22, or 65 percent) are multiple unit megavoltage programs, the existing rules do not preclude the development of single unit programs. In fact, all of the new megavoltage programs approved through the CON process in recent years have been single unit programs. The Department views these rules as providing ample recognition of the often debilitating nature of cancer disease through the inclusion of waiver provisions (at N.J.A.C. 8:33I-1.4(d)) so that applicants can address possible barriers to megavoltage care. As far as the preference for multiple unit programs is concerned, that preference is based not so much on economic considerations as on the broader range of treatment opportunities and expertise that can be expected at multiple unit sites and the quality outcomes that can be anticipated from more experienced high volume radiation oncology centers.

COMMENT: Dr. Paul Wallner, Chief of Radiation Oncology at Cooper Hospital/University Medical Center, questioned the absence of clear language that states that the rule applies to **all** providers of radiation oncology, including free-standing private practice sites. He observes that the presence of a largely unregulated private practice group of providers of radiation oncology would be counterproductive to the goals of quality, utilization and coordinated, multidisciplinary care that is sought by the rules.

RESPONSE: The Department views the proposed rules as applicable to all providers of radiation oncology regardless of setting, which is consistent with the planning statute as amended by the Health Care Cost Reduction Act (P.L. 1991, c.187) and the Health Care Reform Act (P.L. 1992, c.160).

N.J.A.C. 8:33I-1.2 Definitions

COMMENT: Morristown Memorial Hospital (MMH) recommended that the terms MV and MeV should be clarified so that it is clear that MV refers to photon energy levels and MeV refers to electron energy levels.

RESPONSE: The Department is in agreement with this commenter that these terms should be more clearly defined. Amended language is included upon adoption in the definitions of these terms that is consistent with the language proposed by this commenter.

COMMENT: Community/Kimball Health Care System (C/KHCS) comments that the rules do not permit an existing megavoltage provider to expand its program to a second site within a hospital system without being considered a new provider. A similar question regarding this issue was raised by South Jersey Hospital System (SJHS).

RESPONSE: This existing language appears in a number of departmental rules dealing with the definition of a regional program or services and is necessary to achieve the scope and purpose of these rules. The rules are intended to foster multiple unit sites wherever possible in order to provide optimal treatment volumes and settings that provide a full range of treatment modalities and megavoltage radiation oncology energy levels in order to assure quality outcomes.

N.J.A.C. 8:33I-1.3 Utilization of megavoltage units and programs

COMMENT: Atlantic City Medical Center (ACMC) commented that projected utilization should state 10,500 patient visits **or** 600 patients

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within two years of installation because the number of patient visits is the most important consideration of equipment use.

RESPONSE: The utilization standard is designed to establish a threshold patient visit and patient volume that provides greater flexibility to potential applicants for a second unit and to allow for variations in treatment practice. In order for any potential applicant to seek CON approval for a second megavoltage unit, that provider must have already provided services to either 9,000 patient visits or 500 patients on its existing single megavoltage unit. The applicant need only project, presumably based on its historic growth in treatment and patient volume, that it will achieve a volume increase of 20 percent over the course of several years in order to add a second megavoltage unit. The Department does acknowledge, however, the need to correct an omission in publication of this section of the rule. The words "to replace the equipment" should have been deleted from this section of the rule (N.J.A.C. 8:33I-1.3(b)1), as they were in paragraph (b)4 below. Both of these standards apply to additional as well as replacement megavoltage equipment.

COMMENT: South Jersey Hospital System states that the proposed rules do not give priority to the expansion of existing programs over the initiation of new programs.

RESPONSE: While not specifically giving priority to the expansion of existing programs, the requirements contained in the rules for the initiation of a new program are more stringent than the requirements for the expansion of an existing program. New programs, for example, are required to demonstrate that the initiation of an added service provider will not duplicate services already being provided in a given area. Existing programs are required to document their full compliance with all provisions of these rules apart from those specifically addressing new megavoltage oncology programs. While the patient volume requirements for existing providers seeking to add megavoltage equipment are substantially higher than the minimum volume required of a new provider, the existing provider has an historic track record of service provision that can be readily assessed in terms of compliance with the requirements in the rule.

N.J.A.C. 8:33I-1.3(a)3

COMMENT: Chilton Memorial Hospital (CMH) supported the addition of the provision of the rule that requires on-site simulation at all megavoltage radiation oncology providers.

RESPONSE: The Department views on-site simulation capability as necessary to assure quality radiation oncology service delivery.

N.J.A.C. 8:33I-1.3(b)1

COMMENT: CMH recommends that a three year period, rather than the two year period currently in the rules, should be the required time period for the achievement of service volume requirements following the approval of a second megavoltage unit. This would be consistent with other time periods contained in the rules.

RESPONSE: The Department views the two year period following the implementation of an additional megavoltage unit as sufficient to achieve the modest increase in volume that is required (that is, 1,500 patient visits and 100 patients).

N.J.A.C. 8:33I-1.3(a)1, (b)1 and (b)4

COMMENT: The Radiological Society of New Jersey (RSNJ) disagrees with the proposed language regarding the submission of data by existing radiation oncology providers. The RSNJ states that the language in the rule could reward a non-compliant program and should be changed to indicate that utilization compliance will be based on the "most recent calendar year **required** to be reported to the Department . . ."

RESPONSE: The Department agrees that the addition of the word "required" as proposed by the RSNJ would serve to clarify the Department's intent. Language is therefore being added to four provisions of the rules where this suggested language would apply as suggested by the Society (N.J.A.C. 8:33I-1.3(a)1; 1.3(b)1; 1.3(a)4; and 1.4(a)).

N.J.A.C. 8:33I-1.4 Megavoltage Radiation Oncology Resource Allocation Policy

N.J.A.C. 8:33I-1.4(a)

COMMENT: South Jersey Hospital System states that it is not clear whether an existing provider, proposing to add an additional megavoltage unit, is subject to the criterion which requires an applicant for new services to demonstrate that all other megavoltage programs in the LAB region meet the 90 percent of capacity criterion.

RESPONSE: The 90 percent areawide capacity criterion applies to the addition of new programs in a LAB region and not to the expansion of existing programs.

N.J.A.C. 8:33I-1.4(c)

COMMENT: Atlantic City Medical Center (ACMC) comments that outpatient megavoltage centers are not specifically addressed in this section and asked whether the intent was to prohibit such centers.

RESPONSE: The language in this section refers to all megavoltage radiation oncology providers, regardless of whether they provide the service only to inpatients or outpatients.

N.J.A.C. 8:33I-1.4(d)

COMMENT: South Jersey Hospital System states that "serious problems of access" and "jeopardizing an existing area provider" should be clearly defined in the rules.

RESPONSE: It is incumbent on the applicant to show evidence that the approval of a program will not result in a decrease in utilization at an existing program as a result of the addition of megavoltage radiation oncology services in a given region and that there are patients who are not receiving radiation oncology services due to lack of access to existing programs. The language contained in the rule is intended to permit consideration of unique circumstances that may be present in an area of the State and places the burden squarely on the applicant to document the need for a waiver. Specific language in this case would be self-limiting and would therefore defeat the purpose of this provision.

N.J.A.C. 8:33I-1.5 Personnel standards

N.J.A.C. 8:33I-1.5(a)1

COMMENT: The RSNJ and a number of other commenters suggested that the reference to "radiation therapist" should be changed to the current terminology, which is "radiation oncologist."

RESPONSE: The Department agrees that the suggested terminology should be incorporated in the rule, and has done so.

N.J.A.C. 8:33I-1.5(a)2

COMMENT: The RSNJ commented that the complexity of modern radiation oncology requires that adequate physician coverage requires immediate full-time coverage. The RSNJ recommended that the existing language should not be changed.

RESPONSE: The amended language proposed by the Department requires applicants seeking to provide this service to adhere to the current licensing requirements for this service, rather than establishing a higher standard that cannot be enforced through licensure authority. The purpose of many of the amendments proposed for this service is to establish consistent requirements for planning and licensing purposes so that existing and potential new providers are subject to identical requirements. The existing licensing requirement also provides flexibility for the megavoltage provider, so that the coverage can be consistent with the workload experienced by the individual provider. The Department, therefore, is proposing to retain the language as initially published. By retaining this language and citing the specific section of the State's licensing rule, there will be no need for amendment in the future, should licensing requirements change.

N.J.A.C. 8:33I-1.5(a)3

COMMENT: The RSNJ and other commenters also suggested that "radiation therapy technician" should be changed to the current terminology which is "radiation therapist."

RESPONSE: The Department agrees that the suggested terminology should be incorporated in the rule. Amended language has therefore been incorporated on adoption.

N.J.A.C. 8:33I-1.5(a)3

COMMENT: The RSNJ and several hospital providers (for example, St. Barnabas Medical Center, Elizabeth General Hospital, Morristown Memorial Hospital) recommend language that would require two full-time equivalent licensed radiation therapists to ensure safe and high quality care and treatment.

RESPONSE: The language proposed in the rule is consistent with current licensing requirements for the provision of this service. The Department is therefore proposing the retention of the existing language. To do otherwise would impose a higher standard on CON applicants than that required by State licensure. Imposition of such a requirement would also not be enforceable once the megavoltage unit or program becomes operational. Those commenting on the minimum staffing re-

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quirements that are now contained in this rule should consider channeling their efforts toward amending the licensing requirements for this service. This would establish identical requirements for all megavoltage radiation oncology providers which would be enforceable through licensing sanctions.

N.J.A.C. 8:33I-1.5(a)4

COMMENT: The RSNJ recommends that a full-time nurse in a multiple unit program should be required in order to meet the patients' and physicians' needs.

RESPONSE: The language proposed in the rule is consistent with current licensing requirements for the provision of this service. The Department is therefore proposing the retention of the existing language.

N.J.A.C. 8:33I-1.5(a)5

COMMENT: The RSNJ recommends requirement for a full-time equivalent simulation technologist in multiple unit programs to ensure an appropriate level of care.

RESPONSE: The personnel requirements contained in this rule are intended to be **minimum** requirements for the provision of megavoltage services that are consistent with existing licensing requirements. These requirements can be exceeded by providers, based on individual simulator and treatment caseloads.

COMMENT: The RSNJ supports the Department's position that a professional member of the social work department should be available to meet the psychosocial needs of radiation therapy patients and families.

RESPONSE: The Department is appreciative of the Society's support of this requirement.

N.J.A.C. 8:33I-1.6 General criteria

N.J.A.C. 8:33I-1.6(a)9

COMMENT: South Jersey Hospital System states that requirements for off-site megavoltage programs are vague.

RESPONSE: The provision at N.J.A.C. 8:33I-1.6(a)9 specifically states that certificate of need applications by existing providers to locate megavoltage programs off the site of their existing service must satisfy the requirements of N.J.A.C. 8:33I-1.4 concerning new megavoltage programs. The definition of a "megavoltage program" at N.J.A.C. 8:33I-1.2 also clearly indicates that a program is limited to a single location. Off-site programs must therefore meet the criteria set forth for new programs.

N.J.A.C. 8:33I-1.3(a)

COMMENT: Holy Name Hospital questioned the timeliness of the megavoltage data that will be used to "adjudicate the Commissioner's recent call." The commenter views the language that is contained in the rule, which would permit 1992 utilization to be used, as "flawed" since the use of 1992 data will not include several new providers that now exist in the State.

RESPONSE: The language in the rule is intended to clearly identify that the most recent available data required to be reported to the Department is used to evaluate new or expanded megavoltage services. Data is submitted at six month intervals, with 1993 statewide data to be used in the upcoming CON batch. The Department has indicated that it will include the word "required" in this section of the rule, as recommended by the Radiological Society of New Jersey, to clarify the language in this section.

N.J.A.C. 8:33I-1.4(a)

COMMENT: CMH states that the rule does not address the potential purchase of a non-certificated megavoltage unit or the impact of a merger or consolidation and subsequent purchase of megavoltage equipment.

RESPONSE: Policies regarding such issues as transfer of ownership of equipment or services and the impact of mergers and consolidations are addressed in the certificate of need rules at N.J.A.C. 8:33 which guide the administration of the CON process.

COMMENT: South Jersey Hospital System (SJHS) questioned why the utilization of **all** providers, rather than all existing licensed providers, is not utilized to determine need for additional programs.

RESPONSE: The Department is unable to include "private" megavoltage programs that are not licensed and therefore are not required to report utilization statistics. Inclusion of the non-CON program data in the standard would jeopardize the entire process, since the standard could no longer be calculated because of the absence of critical private megavoltage utilization data.

COMMENT: SJHS also questions how the 90 percent areawide utilization figure is calculated. SJHS considers the language vague, since it could refer to individual programs or the entire utilization of the LAB region.

RESPONSE: The language refers to the megavoltage treatment capacity of all of the licensed megavoltage programs in the region. In short, there could be an individual program that is below the 90 percent threshold in a given region, but if there are programs with exceedingly higher volume offsetting the underutilized program, then consideration can be given to new programs.

COMMENT: The University of Medicine and Dentistry of New Jersey (UMDNJ) commented that the term "visits" is not clealry defined. UMDNJ questioned whether visits include consultations, followup visits and simulations in addition to the treatment visits themselves. This commenter also stated that some method of standardizing visits to account for lengthier cases that are often found at teaching hospitals should be instituted similar to that contained in the "Blue Book" of the American College of Radiology.

RESPONSE: An analysis of Statewide utilization data does not indicate that teaching hospitals are unable to achieve either minimal or optimal caseloads. Historically, it has been the major teaching hospitals that have been able to develop multiple unit programs with extremely high utilization levels. The "visits" that are included as one measure of utilization in the rule includes all visits that are related to the treatment of the patient with the megavoltage equipment.

Executive Order No. 27 Statement

This readoption with amendments does not impose standards on megavoltage providers in New Jersey that exceed those contained in Federal law or regulation. There is no direct Federal regulation of megavoltage radiation oncology services. This readoption with amendments does require applicants to comply with Nuclear Regulatory Commission radiation safety standards.

Full text of the readoption can be found in the New Jersey Administrative Code at N.J.A.C. 8:33I.

Full text of the adopted amendments follows (additions to proposal indicated with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

8:33I-1.2 Definitions

(a) For purposes of this subchapter, the following definitions shall apply:

...

"MeV" refers to *[a megavoltage unit with both photon and]* electron beam *[capability]* ***energy***.

"MV" refers to *[a megavoltage unit with only]* photon beam ***energy***.

...

(b) "Energy levels" of megavoltage units shall be defined as follows:

1. (No change.)

2. Medium/high energy—means greater than six MV X-ray or MeV electron energy up to 20 MV X-ray or MeV electron energy.

3. (No change.)

8:33I-1.3 Utilization of megavoltage units and programs

(a) Single unit megavoltage programs shall be subject to the following:

1. Minimum annual utilization for megavoltage unit replacement in single unit megavoltage programs is 300 total patients or 6,200 patient visits. Consideration of minimum utilization standard compliance will take into account the output of Cobalt 60 devices and the age of the equipment. Compliance with these minimum standards will be based on the actual utilization of each megavoltage unit for the most recent calendar year ***required to be*** reported to the Department immediately prior to the Commissioner's call for certificate of need applications to replace the equipment.

2. Failure to achieve an average minimum utilization as defined in (a)1 above during any 36 consecutive months shall form a sufficient basis for the Commissioner to delicense the service.

i. (No change.)

3. Single unit megavoltage programs shall have on-site simulation capability, in accordance with State licensing requirements at N.J.A.C. 8:43G-28.18.

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(b) Multiple unit megavoltage programs shall be subject to the following:

1. Applicants for a second megavoltage unit at an existing megavoltage program shall document minimum acceptable annual utilization level (on its existing unit) of 9,000 actual patient visits or 500 actual patients and project the achievement of 10,500 patient visits and 600 patients within two years of installation of the second megavoltage unit. Compliance with these minimum utilization standards will be based on the actual utilization of each megavoltage unit for the most recent calendar year ***required to be*** reported to the Department immediately prior to the Commissioner's call for certificate of need applications *[to replace the equipment]*.

2.-3. (No change.)

4. Applicants for a third megavoltage unit at an existing multiple unit megavoltage program shall meet a minimum acceptable annual utilization level (on its existing two units) of 16,000 actual patient visits or 900 actual patients. Compliance with these minimum utilization standards will be based on the actual utilization of each megavoltage unit for the most recent calendar year ***required to be*** reported to the Department immediately prior to the Commissioner's call for certificate of need applications.

5. Failure to achieve projected minimum utilization as defined in (b)1 above, within three years of installation of the additional megavoltage equipment, shall form a sufficient basis for the Commissioner to delicense the service.

6. Multiple unit programs failing to achieve an averge annual minimum utilization level as defined at (b)1 or (b)4 above, whichever is applicable, during any period of 36 consecutive months shall form a sufficient basis for the Commissioner to delicense the service.

8:33I-1.4 Megavoltage Radiation Oncology Resource Allocation Policy

(a) The Department of Health will process certificate of need applications for new Radiation Oncology Programs consistent with the provisions of the Certificate of Need Policy Manual (N.J.A.C. 8:33) and only from local advisory board regions where all existing licensed Radiation Oncology Programs meet minimum annual levels of utilization as specified at N.J.A.C. 8:33I-1.3. In addition, the annual patient treatment capacity levels for existing and approved megavoltage equipment must exceed 90 percent for the most recent calendar year ***required to be*** reported to the Department of Health prior to the Commissioner's call for certificate of need applications for new services pursuant to N.J.A.C. 8:33-4.1(a).

1. (No change.)

(b) No more than one new radiation oncology program shall be approved in each local advisory board region as defined at N.J.A.C. 8:33I-1.2, where all existing megavoltage radiation oncology programs are operating at least at minimum levels of utilization as specified of N.J.A.C. 8:33I-1.3. Additional new facilities will be considered only when both existing and approved facilities in a given local advisory board region are operating at minimum levels of utilization as specified at N.J.A.C. 8:33I-1.3.

(c) Applications for new and additional radiation oncology programs in a health service area will be evaluated on the basis of their ability to meet the standards established in this subchapter. In addition, the following factors will also be considered in the review process:

1.-7. (No change.)

8. Evidence that the proposed service is compatible with overall health planning goals and recommendations for the State as identified in the State Health Plan and for the local advisory board area;

9. Evidence that barriers to access to care do not exist, including access to cancer screening and detection programs, and that if no barriers exist, that access to care will remain constant or improve for individuals in the service area; and

10. Evidence that the applicant has participated in cancer disease prevention and health promotion activities throughout the communities to be served by this proposed regional cancer treatment service. Applicants shall document specific programs, targeted populations, and the frequency, duration and volume of participation for these disease prevention and health promotion activities.

(d) (No change.)

(e) All certificate of need applications for new megavoltage radiation oncology programs shall document the ability of the applicant to meet the minimum standards and criteria contained in this subchapter within three years from the initiation of the service. The inability to achieve minimum utilization levels during the third year of operations or thereafter will form a sufficient basis for the Commissioner to delicense the service as specified at N.J.A.C. 8:33I-1.3(a)2, (b)5 and (b)6.

8:33I-1.5 Personnel standards

(a) Each applicant for a certificate of need for a megavoltage radiation therapy unit shall provide the Department with written documentation that the following minimal staff complement shall be available:

1. A radiation *[therapist]* ***oncologist*** directing radiation therapy for each program in accordance with State licensing requirements at N.J.A.C. 8:43G-28.14(a).

i. For the purpose of this regulation a qualified radiation *[therapist]* ***oncologist*** shall be considered to be one who has been:

(1) (No change.)

(2) Certified or eligible for certification by the American Board or the American Osteopathic Board of Radiology in *[therapeutic radiology]* ***radiation oncology*** since 1976.

2. Adequate coverage by a qualified radiological physicist to insure that Cobalt-60 units and other energy units are calibrated and employed properly in keeping with the volume of patients in accordance with State licensing requirements at N.J.A.C. 8:43G-28.14(d).

i. (No change.)

3. *[Radiotherapy technicians]* ***Radiation therapists*** (licensed by the State of New Jersey in accordance with N.J.S.A. 26:2D-24 et seq. and N.J.A.C. 7:28-19) shall be available in accordance with State licensing requirements at N.J.A.C. 8:43G-28.14(c);

4. A registered professional nurse shall be available in accordance with State licensing requirements at N.J.A.C. 8:43G-28.14(e); and

5. A professional member of the social work department shall be available to meet the psychosocial needs of radiation therapy patients and families, in accordance with State licensing requirements at N.J.A.C. 8:43G-28.14(f).

(a)

DIVISION OF HEALTH FACILITIES EVALUATION AND LICENSING

Hospitals Licensing Standards

Readoption with Amendments: N.J.A.C. 8:43G

Proposed: November 21, 1994 at 26 N.J.R. 4537(a).

Adopted: February 1, 1995 by Len Fishman, Commissioner, Department of Health (with approval of the Health Care Administration Board).

Filed: February 3, 1995 as R.1995 d.124, **with substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 26:2H-1 et seq., specifically 26:2H-5.

Effective Date: February 3, 1995, Readoption;
March 20, 1995, Amendments.

Expiration Date: February 3, 2000.

Summary of Public Comments and Agency Responses:

The Department of Health ("Department") received eight written comments from the following entities:

Medical Society of New Jersey
New Jersey Hospital Association (NJHA)
New Jersey State Society of Anesthesiologists (NJSSA)
Hospital Professionals and Allied Employees of New Jersey (AFT AFL-CIO)
St. Peter's Medical Center
State Board of Respiratory Care

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Buttonwood Hospital of Burlington County
South Jersey Hospital System

Following is a summary of the written comments as received, and the responses of the Department.

N.J.A.C. 8:43G-2 Licensure Procedures

COMMENT: St. Peter's Medical Center wrote that it opposes the addition of the phrase "at the Department's discretion" to N.J.A.C. 8:43G-2.3(b), as a hospital may be indefinitely delayed from accepting patients within any newly constructed or expanded facility if "the Department's discretion" fails to effect a prompt inspection. St. Peter's recommends that the rule be revised to require that an on-site inspection of the construction of the physical plant shall be rendered and communicated within 15 days by representatives of the Health Facilities Construction Service.

RESPONSE: The intent of the proposed change was to provide more flexibility to the Department in determining whether site inspections would be performed. Due to staffing constraints, inspections must be limited to those renovation projects that entail services posing the most potential risk to patient safety relative to construciton standards. In instances where no inspection is conducted, the Department will rely upon local building inspectors or written documentation of project completion prior to authorizing occupancy. Thus, no change is made to the rules.

COMMENT: The New Jersey Hospital Association recommended that N.J.A.C. 8:43G-2.4(a)2 contain a timeframe for both the notification of deficiencies as well as for a survey prior to occupancy of a facility. More specifically, St. Peter's Medical Center recommended that the survey be conducted and communicated within 15 days, as in N.J.A.C. 8:43G-2.3(b) above. NJHA also stated that the criteria for the survey should be defined in this standard.

RESPONSE: As indicated above, the Department has not proposed a change to survey procedures other than to make the decision to inspect on-site discretionary. The criteria are those set forth in N.J.A.C. 8:43G-2.3(a), that is, compliance with standards set forth in this chapter. Thus, no change is made to the proposed rules.

COMMENT: In a similar vein, South Jersey Hospital System commented that there should be a time requirement for the Department to provide the hospital with written approval and/or license so that patient services are not unduly delayed.

RESPONSE: The Department cannot accept the requested change for inclusion in regulation. The Department requests notification from hospitals at the time the project is 80 percent complete, in order to afford adequate time for the site visit to be scheduled and occupancy approved, if conditions are acceptable. Given the shift to a flexible determination on conducting site visits, occupancy authorizations should occur on a more expedited basis. The timing of notices from facilities can be changed through a request by telephone to the Department, if more time is required.

COMMENT: The NJHA requested clarification of "ownership or controlling interests" at N.J.A.C. 8:43G-2.5 in terms of its specific intent and its association with the certificate of need process. South Jersey Hospital System commented that the new provision at N.J.A.C. 8:43G-2.5(d) specifies that a hospital must notify the Department of any change in the ownership form or controlling interests affecting hospital governance and that the Department shall determine whether a certificate of need or licensing review must be completed prior to the implementation of any ownership changes. The commenter stated that health care providers need to be able to implement organizational changes as the market dictates without having to work through time consuming and bureaucratic procedures. In the commenter's view, the Department should consider some abbreviated process with a specific time frame which would provide organizations the flexibility they need.

RESPONSE: The rule has been proposed in order to clarify those instances in which notification is required for changes in ownership, as hospitals have in a number of cases failed to provide adequate notice of mergers or acquisitions in transactions requiring a certificate of need. Although it is acknowledged that the health care environment is changing rapidly, whereby mergers, acquisitions, affiliations, and corporate restructuring are being negotiated on an ongoing basis between hospital systems, it remains necessary to assure both that an accurate record of ownerhsip is maintained by the Department and also that the resulting ownership interests and principals have the capacity to operate the facility in a safe and effective manner.

For example, if a proprietary out-of-State hospital chain acquired a controlling interest in the operation of a New Jersey, non-profit hospital, it would be essential to ascertain whether the acquiring entity has a satisfactory track record in providing health care services in all other states it operates within. Without adequate notice, there would not be a means to conduct a background check of the new operators to check whether any licensure or enforcement actions have been taken for substandard care or whether the acquiring entity is financially solvent.

The Health Care Facilities Planning Act has retained the requirement for a Certificate of Need for transfer of ownership of acute care hosptials, and thus, the licensing standards must afford a means to monitor and implement this mandate. However, in order to clarify the proposals' intent in response to the commenters' concerns, the rule will be modified to delineate by reference to certificate of need rules the types of transactions which require prior notice. Given the complexity of arrangements being devised in today's environment, it is not possible to contemplate in advance all possible corporate and business structures that may be created. However, at a minimum, the transactions identified at N.J.A.C. 8:33-3.3 will require notice. The rules at N.J.A.C. 8:33-3.3(h) specifically provide a notice requirement for a variety of transctions meeting the intent of this rule. Failure to provide such notice would constitute a licensing violation under N.J.A.C. 8:43G.

COMMENT: In reference to N.J.A.C. 8:43G-2.11(b), South Jersey Hospital System wrote that it does not understand why a separate license is required if a building or service is not located on the same or adjoining grounds as the hospital. The commenter noted that in the past, requests for site approval have taken months to be resolved, and that in order to remain competitive, hospitals should not be required to obtain a facility license for a free-standing outpatient service while "others" are not required to do so. According to the commenter, the State should be encouraging primary care service expansion as well as provision of services "where the people are" rather than promoting regulation that will deter that effort.

RESPONSE: The Hospital Licensing Standards in N.J.A.C. 8:43G address the minimum standards for operating an acute care hospital. The rules governing the operation of primary care services fall within the Ambulatory Care Licensing Standards at N.J.A.C. 8:43A. From a quality standpoint, and to assure equal treatment of community-based and hospital-operated primary care centers, the Department, as a policy and regulatory matter, will continue to license hospital-based primary care centers separately and through a uniform process applied to all such centers. The exceptions to this general rule are retained in existing rules.

N.J.A.C. 8:43G-4 Patient Rights

COMMENT: The NJHA wrote that N.J.A.C. 8:43G-4.1(a)30 has been misquoted from the signed legislation which makes a distinction between treatment protocols and "policies and procedures," which the NJHA believes pertain to employee health, professional nurse credentials, qualifications, etc.

RESPONSE: The Private Duty Nursing Act of 1994, P.L. 1994, c.22, which this rule seeks to implement, does contain the additional phrase "and policies and procedures" as pointed out by the commenter. The language was not incorporated at proposal, as the Department believed that the statute does not clearly articulate the Legislature's intent. The Department concurs with the interpretations offered by the NJHA, based upon committee hearings and legislative records. To provide greater clarification, the rule has been ammended to duplicate the statutory language. The Department interprets the rule to specify that the hospital may hold private duty nurses to employee health, credentialing, and certain educational and experience qualifications, as long as these requirements are the same as for regularly employed nurses. The Department further interprets this language to mean that a patient may choose a private duty nurse meeting the basic hiring requirements for the service in which the patient is being treated. For example, in specialty areas, this may mean additional certification or experience requirements. For medical-surgical services, however, this may simply mean a New Jersey license as a registered nurse. The hospital may also not impose any unreasonable barriers in the hiring and credentialing process for private duty nurses that effectively prevent a nurse from obtaining and starting the assignment on an almost immediate or same-day basis.

COMMENT: St. Peter's Medical Center wrote that it opposes the requirement that the hospital shall provide the patient or designee with a list of local non-profit professional nurses association registries, "as there is no clear reason to discriminate against for-profit registries." The facility requested the deletion of the qualifier "non-profit."

RESPONSE: The standard as proposed reflects the legislation enacted as the Private Duty Nursing Act of 1994. The Department is unable to delete the qualifier "non-profit," as to do so would contravene the

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specific intent of the legislation. However, as long as the hospital provides a specific list of non-profit professional nurse registries, it may also provide a separate listing of for-profit entities offering similar services.

COMMENT: South Jersey Hospital System commented that it agrees that the patient has a right to contract directly with a New Jersey licensed professional nurse so long as credentials and references are appropriate. The rule, according to the commenter, must be very specific about the role of the "contracted nurse," who must not take the place of hospital staff who are ultimately responsible for the patient's care. Also, the rule should be explicit in excluding licensed practical nurses or aides from permission to contract.

RESPONSE: The role of the contracted nurse is not different from that already established and practiced in hospitals. The 1994 legislation clarified the right of patients to choose a nurse for private professional nursing care during hospitalization. The amendment to the licensing standards reflects that right, but does not imply that such a nurse would take the place of hospital staff. The hospital must assure that all required nursing services are provided, and it may choose to delegate such services to a private duty nurse or to use the nurse only for supplemental services. Additionally, both the legislation and the rule specify "licensed registered professional nurse's as opposed to other categories of nursing personnel.

COMMENT: Buttonwood Hospital of Burlington County wrote that "continuity of care would be lost for the patient in the areas of therapeutic milieu, continued care, and generalized treatment team approach," and questioned whether there are any clarifications for inpatient psychiatric units as opposed to acute medical facilities.

RESPONSE: As noted above, the Private Duty Nursing Act of 1994 codified the right of patients to choose a nurse for private professional nursing care during hospitalization in a general hospital, with emphasis on the ability to choose from local nonprofit nursing registries. The legislation and the amendment to the patient rights subchapter do not specifically address the use of private duty nurses in psychiatric units, however, if requested by a patient, the hospital would be required to permit the practice within the guidelines described above.

N.J.A.C. 8:43G-5 Administrative and Hospital Wide

COMMENT: The NJHA commented that in regards to N.J.A.C. 8:43G-5.1(1), "some hospitals contend that there will be rare exceptions in which patients may smoke, therefore flexibility should be built into this standard to include such an exception only 'upon a physician's order.' " It was also recommended that the phrase any person be substituted for "employee, visitor or patient." South Jersey Health System also supported "discouragement" of smoking in the facility, but expressed concern about the total ban as proposed, especially in regards to adult psychiatric patients.

RESPONSE: The Department notes that the current rule at N.J.A.C. 8:43G-5.1(m) permits the exception (smoking on physician order) requested by the first commenter. As a matter of public health policy, the Department has elected to remove that exception from the rule and to require hospitals to become totally smoke-free by April 1, 1995. There may be individual instances of hardship for patients which will be considered on a case-by-case basis, but the Department is committed to a public policy requiring hospitals, as primary health care facilities in New Jersey, to provide a smoke-free environment. The enumeration of "employees, visitors, or patients" is retained for clarity and emphasis. This will be interpreted to include any visitor to the hospital, including delivery persons and others.

N.J.A.C. 8:43G-6 Anesthesia

COMMENT: The NJHA requested further clarification of N.J.A.C. 8:43G-6.3 in terms of the definition of anesthetic agents.

RESPONSE: The Department refers the commenter to N.J.A.C. 8:43G-6.1, which provides definitions for the generic term "anesthetic agent" as well as for the specific types of anesthesia such as conduction, general, regional, and local.

COMMENT: Ervin Moss, M.D., consultant for the New Jersey State Society of Anesthesiologists, noted that N.J.A.C. 8:43G-6.3(h)3 permits a licensed respiratory practitioner to monitor patients undergoing bronchoscopic procedures who have received conscious sedation. Dr. Moss notes that a registered professional nurse monitoring patients under conscious sedation must be certified in basic cardiac life support and have training and experience in the use of monitoring devices, and further notes that no such qualifications are spelled out for the licensed respiratory care practitioner. He also recommends that the licensed respiratory care practitioner be dedicated to monitoring and not permitted to assist the bronchoscopist, which is usually the role of the respiratory practitioner.

RESPONSE: The Department has relied upon the definitions of the permitted scope of practice for respiratory care practitioners at N.J.A.C. 13:44F-3.1(a), and finds that the duties which may be performed (under the direction or supervision of a physician) are equivalent to the basic cardiac life support and training/experience in monitoring devices required of registered professional nurses who monitor patients under conscious sedation. For example, respiratory care practitioners may perform cardio-pulmonary resuscitation, insert and maintain artificial airways, and administer drugs and medications. They may also use monitoring techniques to measure cardio-respiratory volumes, pressure and flow, draw and analyze blood samples, and establish and maintain arterial lines.

In response to the second point, the Department believes that the rule at N.J.A.C. 8:43G-6.3(h) is specific in requiring that the monitoring of patients under conscious sedation must be provided by an individual who is continuously present for the primary purpose of anesthesia monitoring. The Department further interpreted this rule in Advisory Bulletin H-5-91 dated November 8, 1991. At that time, the interpretive guidelines referred specifically to a registered professional nurse but are analogous for respiratory care practitioners. The Department wrote:

"The Department has also received inquiries regarding the interpretation of this standard in regards to the number of personnel required in the procedure room. The Department prefers to offer some flexibility to hospitals regarding this standard and to permit a determination of the number of required personnel to be based on an assessment of the clinical acuity of each case. The intent of the standard is as follows:

1. The individual who is monitoring shall be continuously present in the procedure room;

2. This individual shall be separate from the individual performing the procedure; and

3. This individual's primary responsibility is that of monitoring the patient. That is, a registered professional nurse [or respiratory care practitioner] whose primary reponsibility is assisting the physician may not be considered to be providing the monitoring. Additionally, reliance upon electronic alarms and signals may not substitute for visual monitoring of the patient's condition. However, a registered professional nurse meeting the qualifications at N.J.A.C. 8:43G-6.C(h) [or respiratory care practitioner] who has intermittent other duties . . . but who is primarily available to monitor the patient, would in most cases meet the standard. The hospital shall establish and implement a protocol for the availability and use of an assistant to the operating physician, separate from the person monitoring the patient, and based upon the clinical needs of each patient."

Therefore, the Department appreciates the comments of the NJSSA but does not believe that further specifications at N.J.A.C. 8:43G-6.3(h)3 are necessary.

COMMENT: The State Board of Respiratory Care wrote to endorse the amendments to N.J.A.C. 8:43G-6.3(b), as well as those at N.J.A.C. 8:43G-31.1 and 31.2. The commenter wrote: "With respect to the proposed anesthesia regulations the Board believes that this addition adds clarification regarding those individuals permitted to assist physicians in special procedures, specifically the bronchoscopy procedure. Respiratory care practitioners throughout the United States have been trained to perform this task safely for over two decades . . . The changes in the anesthesia amendments reiterate the statutory definitions and do not represent an expanded scope of practice for these individuals . . . "

RESPONSE: The Department appreciates the comments but wishes to clarify the intent of the amendment to N.J.A.C. 8:43G-6.3(h). As noted in the above response, the amendment is restricted to the provision of anesthesia monitoring services by respiratory care practitioners. The existing rule further clarified by Advisory Bulletin H-5-91, mandates that the individual who is monitoring a patient under conscious sedation shall be continuously present for the primary purpose of anesthesia monitoring. The Department also offered further interpretive guidelines as delineated in the previous response.

N.J.A.C. 8:43G-7 Cardiac Services

COMMENT: The NJHA commented that the standard at N.J.A.C. 8:43G-7.3(b) should include a qualifier which states that the primary surgeon should be board-certified in thoracic surgery, or shall meet current requirements to be examined "and shall be certified within the requirements of hospital medical staff bylaws, not to exceed a period of two years."

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RESPONSE: The proposed change was to remove the obsolete date. The suggested modification alters the intent of the standard, which refers specifically to board certification or eligibility. A hospital may impose a higher standard in its bylaws, if it wishes to do so, but cannot impose a lower standard.

N.J.A.C. 8:43G-8 Central Supply

COMMENT: Vincent Maressa, Executive Director/General Counsel for the Medical Society of New Jersey (MSNJ), wrote that a number of hospital medical staffs and certain specialty societies such as the New Jersey Academy of Ophthalmology have expressed concern about N.J.A.C. 8:43G-8.11 and 8.13, which are proposed for readoption in their present form. Mr. Maressa stated that these standards have been interpreted to mean that surgical instruments, including various scopes and lasers, must be sent to central supply for sterilization, thereby precluding flash sterilization within the operating suite and reuse on the next or succeeding cases. Clarification is requested to determine whether "appropriately intense and durational flash sterilization may be utilized so that instruments can be safely and efficiently used on succeeding patients on the same day," thus obviating the need to purchase large numbers of instrument sets.

RESPONSE: The Department respectfully submits that the comments are based upon a misunderstanding of the intent of the rules at N.J.A.C. 8:43G-8.11 and 8.13. In 1990, the Department adopted the Association for the Advancement of Medical Instrumentation (AAMI) requirements, "Good Hospital Practice: Steam Sterilization Using the Unwrapped Method (Flash Sterilization)." This rule does not completely abolish the practice of flash sterilization in the operating room, nor does it require that instruments must be sent to central supply for processing. Rather, it defines the level of care but does not specify the location. The standard of care does require that flash sterilization never be used for implantables or for full sets of instruments on a routine basis.

The AAMI position on flash sterilization is shared by the Association of Operating Room Nurses, Inc. (AORN), the Centers for Disease Control and Prevention (CDC), the Association for Professionals in Infection Control and Epidemiology, the International Association of Healthcare Central Service Material Management, and the Joint Commission on Accreditation of Healthcare Organizations.

The overall reasoning in adopting the standards on limiting flash sterilization include:

1. Care givers who are required to reprocess instruments, particularly in the surgical suite, do not always take the time to fully clean and decontaminate the instruments prior to terminal sterilization. While inadequately cleaned products still might be sterile at the end of a cycle, the microbial debris remaining on the devices could cause a pyrogenic reaction for a patient if the device was to be used in an invasive procedure.

2. Inadequate cleaning can also interfere with the functionality of medical devices.

3. Safe delivery of unwrapped products from the sterilizer to the point of use is often difficult given the placement of sterilizers in hallways, near scrub sinks, or in many other situations that contribute to the potential for immediate and significant contamination of the product.

4. The exposure times used for flash sterilization are significantly shorter than those used for wrapped or packaged goods. High bioburden, improper positioning, or the inclusion of porous or lumened materials can greatly increase the potential of not producing a sterile product in these compressed cycles. Therefore, for critical items, such as inplantable devices, longer cycles, biological monitoring of each load containing implantables, and, where possible, quarantine of the load until the result of the biological indicator is known are all recommended by AORN, the CDC, and AAMI. Quarantine is not possible with an unwrapped product.

5. Flash sterilization can be efficacious; however, the selection of the appropriate process and load configuration has to be thoroughly evaluated because of the reduced exposure times. Effective removal of air from the load becomes more critical with reduced sterilization exposure times. Gravity sterilization should only be used on simple open structure instruments, with no cavities, wrap or tray configuration which can contain or trap air.

The costs of implementation of this standard resulted in increased capital expenditures for equipment during the first two years of its existence. More recently, costs have stabilized and it is believed that over the long run hospitals will benefit from the additional care now being given to instruments. The standard has resulted in manufacturers providing hospitals with sterile devices, particularly in orthopedics, eliminating last minute flashing and reducing processing costs to hospitals. It has focused attention on sterile processing, which has resulted in an improved standard of care for instruments.

In response to the clarification requested by the Medical Society, the Department notes that implementation of this standard has generally led to the use of standardized instrument sets. Presently, many hospitals are meeting the individual needs of surgeons by flash autoclaving individual specialty instruments as required, a practice the Department finds acceptable within the parameters described above. Currently, AAMI is making revisions in its guidelines, which are expected to be completed early in 1995. By readopting the existing standards and continuing to reflect current professional standards, the Department will be consistent with national policy and Federal regulations regarding flash sterilization.

N.J.A.C. 8:43G-12 Emergency Department

COMMENT: South Jersey Hospital System, although understanding that N.J.A.C. 8:43G-12.5(a) is not a new standard, questioned why Emergency Department physicians cannot respond to inhouse emergencies under certain condition, for example, if the hospital has an average daily emergency room census of 60 or less. The commenter cited increased costs for inhouse coverage "without demonstrating the benefits to patients."

RESPONSE: The Department is committed to helping to ensure the safety of patients in both the emergency room and inpatient services. Professional standards of care require full-time attendance of emergency room physicians in the emergency room in the majority of hospitals. However, the Department has been willing to consider alternatives which demonstrate an equivalent level of patient safety on a case-by-case basis, if individual hospitals can demonstrate that full compliance would impose hardship.

N.J.A.C. 8:43G-17 and 18 Nurse Staffing and Nursing Care

COMMENT: The Hospital Professionals and Allied Employees of New Jersey (AFT AFL-CIO), representing 5,500 registered professional and licensed practical nurses, technicians, and scientists in health care facilities in New Jersey, commented that to allow the current licensing standards to sunset, or to be weakened, would result in severely negative social consequences, and that unregulated care would almost certainly lead to a relaxation of standards with compromised patient safety and welfare.

The organization wrote that both hospitals and consumers need these quantifiable standards for true evaluation and measurement of patient care. It expressed its support for "the Department of Health's continued commitment to quality patient care and staffing . . ., in particular, the continued emphasis on maintaining the highest level of nursing care as reflected in Subchapters 17 and 18." The commenter continued: "In today's rapidly changing health care industry, the demand for efficiency must not take precedence over the need for a system of patient acuity. Only when hospitals are compelled to classify and care for patients by an acuity system, providing care by a sufficient number of skilled nurses and health care professionals, can patient rights be fully protected. At a time of downsizing and cost-cutting, we are pleased that the Department plans to maintain this commitment to acuity systems for nurse staffing.

Since staffing is often the target of hospital cost-cutting, it is vital that hospitals have corrective procedures in place if staffing levels fall below predetermined levels considered sufficient for patient care.

More emphasis by the Department of Health in enforcing penalties for short staffing would greatly serve both patients and health care workers throughout the State. We suggest that the Department, in addition to maintaining and updating its current standards, develop new procedures and more closely monitor hospital compliance with Subchapters 17 and 18 in the years ahead. As managed care and other market forces increase the stress on hospital systems, many are focusing their efforts on cost-cutting. Many hospitals are not only cutting staff but replacing licensed nursing staff with unlicensed assistants. Training and education for these new 'patient care associates' varies widely among hospitals, as does the standard for their job descriptions. Just as the Department specifies credentials for licensed staff, so should they for these new positions, which in some cases, can pose a danger for patient care. We believe the Department has the responsibility to both protect the patient and improve the delivery of health care in a rapidly changing industry."

RESPONSE: The Department appreciates the comments of support and wishes to restate its commitment to a high quality of patient care

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for the citizens of New Jersey. Regarding the issues of staffing levels and staff qualifications, hospitals are required to meet the standards at N.J.A.C. 8:43G-17.1, 18.3, and those specified in other subchapters that address these issues. Even in a changing health care environment, the Department intends to help ensure patient safety by requiring hospitals to comply with existing basic requirements, including staffing levels and qualifications.

COMMENT: Buttonwood Hospital of Burlington County finds the standard at N.J.A.C. 8:43G-18.5(a)2 "vague" and requests clarification for those facilities that are surveyed as acute psychiatric hospitals. For example, nursing students at that facility are under the direct supervision of their nursing instructor from an accredited New Jersey School of Nursing.

RESPONSE: The standard permits flexibility for facilities and nursing schools to define "qualified supervision" of nursing students. The Department does not believe that further clarification is needed.

N.J.A.C. 8:43G-20 Employee Health

COMMENT: The NJHA commented that the language of the standard at N.J.A.C. 8:43G-20.2 "should allow for greater flexibility; therefore, an employee with positive results should be excluded from work until a physician provides written approval."

RESPONSE: At the request of the NJHA, the Department withheld from publication the rule requiring exclusion from work for further study. The issue is thus moot at this time.

N.J.A.C. 8:43G-24 Physical Plant

COMMENT: Buttonwood Hospital of Burlington County is "in agreement with the Department of Health that the sections in N.J.A.C. 8:43G-24.9 through 24.12 are obsolete and redundant."

RESPONSE: The Department acknowledges the comment.

N.J.A.C. 8:43G-31 Respiratory Care

COMMENT: The NJHA noted that the committee membership specified at N.J.A.C. 8:43G-31.1(a) "is too broad for a standing committee; they can be required to act in a consulting capacity."

RESPONSE: The specification of neonatal, pediatric and adult intensive care is proposed as an amplification of "critical care" in the existing standard. The participation of respiratory care practitioners as on-going committee members rather than as ad hoc consultants is believed to be important to patient care and safety.

N.J.A.C. 8:43G-33 Social Work

COMMENT: The NJHA noted that some hospitals have expressed concern that "directories" of the Respiratory Care and Social Service Department are required in licensing standards, representing "old structures" which may no longer be valid in today's integrated health care delivery system. Therefore, the NJHA suggests that consideration be given to changed language which specifies that N.J.A.C. 8:43G-33.3 applies to facilities which have a distinct social service department. The comment implies a similar suggestion for N.J.A.C. 8:43G-31.3, Respiratory care staff qualifications.

RESPONSE: The standards at N.J.A.C. 8:43G-33.3 reflect recently enacted rules of the New Jersey State Board of Social Work Examiners at N.J.A.C. 13:44G and do not in any sense represent "directories." Similarly, the rules at N.J.A.C. 8:43G-31.3 simplify the existing rules and reflect rules of the State Board of Respiratory Care at N.J.A.C. 13:44F. The proposed amendments delete earlier references to several levels of respiratory care staff and reflect a single designation, that of respiratory care practitioner. The Department reaffirms its intent to require distinct departments or services for respiratory care and social work, each directed by a designated, qualified professional. In today's rapidly changing health care environment, it is important not to lose sight of patients' needs to receive high-quality, professional care in each of the disciplines or areas which are required to help achieve optimal health and functioning. No changes are made to the rules.

Summary of Agency-Initiated Changes:

As part of a general updating of the licensing standards, the Department is deleting language found at N.J.A.C. 8:43G-12.3(a) and 12.3(a)3 to remove obsolete dates relating to emergency department staff qualifications.

Executive Order No. 27 Analysis

The regulations being proposed for readoption, N.J.A.C. 8:43G, have been in existence since 1990. (The rules for anesthesia services became effective one year earlier in 1989.) To meet the requirements of Executive Order No. 27, these standards have been analyzed and compared to Federal Conditions of Participation for Hospitals as adopted by the Health Care Financing Administration at 42 CFR 482 in 1986. Based upon the Department's analysis, the State standards appear to exceed Federal standards in some instances, as described and justified below.

The Department would note that in most instances in which Federal Conditions of Participation are exceeded by State regulations, the exceedance relates to the qualifications of the director of a clinical department or administrative unit, or of key personnel. This is demonstrated in the following areas: Subchapter 5, administrator or chief executive officer; Subchapter 6, physician director of anesthesia services; Subchapter 10, food service director and dieticians; Subchapter 12, emergency department physicians; Subchapter 14, infection control practitioner; Subchapter 15, medical records director; Subchapter 17, director of nursing; Subchapter 26, physician director of psychiatry; Subchapter 27, clinical directors of physical therapy and occupational therapy services; Subchapter 31, physician director of respiratory care; and Subchapter 34, physician director of surgery.

The Department believes that the New Jersey exceedance of Federal Conditions of participation may be accounted for at least in part by the fact that Federal requirements must apply to all hospitals nationwide, from the smallest rural community facility to the largest urban teaching hospital. Federal Conditions cannot reasonably exceed the local norms and the availability of qualified personnel in remote locations. New Jersey hospitals, on the other hand, are situated in the greater New York and Philadelphia metropolitan areas and have access to highly qualified medical personnel in all specialties. Further, more sophisticated health care consumers have come to expect and even demand more highly trained physicians and ancillary personnel, equating them with the delivery of a higher quality of care.

In most instances, the Department is unable to quantify the cost differential between the level of qualifications required by the Federal Conditions of Participation and those required by the hospital licensing standards. This is due to the unavailability of detailed financial data, the divergence of hospital budgets and outlays in different parts of the State, and the fact that a large majority of physicians in New Jersey have already become board-certified in order to remain competitive. The Department would note, however, that in all the subchapters noted above, with the exception of emergency department physicians in subchapter 12, the New Jersey exceedance over Federal Conditions of Participation relates to one individual only—the director of the department. The actual difference, then, in the compensation of a board-certified or otherwise qualified director and one who is less highly qualified is likely to account for only a miniscule portion of a hospital's overall budget. Furthermore, the more highly-qualified personnel have been in place at least since 1990, and in many instances prior to that, so that any possible additional costs have long since been absorbed into the hospitals' annual budgets.

Following is a detailed analysis of hospital licensing standards as they compare with Federal Conditions of Participation, with areas of exceedance noted.

N.J.A.C. 8:43G-5 Administrative and Hospital-Wide Services

42 C.F.R. 482.54 sets forth several requirements for hospitals which provide outpatient services, such as integration with inpatient services. Although rules for outpatient services at N.J.A.C. 8:43G are minimal in number at this time, N.J.A.C. 8:43G-5.21 does require their provision in those services provided on an inpatient basis by the hospital. It further requires provision of at least outpatient and preventive services in medicine and surgery and clinic services for medically indigent patients. The Department maintains the cost-effectiveness of outpatient and preventive services and the appropriateness of requiring that all hospitals in New Jersey provide some such services. Moreover, the rule has been in effect since 1990, and no additional economic impact is anticipated.

N.J.A.C. 8:43G-5.3 exceeds 42 C.F.R. 482.12(b) insofar as the former includes specification of minimum qualifications of the administrator or chief executive officer of the hospital. This provision is consistent with the Department's emphasis on professional competence throughout the manual of standards. In the case of the chief executive officer, the licensure rule presents several alternative ways of satisfying this minimal requirement. The rule has been in effect since 1990, and its readoption will not result in any additional costs to facilities.

N.J.A.C. 8:43G-6 Anesthesia Services

42 C.F.R. 482.52 states that "anesthesia services . . . must be provided in a well organized manner under the direction of a qualified doctor

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of medicine or osteopathy. The service is responsible for all anesthesia administered in the hospital." The Federal requirements regarding qualifications are general since they apply to all states, including those that are more rural with less access to highly qualified medical personnel. In contrast, the rule at N.J.A.C. 8:43G-6.3 is more specific, defining "qualified" to mean board certified in anesthesiology, and could arguably be considered a higher standard. However, board certification is an accepted professional qualification indicating advanced training, clinical work, completion of qualifying examinations, and continuing medical education in a specialty, and is frequently required for senior medical staff positions in urban states such as New Jersey. The Department believes that this standard helps ensure a high level of anesthesia care in a hospital leading to increased patient safety and, since the requirements have been in place since 1989, no additional cost is involved at this time. The second part of the Federal rule is analogous to N.J.A.C. 8:43G-6.3(b), which states that the director is to be involved in the credentialing of all personnel who administer anesthesia in the hospital.

42 C.F.R. 482.52(a)(1)-(5) mandate the qualifications of personnel who are permitted to administer anesthesia. State regulations at N.J.A.C. 8:43G-6.3(d), (g), (h), and (i) are similar for general anesthesia, but specify different and in some instances lower qualifications for personnel who may administer regional anesthesia, conscious sedation, and minor conduction blocks.

N.J.A.C. 8:43G-10 Dietary

Several of the licensure rules in N.J.A.C. 8:43G-10, Dietary, go beyond the analogous Federal rules at 42 C.F.R. 482.28. While the Federal rules state that the hospital must have organized dietary services that are directed and staffed by adequate qualified personnel, licensure rules provide greater specificity regarding qualifications of personnel and their responsibilities. 42 C.F.R. 482.28(a)(1) requires that the hospital must have a full-time director of the dietetic service, while N.J.A.C. 8:43G-10.3(a) lists options for educational and experiential qualifications which the food service director must have. Although 42 C.F.R. 482.28(a)(2) requires the services of a qualified dietitian, the licensure rule at N.J.A.C. 8:43G-10(b) specifies that a registered dietitian shall have full-time responsibility for the clinical aspect of the dietary service. 42 C.F.R. 482.28(b) indicates that patients' nutritional needs must be met in accordance with recognized practices and practitioners' orders; licensure rules at N.J.A.C. 8:43G-10.6(a) through (e) require each hospital to provide nutritional assessments of patients according to specified criteria. The Department believes that the greater clarity in qualifications and responsibilities of the food service director and the dietitian contained in the licensure rules may be justified both in terms of the health and safety of patients and of cost effectiveness. Given that the labor pool in New Jersey supports the hospitals' needs for qualified personnel and that hospitals have complied with these requirements for the past five years, the Department does not expect any additional cost impact as a result of the readoption of these rules. Training programs for food service supervisors are available throughout the state for persons who wish to enroll in them. Inasmuch as dietitians are not yet licensed in this State, as they are in many other states, the Department believes that a dietitian who is registered by the American Dietetic Association is best qualified by education and experience to provide nutritional assessments, to recommend and interpret dietary orders, and to ensure that diets are provided as ordered.

N.J.A.C. 8:43G-11 Discharge Planning

While 42 C.F.R. 482.21 and N.J.A.C. 8:43G-11.1, 11.2 and 11.3 are analagous in requiring an "effective, on-going discharge planning program that facilitates the provision of follow-up care," State regulations augment those standards by requiring that the patient and/or family participate in the development of the discharge plan and receive written instructions. Although Federal rules are silent on these issues, they are felt to be important in terms of patients rights and continuity of care and impose no additional costs on facilities.

N.J.A.C. 8:43G-12 Emergency Department

While 42 C.F.R. 482.55 mandates that there be "adequate medical and nursing personnel qualified in emergency care to meet the written emergency procedures and needs anticipated by the facility, N.J.A.C. 8:43G-12.3 and 12.5 are much more specific in terms of staff qualifications and availability. As noted in the Anesthesia Services section above, Federal requirements are, by necessity, general since they cover a wide variety of hospitals, in varying locations, ranging from small rural community hospitals to busy urban teaching hospitals. As a densely populated urban state, New Jersey has mandated high levels of staff qualifications and availability in the hospital emergency department. For example, N.J.A.C. 8:43G-12.3 requires that physicians working in the emergency department must either be board certified in emergency medicine, or have successfully completed an approved residency program in family medicine, general internal medicine, general surgery, or general pediatrics, or have three years of full-time clinical experience in emergency medicine within the past five years. Further requirements are that every physician shall be certified in Advanced Cardiac Life Support (ACLS), Advanced Trauma Life Support (ATLS), and either Advanced Pediatric Life Support (APLS) or Pediatric Advanced Life Support (PALS). The rules also require that the emergency department be staffed at all times by at least one physician meeting the above requirements and by at least one professional registered nurse certified in ACLS.

Although these standards exceed those in 42 C.F.R. 482.55, they were developed with input from emergency department clinicians, hospital administrators, academicians, and professional societies and associations. They are believed by this professional community and the Department to embody the minimum standards necessary to provide a safe and therapeutic environment for emergency patients, who, by definition, may need the highest levels of care from skilled practitioners.

In comparison to the general Federal requirements, the mandates in New Jersey standards would have a cost impact if they were to be implemented at one time. However, these rules have been in effect since 1990 and have included a gradual phase-in for physician qualifications to permit facilities to absorb the cost impact over a four-year period. In addition, the Department has been willing to consider waiver requests on a case-by-case basis for physician availability provisions in small facilities that have been able to demonstrate financial hardship associated with full compliance. Consequently, it is believed that there will be no further cost impact at this time.

N.J.A.C. 8:43G-14 Infection Control

While 42 C.F.R. 482.42 mandates that "a person or persons must be designated as infection control officer or officers," the State licensing standards once again are more specific in delineating both the qualifications and availability of the infection control practitioner(s). N.J.A.C. 8:43G-14.3 requires that they have education or training in surveillance, prevention, and control of nosocomial infections, and N.J.A.C. 8:43G-14.5(b) requires that there be the equivalent of at least one full-time infection control practitioner for every 250 occupied beds (but in no case less than one half full-time equivalent), as recommended by the Centers for Disease Control.

Based on recommendations from an infection control advisory committee convened during the development of the licensing standards and relying upon guidelines from the Centers for Disease Control, the Department adopted these standards to ensure adequately qualified and available staff to deal with the essential infection control program in hospitals. These rules meet, but do not exceed, professional standards in the hospital industry, and there is no additional cost impact anticipated, as these rules have been in effect since 1990.

N.J.A.C. 8:43G-15 Medical Records

N.J.A.C. 8:43G-15.4 specifies that there shall be a full-time medical record director who is an accredited record technician or a registered record administrator under a certification program approved by the American Medical Record Association. The Federal rule at 42 C.F.R. 482.24(a) requires that the hospital must employ adequate personnel to ensure prompt completion, filing and retrieval of records, but does not specify any staff qualifications. Although the licensure standard does exceed the Federal rules, the Department does not believe that the readoption of this standard represents any new cost impact upon New Jersey hospitals, since hospitals have complied since 1990. Given the increasing complexity of medical records systems as well as the rapid increase of the use of electronic systems, the current marketplace in New Jersey is supportive of this minimum qualification for the medical records director, although this requirement for a single individual may result in a minimal cost impact to hospitals.

N.J.A.C. 8:43G-16 Medical Staff

N.J.A.C. 8:43G-16.6(b) requires that each patient admitted to the hospital have a medical history and physical examination, including a provisional diagnosis, performed by a physician within seven days prior to admission or within 24 hours after admission, whereas the analogous Federal rule, 42 C.F.R. 482.22(c)(5), allows that the physical examination and medical history may be done 48 hours after admission if it was not

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done seven days prior to admission. The Department believes that the 24 hour limit for completing the physical examination and medical history represents a reasonable and appropriate standard of care for New Jersey licensed hospitals. There are sufficient numbers of physicians in the state to complete the necessary examinations within 24 hours, and the standard has not presented compliance problems for hospitals since the rules were instituted. The Department believes that allowing 48 hours to elapse before a history and physical are completed would unnecessarily jeopardize the health and safety of patients. Furthermore, economic benefits accrue to hospitals and payors as a result of the 24 hour time frame, since no patient will be occupying a costly hospital bed for an entire day before an examination is completed and diagnosis and treatment are begun.

N.J.A.C. 8:43G-17 Nurse Staffing

While 42 C.F.R. 482.23 simply requires that the director of the nursing service be a licensed registered nurse, the rules at N.J.A.C. 8:43G-18.3(a) impose additional requirements, specifically a baccalaureate degree and three to five years of combined clinical and progressive management experience in nursing. As noted in previous sections, these standards were developed by a nursing advisory committee and are believed to represent the necessary professional qualifications for a director of nursing in a New Jersey hospital to ensure a high level of patient care. It is clear that there would be an additional cost associated with hiring a more highly qualified director of nursing, but the cost for this one position has already been included in the budgets of New Jersey hospitals at least since 1990, when the rules were originally adopted.

N.J.A.C. 8:43G-18 Nursing Care

Although 42 C.F.R. 482.23(c)(4) requires that there be a hospital procedure for reporting adverse drug reactions and medication errors, it does not elaborate on the elements of such a procedure. The corresponding State standard at N.J.A.C. 4:43G-18.6(g) does include more detail concerning the reporting mechanism. This rule requires that the error or reaction be reported immediately to the nurse in charge of the unit and to the prescriber. By the end of the shift, an entry must be made in the patient's medical record. The incident must be reported in accordance with the facility's policies and procedures concerning quality assurance and risk management. It must also be reported to the pharmacy within 24 hours, in accordance with the policies and procedures approved by the pharmacy and therapeutic committees. This level of detail is intended to promote the efficiency of the reporting system, but the rule explicitly allows the hospital flexibility where appropriate. This licensure rule has been in effect since 1992. Consequently, no additional cost will be incurred by hospitals as a result of its readoption. It should be added that 42 C.F.R. 482.25(b)(6), which governs pharmaceutical services requires that incidents be reported to the attending physician and, if appropriate, to the quality assurance program.

N.J.A.C. 8:43G-23 Pharmacy

42 C.F.R. 482.25 addresses the need for pharmaceutical services and the minimization of drug errors. Whereas the Federal rule calls for "a pharmacy directed by a registered pharmacist or a drug storage area under competent supervision," N.J.A.C. 8:43G-23.1(a) and 23.3(a) require that there be a pharmacy that is licensed by the New Jersey State Board of Pharmacy, with a current DEA registration and a CDS registration from the Department, and directed by a registered pharmacist. In addition, the 42 C.F.R. 482.25(a)(1) allows a full-time, part-time, or consulting pharmacist to direct services, and 42 C.F.R. 482.25(a)(2) requires that there be "an adequate number of personnel to ensure quality pharmaceutical services including emergency services." N.J.A.C. 8:43G-23.4(a), in contrast, requires the pharmacist to be on duty or on call at all times.

Readoption of these rules will not cause the establishment of any new hospital-based pharmacies, since the rules have been in effect for years. It is the Department's belief that, in order to ensure adequate staff availability, it is necessary to require that a registered pharmacist at least be on call at all times. Hence, this requirement is seen as being consistent with 42 C.F.R. 482.25(a)(1) and 42 C.F.R. 482.25(a)(2).

42 C.F.R. 482.25 places responsibility for developing policies and procedures for minimizing drug errors on the medical staff, but allows for delegation of this activity to the pharmaceutical service. N.J.A.C. 8:43G-23.2 assigns a similar duty to the pharmacy and therapeutics committee, which, in accordance with N.J.A.C. 8:43G-23.1(b), is multidisciplinary in nature and includes a licensed pharmacist. Given the current existence of this multidisciplinary committee, its consideration of issues related to medication error should have no cost implications.

N.J.A.C. 8:43G-23.6(g) accords with 42 C.F.R. 482.23(c)(2) insofar as it requires that all medication orders be dated and signed by the prescriber. It goes beyond the Federal rule in stating that the orders must specify the name of the drug, dose, frequency, and route of administration, but such a practice is obviously a necessity in any event and does not present an issue of cost.

N.J.A.C. 8:43G-24 Plant Maintenance and Fire and Emergency Preparedness

42 C.F.R. 482.41(a)1 requires that there be emergency power and lighting in at least the operating, recovery, intensive care, and emergency rooms, and stairwells. N.J.A.C. 8:43G-24.4(e) adds a requirement that the emergency generator be checked weekly, tested under load monthly, and serviced in accordance with accepted engineering practices. This requirement is considered by the Department to be necessary, given the circumstances under which the generator would be used, and is consistent with the intent of Federal rule 42 CFR 482.41(c)2, which states that "equipment must be maintained to ensure an acceptable level of safety and quality."

42 C.F.R. 482.41(b)3 requires the hospital to have written fire control plans which contain provisions for prompt reporting of fires. N.J.A.C. 8:43G-24.13(k) adds the specifications for reporting to the Department fires which result in patients being moved. Staff time utilized for such reporting is minimal, and the Department finds the reported information to be essential in meeting its responsibilities.

N.J.A.C. 8:43G-25 Post Mortem

N.J.A.C. 8:43G-25.3(b) corresponds with 42 C.F.R. 482.22(d) regarding autopsies. It neither entirely includes nor exceeds the Federal rule.

N.J.A.C. 8:43G-26 Psychiatry

42 C.F.R. 482.60 (special provisions applying to psychiatric hospitals) are general and cross-reference many other stnadards at 42 C.F.R. 482. Once again, the standard for the qualifications of the physician director of the psychiatric service in New Jersey hospitals (also psychiatric hospitals) is higher than the Federal standard, which only requires "a physician." N.J.A.C. 8:43G-26.3(b) has required since 1990 that any newly appointed director be board certified (or eligible) by the American Board of Psychiatry and Neurology. This standard is believed to be directly related to the quality of patient care in these units or hospitals, and any cost impact it might have imposed will already have been absorbed by hospitals. The actual differential in compensation cannot readily be quantified, for reasons given earlier, but there will be no further cost upon readoption.

N.J.A.C. 8:43G-28 Radiology and Nuclear Medicine

42 C.F.R. 482.26 (radiologic services) and 42 C.F.R. 482.53 (nuclear medicine services) are somewhat analagous to standards at N.J.A.C. 8:43G-28. In some cases Federal standards exceed State licensing standards, for example, in specifying periodic inspection of equipment, checking for radiation exposure and hazards, and disposal of radioactive waste. These are issues that are addressed elsewhere in State regulation but not in the licensing standards for hospitals. In one instance, the State standard at N.J.A.C. 8:43G-28.16(b) regarding retention of patients records of radiation therapy treatments is higher than 42. C.F.R. 482.53(d)(1), which requires retention for five years. The State standard requires that records shall be maintained for at least two years after the death of the patient, or, if no date of death is known, at least until the patient wouold have attained the age of 90 years, or for five years, whichever is later. This requirement imposes additional storage and maintainance costs on hospitals, but is believed to be necessary in terms of patient care (should the patient require subsequent radiation treatments, even years later). Because these rules have been in effect since 1990, there is no cost impact upon readoption.

N.J.A.C. 8:43G-29 Physical and Occupational Therapy

Licensure rules at subchapter 29 exceed 42 C.F.R. 482.56 to the extent that they provide greater clarity and specificity regarding qualifications of directors of therapy services and also specify ratios of physical therapists to physical therapy assistants. 42 C.F.R. 482.56 states that the hospital must be organized and staffed to ensure the health and safety of patients, and further indicates that therapies must be provided by staff who meet the qualifications specified by the medical staff, consistent with State law. N.J.A.C. 8:43G-29.3(a) and 29.15(a) state, respectively, that

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the physical therapy service shall be under the clinical direction of a physical therapist licensed by the New Jersey State Board of Physical Therapy, and the occupational therapy service shall be under the clinical direction of an occupational therapist registered by the American Occupational Therapy Association. N.J.A.C. 8:43G-29.5 requires a ratio of at least one physical therapist to supervise every three physical therapist assistant. N.J.A.C. 8:43G-15(b) requires that all occupational therapists shall be registered and all occupational therapy assistants shall be certified by the American Occupational Therapy Association. Compliance with these rules, which represent the current state of care in New Jersey, has not been problematic with licensed hospitals since the rules were first adopted, although initially, a minimal cost impact may have been incurred by hospitals. The Department does not foresee readoption of the rules as resulting in any additional costs to hospitals.

N.J.A.C. 8:43G-31 Respiratory Care

Licensure rules at subchapter 31 exceed 42 C.F.R. 482.57 by stating more specific qualifications for staff and more specificity regarding staff time and availability. 42 C.F.R. 482.57(a)(10) require that there must be a director of respiratory care services who is a doctor of medicine or osteopathy with the knowledge, experience, and capabilities to supervise and administer the services properly. N.J.A.C. 8:43G-31.3 on the other hand, states that the physician director of respiratory care shall be board certified or board eligible in pulmonary medicine, and that there shall be an administrative director of respiratory care who is registered or certified by the National Board for Respiratory Care. Furthermore, N.J.A.C. 8:43G-31.5(a) and (b) require that there shall be at least one registered respiratory therapist or certified respiratory technician assigned primarily to patients in critical units, and that there shall be at least one registered respiratory therapist or certified respiratory therapy technician in the hospital or on call at all times in addition to the one who is primarily assigned to critical care units. The Department believes that these requirements for qualified personnel are appropriate to the complexity of respiratory care provided in New Jersey hospitals, help to ensure the health and safety of patients, and that readoption will not impose any additional economic burdens which exceed the initial minimal cost impact which was incurred by hospitals.

N.J.A.C. 8:43G-34 Surgery

N.J.A.C. 8:43G-34 contains rules which exceed 42 C.F.R. 482.51. State rules are more specific regarding staff qualifications and responsibilities, surgery space and environment, as well as surgery supplies and equipment. While the 42 C.F.R. 482.51(a)(1) state that operating rooms must be supervised by an experienced registered nurse or doctor of medicine or osteopathy, N.J.A.C. 8:43G-34.4(a) and (b) require a physician director who has clinical responsibility for the surgical service who is board certified, as well as an individual who has administrative responsibility for the surgical service. N.J.A.C. 8:43G-34.4(d) requires a list of surgical procedures that require the presence of a physician as first assistant. All registered nurses in the unit must have training in basic cardiac life support, in accordance with N.J.A.C. 8:43G-34.5(a). The listing of requirements for surgical space and environment at N.J.A.C. 8:43G-34.7 contains information about access to the surgical suite, staff attire, and trash collection and removal. The listing of surgery supplies and equipment at N.J.A.C. 8:43G-34.8 exceed the minimum listing in 42 C.F.R. 482.51(b)(3). Procedures for handling of sterile supplies are specified at N.J.A.C. 8:43G-34.8(e) and (f), as well as procedures for handling of soiled and clean linens. The Department believes that the specificity of this subchapter provides additional protection for the health and safety of patients and is consistent with the increasing complexity of surgical procedures performed in New Jersey hospitals. Furthermore, we believe that rules concerning the use and care of sterile supplies as well as rules regarding infection control measures in the surgical suite may help to control the growing incidence of nosocomial infections and/or infections resulting from antibiotic resistant organisms. Provision of services by qualified individuals and infection control measures are helping to ensure that surgery in New Jersey hospitals is safe and cost effective. Hospitals have incurred a minimal cost impact to institute these services and to hire qualified individuals, including the Board Certified physician director.

OFFICE OF ADMINISTRATIVE LAW NOTE: In section headings throughout the chapter, "; mandatory" is **deleted** wherever it appears. While such deletions are specifically shown for the amended sections below, such change is also applicable for all sections not otherwise amended; however, the changes to the latter are not reproduced herein. **In addition,** the section headings for all sections of the chapter currently appearing as "(Reserved)" are also **deleted,** although none are reproduced herein.

Full text of the adopted amendments follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

8:43G-1.3 Classification of Institutions

(a) (No change.)

(b) Hospitals shall be further classified as:

1. General hospital, which shall include any hospital which maintains and operates organized facilities and services for the diagnosis, treatment or care of persons suffering from acute illness, injury or deformity and in which all diagnosis, treatment and care are administered by or performed under the direction of persons licensed to practice medicine or osteopathy in the State of New Jersey;

2. Special hospital, which shall include any hospital which assures provision of comprehensive specialized diagnosis, care, treatment and rehabilitation where applicable on an in-patient basis for one or more specific categories of patients; and

3. Psychiatric hospital, which shall include any hospital which assures provision of comprehensive specialized diagnosis, care, treatment and rehabilitation where applicable on an in-patient basis for patients with primary psychiatric diagnoses.

8:43G-2.1 Certificate of Need

(a) Where, in accordance with N.J.S.A. 26:2H-1 et. seq., as amended, a Certificate of Need is required, a hospital shall not be instituted, constructed, expanded or licensed to operate except upon application for and receipt of a Certificate of Need issued by the Commissioner of the Department of Health.

(b) (No change.)

(c) The hospital shall implement all conditions imposed by the Commissioner as specified in Certificate of Need approval letters. Failure to implement the conditions may result in the imposition of enforcement sanctions in accordance with N.J.S.A. 26:2H-13 and 14.

8:43G-2.2 Application for licensure

(a) Where applicable, following receipt of a Certificate of Need as a hospital, any person, organization, or corporation desiring to operate a hospital shall make application to the Commissioner for a license on forms prescribed by the Department. Such forms may be obtained from:

Director
Licensing, Certification and Standards
Division of Health Facilities Evaluation and Licensing
New Jersey State Department of Health
CN 367
Trenton, New Jersey 08625-0367

8:43G-2.3 Newly constructed or expanded facilities

(a) (No change.)

(b) An on-site inspection of the construction of the physical plant shall be made at the Department's discretion by representatives of the Health Facilities Construction Service to verify that the building has been constructed in accordance with the final architectural plans approved by the Department.

(c) (No change.)

8:43G-2.4 Surveys and temporary license

(a) When the written application for licensure pursuant to N.J.A.C. 8:43G-2.2 is approved and the building is ready for occupancy, a survey of the facility by representatives of the Division of Health Facilities Evaluation and Licensing of the Department shall be conducted at the Department's discretion to determine if the facility meets the standards set forth in this chapter.

1. Representatives of the Division of Health Facilities Evaluation and Licensing of the Department shall discuss the findings of the survey, including any deficiencies found, with representatives of the hospital facility.

2. The hospital facility shall notify the Division of Health Facilities Evaluation and Licensing of the Department in writing when the deficiencies, if any, have been corrected. Following review of the hospital facility's report, the Division of Health Facilities Evaluation

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and Licensing may schedule one or more surveys of the facility prior to occupancy.

(b) (No change.)

(c) No hospital facility shall accept patients in any new service, unit, or facility until the hospital has a written approval and/or license issued by the Licensing and Certification Program of the Department.

(d)-(f) (No change.)

8:43G-2.5 Full license

(a)-(c) (No change.)

(d) The license is not assignable or transferable and shall be immediately void if a hospital ceases to operate or its ownership changes. A hospital shall notify the Department of any change in the ownership form or controlling interests affecting hospital governance. The Department shall determine in accordance with N.J.A.C. 8:33-3.3 whether a certificate of need or licensing application must be completed prior to the implementation of any ownership changes ***based upon the information filed and the criteria within N.J.A.C. 8:33-3.3***.

(e) (No change.)

8:43G-2.11 Hospital satellite facilities

(a) A satellite hospital facility may be operated under the effective supervision of an existing hospital.

(b) Individual licenses shall not be required for separate hospital buildings and services located on the same or adjoining grounds, if these are operated under one management.

8:43G-4.1 Patient rights

(a) Every New Jersey hospital patient shall have the following rights, none of which shall be abridged by the hospital or any of its staff. The hospital administrator shall be responsible for developing and implementing policies to protect patient rights and to respond to questions and grievances pertaining to patient rights. These rights shall include at least the following:

1.-27 (No change.)

28. To present his or her grievances to the hospital staff member designated by the hospital to respond to questions or grievances about patient rights and to receive an answer to those grievances within a reasonable period of time. The hospital is required to provide each patient or guardian with the names, addresses, and telephone numbers of the government agencies to which the patient can complain and ask questions, including the New Jersey Department of Health Complaint Hotline at 1-800-792-9770. This information shall also be posted conspicuously in public places throughout the hospital;

29. To be assisted in obtaining public assistance and the private health care benefits to which the patient may be entitled. This includes being advised that they are indigent or lack the ability to pay and that they may be eligible for coverage, and receiving the information and other assistance needed to qualify and file for benefits or reimbursement; and

30. To contract directly with a New Jersey licensed registered professional nurse of the patient's choosing for private professional nursing care during his or her hospitalization. A registered professional nurse so contracted shall adhere to hospital policies and procedures in regard to treatment protocols***, and policies and procedures*** so long as these requirements are the same for private duty and regularly employed nurses. The hospital, upon request, shall provide the patient or designee with a list of local non-profit professional nurses association registries that refer nurses for private professional nursing care.

SUBCHAPTER 5. ADMINISTRATIVE AND HOSPITAL-WIDE SERVICES

8:43G-5.1 Administrative and hospital-wide structural organization

(a)-(k) (No change.)

(l) The hospital shall develop and implement a policy for the facility to be smoke-free by April 1, 1995. The hospital shall ensure that there is no smoking in the facility by employees, visitors or patients.

8:43G-6.1 Definitions

The following words and terms, whenused in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

. . .

"Monitoring" means the observation of a patient using instruments to measure, display, and record (continuously or intermittently) the values of certain physiologic variables such as pulse, blood pressure, oxygen saturation, and respiration.

. . .

8:43G-6.3 Anesthesia staff; qualifications for administering anesthesia

(a) There shall be a physician director of anesthesia services who is a diplomate of either the American Board of Anesthesiology or the American Osteopathic Board of Anesthesiology, or who was made a fellow of the American College of Anesthesiology before 1982.

(b) The physician director of anesthesia services shall participate in the credentialing process and delineation of privileges of all personnel who administer anesthetic agents. Criteria for hospital-wide anesthesia credentialing shall include at least:

1. Objective measures of training and experience in anesthesia care against which all candidates are evaluated; and

2. A requirement for continuing education in anesthesia care.

(c)-(f) (No change)

(g) Anesthetic agents used for conscious sedation shall be administered only by the following:

1. (No change.)

2. Under the supervision of a physician who has been credentialed in accordance with medical staff bylaws to administer or supervise anesthetic agents used for conscious sedation and who is immediately available:

i.-iii. (No change.)

iv. For a supplemental dose, or doses after administration of the initial dose, by a credentialed physician who remains continuously in the procedure room, a registered nurse who is trained and experienced in the use of anesthetic agents; or

3. (No change)

(h) The monitoring of patients who have been given an anesthetic agent for the purpose of creating conscious sedation shall be provided by an individual who is continuously present for the primary purpose of anesthesia monitoring, and who is separate from the individual performing the procedure. This individual shall be one of the following:

1. One of the personnel identified in (g) above;

2. A registered professional nurse who is certified in basic cardiac life support and who has training and experience in the use of monitoring devices; or

3. For bronchoscopic procedures only, a licensed respiratory care practitioner.

8:43G-7.3 Cardiac surgery staff qualifications

(a) (No change.)

(b) The primary surgeon shall be board certified in thoracic surgery, or shall meet current requirements to be examined and shall be examined within two years of eligibility.

(c)-(e) (No change.)

8:43G-9.5 Critical care staff qualifications

(a)-(c) (No change.)

(d) The nursing manager of each unit within the critical care service shall be certified in critical care nursing by the American Association of Critical Care Nurses or have three years of experience in critical care nursing.

(e) (No change.)

8:43G-9.6 Critical care staff qualifications; advisory (Reserved)

8:43G-9.7 Critical care staff time and availability

(a)-(c) (No change.)

8:43G-9.19 Intermediate care structural organizations

(a) Intermediate care services shall be provided in all hospitals that provide critical care services.

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8:43G-12.2 Emergency department policies and procedures

(a)-(e) (No change.)

(f) The emergency department shall have policies to ensure compliance with regulations at 42 CFR 489.24 and 42 CFR 489.20 requiring examination and treatment for emergency conditions and women in labor.

8:43G-12.3 Emergency department staff qualifications

(a) *[Effective July 1, 1992, each]* Each physician practicing in the emergency department, except residents functioning under supervision as part of the hospital's graduate residency training program, consulting physicians, and private physicians who are attending to their patients in the emergency department, shall meet at least one of the following qualifications:

1. Board certification in emergency medicine;

2. (No change)

3. *[Within the past five years has at least one year of full-time clinical experience in emergency medicine. Effective July 1, 1994, the physician shall have]* Three years of full-time clinical experience in emergency medicine within the past five years.

(b) Each physician practicing in the emergency department, except residents functioning under supervision as part of the hospital's graduate residency training program, consulting physicians, and private physicians who are attending to their patients in the emergency department, shall be certified in Advanced Cardiac Life Support and either Advanced Pediatric Life Support or Pediatric Advanced Life Support within 12 months of initial assignment. Physicians who are board certified in emergency medicine shall be exempt from this requirement.

(c) Each physician practicing in the emergency department, except residents functioning under supervision as part of the hospital's graduate residency training program, consulting physicians, and private physicians who are attending to their patients in the emergency department, shall be certified in Advanced Trauma Life Support within 12 months of initial assignment. Physicians who are board certified in emergency medicine shall be exempt from this requirement.

Recodify (e) as (d) (No change in text.)

8:43G-12.4 (Reserved)

8:43G-12.5 Emergency department staff time and availability

(a) At all times at least one licensed physician who meets at least one of the qualifications in N.J.A.C. 8:43G-12.3(a) shall be present in the emergency department to attend to all emergencies.

Recodify (a)-(b) as (b)-(c) (No change in text.)

8:43G-16.2 Medical staff policies and procedures

(a) The medical staff shall have written policies, procedures, and by-laws that are reviewed annually; revised as needed, and implemented. They shall include at least:

1.-2. (No change.)

3. The minimum content of physician orders;

4. Specifications for verbal orders, including who may give verbal orders, who may receive them, and how soon they must be verified or countersigned in writing;

5. If applicable, policies and procedures related to the prescribing or ordering of medications or devices by certified nurse practitioners/clinical nurse specialists in accordance with New Jersey State Board of Nursing rules at N.J.A.C. 13:37-7; and

6. If applicable, the scope of practice, supervision, and record keeping requirements of licensed physician assistants in accordance with New Jersey State Board of Medical Examiners rules at N.J.A.C. 13:35-2B.

(b)-(k) (No change.)

8:43G-18.5 Nursing care patient services

(a) Registered professional nurses and licensed practical nurses shall provide patient care commensurate with their scope of practice, as delineated in the Nurse Practice Act.

1. Patient care may be provided by certified nurse practitioners/clinical nurse specialists in accordance with New Jersey State Board of Nursing rules at N.J.A.C. 13:37-7.

2. Nursing students shall render care to patients only when qualified supervision, as defined by the hospital and the nursing school, is available in the unit.

8:43G-20.1 Employee health policies and procedures

(a) Employee health service shall have written policies and procedures that are reviewed annually, revised as needed, and implemented. These policies and procedures shall be readily available for employees to review and include at least the following:

1. (No change.)

Recodify existing 3.-5. as 2.-4. (No change in text.)

8:43G-20.2 Employee health services

(a)-(c) (No change.)

(d) Each new employee, including members of the medical staff employed by the hospital, upon employment, shall receive a two-step Mantoux tuberculin skin test with five tuberculin units of purified protein derivative. The only exceptions are employees with documented negative Mantoux skin test results (zero to nine millimeters of induration) within the last year, employees with documented positive Mantoux skin test results (10 or more millimeters of induration), employees who received appropriate medical treatment for tuberculosis, or when medically contraindicated. Results of the Mantoux tuberculin skin tests administered to new employees shall be acted upon as follows:

1. If the first step of the Mantoux tuberculin skin test result is less than 10 millimeters of induration, the test shall be repeated one to three weeks later.

2. If the Mantoux test is 10 millimeters or more of induration, a chest x-ray is performed and, if necessary, followed by chemoprophylaxis or therapy.

(e) Each employee, including members of the medical staff employed by the hospital, shall receive an annual Mantoux tuberculin skin test. The only exceptions are those employees exempted at (d) above. Results of positive Mantoux tuberculin skin tests administered to employees shall be acted upon in accordance with (d)2 above.

Recodify existing (e)-(j) as (f)-(k) (No change in text.)

(l) The hospital shall comply with the reporting requirements of the Department of Health's Division of Epidemiology, Environmental and Occupational Health Services for tuberculin and rubella test results, pursuant to N.J.A.C. 8:57. Information regarding testing and reporting can be obtained from:

New Jersey State Department of Health
Communicable Disease Control Services
CN 369 Trenton,
NJ 08625-0369

Recodify existing (l)-(n) as (m)-(o) (No change in text.)

8:43G-31.1 Respiratory care structural organization; definitions

(a) The respiratory care service shall be represented on hospital committees responsible for neonatal, pediatric and adult intensive care, patient care, and infection control.

(b) The following term, when used in this subchapter, shall have the following meaning:

"Licensed respiratory care practitioner" means an individual who qualified and passed the National Board of Respiratory Care Entry Level Examination and is licensed by the State Board of Respiratory Care in accordance with N.J.A.C. 13:44F.

8:43G-31.2 Respiratory care policies and procedures

(a) (No change.)

(b) Verbal or telephone respiratory care orders within the scope of practice of the licensed respiratory care practitioner shall be accepted and recorded by a licensed respiratory care practitioner.

(c) There shall be a protocol whereby the nurse is informed of any verbal or telephone order that is taken by the icensed respiratory care practitioner.

8:43G-31.3 Respiratory care staff qualifications

(a) There shall be a physician director of respiratory care or pulmonary medicine who is board certified or board eligible in pulmonary medicine, and who is responsible for all respiratory care rendered in the hospital.

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(b) There shall be an administrative director of respiratory care who is licensed by the New Jersey State Board of Respiratory Care.

8:43G-31.5 Respiratory care staff time and availability

(a) There shall be at least one licensed respiratory care practitioner assigned primarily to patients in licensed critical care units. Assignments shall be based on the acuity level of patient illness assessed each shift.

(b) There shall be at least one licensed respiratory care practitioner in the hospital or on call, at all times, in addition to the one who is primarily assigned to patients in the critical care unit.

8:43G-31.7 Respiratory care patient services

(a) (No change.)

(b) Written treatment plans, and respiratory therapy goals shall be written by the licensed respiratory care practitioner. The written treatment plans shall supplement the respiratory care orders written by physicians and become part of the medical record.

8:43G-33.3 Social work staff qualifications

(a) There shall be a director of the social work department who is licensed by the New Jersey State Board of Social Work Examiners in compliance with rules at N.J.A.C. 13:44G.

(b) Each social worker shall be certified or licensed by the New Jersey State Board of Social Work Examiners.

(a)

DRUG UTILIZATION REVIEW COUNCIL

List of Interchangeable Drug Products

Adopted Amendments: N.J.A.C. 8:71

Proposed: May 2, 1994 at 26 N.J.R. 1822(a).

Adopted: February 14, 1995 by Robert G. Kowalski, Chairman, Drug Utilization Review Council.

Filed: February 28, 1995 as R.1995 d.178, **with portions of the proposal not adopted but still pending.**

Authority: N.J.S.A. 24:6E-6(b).

Effective Date: March 20, 1995.

Expiration Date: May 16, 1999.

Summary of Public Comments and Agency Responses:

The Drug Utilization Review Council received the following comments pertaining to the products affected by this adoption.

COMMENT: From Chase Laboratories in opposition to the proposed deletion of its products from the Formulary. Chase forwarded a copy of its recent FDA 483 report and responses in support of retaining its product in the Formulary. Chase requested deferral of deletion of its products pending the FDA's re-inspection in the near future.

RESPONSE: The Council took action on the nifedipine products based on a recently completed inspection by the Food & Drug Administration and continued deferral on the remaining products pending an independent consultant's report.

Summary of Hearing Officer's Recommendations and Agency Responses:

A public hearing on the proposed deletions from the List of Interchangeable Drug Products was held on May 23, 1994. Mark A. Strollo, R.Ph., M.S., served as the hearing officer. Seven persons attended the hearing. Eight comments were offered as summarized above and in a previous issue of the New Jersey Register (see 26 N.J.R. 2899(a) and 2898(a)). The hearing officer recommended that the decisions be made based upon the available information and evidence. The Council deleted the products specified as "adopted," declined to delet the products specified "not adopted," and referred the products identified as "pending" for further study. The hearing record may be reviewed by contacting Mark A. Strollo, R.Ph., M.S., Drug Utilization Review Council, Department of Health, Room 501, CN 360, Trenton, NJ 08625-0360.

Executive Order No. 27 Statement

The proposed amendments to N.J.A.C. 8:71 impose a standard of practice in New Jersey for licensed pharmacists and prescribers concerning generic drug substitution. The Federal government does not license practitioners to dispense, administer, or prescribe drugs. State law fixes the scope and standards of these authorized practices. The purpose of N.J.A.C. 8:71 was to encourage the substitution of cheaper, but therapeutically equivalent, generic drugs for more expensive brand name drugs. N.J.A.C. 8:71 does require that the pharmaceutical manufacturer demonstrate compliance with "Good Manufacturing Practices" of Title 21 of the United States Code and evidence of a satisfactory inspection by the Food and Drug Administration. These requirements do not exceed the Federal Food, Drug, and Cosmetic Act, Public Law 75-717.

Full text of the adopted amendments follows:

The **deletion** of the following products and their manufacturers were **not adopted** and therefore, retained in the Formulary in accordance with the reformatting of N.J.A.C. 8:71 which follows a standardized format for each drug product listed:

The name of the substituted brand name drug:
The generic name of the drug product:
The strength of the drug product:
The dosage delivery system of the drug product (for example, cream, capsule, tablet):
The name of the generic drug's manufacturer:

ALDOMET
Methyldopa
125 mg
Tablet
Sidmak

ALDOMET
Methyldopa
250 mg
Tablet
Sidmak

ALDOMET
Methyldopa
500 mg
Tablet
Sidmak

ANTIVERT
Meclizine HCl
12.5 mg
Tablet
Sidmak

ANTIVERT/25
Meclizine HCl
25 mg
Tablet
Sidmak

APRESOLINE
Hydralazine HCl
10 mg
Tablet
Sidmak

APRESOLINE
Hydralazine HCl
25 mg
Tablet
Sidmak

APRESOLINE
Hydralazine HCl
50 mg
Tablet
Sidmak

APRESOLINE
Hydralazine HCl
100 mg
Tablet
Sidmak

ATARAX
Hyroxyzine HCl
10 mg
Tablet
Sidmak

ATARAX
Hyroxyzine HCl
25 mg
Tablet
Sidmak

ATARAX
Hyroxyzine HCl
50 mg
Tablet
Sidmak

BACTRIM
Sulfamethoxazole/TMP
400/80 mg
Tablet
Sidmak

BACTRIM DS
Sulfamethoxazole/TMP
800/160 mg
Tablet
Sidmak

CALAN
Verapamil HCl
80 mg
Tablet
Sidmak

CALAN
Verapamil HCl
120 mg
Tablet
Sidmak

COGENTIN
Benztropine mesylate
0.5 mg
Tablet
Sidmak

COGENTIN
Benztropine mesylate
1 mg
Tablet
Sidmak

COGENTIN
Benztropine mesylate
2 mg
Tablet
Sidmak

DESYREL
Trazodone HCl
50 mg
Tablet
Sidmak

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DESYREL
Trazodone HCl
100 mg
Tablet
Sidmak

DESYREL
Trazodone HCl
150 mg
Tablet
Sidmak

DIABINESE
Chlorpropamide
100 mg
Tablet
Sidmak

DIABINESE
Chlorpropamide
250 mg
Tablet
Sidmak

DISALCID
Salsalate
500 mg
Tablet
Sidmak

DISALCID
Salsalate
750 mg
Tablet
Sidmak

DITROPAN
Oxybutynin Cl
5 mg
Tablet
Sidmak

ELAVIL
Amitriptyline
10 mg
Tablet
Sidmak

ELAVIL
Amitriptyline
25 mg
Tablet
Sidmak

ELAVIL
Amitriptyline
50 mg
Tablet
Sidmak

ELAVIL
Amitriptyline
75 mg
Tablet
Sidmak

ELAVIL
Amitriptyline
100 mg
Tablet
Sidmak

ELAVIL
Amitriptyline
150 mg
Tablet
Sidmak

FLAGYL
Metronidazole
250 mg
Tablet
Sidmak

FLAGYL
Metronidazole
500 mg
Tablet
Sidmak

FULVICIN P/G
Griseofulvin ultramicrosize
165 mg
Tablet
Sidmak

FULVICIN P/G
Griseofulvin ultramicrosize
330 mg
Tablet
Sidmak

INDERAL
Propranolol
10 mg
Tablet
Sidmak

INDERAL
Propranolol
20 mg
Tablet
Sidmak

INDERAL
Propranolol
40 mg
Tablet
Sidmak

INDERAL
Propranolol
60 mg
Tablet
Sidmak

INDERAL
Propranolol
80 mg
Tablet
Sidmak

INDERAL
Propranolol
90 mg
Tablet
Sidmak

INDERIDE
Propranolol/
hydrochlorothiazide
40/25 mg
Tablet
Sidmak

INDERIDE
Propranolol/
hydrochlorothiazide
80/25 mg
Tablet
Sidmak

INDOCIN
Indomethacin
25 mg
Capsule
Sidmak

INDOCIN
Indomethacin
50 mg
Capsule
Sidmak

MOTRIN
Ibuprofen
400 mg
Tablet
Sidmak

MOTRIN
Ibuprofen
600 mg
Tablet
Sidmak

MOTRIN
Ibuprofen
800 mg
Tablet
Sidmak

MYCOSTATIN
Nystatin
100,000U
Tablet
Sidmak

NORPRAMIN
Desipramine HCl
25 mg
Tablet
Sidmak

NORPRAMIN
Desipramine HCl
50 mg
Tablet
Sidmak

NORPRAMIN
Desipramine HCl
75 mg
Tablet
Sidmak

PERIACTIN
Cyproheptadine HCl
4 mg
Tablet
Sidmak

PERSANTINE
Dipyridamole
25 mg
Tablet
Sidmak

PERSANTINE
Dipyridamole
50 mg
Tablet
Sidmak

PERSANTINE
Dipyridamole
75 mg
Tablet
Sidmak

PROCAN SR
Procainamide modified release
250 mg
Tablet
Sidmak

PROCAN SR
Procainamide modified release
500 mg
Tablet
Sidmak

PROVENTIL
Albuterol sulfate
2 mg
Tablet
Sidmak

PROVENTIL
Albuterol sulfate
4 mg
Tablet
Sidmak

THEODUR
Theophylline
100 mg
Tablet
Sidmak

THEODUR
Theophylline
200 mg
Tablet
Sidmak

THEODUR
Theophylline
300 mg
Tablet
Sidmak

THEODUR
Theophylline
450 mg
Tablet
Sidmak

TRILISATE
Choline magnesium salicylate
500 mg
Tablet
Sidmak

TRILISATE
Choline magnesium salicylate
750 mg
Tablet
Sidmak

TRILISATE
Choline magnesium salicylate
1 g
Tablet
Sidmak

URECHOLINE
Bethanechol Cl
5 mg
Tablet
Sidmak

URECHOLINE
Bethanechol Cl
10 mg
Tablet
Sidmak

URECHOLINE
Bethanechol Cl
25 mg
Tablet
Sidmak

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URECHOLINE
Bethanechol Cl
50 mg
Tablet
Sidmak

VIBRAMYCIN
Doxycycline hyclate
100 mg
Capsule
Sidmak

The following products and their manufacturers were **deferred, and still pending**:

Biocraft:
Albuterol sulfate tabs 2 mg, 4 mg
Amiloride HCl, hydrochlorothiazide tabs 5/50 mg
Amitriptyline tabs 10 mg, 25 mg, 50 mg, 75 mg, 100 mg
Amoxicillin as the trihydrate caps 250 mg, 500 mg
Amoxicillin as the trihydrate tabs 250 mg
Amoxicillin as the trihydrate suspension 250 mg/5 ml
Amoxicillin as the trihydrate suspension 125 mg/5 ml
Ampicillin/ampicillin trihydrate susp 250 mg/5 ml
Ampicillin/ampicillin trihydrate susp 125 mg/5 ml
Ampicillin/ampicillin trihydrate caps 250 mg
Ampicillin/ampicillin trihydrate caps 500 mg
Baclofen tabs 10 mg, 20 mg
Cephalexin susp 125 mg/5 ml, 250 mg/5 ml
Cephalexin caps 250 mg, 500 mg
Cephalexin tabs 250 mg, 500 mg
Cephadrine caps 250 mg, 500 mg
Cephadrine susp 125 mg/5 ml, 250 mg/5 ml
Cinoxacin caps 250 mg, 500 mg
Cloxacillin sodium monohydrate caps 250 mg, 500 mg
Cloxacillin sodium monohydrate syrup 125 mg/5 ml
Dicloxacillin sodium monohydrate caps 250 mg, 500 mg
Disopyramide phosphate caps 100 mg, 150 mg
Hydrocortisone cream 1%
Imipramine HCl tabs 10 mg, 25 mg, 50 mg
Ketoprofen caps 25 mg, 50 mg, 75 mg
Metaproterenol tabs 10 mg, 20 mg
Metaproterenol syrup 10 mg/5 ml
Metoclopramide tabs 10 mg
Metoclopramide syrup 5 mg/5 ml
Minocycline HCl caps 50 mg, 100 mg
Nystatin susp 100,000 u/ml
Penicillin G potassium tabs 200,000 u, 400,000 u
Penicillin VK tabs 250 mg, 500 mg
Penicillin VK for sol. 125 mg/5 ml, 250 mg/5 ml
Sulfamethoxazole/TMP susp 200/40 mg per 5 ml
Sulfamethoxazole/TMP tabs 400/80 mg, 800/160 mg
Trimethoprim tabs 100 mg, 200 mg

OFFICE OF ADMINISTRATIVE LAW NOTE: See related notices of adoption at 26 N.J.R. 2898(a), 3717(b) and 4388(b), and 27 N.J.R. 355(b).

(a)

DRUG UTILIZATION REVIEW COUNCIL
List of Interchangeable Drug Products
Adopted Amendments: N.J.A.C. 8:71

Proposed: September 6, 1994 at 26 N.J.R. 3583(a).
Adopted: February 14, 1995 by the Drug Utilization Review Council, Robert G. Kowalski, Chairman.
Filed: February 28, 1995 as R.1995 d.179, **with portions of the proposal not adopted but still pending**.
Authority: N.J.S.A. 24:6E-6(b).
Effective Date: March 20, 1995.
Expiration Date: May 16, 1999.

Summary of Public Comments and Agency Responses:
No comments were received.

Summary of Hearing Officer's Recommendations and Agency Responses:
A public hearing on the proposed additions to the List of Interchangeable Drug Products was held on September 26, 1994. Mark A. Strollo, R.Ph., M.S., served as the hearing officer. No one attended the hearing. No comments were offered. The hearing officer recommended that the decisions be made based upon the available biodata. The Council adopted the products specified as "adopted," declined to adopt the products specified "not adopted," and referred the products identified as "pending" for further study. The hearing record may be reviewed by contacting Mark A. Strollo, R.Ph., M.S., Drug Utilization Review Council, Department of Health, Room 501, CN 360, Trenton, NJ 08625-0360.

Executive Order No. 27 Statement
The proposed amendments to N.J.A.C. 8:71 imposes a standard of practice in New Jersey for licensed pharmacists and prescribers concerning generic drug substitution. The Federal government does not license practitioners to dispense, administer, or prescribe drugs. State law fixes the scope and standards of these authorized practices. The purpose of N.J.A.C. 8:71 was to encourage the substitution of cheaper, but therapeutically equivalent, generic drugs for more expensive brand name drugs. N.J.A.C. 8:71 does require that the pharmaceutical manufacturer demonstrate compliance with "Good Manufacturing Practices" of Title 21 of the United States Code and evidence of a satisfactory inspection by the Food and Drug Administration. These requirements do not exceed the Federal Food, Drug, and Cosmetic Act, Public Law 75-717.

Full text of the adopted amendments follows:

The following products and their manufacturers were **adopted**:

NAPROSYN
Naproxen
250 mg
Tablet
Danbury

NAPROSYN
Naproxen
500 mg
Tablet
Danbury

NAPROSYN
Naproxen
375 mg
Tablet
Danbury

The following products and their manufacturers were **not adopted and still pending**:

ALDACTAZIDE-50
Spironolactone/
hydrochlorothiazide
50 mg/50 mg
Tablet
Danbury

AMOXIL
Amoxicillin as trihydrate
125 mg
Tablet, chewable
Novopharm

AMOXIL
Amoxicillin as trihydrate
250 mg
Tablet, chewable
Novopharm

ANAPROX
Naproxen sodium
275 mg
Tablet
Mylan

ANAPROX
Naproxen sodium
550 mg
Tablet
Mylan

ANSAID
Flurbiprofen
100 mg
Tablet
Mylan

ANSAID
Flurbiprofen
100 mg
Tablet
Novopharm

ANSAID
Flurbiprofen
50 mg
Tablet
Mylan

ANSAID
Flurbiprofen
50 mg
Tablet
Novopharm

BUSPAR
Buspirone HCl
10 mg
Tablet
Danbury

BUSPAR
Buspirone HCl
5 mg
Tablet
Danbury

CAPOTEN
Captopril
100 mg
Tablet
Novopharm

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CAPOTEN
Captopril
12.5 mg
Tablet
Novopharm

CAPOTEN
Captopril
25 mg
Tablet
Novopharm

CAPOTEN
Captopril
50 mg
Tablet
Novopharm

CORGARD
Nadolol
120 mg
Tablet
Danbury

CORGARD
Nadolol
40 mg
Tablet
Danbury

CORGARD
Nadolol
80 mg
Tablet
Danbury

DARVOCET N
Propoxyphene napsylate 100 mg/acetaminophen
100 mg/650 mg
Tablet
Danbury

DESYREL
Trazodone HCl
150 mg
Tablet
Danbury

FIORINAL
Aspirin, butalbital and caffeine
325/50/40 mg
Tablet
Danbury

GLUCOTROL
Glipizide
10 mg
Tablet
Novopharm

GLUCOTROL
Glipizide
5 mg
Tablet
Novopharm

GLUCOTROL
Glipizide
10 mg
Tablet
Watson

GLUCOTROL
Glipizide
5 mg
Tablet
Watson

ISORDIL
Isosorbide dinitrate
20 mg
Tablet
Danbury

ISORDIL
Isosorbide dinitrate
30 mg
Tablet
Danbury

ISORDIL
Isosorbide dinitrate
40 mg
Tablet
Danbury

LOPID
Gemfibrozil
600 mg
Tablet
Mylan

MAXZIDE-25 MG
Triamterene, hydrochlorothiazide
37.5/25 mg
Tablet
Danbury

METIMYD
Sulfacetamide 100 mg, prednisolone 5 mg
Per ml
Ophth Susp
Schering

MICRONASE
Glyburide
1.25 mg
Tablet
Novopharm

MICRONASE
Glyburide
2.5 mg
Tablet
Novopharm

MICRONASE
Glyburide
5 mg
Tablet
Novopharm

MEXITIL
Mexiletine HCl
150 mg
Capsule
Novopharm

MEXITIL
Mexiletine HCl
200 mg
Capsule
Novopharm

MEXITIL
Mexiletine HCl
250 mg
Capsule
Novopharm

MODURETIC 5-50
Amiloride HCl with hydrochlorothiazide
5/50 mg
Tablet
Danbury

NORPRAMIN
Desipramine HCl
100 mg
Tablet
Danbury

NORPRAMIN
Desipramine HCl
10 mg
Tablet
Danbury

NORPRAMIN
Desipramine HCl
150 mg
Tablet
Danbury

NORPRAMIN
Desipramine HCl
25 mg
Tablet
Danbury

NORPRAMIN
Desipramine HCl
50 mg
Tablet
Danbury

NORPRAMIN
Desipramine HCl
75 mg
Tablet
Danbury

ORGANIDIN
Iondinated glycerol
60 mg/5 ml
Elixir
Barre-National

PARLODEL
Bromocriptine mesylate
2.5 mg
Tablet
Danbury

PROLIXIN
Fluphenazine HCl
10 mg
Tablet
Danbury

PROLIXIN
Fluphenazine HCl
1 mg
Tablet
Danbury

PROLIXIN
Fluphenazine HCl
2.5 mg
Tablet
Danbury

PROLIXIN
Fluphenazine HCl
5 mg
Tablet
Danbury

REGLAN
Metoclopramide
5 mg
Tablet
Danbury

SELDANE
Terfenadine
60 mg
Tablet
Danbury

TENORMIN
Atenolol
25 mg
Tablet
Danbury

TUSSI-ORGANDIN DM
Iodinated glycerol 30 mg, dextromethorphan HBr 10 mg
Per 5 ml
Liquid
Barre-National

TUSSI-ORGANDIN
Iodinated glycerol 30 mg and codeine phosphate 10 mg
Per 5 ml
Liquid
Barre-National

OFFICE OF ADMINISTRATIVE LAW NOTE: See related notices of adoption at 26 N.J.R. 4390(a) and 27 N.J.R. 357(b).

(a)

DRUG UTILIZATION REVIEW COUNCIL
List of Interchangeable Drug Products
Adopted Amendments: N.J.A.C. 8:71

Proposed: November 7, 1994 at 26 N.J.R. 4294(a).
Adopted: February 14, 1995 by the Drug Utilization Review Council, Robert G. Kowalski, Chairman.
Filed: February 28, 1995 as R.1995 d.180, **with portions of the proposal not adopted but still pending**.
Authority: N.J.S.A. 24:6E-6(b).
Effective Date: March 20, 1995.
Expiration Date: May 16, 1999.

Summary of Public Comments and Agency Responses:
No comments were received.

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Summary of Hearing Officer's Recommendations and Agency Responses:

A public hearing on the proposed additions to the List of Interchangeable Drug Products was held on November 21, 1994. Vince Astolfi served as the hearing officer. Two persons attended the hearing. No comments were offered. The hearing officer recommended that the decisions be made based upon the available biodata. The Council adopted the products specified as "adopted," declined to adopt the products specified "not adopted," and referred the products identified as "pending" for further study. The hearing record may be reviewed by contacting Mark A. Strollo, R.Ph., M.S., Drug Utilization Review Council, Department of Health, Room 501, CN 360, Trenton, NJ 08625-0360.

Executive Order No. 27 Statement

The proposed amendments to N.J.A.C. 8:71 impose a standard of practice in New Jersey for licensed pharmacists and prescribers concerning generic drug substitution. The Federal government does not license practitioners to dispense, administer, or prescribe drugs. State law fixes the scope and standards of these authorized practices. The purpose of N.J.A.C. 8:71 was to encourage the substitution of cheaper, but therapeutically equivalent, generic drugs for more expensive brand name drugs. N.J.A.C. 8:71 does require that the pharmaceutical manufacturer demonstrate compliance with "Good Manufacturing Practices" of Title 21 of the United States Code and evidence of a satisfactory inspection by the Food and Drug Administration. These requirements do not exceed the Federal Food, Drug, and Cosmetic Act, Public Law 75-717.

Full text of the adopted amendments follows:

The following products and their manufacturers were **adopted**:

GLUCOTROL
Glipizide
5 mg
Tablet
Circa

GLUCOTROL
Glipizide
10 mg
Tablet
Circa

LOPRESSOR
Metoprolol tartrate
50 mg
Tablet
Teva

LOPRESSOR
Metoprolol tartrate
100 mg
Tablet
Teva

TENORMIN
Atenolol
50 mg
Tablet
Teva

TENORMIN
Atenolol
100 mg
Tablet
Teva

The following products and their manufacturers were **not adopted and still pending**:

ANSAID
Flurbiprofen
100 mg
Tablet
Lemmon

ANUSOL HC
Hydrocortisone acetate
25 mg
Suppository
Bio-Pharm

BUMEX
Bumetanide
0.5 mg
Tablet
Zenith

BUMEX
Bumetanide
1 mg
Tablet
Zenith

BUMEX
Bumetanide
2 mg
Tablet
Zenith

CAPOTEN
Captopril
12.5 mg
Tablet
Danbury

CAPOTEN
Captopril
25 mg
Tablet
Danbury

CAPOTEN
Captopril
50 mg
Tablet
Danbury

CAPOTEN
Captopril
100 mg
Tablet
Danbury

CARDIZEM CD
Diltiazem
120 mg
Capsule
Blue Ridge/Carderm

CARDIZEM CD
Diltiazem
180 mg
Capsule
Blue Ridge/Carderm

CARDIZEM CD
Diltiazem
240 mg
Capsule
Blue Ridge/Carderm

CARDIZEM CD
Diltiazem
300 mg
Capsule
Blue Ridge/Carderm

CECLOR
Cefaclor
250 mg
Capsule
Zenith

CECLOR
Cefaclor
500 mg
Capsule
Zenith

CECLOR
Cefaclor
125 mg/5 ml
Suspension
Zenith

CECLOR
Cefaclor
187 mg/5 ml
Suspension
Zenith

CECLOR
Cefaclor
250 mg/5 ml
Suspension
Zenith

CECLOR
Cefaclor
375 mg/5 ml
Suspension
Zenith

CORGARD
Nadolol
20 mg
Tablet
Zenith

CORGARD
Nadolol
40 mg
Tablet
Zenith

CORGARD
Nadolol
80 mg
Tablet
Zenith

CORGARD
Nadolol
120 mg
Tablet
Zenith

CORGARD
Nadolol
160 mg
Tablet
Zenith

CORGARD
Nadolol
80 mg
Tablet
Copley

CORGARD
Nadolol
120 mg
Tablet
Copley

CORGARD
Nadolol
160 mg
Tablet
Copley

DECONSAL II
Guaifenesin/pseudoephedrine
600 mg with 60 mg
Tablet
Anabolic

DOLOBID
Diflunisal
250 mg
Tablet
Danbury

DOLOBID
Diflunisal
500 mg
Tablet
Danbury

DURA-VENT
Guaifenesin/
phenypropranolamine HCl
600 mg/75 mg
Tablet
KV Pharm

DYAZIDE
Triamterene/
hydrochlorothiazide
50 mg/25 mg
Capsule
Zenith

ENTEX PSE
Guaifenesin/pseudoephedrine
600/120
Tablet
Anabolic

HUMIBID DM
Guaifenesin/DM
600/30
Tablet
Anabolic

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HUMIBID LA
Guaifenesin
600 mg
Tablet
KV Pharm

LOZOL
Indapamide
2.5 mg
Tablet
Mylan

NEPTAZANE
Methazolamide
25 mg
Tablet
Mikart

NEPTAZANE
Methazolamide
50 mg
Tablet
Mikart

PHENOBARBITAL
Phenobarbital
20 mg/5 ml
Elixir
Pharm. Assoc.

PYRAZINAMIDE
Pyrazinamide
500 mg
Tablet
Mikart

TAGAMET
Cimetidine
200 mg
Tablet
Zenith

TAGAMET
Cimetidine
300 mg
Tablet
Zenith

TAGAMET
Cimetidine
400 mg
Tablet
Zenith

TAGAMET
Cimetidine
800 mg
Tablet
Zenith

TIGAN
Trimethobenzamide HCl
100 mg
Suppository
Bio-Pharm

TIGAN
Trimethobenzamide HCl
200 mg
Suppository
Bio-Pharm

VOLTAREN
Diclofenac sodium
25 mg
Tablet
Ciba-Geigy

VOLTAREN
Diclofenac sodium
50 mg
Tablet
Ciba-Geigy

VOLTAREN
Diclofenac sodium
75 mg
Tablet
Ciba-Geigy

VOLTAREN
Diclofenac sodium
50 mg
Tablet
Purepac

VOLTAREN
Diclofenac sodium
75 mg
Tablet
Purepac

OFFICE OF ADMINISTRATIVE LAW NOTE: See related notice of adoption at 27 N.J.R. 351(c).

(a)

DRUG UTILIZATION REVIEW COUNCIL

List of Interchangeable Drug Products

Adopted Amendments: N.J.A.C. 8:71

Proposed: January 3, 1995 at 27 N.J.R. 30(a).
Adopted: February 14, 1995 by the Drug Utilization Review Council, Robert G. Kowalski, Chairman.
Filed: February 28, 1995 as R.1995 d.177, **with portions of the proposal not adopted but still pending.**
Authority: N.J.S.A. 24:6E-6(b).
Effective Date: March 20, 1995.
Expiration Date: May 16, 1999.

Summary of Public Comments and Agency Responses:
The following two comments were received:

COMMENT: Sanofi Winthrop, Inc., in opposition to the proposed addition of Copley's generic Plaquenil, submitted comments including reasons for their objections. Based on current information available, Sanofi Winthrop does not believe Copley's product to be bioequivalent to their branded product, Plaquenil. In addition, Sanofi Winthrop requested that Copley's product not be included in the Formulary at this point until further clarification by the FDA regarding their cGMP status.

RESPONSE: Based on the confirmation from the Food and Drug Administration that Copley Pharmaceuticals was found to be in compliance with current Good Manufacturing Practices at its most recent inspection, and Dr. Sugita's bioequivalence evaluation, the Council approved Copley's generic version of Plaquenil for inclusion in the Formulary.

COMMENT: Thomas E. Moseley, on behalf of Daniels Pharmaceuticals, objected to the inclusion of Glaxo's Levothyroxine product in the Formulary. He stated that at the time of the public hearing, biodata had still not been submitted by Glaxo; therefore, their product should be deferred until such data is provided and adequate time is given to review this data.

RESPONSE: The Council verified that the information received after the public hearing was forwarded to Thomas E. Moseley for his review prior to the end of the comment period. However, Glaxo has not provided the requested bioequivalency data and, therefore, the Council deferred taking action pending receipt of bioequivalency data or clinical information.

COMMENT: Burroughs-Wellcome suggested that bioequivalency data be submitted to support Alra's application for the addition of Digoxin. Burroughs-Wellcome also suggested that Alra's current good manufacturing practices be examined to ensure FDA compliance.

RESPONSE: The Council agreed to approve Alra's Digoxin pending Dr. Sugita's review of dissolution and disintegration data to verify compliance with USP guidelines.

Summary of Hearing Officer's Recommendations and Agency Responses:

A public hearing on the proposed additions to the List of Interchangeable Drug Products was held on January 23, 1995. Vincent Astolfi, served as the hearing officer. Six persons attended the hearing. Three comments were offered as summarized above. The hearing officer recommended that the decisions be made based upon the available biodata. The Council adopted the products specified as "adopted," declined to adopt the products specified "not adopted," and referred the products identified as "pending" for further study. The hearing record may be reviewed by contacting Mark A. Strollo, R.Ph., M.S., Drug Utilization Review Council, Department of Health, Room 501, CN 360, Trenton, NJ 08625-0360.

Executive Order No. 27 Statement

The proposed amendments to N.J.A.C. 8:71 imposes a standard of practice in New Jersey for licensed pharmacists and prescribers concerning generic drug substitution. The Federal government does not license practitioners to dispense, administer, or prescribe drugs. State law fixes the scope and standards of these authorized practices. The purpose of N.J.A.C. 8:71 was to encourage the substitution of cheaper, but therapeutically equivalent, generic drugs for more expensive brand name drugs. N.J.A.C. 8:71 does require that the pharmaceutical manufacturer demonstrate compliance with "Good Manufacturing Practices" of Title 21 of the United States Code and evidence of a satisfactory inspection by the Food and Drug Administration. These requirements do not exceed the Federal Food, Drug, and Cosmetic Act, Public Law 75-717.

Full text of the adopted amendments follows:

The following products and their manufacturers were **adopted**:

CECLOR
Cefaclor
250 mg
Capsule
STC Pharm.

CECLOR
Cefaclor
125 mg/5 ml
Suspension
STC Pharm.

CECLOR
Cefaclor
500 mg
Capsule
STC Pharm.

CECLOR
Cefaclor
187 mg/5 ml
Suspension
STC Pharm.

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CECLOR
Cefaclor
250 mg/5 ml
Suspension
STC Pharm.

CECLOR
Cefaclor
375 mg/5 ml
Suspension
STC Pharm.

DARVON
Propoxyphene HCl
65 mg
Capsule
STC Pharm.

DARVOCET N
Propoxyphene napsylate/
acetaminophen
100 mg/650 mg
Capsule
STC Pharm.

DARVON COMPOUND-65
Propoxyphene HCL/Aspirin/
Caffeine
65/389/32.4 mg
Capsule
STC Pharm.

DISALCID
Salsalate
500 mg
Tablet
Amide

DISALCID
Salsalate
750 mg
Tablet
Amide

ILOTYCIN
Erythromycin
0.5%
Ophth oint
Sight/B&L

KEFLEX
Cephalexin
250 mg
Capsule
STC Pharm.

KEFLEX
Cephalexin
500 mg
Capsule
STC Pharm.

LOPID
Gemfibrozil
600 mg
Tablet
Watson

MELLARIL
Thioridazine HCl
10 mg
Tablet
Creighton

MELLARIL
Thioridazine HCl
15 mg
Tablet
Creighton

MELLARIL
Thioridazine HCl
25 mg
Tablet
Creighton

MELLARIL
Thioridazine HCl
50 mg
Tablet
Creighton

MELLARIL
Thioridazine HCl
100 mg
Tablet
Creighton

MELLARIL
Thioridazine HCl
150 mg
Tablet
Creighton

MELLARIL
Thioridazine HCl
200 mg
Tablet
Creighton

PLAQUENIL
Hydroxychloroqine sulfate
200 mg
Tablet
Copley

RESTORIL
Temazepam
7.5 mg
Capsule
Creighton

RESTORIL
Temazepam
15 mg
Capsule
Creighton

RESTORIL
Temazepam
30 mg
Capsule
Creighton

The following products and their manufacturers remain **pending**:

ANAPROX
Naproxen sodium
275 mg
Tablet
Zenith

ANAPROX DS
Naproxen sodium
550 mg
Tablet
Zenith

CAPOTEN
Captopril
12.5 mg
Tablet
Hallmark

CAPOTEN
Captopril
25 mg
Tablet
Hallmark

CAPOTEN
Captopril
50 mg
Tablet
Hallmark

CAPOTEN
Captopril
100 mg
Tablet
Hallmark

FELDENE
Piroxicam
10 mg
Capsule
Purepac

FELDENE
Piroxicam
20 mg
Capsule
Purepac

FELDENE
Piroxicam
10 mg
Capsule
Zenith

FELDENE
Piroxicam
20 mg
Capsule
Zenith

LANOXIN
Digoxin
0.125 mg
Tablet
Alra

LANOXIN
Digoxin
0.25 mg
Tablet
Alra

LANOXIN
Digoxin
0.5 mg
Tablet
Alra

LEVSINEX
Hyoscyamine sulfate
0.375 mg
Capsule
KV Pharm.

LURIDE
Sodium fluoride
0.5 mg/ml
Liquid
Colgate/Lyne

NALDECON SR
Naldecon SR substitute
Per tablet
Tablet
West-Ward

NAPROSYN
Naproxen
250 mg
Tablet
Mova

NAPROSYN
Naproxen
375 mg
Tablet
Mova

NAPROSYN
Naproxen
500 mg
Tablet
Mova

NAPROSYN
Naproxen
250 mg
Tablet
Zenith

NAPROSYN
Naproxen
375 mg
Tablet
Zenith

NAPROSYN
Naproxen
500 mg
Tablet
Zenith

PONTOCAINE
Tetracaine HCl
0.5%
Ophth soln
Sight/B&L

SELDANE
Terfenadine
60 mg
Tablet
Geneva

SINEMET
Carbidopa with levodopa
10/100 mg
Tablet
Geneva

SINEMET
Carbidopa with levodopa
25/100 mg
Tablet
Geneva

SINEMET
Carbidopa with levodopa
25/250 mg
Tablet
Geneva

SYNTHROID
Levothyroxine sodium
50 mcg
Tablet
Glaxo

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SYNTHROID Levothyroxine sodium 100 mcg Tablet Glaxo	TAGAMET Cimetidine 200 mg Tablet Geneva
SYNTHROID Levothyroxine sodium 150 mcg Tablet Glaxo	TAGAMET Cimetidine 300 mg Tablet Geneva
SYNTHROID Levothyroxine sodium 200 mcg Tablet Glaxo	TAGAMET Cimetidine 400 mg Tablet Geneva
SYNTHROID Levothyroxine sodium 300 mcg Tablet Glaxo	TAGAMET Cimetidine 800 mg Tablet Geneva
TAGAMET Cimetidine 300 mg Tablet Mova	VOLTAREN Diclofenac sodium 25 mg Tablet Geneva
TAGAMET Cimetidine 400 mg Tablet Mova	VOLTAREN Diclofenac sodium 50 mg Tablet Geneva
TAGAMET Cimetidine 800 mg Tablet Mova	VOLTAREN Diclofenac sodium 75 mg Tablet Geneva

HUMAN SERVICES

(a)

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

Long Term Care Services Chapter
Care Guidelines and Audits, Rates of Reimbursement

Adopted Amendments: N.J.A.C. 10:63-3.2, 3.3, 3.4, 3.6, 3.7, 3.8, 3.9, 3.10, 3.11, 3.12, 3.13, 3.16, 3.18, 3.19, 3.20, 3.21, 4.1, 4.2, and 4.3

Proposed: January 17, 1995 at N.J.R. 281(a).
Adopted: February 24, 1995 by William Waldman, Commissioner, Department of Human Services.
Filed: February 27, 1995 as R.1995 d.174, **with substantive and technical changes** not requiring additional notice and comment (see N.J.A.C. 1:30-4.3).
Authority: N.J.S.A. 30:4D-6a(4)(a)b(14); 30:4D-7, 7a, b and c; 30:4D-12.
Effective Date: March 20, 1995.
Operative Date: April 1, 1995.
Expiration Date: January 3, 2000.

Summary of Public Comments and Agency Responses:
The following is a list of those who submitted comments:
The Actors' Fund of America, Englewood, NJ, Roberto Muniz, Administrator
The Actors' Fund of America, New York, NY, Tom Dillon, President
The Actors' Fund of America, several residents
Applewood Estates, Freehold, NJ; William P. Brown
Bergen Pines County Hospital, Paramus, NJ; Robert Ragona
Bridges Adult Medical Day Care Center
Bishop McCarthy Residence, Vineland, NJ, Sister Eletta Felli
Central New Jersey Jewish Home for the Aged, Somerset, NJ, Elliot V. Solomon
Clover Rest Home, Columbia, NJ, Timothy Robbins
Cohen, Shapiro, Polisher, Shiekman and Cohen, Attorneys-at-Law
County Nursing Home Administrators, Morris Plans, NJ; Joaquin Deniz
Cumberland Manor, Bridgeton, NJ; Keith Chance
Dellridge Care Center, Paramus, NJ; Marie D. Moore, Ph.D.
Dover General Hospital and Medical Center, Boonton Twp., NJ; Reggie Puk
Elizabeth General Medical Center, Elizabeth, NJ; Frank Villares
Green Hill Retirement Community for Women, West Orange, NJ; Marie E. Powell
Heritage Institute of Kimball Medical Center, Lakewood, NJ; Carol Bennett
Hovcare Inc., Tinton Falls, NJ; Edele Hovnanian
Jewish Federation of Cumberland County, Leon Silver
Jewish Geriatric Home, Cherry Hill, NJ; Isadore Tenneberg
Jewish Home and Rehabilitation Center, Jersey City, NJ; Carl Epstein and Charles P. Berkowitz
Kensington Manor Care Center; W. James Brierly, Administrator
Lincoln Park Intermediate Care Center, Lincoln Park, NJ; Dolores Turco
The Manor, Freehold, NJ; William P. Brown
Masonic Home of NJ, Burlington, NJ; Rick Small
Mater Dei Nursing Home, Newfield, NJ; Sister Anne Ebersold
Mid-Bergen Community Mental Health Center, Inc., Pat Conily Carlozzo
Morris County Board of Social Services, Morristown, NJ; Elizabeth Lehmann
Morris View Nursing Home, Morris Plains, NJ; Joaquin Deniz
Newark Adult Day Health Care Center, Newark, NJ; Callie M. Burks
Newark Beth Israel Medical Center, Newark, NJ; Diane Mayo
Newark Extended Care Facility, Inc., Newark, NJ; Morton Paneth
New Community Extended Care Facility and Medical Day Care Center, Newark, NJ; Karen Marsh
NJ Association of Health Care Facilities, Trenton, NJ; James E. Cunningham
NJ Association of Non-Profit Homes for the Aging, Princeton, NJ; Karen J. Uebele
Parkway Manor Health Center, East Orange, NJ; Diana Lunin
Passaic County Elks Adult Training Center, Clifton, NJ; Stephanie Richvalsky
Princeton Activity Center for the Elderly, Princeton, NJ; Danita Vetter
Promise Alternative Care Inc., Cherry Hill, NJ; Carol Bertino
Reformed Church Ministries to the Aging, Irvington, NJ; Eleanor Hoelzer
Riverview Extended Care Residence, Red Bank, NJ; Laurence Gumina
Saint Ann's Home for the Aged, Jersey City, NJ; Sister Norah Clarke
Saint Mary's Catholic Home, Cherry Hill, NJ; SalemCare Inc., Salem, NJ; Linda Hinson and Relatives of residents
St. Vincent's Nursing Home, Montclair, NJ; Thomas P. Sheehy, Jr.
Seashore Gardens, several interested persons, including recipients, providers and families
Senior Care Centers of America, Inc., Moorestown, NJ; Jason Feuerman
Senior Care and Activities Center, Montclair, NJ; Fred Jenny
The Society of Licensed Nursing Home Administrators of NJ;
Sussex County Department of Health and Public Safety, Newton, NJ; Carmine G. Marchionda
Warren Haven Nursing Home, Oxford, NJ; Frank Gilly, M.D.
Zurbrugg Hospital, Riverside, NJ; Wil Nicholson, Director

General Comments

COMMENT: One commenter suggested that cost savings could be achieved by "the use of all Medicare eligibility before Medicaid will pay." (Presumably a suggestion that all providers become Medicare certified).

RESPONSE: Although this comment is outside of the scope of these proposed changes, and thus could not be included in this adoption, the Division of Medical Assistance and Health Services ('the Division') agrees that this may be a worthy goal, although not clear whether there

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is a need for beds which would be eligible for the elevated level of care reimbursable by Medicare. However, at this time, Medicaid providers are not obliged by the Legislature, the Department of Health or the Division to participate as Medicare providers in order to be certified as Medicaid providers. This suggestion will be studied and evaluated within the Division and with the industry for consideration in future rulemaking proposals.

COMMENT: A commenter suggested that the waiting period for Medicaid eligibility should be increased from 36 to 60 months, which would result in cost savings.

RESPONSE: The "waiting period" is a Federal requirement which the New Jersey Legislature has adopted at N.J.S.A. 30:4D-3. This Legislation requires that a transfer of assets (which are not placed in a trust, which is governed by a different time frame), for less than fair market value, result in a penalty period. A change such as that suggested by the commenter is outside the scope of these proposed changes, and could only be made through Federal and State legislative amendment(s).

COMMENT: A commenter suggested that all subacute patients should be in nursing homes rather than in hospitals at a cost which is between the hospital rate and nursing home rate.

RESPONSE: The Division has recently adopted rules which allow additional costs associated with higher levels of care necessary for certain nursing home residents, N.J.A.C. 10:63. Since the Division is currently studying this issue in conjunction with Department of Health representatives, it does not consider that implementation of a "subacute" reimbursement system would be appropriate as part of this adoption. The Division will consider the issue for future rulemaking.

COMMENT: One commenter suggested that cost savings could be achieved by addressing Department of Health regulations which the commenter alleges drive up the cost of the program without increasing the level of patient care.

RESPONSE: The Division has historically relied upon the Department of Health to regulate the level of patient care provided to nursing facility residents. The Department of Health's regulations are developed through a joint effort of the nursing home industry, consumers and the Department. This comment uses an example, nurses aide certification, which it alleges nursing homes must pay for. This is an allowable cost under both State and Federal regulations. Any concerns with Department of Health Regulations needs to be addressed to the Department of Health and is beyond the scope of this regulatory change.

COMMENT: One commenter suggested that cost savings could be achieved by replacing State inspections with the Joint Commission accreditation.

RESPONSE: The Joint Commission on Accreditation of Healthcare Organizations (JCAHO) currently inspects hospitals throughout the United States, including New Jersey. However, in New Jersey, the Department of Health's Division of Health Facilities Evaluation and Licensing continues to inspect both hospitals and nursing facilities. The decision to continue to use the State agency as the designated inspection agency to inspect hospitals was recently considered by the Legislature, which declined to permit the JCAHO to be the sole inspecting agency for the State. In light of this decision, and because such a change would affect the Department of Health's functions, rather that the Division's, this issue is outside of the scope of the Division's authority, and goes beyond the issues addressed in the proposal.

COMMENT: One commenter suggested the three following publications be considered by the Division:

"Subacute Care in Freestanding Skilled Nursing Facilities: An Estimate of Savings to Medi-Cal, Medicare and Other Health Care Payors in California";

"Subacute Care in Freestanding Skilled Nursing Facilities—an Estimate of Savings to Medicare";

"The Magic Bullet—How to Pay for Universal Long-Term Care—A Case Study in Illinois."

The first two publications are studies on "subacute care" which the commenter alleges is a system which should be adopted by New Jersey to reduce Medicaid expenditures. The third publication suggests several changes which could be made involving all areas of a state's Medicaid program.

RESPONSE: The suggested change to recognize and reimburse a "subacute care level" would impact other entities, including acute care hospitals and nonprofit nursing facilities. Similarly,the scope of the changes suggested by the Illinois case study would also affect other interested parties. For example, this study suggested changes in eligibility rules, which would impact potential Medicaid recipients. Since the changes contained in the publications suggested by this commenter go well beyond the scope of the proposed rules, the changes suggested are not appropriate to be included in this adoption, however, the Division will study the issues raised by these publications, and if appropriate, will use the regulatory process to allow all affected providers to participate in the comment process.

COMMENT: One commenter, the Jewish Home and Rehabilitation Center (JHRC), said that due to an administrative decision made by the Division of Medical Assistance and Health Services to change the reimbursement system to one which no longer recognizes that wages in Hudson and Bergen Counties are higher than those in many other counties, it will lose $232,000 per year starting in 1995 (as a result of expiration of a hold harmless provision contained in the 1992 legislation that eliminated the wage differential). In addition, the commenter said that these proposed changes will cause further reduction in reimbursement of $960,347, which will cause the termination of all services by JHRC in Jersey City. These services include: (1) a 194 bed nursing facility; (2) an adult medical day care; (3) an Alzheimer's day care; (4) geriatric medical service, podiatry, dental and total eye clinics; (5) transportation services; (6) a kosher nutrition site; and, (7) kosher meals on wheels, all of which had up to 100,000 contacts over a year's time.

Another commenter recommends that facilities with 85 percent or higher Medicaid, Medicare, and Welfare recipients should receive a $2.00 a day add-on similar to that received by hopsitals receiving disproportionate share.

RESPONSE: Contrary to the first comment, the Division did not make an administrative decision to change the reimbursement system to one which no longer recognizes a wage differential throughout the State. The elimination of a wage differential, and the establishment of a temporary hold harmless provision, were the results of 1992 legislation (P.L. 1993, c.155 and P.L. 1993, c.196). Chapter 196 created a Medicaid Salary Region Advisory Panel, administered by the Division, to make recommendations to the Governor and the Legislature regarding Medicaid reimbursement for nursing salaries. The panel's majority, including one of the signators of the above comment, recommended the continuation of the single statewide salary region methodology in the calculation of New Jersey Medicaid nursing facility reimbursement. The panel qualified its recommendation with the proviso that some allowance for wage variation be made to the nursing and general services cost limits for facilities with a Medicaid occupancy of over 90 percent. While this adoption does not provide for additional payment to facilities with high Medicaid or Welfare utilization, the concern expressed in the second comment may be addressed in the future through the implementation of the panel's recommendation.

With respect to the unique circumstances mentioned by the first commenter, a facility which believes that it is being impacted unfairly may always consider alternatives such as decertifying beds and seeking relief through a rate appeal. However, nursing facility reimbursement is not intended to subsidize other programs.

COMMENT: Some commenters were concerned that the Division's cost analysis, estimating a cost impact of $36 million, understates the impact on facilities. Their analysis suggests the impact will be over $50 million. One commenter suggests that the impact on the 22 county facilities will be over $17 million.

RESPONSE: The Division's estimate of the impact of the proposed reimbursement changes reflects adjustments which allow for: unreported property capital costs of facilities, and anticipated adjustment of licensed bed capacity to adapt to the 85 percent minimum occupancy target. The $50 million and $17 million figures cited by the commenters apparently were derived without making these adjustments.

COMMENT: A few commenters expressed concern that the proposed regulations would hinder what they characterize as Governor Whitman's efforts to privatize county governmental facilities and concern that county governments may consider getting out of the nursing home business.

RESPONSE: The proposed amendments are not expected to hinder efforts to privatize or to cause county government to leave the nursing home business. It is unclear why the commenters believe this result will follow, since the system will be fair to governmental and private providers. Non-governmental facilities wil still have medians and screens based on a comparison with other non-governmental facilities. Governmental facilities will still have the advantage of the Peer Grouping formula, in which the governmental facilities have their rates established by a compariosn with other governmental facilities.

COMMENT: A few commenters requested meetings, additional time to review the proposals, and/or a delay in implementation because facilities are operating on a budget predicated on existing guidelines.

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RESPONSE: The commenters have had ample time to review the proposal. The Division met with members of the nursing home industry on November 30, 1994 to discuss the changes that were intended to be proposed. The proposal was amended as a result of this meeting. When the proposal was sent to the Office of Administative Law on December 15, 1994 for publication, it was also shared with the nursing home associations. On January 6, 1995, the focus of the Long Term Care quarterly meeting, which included several members of the nursing home provider community, was the impact of this proposal.

Since the facilities have had adequate advance notice, they should have been able to adapt their operating budgets as necessary. In addition, the extensive comments that were submitted demonstrates that the commenters had adequate time to evaluate the proposal.

COMMENT: Several commenters said that the "incentive" payments (presumably including group purchasing add-on, etc.) that are being eliminated under this proposal are used to offset losses incurred due to the stringent screening process or are used by facilities to make improvements.

RESPONSE: These regulatory changes are the result of the Division's review of the reimbursement system to determine those rate components that are not related to costs for direct patient care.

The screening process compares the costs incurred by nursing facilities in each of the cost centers, calculates a median cost, and increases that in most cases by a certain percentage. The Division's analyses show that, even if facilities do not pursue the additional efficiencies that these rate changes are intended to encourage, approximately 91 percent of the aggregate unaudited allowable costs of voluntary and proprietary nursing facilities will be paid and that over 25 percent of these facilities will be paid at least 95 percent of their unaudited allowable costs. The analyses also show (again, even if facilities do not pursue the additional efficiencies that these rate changes are intended to encourage) that over 80 percent of the aggregate unaudited allowable costs of governmental facilities will be paid and that almost 25 percent of these facilities will be paid at least 95 percent of their unaudited costs. The anticipated cost coverage levels are even higher when depreciation, which is not a cash outlay and may not be incurred if facilities appreciate in value, is excluded. Nursing facilities whose base year costs were at or below the median of costs incurred by nursing facilities in each of the cost categories, and that have continued since the base year to manage their costs prudently, should have all of their allowable costs covered.

Facilities are expected to make necessary improvements and these costs are included in the screening process. The Division will continue to reimburse its share of the reasonable costs incurred by a nursing facility for major capital improvements that are made with an approved Certificate of Need from the Department of Health or are mandated, for example, air conditioning systems.

COMMENT: Several commenters indicated that the facilities have three choices: reduce services; pass costs to private paying patients, which would accelerate their time frame for becoming Medicaid eligible, or, in the case of county-run facilities, pass the costs to the county taxpayers; or close. The commenters suggested that facilities with high Medicaid occupancy rates may face the strong possibility of closure in the future.

RESPONSE: The Division believes that a fourth alternative is available, which is to become more efficient. The Division considers that the CARE reimbursement system provides reimbursement that is adequate to meet the costs that must be incurred by efficient and economic providers of nursing facility services. In addition, the peer grouping component of the CARE system for county governmental facilities recognizes additional costs incurred by this distinct group of providers. While the Division anticipates that many providers will be reimbursed their full costs, the CARE system is not intended to guarantee full reimbursement of all costs to all providers.

COMMENT: New Community Extended Care Facility and Medical Day Care Center suggested that Medicaid severely under-reimburses its nursing costs because: the facility is one block from the State operated University Hospital which offers substantially higher salaries and benefits; and the facility is located in one of the highest crime areas in the State. The commenter said that these two factors force the facility to offer a more competitive labor package in order to attract nursing personnel, and that the impact of these changes on the nursing facility and the medical day care center will have a combined negative effect of over $400,000.

RESPONSE: This adoption does not reduce the level of reimbursement for nursing salaries. In addition, every facility has a right to appeal its reimbursement for nursing. If it can demonstrate that it is unique and that the screening process should not be applied to it as a result of this uniqueness, some recognition of those costs in excess of the screens can be made.

COMMENT: Lincoln Park Intermediate Care Center said that nursing homes would not be reimbursed all of their costs unless their costs are at or below the median in all of the cost centers.

RESPONSE: Each cost center that uses the median as a measure to compare reasonable costs continues to allow a tolerance percentage above that median. Some examples include patient activities, which are capped at 50 percent above the median per capita cost, and non-foot general services, which are screened at five percent above the median.

COMMENT: JHRC questioned why the State would give up $25 million in Federal funding rather than explore ways to increase State revenues.

RESPONSE: The Division does not consider the two options mutually exclusive. The Division is always interested in exploring alternative revenue sources. However, while the State seeks to maximize Federal funds for its Medicaid program, it does not seek to maximize the Federal match by maximizing State expenditures where they are inappropriate.

COMMENT: One county nursing facility provider stated that it has already submitted its annual budget to the State for review, that the proposed decreases in reimbursement for fiscal year 1995 were not included in this budget, and that the impact of the changes will be either to reduce services or to increase taxes to the county.

RESPONSE: During any fiscal year, adjustments must be made to accommodate changes which may occur. The counties will have to make their current operations more efficient to allow for the reduction in the levels of reimbursement which will result from the proposed changes.

COMMENT: One commenter noted that if these regulatory changes result in costs being shifted to private pay patients, more nursing home residents may be forced to apply for general assistance payments, thus moving costs from one government program to another.

RESPONSE: The manner in which providers deal with decreases in revenues is discretionary with each provider. The Division would encourage providers to look for ways to create additional efficiencies in their operations to allow for any decreased Medicaid revenues resulting from the proposed changes, before choosing to cost shift to private patients.

COMMENT: Numerous commenters objected to the indirect impact of the reduction of nursing facility reimbursement on providers of services to Medicaid and Medicaid waiver clients attending adult day care and medical day care facilities. They expressed concern that reduction in Medicaid revenues would force these providers to lower the level of care to these clients or, in some cases, jeopardize the stability of some facilities altogether.

RESPONSE: The Division is not making a change to the rules for adult day care and medical day care facilities at this time. The comments reflected general assertions that a rate reduction would result in a decrease in services or, possibly, closure of some facilities. The commenters presented no evidence to demonstrate that they can not achieve efficiencies in their operations that would offset the payment differential of approximately three and one half percent. If the medical day care industry can demonstrate that it is unable to economize without reducing the level of care, amendments to those programs' rules will be considered.

COMMENT: Some commenters filed their comments after the expiration of the 30 day comment period. These commenters expressed the same concerns as those comments that were filed during the comment period.

RESPONSE: The Division believes that its response to other comments addressed all of the issues not timely raised.

COMMENT: Some commenters noted that for county run nursing homes, there will be an (indirect) impact on Peer Grouping revenue, a portion of which is utilized to purchase community-based human services for the purpose of preventing or postponing institutionalization of the elderly and disabled. Reduction in this funding could conceivably result in more Medicaid eligible frail elderly requiring nursing home care.

RESPONSE: The determination of the Peer Grouping revenues is made by calculating the "increased" Federal revenues to counties resulting from the implementation of the Peer Grouping (or enhanced CARE) rate to county governmental nursing facilities. The Peer Grouping amount has historically been based upon the difference between the standard CARE rate and the special Peer rate for each county facility. Since the basis for this methodology is statutory (N.J.S.A. 30:4D-7t), the Division has no authority to change this result.

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N.J.A.C. 10:63-3.2 Timing

COMMENT: One commenter noted that "everyone else" allows reclassification on appeal, that the IRS even pays interest on the underpayment, and that to eliminate the opportunity to reclassify costs would eliminate almost all appeals. The commenter questioned the legality of this particular section, especially when it relates to changes prior to the establishment of the screens and the new rates.

RESPONSE: The Division has determined that the incidence of appeals requesting reclassification of cost report data has become administratively unmanageable. Requests for such adjustments result in relief that ranges from adjusting the per diem rate by a penny to permitting the facility to resubmit an entire cost report. The frequency of such requests taxes the ability of the Division and the Department of Health, Health Facilities Rate Setting Unit, to process appeals in a timely manner. In addition, the Division considers that the use of screens and the need to establish the screen amounts on a timely basis differentiates its system from "other" systems. Because retroactive adjustment of screens using adjusted base period data is impractical, it is critical that facilities take seriously the obligation to allocate costs correctly and report them correctly on their original cost reports. The Division considers a limit on the time for requesting reclassification to be the only practical means to maximize the reliability of the cost screens. In response to the comments, the Division is making a change on adoption which will now allow reclassification of costs for a period of 30 calendar days following the date on which the cost report was originally due.

COMMENT: Several commenters objected to the prohibition on revising and amending cost reports as being unfair when an error is made in good faith by a facility.

RESPONSE: The Division restates its response made to the immediately preceding comment.

COMMENT: One commenter noted that the complex nature of some facilities with many layers of service and accounting systems at times can result in inadvertent, improper allocation of expenses. The commenter stated that the intent of the cost reporting process should be to obtain correct and accurate information and to establish rates based on this information, and that if a nursing facility is not allowed to correct reporting errors, the State may be calculating incorrect rates.

RESPONSE: The Division is adding text upon adoption of these regulatory changes to allow a facility 30 days to submit changes to cost reports. In addition, rate calculation errors made by the State will still be appealable to the Division.

N.J.A.C. 10:63-3.3 Rate components

COMMENT: Several commenters objected to the disallowance of legal expenses related to rate appeals. It is asserted that this provision violates a provider's right to a full and fair hearing and judicial review, and would have the effect of setting rates which are not reasonable and adequate. The commenters felt that because of high Medicaid occupancy levels, Medicaid should reimburse costs related to reasonable and appropriate rate appeals, and that by eliminating legal expenses, facilities are effectively precluded from appealing rates. In addition, it was felt that this preclusion would affect patient care, because a facility will either suffer losses from improper rates without counsel or will incur unreimbursable costs for legal expenses to litigate rates. The commenters noted that many nursing facilities have business structures which are required to retain representation by an attorney in hearings in the Office of Administrative Law, and that the complexity of procedural and substantive issues related to the appeal of reimbursement issues requires representation by an attorney as a matter of fairness. They argue that it is a matter of public interest that providers not be underfunded so that they are able to provide adequate care and avoid cost shifting. The commenters claim that by denying facilities reimbursement for legal fees, the appeal process violates the Boren Amendment. Finally, they point out that the Medicare reimbursement system recognizes legal expenses related to rate appeals as an allowable expense.

RESPONSE: The Division is adopting this change to provide a disincentive for frivolous appeals and appeals that could be avoided if providers would instead undertake appropriate cost containment measures to operate within their rates. This change will have a relatively small impact on facility revenues. Even under the rules in effect prior to this adoption, reimbursement for nursing facility legal expenses was limited by a screen and accounted for only a small percentage of revenue. Also, the Division does not expect that facilities will incur substantial legal fees to appeal rate calculation errors. The Division also notes that it is traditional for litigants to bear their own legal expenses unless a court rule or statute provides otherwise. Neither Federal nor State law requires the New Jersey Medicaid program to reimburse providers' legal fees.

N.J.A.C. 10:63-3.6 General services expenses

COMMENT: Some commenters have taken exception to the proposed reduction in the screens for administrator and assistant administrator to 105 percent since the screens have been consistently calculated for over 13 years and industry has based salaries on these screens. They allege that there is no rationale to change this methodology for any reason other than budgetary concerns, and that facilities are penalized since salaries paid to unrelated administrators cannot be reduced.

Other commenters have suggested that if administrators' salaries are reduced, there is a possibility that the quality of care may be affected. In addition, they suggest that quality professionals may be forced to seek other professions at a time when nursing facilities are having difficulty attracting qualified administrators and assistant administrators.

RESPONSE: The comments confirm what the Division has observed, that is, some facilities set salaries at the screen limit rather than attempting to be efficient and economical and set salaries at levels closer to the industry norm. The Division has seen no evidence that quality of care suffers at facilities that pay administrators up to the screened amount. The Division has seen no evidence of the perceived difficulty in attracting administrators and assistant administrators.

COMMENT: One commenter believes it is unfair that nursing home administrators are being required to take pay cuts when the average hospital president already earns 200 percent more in salary and 100 percent more in various fringe benefits.

RESPONSE: The Division believes it is reasonable to expect that efficiently and economically operated nursing facilities would seek to pay salaries in accordance with nursing facility industry norms.

COMMENT: One commenter indicated that the screen change for the administrator is acceptable provided that the screen is calculated without elimination of high salaries.

RESPONSE: The Division will continue to calculate the screen for the administrator by eliminating only extreme and isolated high and low salaries, not all high salaries.

COMMENT: Some commenters stated that the calculation of the administrator/management screen is arbitrary, because it is based upon unrelated administrators' expenses only and does not include management costs.

RESPONSE: The administrator/management screen is based upon unrelated administrators' expenses utilizing a cost regression analysis. Management costs, including upper management and property costs of home office or related-party management companies, are combined with administrator's expenses and screened against the administrator's cost limit. The Division has not made any additional change in the administrator/management screen upon adoption. The Division considers this screen appropriate in part because the sole proprietorship facility with an unrelated administrator is considered a model or benchmark for the cost of economic and efficient operation of the administration function.

N.J.A.C. 10:63-3.7 Property operating expenses

COMMENT: Several commenters opposed this reduction because facilities cannot choose their utility company or negotiate their prices to control their expenses. They suggested that this concern is especially applicable to older facilities, and that utility costs should be allowed unscreened, or subjected to the current screen.

RESPONSE: The Division's analysis demonstrates that a screen of 125 percent of the median will reimburse 96 percent of the aggregate utility costs and 78.7 percent of facilities will receive all of their costs even without further attempts to improve efficiencies. The Division believes that facilities should be able to achieve some efficiencies in their utility costs. The Division also notes that facilities that are able to demonstrate consistent effort to achieve efficiency in their utility costs may be eligible for relief through the appeals process.

COMMENT: One commenter stated that the original intent of CARE was not to screen utility costs.

RESPONSE: The Division is unaware of any documentation on this claim. In any event, current rules require a utility screen.

COMMENT: Several commenters referred to the State's mandate on temperature controls for heat in the winter and air conditioning in the summer and claim that the facilities have no control of the utility costs associated with these mandates.

RESPONSE: The State mandates on facility temperature levels apply to all facilities, and, therefore, the expenses that facilities incur to comply with these mandates are reflected in the median and the screen.

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COMMENT: Several commenters referred to a recent utility conservation proposal, New York efforts in this area, and other potential incentives.

RESPONSE: The Division is considering a number of proposals in this area, including a special light bulb proposal, under discussion with the industry. Furthermore, the Division welcomes any other suggestions in this area.

N.J.A.C. 10:63-3.8 Special amortization

COMMENT: One commenter suggested that the availability of alternative bids on capital projects is limited and would pose a significant problem for some facilities. It was suggested that the Division limit the number of bids required for reviewing reasonableness of project costs.

RESPONSE: The Division recognizes the commenter's concern that this provision be clarified, and believes that a clarification is within the scope of the original proposal. Therefore, the adopted text will be changed to explain that the Division will interpret three to be a "reasonable" number of bids. This small number of bids should resolve the issue of whether alternative bids can be obtained for capital projects.

COMMENT: One commenter asserted that governmental facilities are already required by law to have open bidding and must always accept the lowest bid. This further restricts the facility's ability to move on projects.

RESPONSE: The review of bids contemplated by this provision does not anticipate that the Division will be involved during the bidding process, but that the Division will be able to review the bids after the fact. This review will be limited to determining if a competitive bidding process was actually conducted and whether the winning bid was reasonable in comparison to the other bids considered. The Division does not anticipate exercising a "veto" over the competitive bidding process of a nursing facility provider, but will exercise its obligation to limit reimbursement if the cost of acquisitions or capital projects is unreasonable. Since governmental facilities are required to participate in a competitive bidding process, the review conducted by the Division will be simplified.

N.J.A.C. 10:63-3.9 Routine patient care expenses

COMMENT: One commenter suggested that nurse staffing requirements for patients with conditions requiring additional nursing services should be changed to recognize the need for all licensed nurses rather than a distribution of 20 percent licensed and 80 percent unlicensed nurse staffing.

RESPONSE: The Division utilizes the Department of Health nursing facility licensing standards for required nurse staffing as the basis for calculating the nursing cost limit of the reimbursement rate. The Division has historically relied on these standards as the basis for this calculation and believes that the overall methodology for calculating the nursing cost screen, which allows for a 15 percent increment above required nurse staffing hours to allow for variations in nurse staffing, provides adequate flexibility for facilities to meet differences in individual patient needs. The Division believes that nursing skill mix is a relevant factor in nursing facility efficiency and economy. The Division does not consider that a change in the basis of the nursing cost screen is appropriate at the present time, and, therefore, made no change in this adoption.

COMMENT: Several commenters interpreted the regulatory proposal to involve a reduction in reimbursement for nurse staffing.

RESPONSE: The proposal does not include any reduction to the nurse staffing component of the nursing cost limit.

COMMENT: One commenter stated that the existing reasonable limit placed on nursing services has had a devastating impact on patient care. The commenter suggests that reimbursement for nursing services should be studied and increases should be funded.

RESPONSE: The Division believes that the current reimbursement for nursing costs results in rates that are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities. The Division has seen no evidence that adequate quality care cannot be provided without increased reimbursement for nursing services. The Division is aware that New Jersey compares favorably to other states in quality of care and sees no reason to adjust nursing compensation.

N.J.A.C. 10:63-3.10 Property-capital costs

COMMENT: One commenter stated that, due to lack of incentive from removal of the return on equity, providers who have low property capital costs may leave the nursing home industry.

RESPONSE: The intent of this regulatory change is neither to encourage nor to discourage the sale of nursing facilities. The scope of these changes is, however, intended to provide adequate reimbursement of provider costs. It should be noted that the Medicare program has phased out the return on equity in its reimbursement methodology within the last couple of years.

COMMENT: One commenter noted that facilities which will receive only actual property capital costs will look for ways to restructure ownership, which would result in higher Capital Facilities Allowance payments.

RESPONSE: The Division does not anticipate this result. The rules provide for limits on recognition of costs incurred through transactions between related parties. Therefore, only "arms length transactions" will affect the basis of the property capital component of the rate.

COMMENT: One commenter stated that the current method, recommended by the State Commission of Investigation, was designed to stop resale and refinancing, while assuring a healthy, viable long-term care industry, while the reimbursement of the lower of CFA or actual property capital costs would result in bad policy.

RESPONSE: The rules have, in fact, retained the original intent of the 20-year-old S.C.I. recommendation by using the CFA as a limit on property capital costs, thereby restricting the artificial inflation of property capital values.

COMMENT: Several commenters objected that the proposed change would not give providers fair market value for the "rental" of beds for Medicaid patients.

RESPONSE: Facilities will now be paid the lower of their actual costs or the CFA. The Division can no longer justify paying a CFA in excess of actual property capital costs (in some cases enormously out of proportion to those costs). It is now appropriate to change the method of capital reimbursement to recognize the reasonable actual property capital cost of facilities that have costs below the CFA. In addition, the Division is not required by State or Federal law to pay fair market rental value.

COMMENT: One commenter suggested that the elimination of return on equity encourages "complete" financing and that such financing arrangements are dangerous, especially for facilities with a high Medicaid occupancy.

Other commenters noted that the elimination of the return on equity will discourage owners from maintaining equity in their property.

RESPONSE: The commenters seem to suggest that providers would have an incentive to refinance and withdraw equity in order to maximize their CFAs. The Division does not believe that the rules provide such an incentive, because the additional borrowing, if unrelated to the operation of the facility, would not be reimbursable. It should also be noted that the Medicare reimbursement system for nursing facilities no longer pays a return on equity.

COMMENT: Several commenters noted that elimination of a return on equity penalizes older facilities.

RESPONSE: The Division does not believe that not paying an allowance for capital costs to a facility that has no capital costs is a penalty. The Division has no legal obligation to pay a return on investment.

COMMENT: One commenter noted that the change in property capital reimbursement sends a message that the State is no longer concerned with who owns and operates nursing facilities.

RESPONSE: These rules deal strictly with the reimbursement of nursing facilities. The State will continue to monitor all potential owners through the Certificate of Need process, administered by the Department of Health.

COMMENT: One commenter noted that there will be additional administrative duties to the State for additional desk audit and field audit functions.

RESPONSE: The Division recognizes that the State will have additional administrative duties as a result of these changes.

COMMENT: One commenter noted that the plan for privatization of county nursing facilities will be hindered by the proposed amendments.

RESPONSE: It is not the goal of these amendments to foster privatization, but to assure the provision of adequate patient services at reasonable levels of reimbursement.

COMMENT: One commenter noted that, as the proposal was written, it was uncertain whether the capital costs of a facility could be claimed on the facility cost report even though they were reported on a holding company's books.

RESPONSE: The Division allows for (in fact, requires) the reporting of the depreciation, interest, and leasing costs directly related to the purchase, financing or leasing of a facility, even if actually recorded on

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the financial accounting records of a parent corporation or related party holding company.

N.J.A.C. 10:63-3.11 Buildings

COMMENT: One commenter noted that when facilities finance through a governmental agency, the timing of the establishment of the interest rate that will be paid is dramatically different than when financing commercially. Since interest rates can fluctuate drastically between a commitment and operation date, nursing facilities will be placed at risk if the Medicare rate of return decreases during this time. The commenter further states that since Medicaid is purporting to foster cost effectiveness and efficiency with this proposal, it should be encouraging low cost financing (governmental financing) for facilities by recognizing the rate at commitment.

RESPONSE: The Division recognizes that fluctuation of interest rates impacts the calculation of the CFA. However, just as a decrease in financing rates between the date of commitment and the date of commencement of operation may negatively impact the level of a provider's reimbursement, an increase in rates during this period can also increase the CFA. Since the change suggested by the commenter has a mixed impact, the Division does not consider that any change upon adoption of the current proposal is appropriate. However, the Division will study the issue and, if appropriate, will use the regulatory process to allow all affected providers to participate in the comment process.

COMMENT: One commenter noted that the ongoing use of 1977 property valuations (for facilities in existence in 1977) penalizes older facilities.

RESPONSE: The Division has suggested no changes to this provision in the current proposal. The Division considers that for facilities existing in 1977, the valuation of properties at 1977 price levels is an appropriate basis for the CFA.

COMMENT: Some commenters objected to the elimination of an allowance for the cost of governmental financing ("soft costs" related to the original financing) in the CFA.

RESPONSE: These costs have been historically allowed to a limited number of providers based upon either an adjustment to the facility's appraised value or a direct add-on to the rate. The change to the CFA will allow reimbursement for these costs if a facility's actual property capital costs (including amortized soft costs) are below the CFA.

N.J.A.C. 10:63-3.16 Target occupancy levels

COMMENT: One commenter noted that the proposal would base the per diem rate on patient days that do not exist and beds not incurring costs, and thought that such a reduction would definitely affect patient care and result in Medicaid not paying its fair share. The commenter stated that if there are beds out of service which would put a facility below 85 percent, that is, if there is a bed hold forced by the State, a closing of wards, or as a result of a catastrophe, a method should be developed to reflect a temporary licensure adjustment until such time as the situation is rectified, and the facility should not be penalized. The commenter said that this area should be reimbursed on 85 percent of beds that they consider to be in service.

RESPONSE: The Division is obligated under its State plan with the Federal government to set rates that are reasonable and adequate to meet the costs that efficiently and economically operated facilities must incur to provide legally adequate care. The Statewide average occupancy of nursing facilities in New Jersey is approximately 90 percent. Consequently, it is not unreasonable for the Division to adopt, as a standard of efficient and economic operation, a minimum occupancy level of 85 percent for the purpose of calculating the per diem rate. However, there may be cases in which a facility temporarily experiences an unusually low occupancy rate which merits unique consideration. In these cases a facility can seek relief from the application of this reimbursement standard by means of the rate appeal process.

COMMENT: Several commenters objected to the discontinuance of Medicaid payments for bed hold days (that is, for patients in acute hospital care).

RESPONSE: The commenters erroneously assumed that the reference to bed hold days in this section meant that the Division would no longer pay for bed hold days. The reference to bed hold days in the proposal is confined to the use of paid bed hold days in the per diem cost calculation. The requirement for Medicaid to pay bed hold days (a maximum of 10 days per visit) is statutory and the Division will continue to pay for these days.

COMMENT: Two commenters noted that the inclusion of bed hold days in the per diem calculation would reduce revenues available to maintain current staffing levels.

RESPONSE: It is inconsistent to exclude bed hold days in determining per diem costs but to include them in determining reimbursable days. The Division is making this change to correct this inconsistency in the per diem rate calculation. In addition, the Division wants to avoid any possible incentive for a facility to maximize the number of bed hold days as a means to enhance its per diem rate.

COMMENT: One commenter requested that assurances be given that bed hold days are not part of the methodology used to calculate the median runs which constitute the basis of the cost limits.

RESPONSE: The Division confirms that bed hold days are not part of the methodology used to calculate the median runs which constitute the basis of the cost limits. The effect of this is to increase the median and to make the rate more generous to the providers.

N.J.A.C. 10:63-3.18 Adjustments to base period data

COMMENT: One commenter agreed with the inclusion of "special medical guardian" and "emergency evacuation" for treatment as being eligible for "schedule C" treatment (that is, eligible for contemporaneous reimbursement outside of the prospective reimbursement system). It praised Medicaid for correcting a situation which has caused problems for patients and facilities.

RESPONSE: The Division acknowledges this comment and thanks the Associations for their contributions to the discussion and analysis of these issues. The Division's intention in this rule adoption is to assure fairness in its reimbursement system and to assure that reimbursement is reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated facilities.

N.J.A.C. 10:63-3.20 Total rates

COMMENT: Several commenters noted that the purpose of working capital was to recognize that the Medicaid payment system does not reimburse a nursing facility in a timely manner. They stated that the cost of carrying the Medicaid receivables is directly related to patient care because a facility is dependent on the timely receipt of Medicaid payments to pay its operating expenses and that working capital is still necessary due to Medicaid patient eligibility and payment system problems that may cause delays in receipt of payment for patients.

RESPONSE: The operator of an efficient and economic facility must plan for the lag time between the date when services are rendered and the date when payment is made. The fact that the 0.53 percent working capital mark-up to the rate has been received by all facilities for many years means that facilities have been afforded resources that should enable them now to carry any costs associated with this lag factor.

COMMENT: Several commenters objected to the discontinuance of the group purchasing add-on and urged continuation of this payment supplement as an incentive to continue participation in cooperative buying groups.

RESPONSE: The cooperative buying add-on of $0.25 per patient day began over 10 years ago. In that period, it has helped bring the number of facilities which participate in cooperative buying groups to approximately 90 percent of all Medicaid nursing facility providers. The Division considers that the original purpose of the cooperative buying add-on has been accomplished and that the inherent benefits of participating in these groups will be adequate incentive to provide for continued participation in group purchasing arrangements.

COMMENT: Several commenters objected to the discontinuance of the cooperative buying add-on because the rate reduction would eliminate a source of compensation for patient care costs otherwise screened out by the reimbursement system.

RESPONSE: The Division considers that the cost screens adequately provide for the reimbursement of efficient, economic and necessary costs for patient care expenses and that a facility's discretionary use of the group purchasing add-on proceeds to finance these excess expenditures is not sufficent justification to continue the add-on.

COMMENT: One commenter proposed a phase-out of the cooperative buying add-on over a period of years to minimize the financial impact on providers, especially for facilities with high Medicaid occupancy.

RESPONSE: The Division does not consider that a phase-out of this rate supplement is critical to the operation of facilities due to reasons noted in the response to the immediately preceding comment.

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N.J.A.C. 10:63-3.21 Appeals process

COMMENT: One commenter took exception to the inclusion in the proposal of more restrictive time limits on the filing of appeals, while not including any language which requires the State to process the appeal on a timely basis. The commenter stated that the one-sided requirement is unfair, especially in cases where nursing home rate appeals date back several years and have not been addressed by the State.

RESPONSE: The Department of Health, Health Facilities Rate Setting Unit and the Division have made considerable progress in clearing up the outstanding backlog of rate appeals. In regard to the fairness of the requirement, a facility only has one rate to appeal at a time. However, the rate setting unit has to process numerous appeals concurrently (approximately 50 percent of rates have been appealed in recent years). The change in procedure is designed to help avoid backlog situations from occurring in the future. The new time frame will allow facilities 80 days to identify and document issues within the narrowed scope of appealable items (reclassification of costs are precluded on appeal). The appeal of calculation errors are easily identified and generally require no documentation. Requests for exceptions to the standard rate application can be anticipated before the rate is finalized and documentation can be prepared prior to finalization of the rate and filing of an appeal.

COMMENT: One commenter suggested that it is unreasonable to set up time limits for appeals within which the State itself could not operate.

RESPONSE: The purpose of establishing the new time frame for the submission of appeals is specifically to assist the State in processing appeals in a timely manner. By setting a time frame within which a facility must submit documentation in support of its appeals, the Division is merely reasserting the obligation of a facility to carry the burden of proof. The intent of the change is that rate analysts, who are likely to receive a significant number of appeals after setting rates for over 300 facilities, will have all documentation available to them within a reasonable period of time after the establishment of the rate. Consequently, the process of review of the appeal documentation and final disposition of the appeal recommendation can be expedited.

COMMENT: One commenter suggested that the time limits for filing appeal documentation would be difficult to meet.

RESPONSE: As noted in the response to a previous comment, appeal issues will now be restricted to calculation errors and requests for exceptions to the standard rate methodology. Calculation errors need only be identified and generally require no documentation. Requests for exceptions to the standard rate application can generally be anticipated before the rate is issued and documentation can be prepared in anticipation of the finalization of the rate and filing of an appeal.

COMMENT: One commenter stated that it would be willing to agree to the time frame established by the proposal, if the State adopted a one year time frame for the finalization of appeals.

RESPONSE: The Division acknowledges that establishment of a time frame for finalization of appeals is not an unreasonable request. However, since the Department of Health, Health Facility Rate Setting Unit and the Division are still in the process of clearing a backlog of appeals and the efficiency of the proposed changes to expedite the appeal process is yet unproven, the Division is not prepared to commit to such a time limitation at the present time.

N.J.A.C. 10:63-4.1 Audit cycle

COMMENT: Some commenters objected to a "proposal" to expand the period of time within which a facility may be audited from three to seven years.

RESPONSE: The expansion of the audit cycle from three to seven years was orignally considered for inclusion in this proposal by the Division, but was withdrawn prior to publication for review and reconsideration.

Summary of Changes Between Proposal and Adoption

The Division is making three changes upon adoption. These changes are being made in response to public comments.

One change appears at N.J.A.C. 10:63-3.2(f). The proposal indicated that a nursing facility (NF) cost report cannot be substituted or revised by a NF after the cost report had been submitted to the Department of Health, Health Facilities Rate Setting. The change upon adoption will allow a NF 30 days after the original due date for filing to submit a revised cost report.

This change lessens the burden upon NFs. While NFs are required to file cost reports within specified time periods, pursuant to N.J.A.C. 10:63-3.2(a), this change upon adoption allows a NF to submit revisions to a cost report. If the standard were adopted as proposed, some NFs would always have to file perfect cost reports initially with no opportunity for minor corrections.

Another change affects N.J.A.C. 10:63-3.8. A commenter requested clarification on the number of bids required by the Division in reviewing requests for special amortization of capital projects or acquisition. The bids would have been sought by the NF undertaking a capital project or acquisition. The commenter wanted the Division to specify the number of bids a NF must obtain.

The Division is requiring a minimum of three bids. This change upon adoption does not impose additional burden on providers, because it establishes a reasonable limit. If the standard were not quantified, neither the industry nor the Division would know how many bids were "reasonable". The limit being imposed upon adoption is designed to set an objective standard that is fair to both the NFs and the Division.

The Division is adding language to the text to address the concern of one commenter as to whether the "median runs" will continue to be calculated using actual patient days (excluding bed hold days) rather than the revised "target days" (revised on this adoption to include paid bed hold days). Median runs are the mechanical rankings of facilities' per diem costs for various cost centers. They are used as the basis for establishing cost screens is (each cost screen set at a predetermined percentage above facilities' median per diem cost). Target days are used to calculate each facility's per diem reimbursement rate. The Division has used actual patient days in the calculation of the median runs since the beginning of the CARE system. The Division is adding language to the text upon adoption in order to clarify that actual patient days, excluding bed hold days, will continue to be used in the development of median runs and in the cost regression analysis used in calculating the administrator/management screen.

Executive Order No. 27 Statement

Long Term Care reimbursement is subject to the provisions of 42 CFR Part 447. These Federal regulations require that payments be reasonable and adequate to meet the costs which must be incurred by efficient and economically operated nursing facilities, be consistent with efficiency, economy and quality of care, and remain within Medicare upper payment limits.

The rate methodology established by these regulations and the adopted amendments are in keeping with these Federal requirements. Therefore, no additional analysis is applicable to this rulemaking.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

10:63-3.2 Timing

(a)-(c) (No change.)

(d) The Director, Division of Medical Assistance and Health Services, or a designee of the Director, may mitigate or waive the penalties specified in (b) above, for "good cause" shown:

1.-3. (No change.)

(e) (No change.)

(f) A nursing facility cost report cannot be substituted or revised by a NF ***except during the 30 calendar days after the original due date of the cost report*** *[after submission]* to ***the*** Department of Health, ***Health*** Facilities Rate Setting*[, unless]****. **However,*** such substitution or revision ***can be made if it*** would prevent an overpayment to the NF.

10:63-3.3 Rate components

(a)-(f) (No change.)

(g) A provision for inflation will be added to reasonable base period costs in calculating the prospective rates as described in N.J.A.C. 10:63-3.19.

(h)-(j) (No change.)

(k) The cost of legal services for the appeal of reimbursement rates shall be excluded for reimbursement purposes.

10:63-3.4 Equalized costs

(a) In order to equitably develop and apply screens the following computation will be made:

1.-5. (No change.)

***6. In the calculation of costs screens, the per diem median runs and the cost regression analysis for the administrator/management**

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screen will be calculated using actual patient days excluding bed hold days.*

10:63-3.6 General service expenses

(a) (No change.)

(b) The bases for screen development and reported costs subject to applicable screens, are as follows:

1. (No change.)

2. Administrator: Reasonable compensation of unrelated administrators as determined by the regression analysis formula utilized by the Department of Health, Health Facilities Rate Setting.

i. The regression will utilize as variables: fringed salaries of unrelated administrators and facility bed size. The constants resulting from the regression formula will then be used in the following formula to produce reasonableness limits for each long term care provider.

$$\left[x + \left(\frac{y}{\text{Median Days Per Bed}} \times \text{NF Patient Days}\right)\right] \times 1.05 = \text{Limit}$$

x = Salary constant from regression
y = Per bed salary constant from regression
1.05 = 5 percent Uniqueness factor

ii.-iv. (No change.)

3. Assistant Administrator: Limited to 105 percent of median unrelated assistant administrator compensation.

i. This cost category will apply only to facilities which exceed 99 licensed nursing facilitiy beds.

4. Other general services and legal fees. This category will consist of the following cost elements:

i.-v. (No change.)

5.-8. (No change.)

10:63-3.7 Property operating expenses

(a) Property operating expenses include property taxes and utilities.

1.-3. (No change.)

4. For NFs whose appraised value per plant square foot (as determined by an agent designated by the State) is greater than 110 percent of the median construction costs at 1977 price levels, the property taxes attributable to the excess will be excluded from the rate base unless the owners can demonstrate unusual circumstances. For screening new NFs, this figure will be revised each year for inflation and for effects of standards changes upon construction cost. (See N.J.A.C. 10:63-3.11 for the methodology for calculating this limit at 1977 price levels.)

5.-8. (No change.)

(b) (No change.)

(c) Utility costs will be screened for reasonableness as follows:

1. Base period utility costs per bed will be deemed unreasonable to the extent that they exceed 125 percent of the Statewide median cost per bed, as determined for each class type of NF indicated in N.J.A.C. 10:63-3.3.

i. (No change.)

10:63-3.8 Special amortization

(a) The departments will consider on an individual basis, the amortization of start-up costs and special expenditures in rates. Each case will be reviewed on its particular merits and, accordingly, no guidelines are specified herein. As a rule, however, provisions for special amortization would relate to expenditures of a capital nature that are mandated by changes in laws and regulations. The amortization period would generally range from 12 to 60 months, depending upon the nature and magnitude of expenses.

(b) In approving the amortization of special expenditures, the departments will also consider the extent to which a NF's rates are based on capital and cost levels of fully complying NFs, or, for capital items, a review of ***a minimum of three*** bids on the acquisition or project.

10:63-3.9 Routine patient care expenses

(a) (No change.)

(b) Reasonableness limits for nursing services (RN's, LPN's and other) will be established as follows:

1. The minimum nursing requirements in terms of hours worked will be calculated for each Class I and Class II NF based upon the case mix patient classification (see N.J.A.C. 10:63-3.9(b)1ii(2) and standards in effect during the base period. Minimum nursing requirements in terms of hours shall be calculated for each NF based upon:

i. (No change.)

ii. The base period patient mix related to additional nursing services requiring additional minimum nursing time as derived from patient counts reported by each facility to the Medicaid fiscal agent:

(1) Patients with conditions requiring additional nursing services will be reported by means of the billing turnaround document (TAD) for Medicaid recipients, and the Medicaid billing certification document for non-Medicaid patients. If a facility fails to report a condition requiring additional nursing services on the original TAD or billing certification document, the count will not be used in the facility's rate calculation.

(2) Facilities will report patients with conditions requiring additional nursing services if a patient: resided in the facility and had the condition(s) for the entire month; resided in the facility for the entire month and developed the condition(s) during that month; or entered the facility and had the condition(s) for some portion of the month. This count shall include patients who develop condition(s) during a month or enter the facility with condition(s) and cease to have this condition, are discharged, or die during the same month. No reporting shall be made for a patient who ceased to have the condition(s), died or left the facility during a month (other than the month of admission or onset of the condition(s)), except for a patient who was on a bed hold leave to an acute care hospital and returned to the facility.

iii. The State Department of Health minimum nurse staffing standards, according to N.J.A.C. 8:39-25.

iv. (No change.)

2.-7. (No change.)

(c)-(f) (No change.)

10:63-3.10 Property-Capital Costs

(a) Included in this category are the following rate components:

1.-5. (No change.)

Recodify existing 7 through 9 as 6. through 8. (No change in text.)

(b) (No change.)

(c) The departments believe that the above objectives can best be met by establishing an aggregate "capital facilities allowance" (CFA). The aggregate annual CFA for building, land, and movable equipment shall constitute the maximum reasonable reimbursement for depreciation (except automobiles), rentals of buildings and equipment (except automobiles), interest on all indebtedness, and amortization of leasehold improvements. Reimbursement shall be limited to the lower of:

1. The total actual NF expenses for depreciation, interest and rental; or

2. The aggregate capital facilities allowance for building, land, and movable equipment.

(d) (No change.)

10:63-3.11 Buildings and fixed equipment

(a) The CFA for buildings and fixed equipment will be based upon appraised value as follows:

1. For NFs beginning operation before January 1, 1978, the CFA will be determined based upon appraised 1977 replacement costs derived from nationally recognized construction cost manuals, less wear and tear and subject to reasonableness limits as described in (c), (d) and (e) below.

2. For NFs, or significant additions to existing NFs, beginning operation on or after January 1, 1978, the appraised value will be determined at the time construction is completed, based upon price levels derived from nationally recognized construction cost manuals, subject to reasonableness limits as described in (c), (d) and (e) below.

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(b) The appraisals are to be conducted by an agent designated by the State.

(c) (No change.)

(d) A reasonableness limit on appraised value per square foot will be established as follows:

1. For NFs beginning operation before January 1, 1978, at 110 percent of the median appraised value, at 1977 price levels, of proprietary and voluntary NFs which had over 20 percent Medicaid days in the base period;

2. For NFs beginning operation on or between January 1, 1978, and December 31, 1984, at the original reasonableness limit as determined from (d)1 above, increased for inflation by 15 percent for the first year and 10 percent for each succeeding year;

3. For facilities beginning operation on or after January 1, 1985, at the reasonableness limit determined for 1984, incremented annually by a factor for inflation which is the average of percentages representing cost increases derived from:

i. The Marshall Swift Valuation Index for the Eastern District; published by Marshall and Swift, 1617 Beverly Blvd., P.O. Box 26307, Los Angeles, California; and

ii. Inflation factors published by the U.S. Department of Labor, Bureau of Labor Statistics for New York and Northeastern New Jersey;

4. For significant additions to existing NFs beginning operation since January 1, 1978, at the original reasonableness limit as determined from (d)1 above, increased by a factor for inflation (see (d)2 above). A single weighted reasonableness limit for the entire NF will be calculated based upon the square footage and the corresponding construction cost factors of the building as originally appraised and the appraised addition(s); and

5. A separate reasonableness limit will be developed for governmental NFs by the same method.

(e) (No change.)

(f) The CFA for buildings and fixed equipment will be determined by applying the appropriate interest or amortization rate, described in (f)1 and 2 below, to the reasonable appraised value of the building and fixed equipment.

1. Interest rate:

i. For NFs beginning operation before January 1, 1978, the interest rate is equal to the Medicare return on equity rate for the 12 month period ending with December of 1976 (10.719 percent).

ii. For NFs, or significant additions to existing NFs, beginning operation between January 1, 1978 and September 30, 1985, the interest rate is equal to the Medicare return on equity rate published at the inception of operations.

iii. For NFs, or significant additions to existing NFs, beginning operations between October 1, 1985 and September 30, 1993, the interest rate is equal to 150 percent of the Medicare return on equity rate published at the inception of operations.

iv. For NFs, or significant additions to existing NFs beginning operations on or after October 1, 1993, the interest rate is equal to 150 percent of the applicable interest rate at the inception of operations as indicated by the Table of Average Interest Rates on Special Issues of Public-Debt Obligations Issued to the Federal Hospital Insurance Trust Fund as published by the Office of the Actuary of the Federal Health Care Financing Administration.

2. The amortization rate shall be equal to the ratio of annual debt service (principal and interest) to original principal required to amortize a loan in 25 equal installments, with an interest rate equal to the appropriate above defined "interest rate".

(g) For the first 25 years of the life of a NF beginning with the year of construction, the amortization rate will be applied to the reasonable appraised value of the building and fixed equipment.

(h) Beyond the 25th year after construction, the interest rate will be applied to the reasonable appraised value of buildings and fixed equipment.

(i)-(k) (No change.)

(l) For existing NFs the State will not increase the CFA rate in future years should the Medicare return on equity rate increase.

(m) (No change in text.)

10:63-3.12 Land

(a) The CFA for land will be based upon appraised value of land and land improvements determined by an agent designated by the State of New Jersey as follows:

1. For NFs beginning operation before January 1, 1978, the 1977 value of land and land improvements;

2. For NFs beginning operation on or after January 1, 1978, the value of land and land improvements as of the completion of construction;

3. For additions to existing NFs beginning operation on or after January 1, 1978, the value of additional land acquired or additional land improvements made as of the completion of construction of the addition. Land or land improvements previously included in a facility's appraisal will not be reappraised in determining value of an addition to a facility;

4. For replacement facilities beginning operation on or after January 1, 1978, the value of additional land acquired or additional land improvements made as of the completion of construction. Land or land improvement included in the original facilities appraisal will not be reappraised in determining value of a replacement facility;

5. Land and land improvement value will be subject to reasonable limits with respect to:

i. Reasonable land area;

ii. The total reasonable appraised value of reasonable land area.

6. Reasonableness limits for land and land improvements will be the same as defined for property taxes on land in N.J.A.C. 10:63-3.7. For NF's beginning operation on or after January 1, 1978, the original reasonableness limit for reasonable appraised value will be increased by a factor for inflation, which factor will be the same as described in N.J.A.C. 10:63-3.11(d)2. For acquisitions of land related to addition(s) to building or building replacements, a single weighted reasonableness limit for the entire NF land evaluation will be calculated based upon acreage and the appraisal land limit factors of land as originally appraised, and the land-appraised addition(s) to land.

(b) The applicable interest rate developed for a facility per N.J.A.C. 10:63-3.11(f) will be applied to the reasonable appraised land value.

(c) The provisions of N.J.A.C. 10:63-3.11(l) through (m) will also apply to CFA for land.

(d) (No change.)

10:63-3.13 Moveable equipment

(a) (No change.)

(b) The allowance per licensed bed will be determined by applying to this median cost the applicable interest rate developed per N.J.A.C. 10:63-3.11(f).

(c) (No change.)

10:63-3.16 Target occupancy levels

(a) A target occupancy level of 95 percent of licensed bed-days (excluding quiet beds) will be used to develop the reasonable per diem amounts of the following rate components:

1.-3. (No change.)

4. CFA for:

i.-iv. (No change.)

v. Property insurance; and

5. Actual NF expenses for depreciation, rental, interest, and amortization in accordance with N.J.A.C. 10:63-3.10(c).

(b) (No change.)

(c) The per diem amounts for all other expenses will be based upon reasonable base period costs divided by actual base period patient days (but no less than 85 percent of licensed bed days will be used).

1. Actual base period patient days shall include paid bed hold days.

(d)-(e) (No change.)

10:63-3.18 Adjustments to base period data

(a) As described elsewhere in this subchapter, with the exception of capital items, rates will be based upon reasonable actual base period costs. This section provides for adjustments to reasonable base period costs in establishing prospective rates.

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1. (No change.)

2. NFs may also request that cost in addition to base period expenditures be included in the prospective rates owing to:

i.-ii. (No change.)

iii. Appointment of a special medical guardian required to authorize emergency medical treatment for a patient.

iv. Emergency evacuation of a facility which was conducted consistent with an Emergency Management Evacuation Procedure which has been duly adopted and fully implemented by the facility. Costs in additions to base period expenditures for emergency evacuation shall be only those extraordinary costs which are directly related to evacuation, and routine costs which exceed base period levels as a direct result of the emergency evacuation.

3.-4. (No change.)

5. In the case of significant items, the departments may exclude the effects of legal and management changes from rates until the change is effected, and if necessary, new appraisals made.

10:63-3.19 Inflation

(a)-(e) (No change.)

(f) No provision for inflation will be made with respect to costs for buildings, land, moveable equipment, interest and lease, as determined by N.J.A.C 10:63-3.11, 3.12 and 3.13 nor to special amortization of capital costs as determined by N.J.A.C 10:63-3.8.

10:63-3.20 Total rates

Rates shall not contain allowances for working capital or for an incentive for NF's participating in a cooperative buying group.

10:63-3.21 Appeals process

(a)When a NF believes that, owing to an unusual situation, the application of these rules results in an inequity (except for the application of N.J.A.C. 10:63-3.2(f)), two levels of appeals are available: a Level I Appeal heard by representatives from the Department of Health and Department of Human Services; and a Level II Appeal heard before an Administrative Law Judge.

1. Level I Appeal: A request for a Level I appeal should be submitted in writing to the Department of Health, Health Facilities Rate Setting, Health and Agriculture Building, Room 600, John Fitch Plaza, CN-360, Trenton, New Jersey, 08625.

i. Requests for Level I appeals shall be submitted in writing within 20 calendar days of receipt of notification of the rate by the facility.

ii. A facility shall identify its rate appeal issues in writing to the Department of Health, Facilities Rate Setting, within 50 calendar days of receipt of notification of the rate by the facility.

iii. Documentation supporting the appealed rate issues shall be submitted to the Department of Health, Facilities Rate Setting, within 80 calendar days of receipt of notification of the rate by the facility.

iv. (No change in text.)

v. (No change in text.)

vi. The analyst's recommended resolutions will first be reviewed at appropriate levels within the Department of Health, Health Facilities Rate Setting, and will then be forwarded to the Division of Medical Assistance and Health Services for the approval of the Director or a designee of the Director.

vii. Adjustments resulting from the Level I appeal shall be effective as follows:

(1) At the beginning of the prospective reimbursement period if an error in computation was made by the Department or if the appeal was submitted within the specified period.

(2) On the first of the month following the date of appeal for non-computational matters if the appeal is submitted after the specified period.

viii. The date of submission shall be defined as the date received by the Department of Health.

2. (No change.)

10:63-4.1 Audit cycle

(a) Any cost study submitted by a Medicaid participating nursing facility (NF) which is selected for audit on or after February 7, 1983 may be audited within three years of the due date of the cost report or the date it is filed, whichever is later. This requirement shall be satisfied if the on-site audit of the NF is initiated within the three-year period and completed within a reasonable time thereafter. If a NF audit is not initiated within this time limit, the appropriate cost study or cost studies shall be excluded from the audit, subject to the conditions set forth in the balance of this subsection and the waiver provisions set forth in (b) below. Exclusion is subject to the following conditions:

1. (No change.)

2. When a timely audit is conducted and additional overpayments are discovered by another agency, the Division shall not be precluded from collecting such overpayments together with any applicable interest or other penalties.

(b) The Division shall not be precluded from waiving the three-year limitation for good cause, and good cause shall include, but not be limited to, the following circumstances:

1. The overpayments involved in the audit were generated as a result of fraudulent activity by the NF or NF-related party, whether or not that fraudulent activity has been the subject of a criminal investigation and/or prosecution;

2. The NF, its agents or employees have failed to cooperate in the initiation or conduct of the audit;

3. (No change.)

4. The audit could not be initiated within the three-year period because of delay or cessation of the audit resulting from a request by a law enforcement agency or an administrative agency with jurisdiction over the facility.

i. This provision shall not apply if the NF's records are available and no request for delay or cessation of the audit has been made by any of these agencies.

(c) Notice must be given to the NF when the three year requirement is waived together with the reasons for such action. The NF may request a hearing on any waiver by the Division to the extent authorized by applicable statutes, rules and regulations.

10:63-4.2 Audits

(a) For the exclusive purpose of calculating interest, under N.J.S.A. 30:4D-17(f), "completion of the field audit" for nursing facility providers shall be defined in the following manner:

1. For all such audits and audit recovery cases pending on February 7, 1983, it shall mean the date that field work is completed, or the date information requested from the provider during the course of that field work is received, whichever is later;

2. (No change.)

3. For all such audits initiated on or after February 7, 1983, it shall mean the date the exit conference is completed or the date information requested from the provider during the course of the exit conference is received, whichever is later.

(b) Notwithstanding any of the previous subsections, if after the screening of any nursing facility provider audit the Assistant Director, OPIA, determines with reasonable justification that an act or omission on the part of the provider requires additional field work, for the exclusive purpose of calculating interest under N.J.S.A. 30:4D-17, the field audit shall be considered completed when the additional field work is completed.

(c) Notwithstanding any of the previous subsections, if after the screening of any nursing facility provider audit the Assistant Director, OPIA, determines with reasonable justification that an act or omission on the part of the provider requires that additional information or documentation be obtained from the provider, then a completed field audit shall, for the exclusive purpose of calculating interest, be considered reopened and interest shall again accrue for the period beginning 20 days from the date that the request for such information or documentation is received by the provider and ending on the date that all of the requested information or documentation is received by the agency making the request.

(d) Notwithstanding any of the previous subsections, if all or part of any nursing facility provider audit initiated on or after the effective date of this subsection is referred to the Division of Criminal Justice or other agency for criminal investigation:

1.-2. (No change.)

10:63-4.3 Final audited rate calculation

(a) The Division of Medical Assistance and Health Services will calculate final per diem rates based on audit adjustment reports.

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(b) The final per diem rates determined based on (a) above cannot exceed the prospective rates previously paid.

Recodify existing (b)-(c) as (c)-(d) (No change in text.)

(e) This section applies to all current, pending or future audits for rate years on or after *[the date of adoption]* ***March 20, 1995***.

(a)

DIVISION OF FAMILY DEVELOPMENT

Home Energy Assistance Handbook

Readoption with Amendments: N.J.A.C. 10:89

Proposed: December 5, 1994 at 26 N.J.R. 4726(a).
Adopted: February 27, 1995 by William Waldman, Commissioner, Department of Human Services.
Filed: February 27, 1995 as R.1995 d.172, **without change**.
Authority: N.J.S.A. 30:4B-2.
Effective Date: February 27, 1995, Readoption;
March 20, 1995, Amendments.
Expiration Date: February 27, 2000.

Summary of Public Comments and Agency Responses:
No comments received.

Executive Order No. 27 Statement

These rules contain standards which are the same as those imposed by Federal law.

Full text of the readoption can be found in the New Jersey Administrative Code at N.J.A.C. 10:89.

Full text of the adopted amendments follows:

10:89-1.1 Fair hearings

(a) Any household is entitled to, and upon request will receive an administrative review or a fair hearing if any of the following occurs:

1. (No change.)

2. The household's application is neither approved nor denied within 30 days after application (or 20 days after application for elderly or disabled individuals), unless the delay was caused by the household's lack of cooperation in providing necessary and reasonable evidence;

3.-4. (No change.)

(b)-(c) (No change.)

10:89-5.6 Outreach requirements

(a) (No change.)

(b) Outreach activities must be implemented to ensure the identification and provision of services to the following:

i. The elderly, ill, bedridden, disabled and young children;

2.-3. (No change.)

(c) CWA outreach responsibilities shall include, at a minimum, the following:

1. (No change.)

2. Distribution of blank application forms and instructions to cooperating outreach groups, agencies, and organizations so that they may be made available to the elderly and the disabled;

3.-5. (No change.)

(d)-(f) (No change.)

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PUBLIC NOTICES

ENVIRONMENTAL PROTECTION

(a)

NEW JERSEY CLEAN AIR COUNCIL

Notice of Public Hearing
Strategies for Meeting Clean Air Goals

Take notice that the New Jersey Clean Air Council, pursuant to the New Jersey Air Pollution Control Act, N.J.S.A. 26:2C-1 et seq., will hold a public hearing entitled "Strategies for Meeting Clean Air Goals."

The **public hearing** will be held on:

Monday, April 24, 1995 at 9:00 A.M.
New Jersey Department of Environmental Protection Public Hearing Room
401 East State Street
Trenton, New Jersey

The objective of the Clean Air Council 1995 public hearing is to clarify various issues surrounding New Jersey's choice of strategies for meeting the goals of the Clean Air Act Amendments. This hearing will seek to solicit comment on New Jersey's proposed strategies for achieving clean air objectives as well as suggestions for alternative means to reach clean air goals.

Persons wishing to make oral presentations are asked to reserve a 15 minute time period by telephoning or writing to:

Ms. Linda O'Hara
New Jersey Department of Environmental Protection
CN 418
Trenton, New Jersey 08625
(609) 777-1345

Presenters should bring 15 copies of their remarks to the hearing for use by the Council members, the hearing transcriber and the press. The hearing record will be held open for 15 days following the date of the public hearing so that additional written testimony can be received.

Submit written comments by May 9, 1995 to:

Mr. John H. Gilbert
New Jersey Department of Environmental Protection
Policy and Planning
CN 418
Trenton, New Jersey 08625-0418

(b)

ENVIRONMENTAL REGULATION

Notice of Public Hearing
New Jersey Pollutant Discharge Elimination System 1994-95 Annual Fee Report and Fee Schedule

Take notice that the Department of Environmental Protection (Department) will hold a **public hearing** to present the 1994-95 Annual Fee Report and Fee Schedule for the New Jersey Pollutant Discharge Elimination System (NJPDES) program. The Department has also proposed to change the minimum fee schedule and simplify the fee assessment methodology for discharges to the surface waters of the State by proposing amendments to N.J.A.C. 7:14A-1.8. The proposed amendments appear in this issue of the New Jersey Register. The fee assessments presented in the 1994-95 NJPDES Annual Fee Report and Fee Schedule are calculated using the proposed fee assessment methodology and proposed minimum fee schedule. The Department plans to adopt amendments to N.J.A.C. 7:14A-1.8 before assessing the 1994-95 NJPDES permit fees.

The **public hearing** will be held on Tuesday, April 18, 1995 at:

New Jersey Department of Environmental Protection
Public Hearing Room, First Floor
401 East State Street
Trenton, New Jersey

The public hearing on the proposed amendments to N.J.A.C. 7:14A-1.8 will commence at 10:00 A.M. The hearing on the 1994-95 NJPDES Annual Report and Fee Schedule will commence after all testimony on the proposed amendments to N.J.A.C. 7:14A-1.8 has been received. **Written comments** on both subjects will be accepted until May 2, 1995. Please submit written comments to:

Janis E. Hoagland, Esq.
Department of Environmental Protection
Office of Legal Affairs
CN 402
Trenton, New Jersey 08625-0402
Attn: DEP Docket No. 06-95-02/508

Copies of the 1994-95 Annual Fee Report and Fee Schedule will be mailed to NJPDES permittees by March 20, 1995. Other interested parties may request a copy by contacting the Bureau of Permit Management at (609) 984-4428.

(c)

GREEN ACRES PROGRAM

Notice of Public Hearing
Proposed Conveyance of 2.04 Acres in Fee as well as Proposed Slope and Drainage Easements on 1.6 Acres of Land Located on Department of Environmental Protection Owned Lands Located at the Berkshire Valley Wildlife Management Area

Take notice that the State of New Jersey, Department of Environmental Protection and Morris County will hold a public hearing to seek comments on the proposed conveyance in fee and easements on the following State-owned lands:

Lands located within the Berkshire Valley Wildlife Management Area on Block 61, Lots 18 and 21 in the Borough of Mt. Arlington, Morris County, and Block 1, Lot 29 in the Township of Roxbury, Morris County.

These lands were acquired with monies from the Hunters and Anglers License Fund.

The applicant seeks these lands for the realignment of approximately 3500 feet of an "S" shaped section of Howard Boulevard to alleviate an existing hazardous condition resulting from the roadways narrow width, sharp curves and steep hill in this section.

The **public hearing** will be held on:

Thursday, April 27, 1995 at 2:00 P.M. at the
Morris County City Hall of Records Building located at
Court Street, Morristown, New Jersey

Persons wishing to make oral presentation are asked to limit their comments to a five minute time period. Presenters should bring a copy of their comments to the hearing for use by the Department. The hearing records will be kept open for a period of seven days following the date of the public hearing so that additional written comments can be received.

Interested persons may submit written comments until May 8, 1995 to:

Robert McDowell, Director
Division of Fish, Game & Wildlife
Department of Environmental Protection
CN 400
Trenton, New Jersey 08625-0400

(d)

GREEN ACRES PROGRAM

Notice of Availability of Grant Funds and Application Deadline
Nonprofit Acquisition Program

Take notice that, in compliance with N.J.S.A. 52:14-34.4, 34.5, and 34.6, the Department of Environmental Protection hereby announces the availability of the following State grant funds:

A. **Name of grant program:** Green Acres Nonprofit Acquisition Grant Program

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B. **Purposes:** The purpose of this program is to provide matching grant funds to eligible private nonprofit organizations for the acquisition of land which will be open to the public for conservation and recreation purposes. The nonprofit organizations will donate to the State a conservation restriction or historic preservation restriction, as the case may be, on the land acquired using the grant.

C. **Amount of money in the grant program:** Up to $6 million will be awarded in 50/50 matching grants in this funding round. A maximum of $500,000 will be awarded per project unless Green Acres determines that the project area is of special environmental concern or has extraordinary resource value.

D. **Match:** The nonprofit organization must match State grant funds on a 50/50 basis. The match may be in the form of cash or a donation of the value of land being acquired as part of the approved project scope.

E. **Individuals or organization who may apply for matching grants under this program:** Tax exempt nonprofit organizations which qualify as a Charitable Conservancy for the purposes of P.L. 1979, c.378 (N.J.S.A. 13:8B-1 et seq.)

F. **Qualifications needed by applicant to be considered for the grant program:** To qualify for grant consideration, the board of directors or governing body of the applying tax exempt nonprofit organization shall:

a. Demonstrate to the Commissioner of the Department of Environmental Protection that it qualifies as a Charitable Conservancy for the purposes of P.L. 1979, c.378 (N.J.S.A. 13:8B-1 et seq.);

b. Demonstrate that it has the resources to match the grant requested;

c. Agree to make and keep the lands accessible to the public, unless the Commissioner determines that public accessibility would be detrimental to the lands or any natural resources associated therewith;

d. Agree not to sell, lease, exchange, or donate the lands except to the State, a local government unit, another qualifying tax exempt nonprofit organization, or the Federal government for recreation and conservation purposes (then only with the prior written approval of Green Acres); and

e. Agree to execute and donate to the State, at no charge, a conservation restriction or historic preservation restriction, as the case may be, pursuant to P.L. 1979, c.378 (N.J.S.A. 13:8B-1 et seq.) on the lands being acquired using this grant.

G. **Procedure for application:** Application packages may be requested from:

Martha Sullivan Sapp, Principal Planner
Bureau of Green Trust Management
Green Acres Program
CN 412
Trenton, NJ 08625-0412
(609) 588-3490

H. **Address of the division, office, or official receiving the application:** Same as above.

I. **Dates applications will be accepted:** Applications must be submitted by May 31, 1995.

J. **Dates by which applicant shall be notified of preliminary approval:** Applicants shall receive notice of preliminary approval no later than December 29, 1995.

(a)

OFFICE OF LAND AND WATER PLANNING

Amendment to the Northeast Water Quality Management Plan

Public Notice

Take notice that the New Jersey Department of Environmental Protection (NJDEP) is seeking public comment on a proposed amendment to the Northeast Water Quality Management (WQM) Plan. This amendment proposal was submitted by Verona Township. The amendment would adopt a Wastewater Management Plan (WMP) for Verona Township. Based on the modifications to the sewer service area of the Verona sewage treatment plant (STP) proposed as part of this WMP, the Verona Township WMP also amends the Caldwell Township, Cedar Grove Township and Joint Meeting of Essex and Union Counties (JMEUC) WMPs.

The Verona Township WMP proposes expansion of the sewer service area to the Verona STP to address the following: a) abandonment of the Essex County Hospital STP in Cedar Grove Township, which currently discharges into the Peckman River downstream from the Verona STP, and connection to the Verona STP; b) redirection of the wastewater flow at the Essex County Correctional Facility in North Caldwell and Verona Townships from the Caldwell STP, which discharges into the Passaic River, to the Verona STP, which discharges into the Peckman River; and c) transfer of an area in West Orange Township from the future sewer service area of the JMEUC STP to the future sewer service area of the Verona STP to accommodate 900 potential townhouse units. The flow to be served by the Verona STP from the Essex County Hospital and Correctional Facility is 0.5 million gallons per day (mgd), 0.25 mgd from each facility. The proposed redirection of flow at the Essex County Correctional Facility from the Caldwell STP to the Verona STP would be an interbasin transfer of wastewater from the Upper Passaic River Basin to the Lower Passaic River Basin.

The Verona Township WMP specifies the total projected wastewater flow to the Verona STP as an annual average flow of 3.13 mgd and a maximum month flow of 5.0 mgd. Verona Township intends to undertake a rerating of the STP capacity to provide for this projected flow.

This amendment represents only one part of the permit process and other issues will be addressed prior to final permit issuance. Additional issues which were not reviewed in conjunction with this amendment but which may need to be addressed may include, but are not limited to, the following: antidegradation; effluent limitations; water quality analysis; exact locations and designs of future treatment works (pump stations, interceptors, sewers, outfalls, wastewater treatment plants); and development in wetlands, flood prone areas, designated Wild and Scenic River areas, or other environmentally sensitive areas which are subject to regulation under Federal or State statutes or rules.

This notice is being given to inform the public that a plan amendment has been proposed for the Northeast WQM Plan. All information related to the WQM Plan and the proposed amendment is located at the NJDEP, Office of Land and Water Planning, CN423, 401 East State Street, Trenton, New Jersey 08625. It is available for inspection between 8:30 A.M. and 4:00 P.M., Monday through Friday. An appointment to inspect the documents may be arranged by calling the Office of Land and Water Planning at (609) 633-1179.

Interested persons may submit written comments on the proposed amendment to Dr. Daniel J. Van Abs, at the NJDEP address cited above with a copy sent to Mr. James M. Helb, Township Engineer, #10 Commerce Court, Verona, New Jersey 07044. All comments must be submitted within 30 days of the date of this public notice. All comments submitted by interested persons in response to this notice, within the time limit, shall be considered by NJDEP with respect to the amendment request.

Any interested persons may request in writing that NJDEP hold a nonadversarial public hearing on the amendment or extend the public comment period in this notice up to 30 additional days. These requests must state the nature of the issues to be raised at the proposed hearing or state the reasons why the proposed extension is necessary. These requests must be submitted within 30 days of this public notice to Dr. Van Abs at the NJDEP address cited above. If a public hearing for the amendment is held, the public comment period in this notice shall be extended to close 15 days after the public hearing.

(b)

OFFICE OF LAND AND WATER PLANNING

Amendment to the Tri-County Water Quality Management Plan

Public Notice

Take notice that on February 2, 1995, pursuant to the provisions of the New Jersey Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., and the Statewide Water Quality Management Planning rules (N.J.A.C. 7:15-3.4), an amendment to the Tri-County Water Quality Management Plan was adopted by the Department of Environmental Protection (DEP). The amendment changes the Evesham Municipal Utilities Authority (MUA) Wastewater Management Plan (WMP) by identifying

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a proposed wastewater planning flow expansion for the Elmwood Sewage Treatment Plan (STP) from 2.3 million gallons per day (MGD) to 2.978 MGD. The reasons for this expansion are increased development and zoning changes within the Elmwood STP sewer service area. A sewer service area expansion to serve a portion of the Barton Run Planned Urban Development was also proposed.

The Elmwood STP discharges into the Southwest Branch of Rancocas Creek which is classified as FW2-NT waters. Downstream of the Elmwood STP discharge, the Southwest Branch of Rancocas Creek designation changes from FW2-NT to Pinelands waters. The Pinelands Commission has reviewed this proposal, both the STP expansion and the sewer service area expansion, for consistency with the Pinelands Comprehensive Management Plan (CMP). Based on the proposed permit limits to be set by the DEP and minor sewer service area boundary corrections for the Elmwood STP, the Pinelands has determined that this proposal appears to be consistent with the Pinelands CMP.

This amendment proposal also serves to update the Evesham MUA WMP documents adopted by the DEP on September 16, 1985 and August 26, 1986, including the Evesham WMP Sewer Service Area Map. Minor sewer service area boundary modifications have been shown which more accurately reflect the actual existing sewer service area boundaries of all three municipal sewage treatment plants.

This amendment represents only one part of the permit process and other issues will be addressed prior to final permit issuance. Additional issues which were not reviewed in conjunction with this amendment but which may need to be addressed may include, but are not limited to, the following: antidegradation; effluent limitations; water quality analysis; exact locations and designs of future treatment works (pump stations, interceptors, sewers, outfalls, wastewater treatment plants); and development in wetlands, flood prone areas, designated Wild and Scenic River areas, or other environmentally sensitive areas which are subject to regulation under Federal or State statutes or rules.

HUMAN SERVICES

(a)

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

Notice of Action on Petition for Rulemaking N.J.A.C. 10:49-7.3

Petitioner: John L. Tweed, Executive Director, Medical Transportation Association of New Jersey, Inc.

Take notice that on January 13, 1995, the New Jersey Department of Human Services received a Petition for Rulemaking dated January 11, 1995 concerning N.J.A.C. 10:49-7.3, the rules for claims payments as described below. Petitioner is John L. Tweed, Executive Director, Medical Transportation Association of New Jersey, Inc. (MTANJ).

Petitioner requested that the Department commence rulemaking activity to require the New Jersey Medicaid Program to make full payment of Medicare (Title XVIII) Part B premiums, deductibles, and co-payments on behalf of Dual Eligibles (someone with both Medicaid and Medicare coverage) and Qualified Medicare Beneficiaries (QMB).

The Department has already filed a Notice of Receipt of the Petition with the Office of Administrative Law (OAL) (see 27 N.J.R. 770(b)).

The Department's response to the petitioner's request is that it will engage in appropriate rulemaking activity in the manner prescribed by OAL with regard to payment for services for dual eligibles and QMBs. The rulemaking will address the issue(s) raised by the petitioner.

A copy of this Notice of Action on the Petition has been sent to the Petitioner as required by N.J.A.C. 1:30-3.6.

(b)

NEW JERSEY DEVELOPMENTAL DISABILITIES COUNCIL

Notice of Availability of Grant Funds Training Incentive Grants

Take notice that, pursuant to N.J.S.A. 52:14-34.4, 34.5 and 34.6, the Developmental Disabilities Council hereby announces the availability of the following State Grant funds:

A. **Name of program:** 1995 Training Incentive Grant.

B. **Purpose:** This is a grant to encourage accredited undergraduate educational institutions to reach out to students with disabilities and help them reach their employment goals. The grant is intended to be used to augment the school or career development department's ability to recruit, test and place students with disabilities who want good jobs.

C. **Amount of available funding for the program:** Two $10,000 grants.

D. **Qualifications:** All accredited undergraduate institutions in New Jersey, such as those listed in *Going to College in New Jersey* (State of New Jersey, 1995-97) and similarly accredited institutions, are eligible to apply.

E. **Procedure for eligible persons to apply:** Interested applicants may request an application package by writing on their letterhead:
Training Incentive Grant
c/o Rachel A. Hickson
NJ Developmental Disabilities Council
CN 700
Trenton, NJ 08625-0700

F. **Address to which applications must be submitted:** same as E above.

G. **Deadline by which applications must be received:** By close of business, Monday, July 3, 1995.

H. **Date the applicant is to be notified of acceptance or rejection:** July 24, 1995. Grant funds are available for six months beginning no sooner than August 1, 1995.

CORRECTIONS

(c)

THE COMMISSIONER

Notice of Action on Petition for Rulemaking N.J.A.C. 10A

Petitioner: Larry J. Pyatt, New Jersey State Prison.

Take notice that on January 5, 1995, the New Jersey Department of Corrections received a petition for rulemaking regarding the establishment of a unit for incarcerated veterans. Public notice of this petition was published in the February 6, 1995 New Jersey Register at 27 N.J.R. 592(a).

The petitioner stated that many incarcerated veterans suffer from similar disorders and physical disabilities incurred while in the military and that "... veterans have histories that are less chaotic than the average incarcerated individual; have experience with discipline; are generally older than the average inmate; and their maturity has a leveling effect on the behavior of those around them" [sic]. The petitioner further stated that the Trenton Incarcerated Veterans' Group "is made up of strictly prisoners, none with the power to enforce policy, particularly to ensure that incarcerated veterans receive veterans benefits .... An incarcerated veterans unit would provide access for bringing in professionals from the Veterans Administration, which would be enforced on our behalf through the State Department of Military and veterans Affairs ..." [sic].

The petition requesting that a rule be developed for setting up a unit for incarcerated veterans is outside the scope of the process for classification of inmates as established at N.J.A.C. 10A:9. Although one criterion of the 20 listed decision making criteria found in N.J.A.C. 10A:9-3.3 and used by the Institutional Classification Committee to determine the housing assignment of an inmate is military history, other criteria also must be considered, including, but not limited to, correctional facility adjustment, nature and circumstances of the present offense, prior offense record, medical history, psychological and/or

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psychiatric reports, and vocational and educational needs. Classifying inmates solely on the basis of their military history or to their affiliation to a specific group and establishing a unit for that group negates the classification process and could be considered a form of segregation that inevitably would result in allegations of inequitable treatment of other inmates.

The Department of Corrections has established guidelines which permit the operation of inmate groups. One such group is the Trenton Incarcerated Veterans' Group. Affiliation with this group is voluntary and meetings should provide meaningful opportunities for group discussion during which the inmates may voice complaints concerning problems or issues which affect them, and make recommendations regarding these problems and issues. Additionally, members of this group have access to all of the privileges and benefits to which incarcerated inmates are entitled at New Jersey State Prison. Neither affiliation with the Trenton Incarcerated Veterans' Group, nor the physical area, such as a unit in which veterans are housed within a particular correctional facility, would provide "power to enforce policy" for incarcerated veterans. The provision of benefits for veterans is regulated by agencies other than the New Jersey Department of Corrections such as the United States Department of Veteran's Affairs and/or the New Jersey Military and Veteran's Affairs Department. Therefore, incarcerated veterans have access to whatever benefits the United States Department of Veteran's Affairs and the New Jersey Military Veteran's Affairs Department deem appropriate which are not inconsistent with their status as inmates.

The designation of a unit known as an "Incarcerated Veterans Unit" would be an inefficient use of limited cell space available to the Department of Corrections. For example, at any given time, the correctional facility may have fewer inmates who are eligible and/or agreeable to being housed on such a unit than there are cells on that unit. The Department of Corrections finds it inappropriate to develop the requested rule, therefore the petition for formal rulemaking is denied.

INSURANCE

(a)

NEW JERSEY INDIVIDUAL HEALTH COVERAGE PROGRAM BOARD

Notice of Action on Petition for Rulemaking N.J.A.C. 11:20-1.1, Exhibit F

Petitioner: Oxford Health Plans N.J., Inc.

Take notice that on August 30, 1994 the New Jersey Individual Health Coverage Program ("IHC") Board received a Petition for Rulemaking from Oxford Health Plans, N.J. Inc. concerning N.J.A.C. 11:20-1.1 Exhibit F, the standard HMO health benefits plan policy form (see 26 N.J.R. 4228(b)).

The petitioner requests that the IHC Board promulgate a standard rider to the HMO policy form that would permit an HMO to offer benefits for services performed by non-network HMO providers upon referral by the primary care physician or with the prior approval of the carrier.

The IHC Board has considered the petition pursuant to law, and voted to deny the petition for rulemaking at its monthly meeting on January 19, 1995. The IHC Board has determined that the provision of non-network benefits, with or without a gatekeeper, is an indemnity benefit. Upon advice of counsel, the Board has concluded that an HMO, acting alone, lacks legal authority under N.J.S.A. 26:2J-1 et seq. to provide indemnity benefits in the individual market, except for out-of-area and emergency services. Therefore, the Board does not believe it may legally promulgate the rider requested.

The Board wishes to make clear that its decision should not be interpreted as reflecting the Board's judgment of the desirability of an HMO's being able to offer non-network benefits in the marketplace or whether such benefits could be offered by an HMO in conjunction with an indemnity carrier or health service corporation. Rather, the IHC Board did not believe it could undertake a rulemaking that would create the means for an HMO to act beyond the scope of its licensure.

A copy of this notice has been mailed to the petitioner, as required by N.J.S.A. 52:14B-4(f).

(b)

NEW JERSEY SMALL EMPLOYER HEALTH BENEFITS PROGRAM BOARD

Notice of Final Action on Petition for Rulemaking N.J.A.C. 11:21 Appendix Exhibit G

Petitioner: New Jersey Optometric Association.

Take notice that the New Jersey Small Employer Health Benefits Program ("SEH") Board received a petition for rulemaking on October 19, 1994 concerning N.J.A.C. 11:21 Appendix Exhibit G, the small employer health benefits HMO policy form, Section V(b) under "Specialist Doctor Benefits."

The petitioner requested that the SEH Board amend the list of "Specialist Doctor Benefits" by excluding "Ophthalmology" from the list or by substituting the term "licensed eye care practitioner."

On December 19, 1994, the SEH Board published a notice in the New Jersey Register to provide notice of the receipt of the petition for rulemaking and of the Board's decision to refer the matter to the Board's Policy Forms Committee for further deliberations in accordance with N.J.A.C. 11:21-18.3(c)3 with the intent to make a final determination on or before March 15, 1995 (see 26 N.J.R. 5120(a)).

The deliberations of the Policy Forms Committee were completed and the Committee made a recommendation to the SEH Board to deny the petition at the Board's January 18, 1995 meeting. At its February 17, 1995 meeting, after fully considering the petition and the recommendation of the Policy Forms Committee, the SEH Board determined that an amendment to the list of "Specialist Doctor Benefits" to exclude "Ophthalmology" from the list or by substituting the term "licensed eye care practitioner" was not necessary at this time.

The list of Specialist Doctor Benefits in the HMO contract is not exclusive; rather, section V(b) of the standard HMO policy form specifically states that "[s]ervices include but are not limited to the following" and proceeds to list 19 examples of the most common specialist services. Further, optometry is not listed in the exclusions in section VI of the HMO policy form. The contract's definition of "covered services" lists the criteria used to determine whether a service will be covered by the carrier. It is clear from those criteria that medically necessary services performed by a licensed optometrist, upon referral by the primary care physician, would be covered. Since both "Ophthalmology" and "Optometry" are clearly covered, the SEH Board and its Policy Forms Committee believe that no change is needed at this time.

A copy of this notice has been mailed to the petitioner as required by N.J.A.C. 11:21-18.3(b).

OTHER AGENCIES

(c)

ELECTION LAW ENFORCEMENT COMMISSION

Notice of the Availability of the Quarterly Report of Legislative Agents for the Fourth Quarter of 1994, ending December 31, 1994

Take notice that Frederick M. Herrmann, Executive Director of the Election Law Enforcement Commission, in compliance with N.J.S.A. 52:13C-23, hereby publishes Notice of the Availability of the Quarterly Report of Legislative Agents for the fourth quarter of 1994, accompanied by a Summary of the Quarterly Report.

At the conclusion of the fourth quarter of 1994, the Notices of Representation filed with this office reflect that 581 individuals are registered as Legislative Agents. Legislative Agents are required by law to submit in writing a Quarterly Report of their activity in attempting to influence legislation and regulation during each calendar quarter. The aforesaid report shall be filed between the first and tenth days of each calendar quarter.

A complete Quarterly Report of Legislative Agents, consisting of the summary and copies of all Quarterly Reports filed by Legislative Agents for the fourth calendar quarter of 1994, has been filed separately for reference with the following offices: the Office of the Governor, the Office of the Election Law Enforcement Commission, the Office of

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Legislative Services, and the State Library. Each is available for inspection in accordance with the practices of those offices.

The Summary Report includes the following information:

- The names of registered Agents, their registration numbers, their business addresses and whom they represent.
- A list of Agents who have filed Quarterly Reports by statutory and compilation deadlines for this quarter.
- A list of Agents whose Quarterly Reports were not received by the compilation deadline for this quarter.

Following is a listing of all new Legislative Agents who have filed Notices of Representation during the fourth calendar quarter of 1994:

No. 948-1 Gene J. Mulroy representing Holt & Ross Inc.
No. 949-1 Donald Linky representing Public Affairs Research Institute of New Jersey, Inc.
No. 950-1 Donald A. Caminiti of Breslin & Breslin representing Association of Trial Lawyers of America—New Jersey Branch
No. 268-4 John Loos representing Communications Workers of America
No. 21-14 Cynthia Baltazar representing New Jersey School Boards Association
No. 774-5 Barth A. Aaron of Horn, Goldberg, Gorny, Daniels, Plackter & Weiss representing Shuffle Master, Inc.
No. 774-5 Barth A. Aaron of Horn, Goldberg, Gorny, Daniels, Plackter & Weiss representing Taj Mahal Casino Dealers Toke Committee
No. 951-5 Raymond S. Torreon representing U.S. English
No. 173-13 Edward K. DeHope representing Riker, Danzig, Scherer, Hyland & Perretti
No. 952-1 Kenneth J. Parker representing Atlantic Electric
No. 953-1 Brian J. Kelly representing Warner Lambert Company
No. 954-1 Robert J. Swissler representing Joint Council of County Special Services School Districts
No. 955-1 Paul Anzano representing Picco Mack Herbert
No. 583-15 Alfred J. Gaburo, Jr. representing Policy Management and Communications
No. 149-2 Arthur F. Herrmann representing Prudential Insurance Company of America
No. 956-1 Ralph M. Scott representing New Jersey Citizen Action
No. 957-1 James Logan, III representing Marriott Ownership Resorts, Inc.
No. 957-1 James Logan, III representing Disney Vacation Club
No. 433-9 Roger Bodman representing Public Strategies/Impact
No. 433-10 Kimberly Young representing Public Strategies/Impact
No. 433-11 G. Bruce Jones representing Public Strategies/Impact
No. 433-12 Carol Katz representing Public Strategies/Impact
No. 958-1 David L. Maxwell representing United A.B.A.T.E. of New Jersey
No. 291-9 Barbara D. Reiche representing Nancy H. Becker Associates, Inc.
No. 959-1 Gary A. Shute representing Amoco Corporation
No. 960-1 Donald Parisi representing First Option Health Plan

Following is a listing of all Legislative Agents who have filed Notices of Termination during the fourth calendar quarter of 1994.

Legislative Agent	Registration Number
Roger Bodman	345-1
Frank DeMaria	697-1
Debra P. Dilorenzo	597-1
Frances M. Duthie	182-1
Robert D. Gilbert	592-1
Arthur F. Herrmann	144-1
G. Bruce Jones	345-4
Carol Katz	345-6
Benedict A. Lee	650-2
Donald Parisi	607-6
Michael A. Vrancik	21-12
Penni E. Wild	147-2
Peter M. Yaffe	840-1
Kimberly Young	345-3

For further information, contact the staff of the Commission at (609) 292-8700.

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REGISTER INDEX OF RULE PROPOSALS AND ADOPTIONS

The research supplement to the New Jersey Administrative Code

A CUMULATIVE LISTING OF CURRENT PROPOSALS AND ADOPTIONS

The **Register Index of Rule Proposals and Adoptions** is a complete listing of all active rule proposals (with the exception of rule changes proposed in this Register) and all new rules and amendments promulgated since the most recent update to the Administrative Code. Rule proposals in this issue will be entered in the Index of the next issue of the Register. **Adoptions promulgated in this Register have already been noted in the Index by the addition of the Document Number and Adoption Notice N.J.R. Citation next to the appropriate proposal listing.**

Generally, the key to locating a particular rule change is to find, under the appropriate Administrative Code Title, the N.J.A.C. citation of the rule you are researching. If you do not know the exact citation, scan the column of rule descriptions for the subject of your research. To be sure that you have found all of the changes, either proposed or adopted, to a given rule, scan the citations above and below that rule to find any related entries.

At the bottom of the index listing for each Administrative Code Title is the Transmittal number and date of the latest looseleaf update to that Title. Updates are issued monthly and include the previous month's adoptions, which are subsequently deleted from the Index. To be certain that you have a copy of all recent promulgations not yet issued in a Code update, retain each Register beginning with the February 6, 1995 issue.

If you need to retain a copy of all currently proposed rules, you must save the last 12 months of Registers. A proposal may be adopted up to one year after its initial publication in the Register. Failure to adopt a proposed rule on a timely basis requires the proposing agency to resubmit the proposal and to comply with the notice and opportunity-to-be-heard requirements of the Administrative Procedure Act (N.J.S.A. 52:14B-1 et seq.), as implemented by the Rules for Agency Rulemaking (N.J.A.C. 1:30) of the Office of Administrative Law. If an agency allows a proposed rule to lapse, "Expired" will be inserted to the right of the Proposal Notice N.J.R. Citation in the next Register following expiration. Subsequently, the entire proposal entry will be deleted from the Index. See: N.J.A.C. 1:30-4.2(c).

Terms and abbreviations used in this Index:

N.J.A.C. Citation. The New Jersey Administrative Code numerical designation for each proposed or adopted rule entry.

Proposal Notice (N.J.R. Citation). The New Jersey Register page number and item identification for the publication notice and text of a proposed amendment or new rule.

Document Number. The Registry number for each adopted amendment or new rule on file at the Office of Administrative Law, designating the year of promulgation of the rule and its chronological ranking in the Registry. As an example, R.1995 d.1 means the first rule filed for 1995.

Adoption Notice (N.J.R. Citation). The New Jersey Register page number and item identification for the publication notice and text of an adopted amendment or new rule.

Transmittal. A series number and supplement date certifying the currency of rules found in each Title of the New Jersey Administrative Code: Rule adoptions published in the Register after the Transmittal date indicated do not yet appear in the loose-leaf volumes of the Code.

N.J.R. Citation Locator. An issue-by-issue listing of first and last pages of the previous 12 months of Registers. Use the locator to find the issue of publication of a rule proposal or adoption.

MOST RECENT UPDATE TO THE ADMINISTRATIVE CODE: SUPPLEMENT JANUARY 17, 1995

NEXT UPDATE: SUPPLEMENT FEBRUARY 21, 1995

Note: If no changes have occurred in a Title during the previous month, no update will be issued for that Title.

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N.J.R. CITATION LOCATOR

If the N.J.R. citation is between:	Then the rule proposal or adoption appears in this issue of the Register	If the N.J.R. citation is between:	Then the rule proposal or adoption appears in this issue of the Register
26 N.J.R. 1179 and 1272	March 7, 1994	26 N.J.R. 3781 and 3916	September 19, 1994
26 N.J.R. 1273 and 1416	March 21, 1994	26 N.J.R. 3917 and 4120	October 3, 1994
26 N.J.R. 1417 and 1554	April 4, 1994	26 N.J.R. 4121 and 4244	October 17, 1994
26 N.J.R. 1555 and 1738	April 18, 1994	26 N.J.R. 4245 and 4470	November 7, 1994
26 N.J.R. 1739 and 1904	May 2, 1994	26 N.J.R. 4471 and 4720	November 21, 1994
26 N.J.R. 1905 and 2166	May 16, 1994	26 N.J.R. 4721 and 4856	December 5, 1994
26 N.J.R. 2167 and 2510	June 6, 1994	26 N.J.R. 4857 and 5138	December 19, 1994
26 N.J.R. 2511 and 2692	June 20, 1994	27 N.J.R. 1 and 262	January 3, 1995
26 N.J.R. 2693 and 2828	July 5, 1994	27 N.J.R. 263 and 410	January 17, 1995
26 N.J.R. 2829 and 3102	July 18, 1994	27 N.J.R. 411 and 606	February 6, 1995
26 N.J.R. 3103 and 3230	August 1, 1994	27 N.J.R. 607 and 790	February 21, 1995
26 N.J.R. 3231 and 3504	August 15, 1994	27 N.J.R. 791 and 966	March 6, 1995
26 N.J.R. 3505 and 3780	September 6, 1994	27 N.J.R. 967 and 1336	March 20, 1995

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
ADMINISTRATIVE LAW—TITLE 1				
1:1-3.2, 14.10, 14.14	Conduct of contested cases: fines for misconduct	27 N.J.R. 609(a)		
1:6A	Special Education Program	27 N.J.R. 4(a)	R.1995 d.176	27 N.J.R. 1179(a)
1:7A	Department of Environmental Protection cases	26 N.J.R. 4124(a)		
1:7A-1.1, 8.1	Department of Environmental Protection Cases: public hearing and extension of comment period	26 N.J.R. 4863(a)		
1:30-1.2, 3.1, 4.1	Agency rulemaking: Federal standards	27 N.J.R. 414(a)		
1:30-1.9	Agency rulemaking: document copying fees	27 N.J.R. 416(a)		
Most recent update to Title 1: TRANSMITTAL 1994-5 (supplement September 19, 1994)				
AGRICULTURE—TITLE 2				
2:5	Quarantines and embargoes on animals	26 N.J.R. 1908(b)		
2:6	Animal health: biological products for diagnostic or therapeutic purposes	26 N.J.R. 3784(a)	R.1995 d.83	27 N.J.R. 481(a)
2:24	Diseases of bees	27 N.J.R. 5(a)		
2:33	Agricultural fairs	27 N.J.R. 610(a)		
2:76-3.3, 3.5, 3.6, 3.9, 3.10, 3.12	Creation of farmland preservation programs	27 N.J.R. 8(a)		
2:76-4.3, 4.5, 4.6, 4.9, 4.11	Creation of municipally approved farmland preservation programs	27 N.J.R. 10(a)		
2:76-6.2, 6.5, 6.6, 6.7, 6.9–6.18B	Acquisition of development easements	27 N.J.R. 13(a)		
Most recent update to Title 2: TRANSMITTAL 1995-1 (supplement January 17, 1995)				
BANKING—TITLE 3				
3:1-6.6	Department examination charges	26 N.J.R. 1560(b)		
3:1-6.7	Failure to pay license fees and examination charges	27 N.J.R. 20(b)		
3:2-1.2, 1.3, 1.4	Disclosures and advertising of accounts	27 N.J.R. 793(a)		
3:3-2, 3	Department of Banking organization: nonpublic records; grievance procedure pursuant to ADA	27 N.J.R. 20(a)	R.1995 d.125	27 N.J.R. 877(a)
3:7-4	Disclosures and advertising of accounts	27 N.J.R. 793(a)		
3:11-7.8	Lending limitations of banks	27 N.J.R. 794(a)		
3:18-10.5	Failure to pay license fees and examination charges	27 N.J.R. 20(b)		
3:23-2.1	Check cashing businesses	26 N.J.R. 4863(b)		
3:24	Check cashing businesses	26 N.J.R. 4863(b)		
3:38-1.6	Failure to pay license fees and examination charges	27 N.J.R. 20(b)		
3:38-1.11, 2.1	Mortgage bankers and brokers: notice of termination of funding	27 N.J.R. 611(a)		
3:40-1.9	New Jersey Cemetery Board: organizational meetings	26 N.J.R. 4475(a)	R.1995 d.118	27 N.J.R. 877(b)
Most recent update to Title 3: TRANSMITTAL 1995-1 (supplement January 17, 1995)				
CIVIL SERVICE—TITLE 4				
Most recent update to Title 4: TRANSMITTAL 1992-1 (supplement September 21, 1992)				
PERSONNEL—TITLE 4A				
4A:2-3.1	Performance evaluations	26 N.J.R. 3509(a)		
4A:6-5.3	Performance evaluations	26 N.J.R. 3509(a)		
4A:8	Layoffs	26 N.J.R. 3518(a)	R.1995 d.55	27 N.J.R. 482(a)

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N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
4A:8	Layoffs	27 N.J.R. 482(a)		
4A:8	Layoffs	27 N.J.R. 612(a)		

Most recent update to Title 4A: TRANSMITTAL 1995-1 (supplement January 17, 1995)

COMMUNITY AFFAIRS—TITLE 5

5:1	Standards of conduct for officers and employees of the Department	26 N.J.R. 4866(a)	R.1995 d.119	27 N.J.R. 877(c)
5:12	Homelessness Prevention Program	26 N.J.R. 4248(a)	R.1995 d.56	27 N.J.R. 483(a)
5:16	Local Housing Authority and Municipal Redevelopment Agency Training Program	26 N.J.R. 4867(a)		
5:18	Uniform Fire Code	26 N.J.R. 4258(a)	R.1995 d.58	27 N.J.R. 878(b)
5:18-1.5, 2.7, 2.8, 2.22, 3.3, 3.4, 3.5, 4.9, 4.13	Uniform Fire Code requirements	26 N.J.R. 4249(a)	R.1995 d.59	27 N.J.R. 891(a)
5:18-2.4A	Uniform Fire Code: overnight camps life hazard use category	26 N.J.R. 4254(a)	R.1995 d.57	27 N.J.R. 878(a)
5:18-2.11A	Construction boards of appeal: UCC and Fire Code appeals	26 N.J.R. 4254(b)		
5:18-2.12, 2.21, App. 3-A	Uniform Fire Code: cigarette lighters	26 N.J.R. 2182(b)		
5:18A	Fire Code Enforcement	26 N.J.R. 4258(a)	R.1995 d.58	27 N.J.R. 878(b)
5:18B	High Level Alarms	26 N.J.R. 4258(a)	R.1995 d.58	27 N.J.R. 878(b)
5:18C	Standards for Fire Service Training and Certification	26 N.J.R. 4258(a)	R.1995 d.58	27 N.J.R. 878(b)
5:18C-2.4	Fire service training facilities	26 N.J.R. 4249(a)	R.1995 d.59	27 N.J.R. 891(a)
5:22-1	Urban enterprise zone municipalities: exemptions from taxation for residential new construction, improvement and conversion	27 N.J.R. 794(b)		
5:23-2.9, 2.34–2.37, 4.40	Construction boards of appeal: UCC and Fire Code appeals	26 N.J.R. 4254(b)		
5:23-3.4, 3.18	Uniform Construction Code: energy subcode	26 N.J.R. 4872(a)	R.1995 d.143	27 N.J.R. 1179(b)
5:23-3.14, 7	Uniform Construction Code: Barrier Free Subcode	26 N.J.R. 2698(a)	R.1995 d.144	27 N.J.R. 1180(a)
5:23-3.14, 7	Barrier Free Subcode: correction of public hearing date	26 N.J.R. 3524(a)		
5:23-3.15	Uniform Construction Code: abandonment of septic systems	26 N.J.R. 4874(a)	R.1995 d.122	27 N.J.R. 894(a)
5:23-3.20	Uniform Construction Code: mechanical subcode	26 N.J.R. 4874(b)	R.1995 d.120	27 N.J.R. 894(b)
5:23-9.4	Uniform Construction Code: seismic zones	26 N.J.R. 4875(a)	R.1995 d.121	27 N.J.R. 894(c)
5:23-2.20, 4.5	Uniform Construction Code: heating equipment installation	27 N.J.R. 619(a)		
5:34-7.6, 7.8, 7.9	Local government finance: renewal of registration of Cooperative Purchasing System	26 N.J.R. 4724(a)	R.1995 d.142	27 N.J.R. 1189(a)
5:52	Volunteer Coaches' Safety Orientation and Training Skills Programs	27 N.J.R. 21(a)	R.1995 d.150	27 N.J.R. 1190(a)
5:80	New Jersey Housing and Mortgage Finance Agency rules	27 N.J.R. 265(a)		

Most recent update to Title 5: TRANSMITTAL 1995-1 (supplement January 17, 1995)

MILITARY AND VETERANS' AFFAIRS—TITLE 5A

Most recent update to Title 5A: TRANSMITTAL 1994-1 (supplement June 20, 1994)

EDUCATION—TITLE 6

6:5-2.4	Organization of the Department	Exempt	R.1995 d.64	27 N.J.R. 894(d)
6:28-2.10, 4.2	Special Education: least restrictive environment; program options	27 N.J.R. 416(c)		
6:68	State Library assistance programs	27 N.J.R. 620(a)		

Most recent update to Title 6: TRANSMITTAL 1994-9 (supplement December 19, 1994)

ENVIRONMENTAL PROTECTION—TITLE 7

7:0	Management of waste oil: request for public comment	26 N.J.R. 1466(a)		
7:1C-1.5	Payment schedule for permit application fees	26 N.J.R. 3922(a)		
7:1H	County Environmental Health Act rules: pre-proposal	26 N.J.R. 3526(a)		
7:1H	County Environmental Health Act rules: postponement of new rules proposal	27 N.J.R. 22(a)		
7:1L	Payment schedule for permit application fees	26 N.J.R. 3922(a)		
7:5D	State Trails System	26 N.J.R. 1459(a)	R.1995 d.147	27 N.J.R. 1204(c)
7:7A-16.1	Payment schedule for permit application fees	26 N.J.R. 3922(a)		
7:7E	Coastal zone management	27 N.J.R. 417(a)		
7:9	NJPDES permitting program: proposal summary and request for public comment	26 N.J.R. 3927(a)		
7:9B	NJPDES permitting program: proposal summary and request for public comment	26 N.J.R. 3927(a)		
7:10-15.1	Payment schedule for permit application fees	26 N.J.R. 3922(a)		
7:11-2.2, 2.3, 2.4, 2.10, 2.12	Delaware and Raritan Canal-Spruce Run/Round Valley Reservoirs System: sale of water	26 N.J.R. 4907(a)		
7:11-4.3, 4.4, 4.9, 4.13	Manasquan Reservoir Water Supply System: sale of water	26 N.J.R. 4910(a)		

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N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
7:12-1.2, 2.1, 3.2, 4.1, 4.2, 9.1	Shellfish growing water classifications	26 N.J.R. 4475(b)	R.1995 d.81	27 N.J.R. 484(a)
7:13	Flood hazard area control	26 N.J.R. 1009(a)	R.1995 d.149	27 N.J.R. 1211(a)
7:14	NJPDES permitting program: proposal summary and request for public comment	26 N.J.R. 3927(a)		
7:14-8.1, 8.3, 8.4, 8.15	Water supply allocation	26 N.J.R. 4912(a)	R.1995 d.162	27 N.J.R. 1265(a)
7:14A	New Jersey Pollutant Discharge Elimination System	26 N.J.R. 1332(a)		
7:14A	NJPDES permitting program: proposal summary and request for public comment	26 N.J.R. 3927(a)		
7:14A-1.8	Payment schedule for permit application fees	26 N.J.R. 3922(a)		
7:14B-3.9	Payment schedule for permit application fees	26 N.J.R. 3922(a)		
7:15	NJPDES permitting program: proposal summary and request for public comment	26 N.J.R. 3927(a)		
7:19	Water supply allocation	26 N.J.R. 4912(a)	R.1995 d.162	27 N.J.R. 1265(a)
7:19-3.8	Payment schedule for permit application fees	26 N.J.R. 3922(a)		
7:19A	Water supply allocation	26 N.J.R. 4912(a)	R.1995 d.162	27 N.J.R. 1265(a)
7:19B	Water supply allocation	26 N.J.R. 4912(a)	R.1995 d.162	27 N.J.R. 1265(a)
7:20	Dam safety standards	27 N.J.R. 795(a)		
7:24A	Dam Restoration and Inland Waters Projects Loan Program	26 N.J.R. 2228(a)	R.1995 d.117	27 N.J.R. 895(a)
7:25-4.18	Endangered and Nongame Species Advisory Committee: term limitations requirement	27 N.J.R. 797(a)		
7:25-18.1, 18.4, 18.5, 18.13–18.15	Marine fisheries management: winter flounder, bluefish, weakfish, Atlantic sturgeon, American lobster	26 N.J.R. 4277(b)	R.1995 d.82	27 N.J.R. 487(a)
7:25-24.7, 24.9	Leasing of Atlantic coast bottom for aquaculture	26 N.J.R. 3109(a)		
7:25A	Oyster management and harvest	27 N.J.R. 798(a)		
7:26-1.4, 3.4, 3.6, 4.3, 4.7	Solid waste management: intermodal container facilities	27 N.J.R. 801(a)		
7:26-3A.1, 4.1, 4A.1	Payment schedule for permit application fees	26 N.J.R. 3922(a)		
7:26A-2.1	Payment schedule for permit application fees	26 N.J.R. 3922(a)		
7:26B-1.10	Payment schedule for permit application fees	26 N.J.R. 3922(a)		
7:27-8.11	Payment schedule for permit application fees	26 N.J.R. 3922(a)		
7:27-15	Motor vehicle enhanced inspection and maintenance program	26 N.J.R. 3258(b)		
7:27-16.1, 16.4, 16.8, 16.9, 16.10, 16.17, 16.18	Control and prohibition of air pollution by volatile organic compounds	26 N.J.R. 4478(a)		
7:27-19	Control and prohibition of air pollution from oxides of nitrogen	26 N.J.R. 3298(a)		
7:27-22.1, 22.31	Air Quality Regulation Program: facility operating permit fees	27 N.J.R. 22(b)		
7:27-25.1, 25.3	Oxygenated fuels program	26 N.J.R. 1148(a)		
7:27-25.1, 25.3, 25.4, 25.8	Oxygenated fuels program	Emergency (expires 4-9-95)	R.1995 d.129	27 N.J.R. 787(a)
7:27-25.3	Oxygen program exemptions	26 N.J.R. 3835(a)		
7:27-26	Low Emission Vehicles Program	26 N.J.R. 1467(a)		
7:27-26	Low Emission Vehicles Program: extension of comment period	26 N.J.R. 4482(a)		
7:27A	Air administrative procedures and penalties: administrative correction	———	———	27 N.J.R. 498(a)
7:27A-3.10	Control and prohibition of mercury emissions	26 N.J.R. 1050(a)		
7:27A-3.10	Motor vehicle enhanced inspection and maintenance program	26 N.J.R. 3258(b)		
7:27A-3.10	Control and prohibition of air pollution from oxides of nitrogen	26 N.J.R. 3298(a)		
7:27B-4	Motor vehicle enhanced inspection and maintenance program	26 N.J.R. 3258(b)		
7:28	Radiation protection	26 N.J.R. 4942(a)		
7:28-48	Non-ionizing radiation producing sources: extension of comment period regarding registration fees	26 N.J.R. 793(b)		
7:28-48.7	Registration fees for non-ionizing radiation producing sources: administrative correction	27 N.J.R. 498(b)		
7:30-1.1	Payment schedule for permit application fees	26 N.J.R. 3922(a)		
7:31-1.1	Payment schedule for permit application fees	26 N.J.R. 3922(a)		
7:60-1.2, 1.3, 1.4, 1.6	Assessment of generators for cost of siting and developing low-level radiactive waste disposal facility	26 N.J.R. 4946(a)	R.1995 d.130	27 N.J.R. 905(a)

Most recent update to Title 7: TRANSMITTAL 1995-1 (supplement January 17, 1995)

HEALTH—TITLE 8

8:1-1	Disability discrimination grievance procedure	26 N.J.R. 2005(a)		
8:7-1.11–1.18	Licensure of persons for public health positions	27 N.J.R. 267(a)		
8:19	Newborn Screening Program	27 N.J.R. 807(a)		
8:20	Birth Defects Registry	27 N.J.R. 269(a)		

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N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
8:33I	Megavoltage radiation oncology services: certificate of need	26 N.J.R. 4875(b)	R.1995 d.146	27 N.J.R. 1287(a)
8:39-2.2, 2.12	Long-term care facilities: application for licensure; add-a-bed	26 N.J.R. 4641(a)	R.1995 d.127	27 N.J.R. 937(b)
8:41-8.1, 10.1	Approved drug formulary for mobile intensive care units	27 N.J.R. 808(a)		
8:43E	Health care facilities: enforcement of licensure standards	26 N.J.R. 4527(a)		
8:43F	Adult day health care facilities: standards for licensure	26 N.J.R. 4532(a)	R.1995 d.128	27 N.J.R. 939(a)
8:43G	Hospital licensing standards	26 N.J.R. 4537(a)	R.1995 d.124	27 N.J.R. 1290(a)
8:44	Operation of clinical laboratories	27 N.J.R. 626(a)		
8:44-2.5	Clinical laboratory Proficiency Testing Program	26 N.J.R. 1070(a)		
8:44-2.11	Clinical laboratories: reopening of comment period on reporting of blood lead levels	26 N.J.R. 1190(a)		
8:45	Clinical laboratory services	27 N.J.R. 32(a)	R.1995 d.126	27 N.J.R. 941(a)
8:57	Communicable diseases	27 N.J.R. 420(a)		
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8:71	Interchangeable drug products (see 26 N.J.R. 2897(a), 3719(a), 4388(a))	26 N.J.R. 1821(a)	R.1995 d.33	27 N.J.R. 357(a)
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10:49-14.4	Medical assistance recoveries involving county welfare agencies	26 N.J.R. 3348(a)		
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10:52	Hospital Services Manual	26 N.J.R. 4551(a)		
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10:52-10	Manual for Hospital Services: charity care eligibility	27 N.J.R. 656(a)		
10:55	Medicaid program: Prosthetic and Orthotic Services Manual	26 N.J.R. 4979(a)		
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10:60-1.1, 1.2, 1.4, 1.13, 4.2	Home Care Services: EPSDT private duty nursing services	27 N.J.R. 279(a)		
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10:64-1.3	Hearing Aid Services: optional audiological examinations	27 N.J.R. 287(a)		
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10:81-11.9	Public Assistance Manual: $50 disregarded child support payment	26 N.J.R. 1937(a)		
10:85-3.2	General Assistance program: fingerimaging procedures	27 N.J.R. 864(a)		
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10:89	Home Energy Assistance Handbook	26 N.J.R. 4726(a)	R.1995 d.172	27 N.J.R. 1317(a)
10:89-2.3, 3.1	Home Energy Assistance program: income eligibility; automatic payments	Emergency (expires 4-17-95)	R.1995 d.145	27 N.J.R. 942(a)
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11:5-1.43	Real Estate Commission: consumer information statement	26 N.J.R. 3113(a)	R.1995 d.110	27 N.J.R. 697(a)
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13:70-14A.9	Thoroughbred racing: administration of phenylbutazone on day of race	26 N.J.R. 1956(a)		
13:70-29.50	Thoroughbred racing: Daily Triple	27 N.J.R. 306(a)		
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14A:6	Business Energy Improvement Program: recodify as 14:31	26 N.J.R. 4482(c)	R.1995 d.68	27 N.J.R. 503(a)
14A:8	Energy Facility Review Board: recodify as 14:33	26 N.J.R. 4484(a)	R.1995 d.69	27 N.J.R. 503(b)
14A:11	Periodic reporting by energy industries: recodify as 14:34	26 N.J.R. 4484(b)	R.1995 d.70	27 N.J.R. 504(a)

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16:20A	Federal Aid Urban System Substitution Program: county and municipal aid	26 N.J.R. 4485(a)	R.1995 d.71	27 N.J.R. 504(b)
16:20B	Transportation Trust Fund Authority Act: municipal fund for road and bridge improvement projects	26 N.J.R. 4486(a)	R.1995 d.72	27 N.J.R. 504(c)
16:28-1.61	Speed limit zones along Collins Avenue-Nixon Drive under State jurisdiction in Burlington County	26 N.J.R. 4337(b)	R.1995 d.95	27 N.J.R. 733(c)
16:28-1.62	Speed limits along connector roads to U.S. 202, U.S. 206, and Route 28 in Somerset County	27 N.J.R. 46(b)	R.1995 d.157	27 N.J.R. 1195(a)

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16:28-1.65	Speed limit zone along Penn Avenue-Route 70 connector ramp in Cherry Hill	27 N.J.R. 468(b)		
16:28-1.69	Speed limit zones along U.S. 130, including parts of I-295, U.S. 30 and U.S. 206, in East Windsor	27 N.J.R. 47(a)	R.1995 d.158	27 N.J.R. 1195(b)
16:28-1.71	Speed limit zone along Park Boulevard-Route 70 connector ramp in Cherry Hill	27 N.J.R. 469(a)		
16:28-1.79	Speed limit zones along Route 94 in Sussex County	26 N.J.R. 3133(a)		
16:28-1.96	Speed limit zones along Route 45 in Harrison Township	26 N.J.R. 4970(a)	R.1995 d.97	27 N.J.R. 734(a)
16:28-1.132	Speed limit zones along Route 47 in Dennis Township, Cape May	26 N.J.R. 4745(a)	R.1995 d.98	27 N.J.R. 734(b)
16:28-1.158	Speed limit zones along Route 179 in West Amwell Township	26 N.J.R. 4486(b)	R.1995 d.62	27 N.J.R. 505(a)
16:28A-1.21	No stopping or standing zones along U.S. 30 in Oaklyn Borough	26 N.J.R. 4971(a)	R.1995 d.93	27 N.J.R. 734(c)
16:28A-1.33	No stopping or standing zone on Route 47 in Millville	27 N.J.R. 309(a)	R.1995 d.153	27 N.J.R. 1196(a)
16:28A-1.36	Handicapped parking along Route 57 in Washington Borough, Warren County	26 N.J.R. 4160(b)	R.1995 d.67	27 N.J.R. 505(b)
16:28A-1.37	No stopping or standing zones along Route 70 in Cherry Hill and Pennsauken	26 N.J.R. 4338(a)	R.1995 d.94	27 N.J.R. 735(a)
16:28A-1.38	No stopping or standing along Route 71 in Bradley Beach Borough	26 N.J.R. 4161(a)	R.1995 d.66	27 N.J.R. 505(c)
16:28A-1.38	Parking restrictions along Route 71 in Asbury Park	27 N.J.R. 48(a)	R.1995 d.154	27 N.J.R. 1196(b)
16:28A-1.41	Bus stops along Route 77 in Bridgeton	27 N.J.R. 49(a)	R.1995 d.155	27 N.J.R. 1197(a)
16:28A-1.44	No stopping or standing zones along Route 88 in Lakewood	27 N.J.R. 823(a)		
16:28A-1.52	No stopping or standing zones along Route 173 in Town of Clinton	26 N.J.R. 4971(b)	R.1995 d.96	27 N.J.R. 735(b)
16:28A-1.57	Bus stop on U.S. 206 in Princeton Township	26 N.J.R. 3820(a)	R.1995 d.54	27 N.J.R. 506(a)
16:28A-1.57	Bus stop on U.S. 206 in Princeton Township: administrative correction and extension of comment period	26 N.J.R. 4487(a)		
16:28A-1.58	Parking restrictions along U.S. 206-94 in Newton	27 N.J.R. 49(b)	R.1995 d.156	27 N.J.R. 1197(b)
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16:30-3.13	Left turns along U.S. 9 in Middle Township, Cape May	26 N.J.R. 4746(a)	R.1995 d.99	27 N.J.R. 736(a)
16:30-3.14	Left turn lane along Route 154 in Cherry Hill	27 N.J.R. 51(a)	R.1995 d.160	27 N.J.R. 1198(b)
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16:50-15	Employer Trip Reduction Program tax credit	26 N.J.R. 756(a)	R.1995 d.75	27 N.J.R. 521(a)
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16:77	Use or occupancy of NJ TRANSIT-owned property	26 N.J.R. 4972(a)	R.1995 d.111	27 N.J.R. 750(a)

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17:13	Goods and services contracts for small businesses and female and minority businesses	27 N.J.R. 52(a)		
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17:25	Collection of debts owed to NJHEAA by public employees	27 N.J.R. 309(b)	R.1995 d.170	26 N.J.R. 1199(a)

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